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at New York University School of Law

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**Before the
Congressional Black Caucus**

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Chairman Richmond and members of the Congressional Black Caucus, thank you for inviting me to speak to you today about the FBI's August 2017 intelligence assessment describing a purported threat posed to law enforcement officers by "Black Identity Extremists" (BIE).¹ The assessment is of such poor analytic quality that it raises serious questions about the FBI's purpose in producing it. What is most troubling about the BIE assessment is its potential to incite irrational police fear of black political activists. Irrational fear, unfortunately, too often in the past translated into unnecessary police violence against unarmed and unthreatening black men and women.²

As a former FBI agent, civil rights advocate at the ACLU, and now fellow at the Brennan Center for Justice, I have reviewed hundreds of terrorism intelligence products like the BIE report, and I am sorry to say it isn't unusual. In 2011, the ACLU exposed bigoted FBI training materials that demonstrated bias against Arabs, Muslims, and Asians. In 2012, I wrote articles criticizing FBI intelligence materials on "Black Separatist Extremists," "American Islamic Extremists," "Animal Rights Extremists," and "The Chinese," which I provided to CBC staff. Since the BIE report came out, I have seen training materials produced by state and local law enforcement agencies adopting its language. The problem is much bigger than one report.

The FBI's BIE assessment never mentions Black Lives Matter, but as the most prominent group protesting police violence, it certainly seems to be in the crosshairs. Understanding how the FBI's investigative authorities work may provide insight into the purpose of this report. The FBI's investigative authorities are governed by the Attorney General Guidelines for Domestic FBI Operations (AGG), which prohibit investigations based *solely* on First Amendment activities. This is an extremely low standard, and the BIE assessment may be intended to provide

the additional element necessary to justify monitoring, questioning, investigating BLM or other African American protest groups.

Last modified by Attorney General Michael Mukasey in December 2008, the AGG authorizes a new type of investigation called an “assessment,” not to be confused with an “intelligence assessment” like the BIE report or the “threat assessment” authorized under a previous version of the AGG for national security investigations.³ The AGG authorizes FBI agents to open assessments without a factual basis to believe someone has violated the law or poses a threat. Instead, agents simply certify that their purpose is to investigate violations of federal criminal laws or threats to national security, identify the individuals or organizations involved, or collect foreign intelligence to authorize their inquiry. Assessments are intrusive. They can involve physical surveillance, recruiting and tasking informants, trash covers, overt and covert interviews, commercial database searches, and grand jury subpoenas for telephone and email subscriber information.⁴ Under the AGG, assessments can be opened for the purpose of recruiting, or coercing, a person to become an informant. Again, no factual predicate suggesting wrongdoing is required. The FBI has claimed the AGG authorize it to collect and map racial and ethnic demographic information and track “ethnic behaviors,” which is basically neighborhood profiling.⁵ The reason the FBI draws these maps is so it can treat people on one side of the line differently from those on the other.

The Department of Justice Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity, issued by Attorney General Eric Holder in 2014 likewise fails to protect African American activists from inappropriate scrutiny.⁶ It states that the Constitution only requires that the listed characteristics cannot be *sole* basis for law enforcement action. It allows federal law enforcement officers to use these characteristics whenever there is “trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.” Under the FBI’s rules, the BIE assessment may provide the necessary “trustworthy information” about a purported scheme, organization, or threat that can justify using race or ethnicity to target a particular group or individual.

In addition to these lax rules, the lack of diversity within the FBI remains a significant problem. Every director since William Sessions has identified this lack of diversity as one of the FBI’s major weaknesses. The bureau made slow but steady progress against this problem throughout the 1990s, but those gains were lost under directors Robert Mueller and James Comey. By August 2016, African Americans made up only 4.46% of special agents, a smaller percentage than in 1992. At the same time, the percentage of Latino agents fell to 6.57%, the lowest since 1996, and remarkable considering Latino Americans grew to make up 17.6% of the U.S.

population over this period.⁷ The percentage of Asian agents increased to 4.53% over this time, but they remain underrepresented as compared to their proportion in the general population. Women account for only about 20% of FBI agents, but their representation in senior management decreased by 3% from 2013 to 2016.⁸ The FBI refused to provide *ProPublica* reporter Topher Sanders with current racial and ethnic demographics for an article published last Friday.⁹ I imagine this refusal means the FBI isn't making progress on this issue.

Policy Recommendations

- Require the FBI to withdraw and denounce BIE report and any other intelligence assessments or training materials referencing BIE as a category of domestic terrorists.
- Require independent review of FBI intelligence and training materials regarding investigation, surveillance, and intelligence gathering that targets protected classes, modeled after its review of anti-Muslim training materials in 2012.
- Establish a peer review system to oversee the production of intelligence reports and training materials that include the FBI Office of General Counsel, DOJ Privacy Officer, and DOJ Civil Rights Division prior to publication (DHS already does this).
- Require all intelligence and training products to be available for congressional review, with all personally identifiable information (PII) properly redacted.
- End the FBI's racial and ethnic mapping program.
- Pass the Ending Racial Profiling Act.
- According to 2016 data, the FBI is 83.4% white and 80% male.¹⁰ Congress should order an independent study to determine why diversity gains throughout the 1990s have fallen over the last 18 years. It should examine bias in hiring, promotion, and disciplinary processes.

Thank you for the opportunity to speak with you today.

¹ Federal Bureau of Investigation, "(U//FOUO) Black Identity Extremists Likely Motivated to Target Law Enforcement Officers," Intelligence Assessment, August 3, 2017.

² Dara Lind, "The FBI is trying to get better data on police killings. Here's what we know now," Vox.com, April 10, 2015, <https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black>.

³ Department of Justice, *The Attorney General's Guidelines for Domestic FBI Operations*, September 29, 2008, <https://www.justice.gov/archive/opa/docs/guidelines.pdf>. See also, Emily Berman, "Domestic Intelligence: New Powers, New Risks," *Brennan Center for Justice at New York University Law School*, January 18, 2011, <https://www.brennancenter.org/publication/domestic-intelligence-new-powers-new-risks>.

⁴ Ibid.

⁵ Federal Bureau of Investigation, *Domestic Investigations and Operations Guide (DIOG)*, December 16, 2008.

⁶ The Department of Justice, *Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation*, December 2014, <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>

⁷ U.S. Census Bureau, “Facts for Features: Hispanic Heritage Month 2016,” October 12, 2016, <http://www.census.gov/newsroom/facts-for-features/2016/cb16-ff16.html>.

⁸ Adam Goldman, “Where Are the Women in F.B.I.’s Top Ranks?,” *The New York Times*, October 22, 2016, <https://www.nytimes.com/2016/10/23/us/fbi-women.html>.

⁹ Topher Sanders, “The FBI – ‘Fidelity, Bravery, Integrity’ – Still Waiting on the Diversity,” ProPublica, March 16, 2018, <https://www.propublica.org/article/the-fbi-fidelity-bravery-integrity-still-working-on-diversity>

¹⁰ Kaitlyn D’Onofrio, “Why Is FBI Even Less Diverse Than 20 Years Ago? Director Doesn’t Know,” DiversityInc, July 15, 2016, <http://www.diversityinc.com/news/fbi-james-comey-diversity/>.