

New Report on FBI Spying Shows Need for Congressional Investigation

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Clearing the FOG (forces of greed) hosts Kevin Zeese and Margaret Flowers interviewed Chip Gibbons, an expert on Constitutional Law and the legal and policy counsel for Defending Rights and Dissent about a recent right to protest victory in Washington, DC plus his new report, "Still Spying on Dissent: The enduring problem of FBI First Amendment Abuse." You can read and download the report [here](#). This report, which finds that people are being investigated for their political opinions, is part of a new campaign to hold the FBI accountable and stop its widespread surveillance and infiltration of social movements. You can listen to the entire interview and the week's news analysis on [Clearing the FOG](#).

Interview

Clearing the FOG (CtF): Before we get into your new report, let's talk about the recent victory over an effort by the Trump Administration to stifle protest in Washington DC. Can you tell us about that?

Chip Gibbons (CG): Late last year, the National Park Services asked for comments on new proposed rules that would have severely curtailed the ability to protest on public lands, national parks. One of the elements of the proposed rules that got the most attention was the so-called protest tax that would have allowed the National Park Service to charge protesters for the cost of policing or cleaning up of demonstrations. There was also concern that they were going to eliminate the deemed granted rule, which is that if you don't hear back from the National Park Service within a certain period of time when you apply for a permit, your permit request is deemed granted.

A hundred and forty thousand people submitted comments about this proposal opposing it. Eighty civil society groups, including Popular Resistance and Defending Rights and Dissent, labor unions, and civil rights groups submitted comments opposing it. It was just announced this week that the Park Service was withdrawing the proposed rule change. That's a pretty big victory because, at the end of the day, democracy is about more than just voting. It's also about freedom of expression and assembly and that includes the right of people to come together in a common cause.

The National Park System is not only a custodian of our parks, but they also play a crucial role in facilitating democracy. Under international law, the right of free expression is interpreted as recommending that governments only require notice, not permits, for political demonstrations because as the previous rapporteur for the United Nations on Free Speech and Assembly said, "A right is not a right if it has to be granted."

CtF: We really want to ask you about this new report that you authored for Defending Rights

and Dissent. It's about the FBI's monitoring of social movements. Can you tell us about it?

CG: The report is called "Still Spying on Dissent: The enduring problem of FBI First Amendment abuse," and it focuses on FBI surveillance or monitoring of social movements, protests, and civil society activity since 2010. It's based on information that was already in the public domain. A number of journalists have filed FOIA [Freedom of Information Act] requests and a number of activists have reported being visited at their homes by the FBI.

A very interesting development was when Walmart was brought before the National Labor Relations Board for unfair labor practices, it was revealed in discovery that they contacted the FBI JTTF, Joint Terrorism Task Force, about Occupy protesters. This is information that's been in the public domain, but the point of the report was to compile it all in one place. When you put all of the incidents we know about together in one place in detail, a picture starts to emerge of a systemic problem of surveillance in the United States. After covering that, the report steps back and puts it in the context of the FBI's history since 1908 of spying on dissent.

The other thing is that in a number of cases what we know actually raises further questions, which is why it would be very helpful for somebody with subpoena power like Congress to actually step in and do their own investigation of this matter. A number of times when people received FOIA documents, they were redacted to the point of being unintelligible. We know that different people have filed FOIA requests about the same information and have gotten different responses. There's some evidence to suggest the FBI is wrongfully withholding information when they're subjected to FOIA requests. And when you hear stories about activists being visited at their homes, the question is what investigation is that part of?

What we know is very disturbing and it is cause for concern but just as important is what we don't know. That's why Congress needs to make sure we know more.

CtF: We don't really know the extent of the FBI's infiltration and monitoring of social movements. The Church Committee hearings exposed widespread government and FBI surveillance in the past. Do you think we're really at that stage again where it's so widespread that we need to have a series of Congressional hearings focusing on FBI surveillance of political activity in the United States?

CG: I absolutely do think so. I mean the Church Committee is the example that usually gets cited. The Church Committee was a select committee investigation into bad acts by the intelligence community in general. It talked about assassinations and about CIA tricks overseas, but the committee also talked about the use of intelligence to infringe on people's rights domestically. A lot of people don't know this, but the FBI is not only a law enforcement agency, but it's also an intelligence agency. So, there is some information in it about the FBI's use of its domestic intelligence powers to violate American's constitutional rights.

In the late 80s, there was another investigation done by the Senate Intelligence Committee with some input from the Senate Judiciary Committee into what the FBI was doing when they were spying on opponents of Ronald Reagan's foreign policy. It came out in the 1980s that the FBI had been spying on the Committee in Solidarity with the People of El Salvador. There are a number of ways this came to light, my favorite of which is that they didn't pay their informant and he complained. The Senate had an investigation, not a hearing, but an

actual investigation. They released a report. People at the time felt like it was a bit of a whitewash but compared to the types of oversight we have of the FBI today, it certainly was an improvement.

In 2006, it came out that the Bush Administration was spying on a bunch of groups and that led Congress to ask the DOJ Inspector General to study the matter. They released their report on the Bush-era FBI spying in September of 2010. That's why we choose 2010 as our starting date because there's been no real oversight since then. Just four days after the report was released, the FBI raided the homes of anti-war and solidarity activists in the Midwest. The report showed that the FBI has loose guidelines.

When the Bureau of Investigation was created in 1908, it was created while Congress was on recess and to this day it has no statutory charter. After the Church Committee, there were some efforts to impose a charter on it, but Congress instead allowed the Attorney General to write guidelines in lieu of a Charter. As you can imagine, conservative attorney generals like those in the Reagan Administration and the Bush Administration rewrote the guidelines to be less restrictive and less protective of civil liberties.

Since the time period covered in the OIG report, the FBI's guidelines have actually gotten even looser. George Bush's lame-duck attorney general Michael Mukasey promulgated the current guidelines, which created a new category of investigations called assessments that allow the FBI to investigate people using very intrusive techniques when there's no suspicion of criminal wrongdoing or national security threat, just an "authorized law enforcement purpose." That's the first time since the Church Committee the FBI was allowed to investigate people absent facts that suggested they were engaged in either a national security threat or in criminal wrongdoing. The other type of investigations allowed in the guidelines are literally called predicated investigations and that means they have a factual predicate. So, an assessment is an investigation without a factual predicate to suggest any wrongdoing at all.

CtF: So in the "land of the free" people can be investigated simply because of their political opinions. You mentioned that they use intrusive techniques to surveil activists. Can you talk about what some of those are?

CG: The biggest problem is human intelligence or confidential informants. There's a lot of focus contemporarily on sort of the high-tech surveillance that the NSA does or all these sorts of spy tools that local police departments are acquiring and that's very scary. And I think just as analogous when people talk about the FBI of the pre-Church Committee era, there's a lot of fixation on illegal wiretaps and stuff like that.

Most of the surveillance the FBI does is through human intelligence. That's either an undercover officer or confidential informant. You can have the best encryption in the world, but if the person that you're sending the message to is reporting everything back to the FBI, it's not very helpful. This is not to say that we shouldn't be concerned with bulk surveillance and all this technology that is sucking up all our information. We should be terrified of it.

We also should not lose sight that the FBI is still using the tried and true old methods as well. And increasingly what we see is that these confidential informants go well beyond gathering information and they actively engage as *agents provocateurs* meaning that they come up with terror plots and they entice people into participating in them. Then the FBI

turns around and arrests them and that allows the FBI to sort of over-exaggerate the threat of terror as well. If they say they're arresting all these terrorists, that implies there's some sort of further need for security.

When Donald Trump issued the first executive order authorizing the Muslim ban, the courts asked about the purpose. The second executive order used two terror plots supposedly involving refugees as justification for it, but in both cases, those plots were the product of FBI *agents provocateurs*. In one of the cases cited by Trump's executive order, a judge found it to be an example of "imperfect entrapment," which is different than perfect entrapment. That is an affirmative defense and bars your conviction. Imperfect entrapment is just an argument for a lesser sentence. A judge said this was imperfect entrapment and Trump then turned around and cited that as justification for a repressive policy.

CtF: Right after the Occupy Movement was winding down in 2012, there were a few cases of relatively young men who were vulnerable and they were entrapped into making it look like they were going to commit violent acts. In the past, the FBI would go after leaders of movements, but in this case, they went after the low-hanging fruit and then made headline cases out of it. Can you talk about that?

CG: I believe the case you are referring to is Occupy Cleveland where there were a number of young men sort of on the margins. They had issues and an FBI informant enticed them into participating in this plot to blow up a bridge on May Day. Obviously, that's horrible, you shouldn't blow up civilian bridges. But there was no such plot and the FBI announced the arrests right on the eve of Occupy Cleveland's major May Day demonstration, which was supposed to have revived the movement in Cleveland that had sort of gone into hibernation during the winter. So they had to cancel the march given the negative publicity. So, they completely decimated the resurrection of Occupy Cleveland by creating this fake terror plot and then being able to defame the movement.

CtF: Can you give us a sense of the kind of groups targeted by the FBI?

CG: It's the same groups the FBI has always targeted. It's peace and solidarity groups, environmental groups, racial justice groups and economic justice groups. We know the FBI has this ridiculous threat assessment called "Black Identity Extremism", which argues that perceptions of racism, police violence and social injustice in the African-American community could lead to retaliatory lethal violence against police. The argument is that if you're rightfully angry or rightfully concerned about the racism or police brutality you've been on the receiving end of in our society and you want to speak out against that, that's a precursor to violence. That's a really insidious logic because it treats not only First Amendment protected speech as a precursor to criminality but rightful and legitimate concern about injustice as a precursor to doing a criminal act.

CtF: That's such circular reasoning. Police commit violations of people's rights, especially racist violations. The community is aware of it. And because you are aware of it, you're a suspect for potential violence yourself and therefore under surveillance by the FBI.

CG: They use that logic repeatedly. There was a recent document that Yahoo! News got a hold of from an FBI office in Arizona where they mentioned that because of people being angry at children being put in concentration camps and the abuse of migrants that there could be an increased likelihood of armed confrontation between anarchists and the federal government. It's totally insidious. It just treats First Amendment protected speech as a

reason to be suspicious of someone as willing to commit a crime. When they single out these groups, oftentimes the FBI and their own files admit there's no indication that anyone is planning on engaging in violence, but an unknown person at an unknown point in the future could. So, the FBI has very clearly embraced this logic that certain points of view are inherently suspicious and that they should be monitored and investigated.

MF: One of the major groups that have been targeted by the FBI is the Muslim Community. Can you talk about that?

CG: Another really insidious thing the FBI does when it uses these confidential informants is it oftentimes sends them to the Muslim Community without any specific targets.

There's a very notorious case where the FBI engaged in something called Operation Flax where they sent an informant into a mosque in Orange County. The mosque actually reported the informant to the FBI because he was acting rather ridiculously and the informant came forward and said that he had asked the FBI, "Who is my target?" and they said, "Oh the target will come to you." So what you're talking about is a sort of dragnet suspicion-less surveillance. They asked this informant to infiltrate a Southern California mosque to gather personal information such as email addresses, cell phone numbers, and political and religious views. He was even encouraged by the FBI to enter into sexual relations with Muslim women in order to gather intelligence.

There's an ongoing lawsuit about this surveillance. The FBI has tried to have it dismissed under the State Secrets Doctrine. It doesn't look like they're going to get away with that, but it still highlights the problem of this suspicion-less surveillance. Another famous case is the Newburgh Four.

The informant goes into this mosque and he's not targeting anyone in particular, as far as we know. We have no idea why the FBI picked Newburgh for this particular type of surveillance. He eventually encounters the person he entices into this fake plot in a parking lot. So, they're just going into Muslim communities where no one is suspected of any crime and just surveilling them and then trying to invent crime.

The FBI clearly views the Muslim community as a fifth column, which is why they are subjecting them to this awful suspicion-less surveillance.

CtF: In Robert Mueller's era as FBI director, he did a lot of that kind of activity in the Muslim community, yet people look at Mueller as a great hero because he investigated Trump for Russiagate.

CG: There's an entire OIG report on Robert Mueller's FBI counterterrorism investigation of domestic advocacy groups, like Greenpeace, PETA, and the Catholic Workers. The last major attempt at oversight, the report released in 2010, coincides with Robert Mueller's time at the FBI. Robert Mueller is not a hero.

CtF: You are a constitutional law expert, Chip. Can you talk about the state of our constitutional freedoms in the United States right now? How would you assess our rights to protest and to free speech?

CG: In terms of the FBI's political surveillance, the courts have made it very difficult to challenge it. There's a very important case in the 1970s where people who were protesting the Vietnam War in DC were spied on by the US Military and they tried to sue, *Laird v.*

Tatum. They tried to sue the military for spying on them and the Supreme Court in a 5 to 4 decision refused to hear the case on the merits; therefore, never ruling whether or not they had a First Amendment complaint.

In order to be able to have standing to sue, you have to show that you suffered a harm and that the court can remedy that harm. The Supreme Court reasoned that the idea that if the military creates a dossier on you with your picture and tracks you because of your First Amendment protected activity, that if you might not want to engage in that activity, then that's a self-subjective chill. You're doing the harm to yourself. There are instances where people have gotten over that hurdle, but it's extraordinarily difficult to challenge political surveillance in the courts.

What's really needed is for Congress to act. Over the years, there have been a number of fine pieces of legislation proposed to impose limits on the FBI. I think those limits should be part of an overarching charter. We're talking stuff like forbidding the FBI from investigating First Amendment protected activity unless there are facts indicating a violation or likely violation of the federal criminal code and that they have to weigh the magnitude of the crime against the threat to free speech, which you know isn't a terribly radical suggestion. It's actually quite moderate. Also, any sort of FBI charter needs to be judicially enforceable, meaning that if the FBI does break the charter and spies on you, you have a remedy in terms of both declaratory and injunctive relief. So, the courts can say this spying broke the charter and the FBI has to stop it. Those would be positive steps forward. Congress needs to have an investigation into why the FBI is doing what it's doing.

CtF: If you add the attacks on journalism with Julian Assange, Chelsea Manning, Max Blumenthal, there are so many attacks on our freedoms. When they know a protest is being planned, like Occupy, how early do you think the FBI starts infiltrating and investigating protesters?

CG: Well, with Occupy, we don't have to speculate because we know from the documents that were released the FBI began monitoring Occupy Wall Street in August of 2011. That's a month before the protests began. Before the very first protester ever set foot in Zuccotti Park, the FBI was on the case. I don't know in every instance how with-it the FBI is. The FBI is not always the most with-it people when you look at some of these documents they've released. It's not unlikely before a protest or a movement happens for the FBI to start investigating or monitoring it. That's clearly what happened in Occupy.

There are other cases where they're sort of late to the picture. There's a very disturbing example that we talk about in this report that involves By Any Means Necessary, which is a civil rights group, a racial justice group. They were doing a counter-protest of the Traditionalist Workers Party, which is right-wing, white supremacist, and fascist. The counter-protesters, the racial justice protesters, were stabbed. They were attacked. And the FBI instead of investigating the fascists who committed a crime, investigated By Any Means Necessary. What's very fascinating is that the FBI gets the name of the racist group wrong. They think it's the Ku Klux Klan. So, you have these FBI documents where the FBI says things like the Ku Klux Klan is a group that some people perceive as having a white supremacist agenda. They end up investigating the civil rights group as part of a counter-terrorism investigation and for possibly violating the civil rights of the Ku Klux Klan.

I've seen FBI documents where they're describing the relationship between different activist groups, groups that I'm familiar with, and it's like wow. On the one hand, the degree of

surveillance is so terrifying but on the other hand, it's like you guys are also kind of really out of it.

CtF: It's not just the FBI. That's just one agency. There are over 30 police agencies in Washington DC. The New York City Police Department is the size of an army. The US has been increasing the number of police officers since the Clinton era. He added more than a hundred thousand police to the streets in his era. How does the FBI work with local and state law enforcement?

CG: The FBI as a police force isn't actually that large. The NYPD has more police than there are FBI agents, at least that used to be the case. What we increasingly see is that local police are working for the FBI in these so-called Joint Terrorism Task Forces. And in the Joint Terrorism Task Force, local law enforcement, and in some cases other federal agents are assigned to them, carry out their day to day missions as JTTF officers and they do this under the purview of the FBI. In most cases, they follow the FBI's own guidelines.

There's been a lot of pushback against this recently because, in a number of cases, states have laws on the books governing local police conduct and those laws are more stringent than the FBI's own guidelines. So, in theory, the local police by following the FBI's guidelines could be breaking state law. San Francisco rewrote their memorandum of understanding with the FBI mandating that local police have to follow local laws even when they're acting as FBI Joint Terrorism Task Force agents. They then turned around and broke away from the Joint Terrorism Task Force completely. Portland also left that.

There's been some controversy recently with some of these federal task forces, not just the Joint Terrorism Task Force, but some of the DEA ones, where they don't allow their agents to wear body cameras. I believe this may have changed but they weren't allowing the agents to wear body cameras. So, in cities or states where it was the law that police had to wear body cameras, they weren't doing so when they were acting as Federal Task Force agents. Local officials rightfully got upset by that.

More and more, the FBI is turning local police into their foot soldiers.

CtF: There are ways to deal with informants, infiltrators and *agents provocateurs*. On our Popular Resistance website, we have a class on how social transformation occurs and at least one class is on these issues. This report is very helpful for people to know what kind of tactics they use, how widespread it is and what to expect, but beyond that, there are other things people can do to build their movement in a way that handles this pretty well. How can people who care about this issue get more involved? Is there anything that they can do concretely?

CG: We have repeatedly called on Congress to investigate the FBI. We had a major campaign in 2016 where something like a hundred and thirty-seven groups, including Popular Resistance, and 88,000 people signed our petition to ask the Senate and House Judiciary committees to hold hearings about FBI surveillance of Occupy Wall Street, Black Lives Matter and pipeline protesters. We are gearing up to relaunch that campaign in light of the report.

If people want to read the report, it's on our website at rightsanddissent.org/FBI-spying/. On that page, there is an action you can take. In the coming weeks, we're going to be using this report as an organizing tool and trying to build pressure around this issue of FBI political

surveillance.

This is the time to put the pressure on Congress to use this moment to try to look into what's going on and actually come up with some tangible solutions. The first attempt to check the FBI political surveillance was in 1924. Harlan Fiske Stone read a report by the ACLU about the FBI doing political spying. He was so concerned by it, he made J Edgar Hoover meet with Roger Baldwin, the head of the FBI. Stone did not know that Hoover was spying on Roger Baldwin and the ACLU. He put into place a regulation that the FBI had to stick to investigating violations of the criminal code and he asked Hoover, can you show us anywhere where it's illegal to be a communist? Hoover found ways to get around that.

The FBI is very good at finding reasons to spy on people. But then in the 30s, there was a whole bunch of national executive orders from Roosevelt that gave the FBI very broad national security powers. So, this isn't a new issue, but you know some of the ideas that have been proposed over the last almost 100 years are still very good ideas.

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