

DEMOCRACY

A JOURNAL OF IDEAS

In Trump's America, Dissenters Beware

Jonathan Blanks

December 18, 2017

The history of government investigation, infiltration, and disruption of Americans who exercise their First Amendment rights is nearly as old as the Amendment itself. Many individuals and groups who were targeted fell under suspicion not for secret plots against the government, but for openly exercising their constitutional rights. Congress passed the **Alien and Sedition Acts (1798)** to crack down on anti-government writing and protest. President Lincoln famously **suspended habeas corpus** (a detainee's right to challenge his detention) and **jailed dissenting journalists** and others suspected of spying during the Civil War. Just over half a century later, the Bureau of Investigation—the precursor to the FBI—was established and shortly thereafter infiltrated and undermined the Socialist Party of America.

The BOI and other federal government organs surveilled or **harassed pacifists and other anti-militarist groups like the Quakers, labor organizers, anarchists, communists, radical groups, and even foreign language newspapers** they thought to be subversive throughout the early twentieth century. As the century moved on, black nationalists like Marcus Garvey and the American Civil Liberties Union came under direct government scrutiny. Once established under the directorship of J. Edgar Hoover, the FBI continued and enlarged the scope of surveillance, infiltration, and harassment efforts against the NAACP, Martin Luther King Jr., Malcolm X, and many others in the American civil rights movement of the 1950s and '60s, include an **infamous attempt to blackmail Dr. King to kill himself**.

Some interventions may have, to some degree, been warranted. Certainly, there were spies and others who sought to violently overthrow (or aid in secession from) the government and break the laws that govern society. But whatever threats those individuals or groups caused were usually dwarfed in comparison to the government's reaction toward them and, very often, the individuals posed no security threats at all.

As much as Americans may like to think of government spying on and interfering with innocent people as a relic of the Red Scares and Cold War pasts, recent law enforcement actions against Muslim Americans, Black Lives Matter activists, and anti-Trump protesters strongly suggest history is repeating itself.

If there is one overriding theme throughout the history of American surveillance, it is mission creep. In 1976, a bipartisan Senate committee led by Democratic Idaho Senator Frank Church released **a massive report**, following its investigation into domestic surveillance of Americans and other national security issues. The Church Committee found that the government had abused its authority in order to spy on, violate the rights of, and undermine the political power of

thousands of American citizens. The committee found that some discrete and focused investigations into individuals or small groups of potential suspects of criminal activity became dragnets for political dissenters and others who otherwise found themselves on government watchlists. Between 1960 and 1974, the FBI conducted more than 500,000 different investigations of “subversives,” like **folk singers**.

Other **programs like COINTELPRO** were, from the outset, large domestic spy operations to “disrupt” and “neutralize” targets like the American Communist Party that evolved into interference in civic organizations like parent-teacher associations and advocacy groups supporting equal employment opportunity. While skeptics might like to assign such a vast surveillance and retribution to the paranoia of the longtime FBI director, the Church Commission Report identified internal systemic tendencies to enlarge investigative targets, and the report itself was released several years after Hoover’s death. Moreover, the **Rockefeller Commission**, the **New York Times**, and others revealed similar abuses of power by the CIA and National Security Agency. Documents released in 2013 revealed these agencies were wiretapping **boxing legend Muhammad Ali** and **humorist Art Buchwald**, among many others.

The threats to First Amendment rights extend beyond politics and into religion as well. In a misguided effort to root out terrorists since 9/11, the FBI and local law enforcement agencies **broadly surveilled American Muslim communities** and **infiltrated mosques in search of so-called radicals**. This infiltration was undertaken in spite of the fact that American Muslims are typically difficult to recruit into radical Islam. Harvard lecturer **Jessica Stern told Politico in 2016**, “Polling shows that American Muslims are patriotic. They are significantly happier with the direction of the country than non-Muslims.” For that reason, many Muslims are eager to root out potential radicals in their midst, and in at least one case, they even reported **an FBI informant to the FBI** for being a threat to the mosque after he said he had weapons and suggested blowing up a mall. (In several cases, civil liberties advocates have **accused the FBI** and **other law enforcement** of facilitating phony plots and encouraging people to join where no previous credible threat existed.) The free exercise of religion is inherently threatened when government instigates and agitates adherents, particularly inside holy places, which can further widen divides between targeted religious communities and law enforcement.

Reflecting on this lengthy history up to the present day, when documents leak, as they did in October, revealing that the FBI is going to focus attention on “**Black Identity Extremists**,” (BIE) First Amendment alarm bells should sound, once again.

The FBI refers to BIE as an “ideology,” though neither the FBI **nor Attorney General Jeff Sessions** has identified an organization or program directly associated with it. There have been acts of **violence against police by black individuals** who **uttered complaints about police violence against black Americans** in police ambushes in Dallas and New York City, but no communication, coordination, or other link between them has been established. Former FBI counterterrorism agent and Brennan Center fellow Michael German told *Foreign Policy* in October that **BIE means little more than “black people who scare [the FBI].”** While the FBI told *FP* they “cannot initiate an investigation based solely on an individual’s race, ethnicity, national origin, religion, or the exercise of First Amendment rights,” it is doubtful many activists in Black Lives Matter (BLM) or similar organizations will choose to give the Bureau the benefit of the doubt.

When governments crack down on speech rights, they not only punish the immediate targets, but everyone else who believes they may be subjected to surveillance, mistreatment, or prosecution if they similarly exercise their rights. This broader effect is known as the “chilling” of free speech, in which other potential dissenters or like-minded folks are intimidated or otherwise dissuaded from speaking out against the status quo for fear of government retribution.

Internal emails and other documents obtained by *Al Jazeera* through a Center for Constitutional Rights (CRC) lawsuit show that the FBI has indeed monitored BLM, which the Bureau rationalized with claims of the potential for violence erupting at such events. Omar Farah, the lead CRC lawyer on the case, **told Al-Jazeera that**, “the problem with surveillance – and particularly the historical and current surveillance of black-led movements for social change – is that the surveillance itself is what does all the work, even if...the FBI later stops recording protected activity.... Surveillance is what chills people from mobilizing and organizing.” **Other commentators** contend that the BIE distinction is simply a fiction created to give federal law enforcement the cover to surveil BLM marches and other constitutionally protected activities by black activists.

Elsewhere in D.C., an apparent crackdown on dissidents is in the news: More than 180 protesters and marchers are **facing felony and misdemeanor charges after being rounded up during the so-called J20 protests** of the Inauguration of President Trump last year. Several black-clad protesters threw rocks, broke business windows, and even torched a limousine in downtown D.C., while countless protesters marched and demonstrated peacefully. In response, the federal prosecutor has decided to charge almost every individual picked up by police with felony rioting, despite the relatively small number of individuals directly responsible for property damage. (Those who the government believes were directly responsible for this damage indeed face additional charges.)

After some store windows were broken, along with other damage in proximity of a large group of marchers, D.C. Metropolitan Police trapped about 200 protesters, observers, and journalists and held them for several hours outdoors. The handful of credentialed journalists among those arrested and charged for the most part had their cases dropped.

The trial of the first six J20 defendants is currently underway. The six include **one photojournalist** who allegedly had press credentials **under a pseudonym**. On Wednesday, the judge dismissed **felony rioting charges** against all six defendants, but the trial continued on the misdemeanor counts.

Before the first trial began, one person pled guilty to a felony charge and about 20 people pleaded guilty to misdemeanors. Marcelline Mitchell was one of those in the march who pled to a lesser charge. She told me over the phone that she came to D.C. to observe the protest as part of her undergraduate thesis, but freely admitted that she was not a fan of the President. According to her memory, about 30 minutes after she first heard windows smashed toward the back of a group of marchers, Mitchell saw police officers arrive at the scene and close off streets, encircling the group of mostly peaceful protesters.

“Immediately upon surrounding and completely circling us, [the police] just started pepper spraying us all, indiscriminately,” Mitchell said. “There was no reason for that; no one was even trying to get out of this kettle”—a kettle is a crowd control tactic in which police keep crowds in

a controlled area. “In my head, I’m just thinking “I’m exercising my First Amendment right. [The window smashing] has nothing to do with me.”

Mitchell said she was surprised there were no orders to disperse, as she had witnessed at #Occupy events and other protests, but instead, she was corralled into the kettle and eventually charged with felony rioting. She didn’t feel she could fight the charges because it was too expensive and onerous to travel back to and from D.C. Like so many criminal defendants, a plea deal with community service and a fine seemed like the best option available. As an additional cost, Mitchell had to replace the phone the police took, which has not been returned to her to this day.

Reports **from the *Huffington Post*** and others suggest the judge presiding over the first J20 trial is unsympathetic to the First Amendment claims put forth by the defendants. If convicted, the defendants may have better luck at the appellate levels of the federal system, but such processes are long and very expensive. In the meantime, any person convicted of felonies may **face collateral consequences** like ineligibility for certain jobs and government benefits, or the revocation of their right to own firearms, even if they never step foot in a prison. Should this become precedent even temporarily, anyone who comes to protest in D.C., where protests are commonplace, would potentially be at risk of prosecution due solely to their physical proximity to criminal acts by others. The financial and personal costs associated with fighting federal charges could threaten some of the bedrock freedoms of speech and assembly in our nation’s capital.

The government should be vigilant in attempts to keep Americans safe. It should also seek to bring those responsible for the destruction of property to account for their actions. But these laudable goals should not be stretched to surveil constitutionally protected activities and prosecute those who happen to be marching within earshot of criminal acts. The FBI and the Justice Department have a long, ignoble history of curtailing the rights of citizens to lawfully dissent. Too many signs point to a new chapter of government abusing Americans who exercise their most cherished freedoms.

JONATHAN BLANKS is a research associate at the Cato Institute’s Project on Criminal Justice and writer-in-residence at Harvard University’s Fair Punishment Project. You can follow him on Twitter @blanksslate.