

Congress of the United States
Washington, DC 20515

October 15, 2020

The Honorable Adam I. Klein, Chairman
The Honorable Edward W. Felten, Board Member
The Honorable Jane E. Nitze, Board Member
The Honorable Travis LeBlanc, Board Member
The Honorable Aditya Bamzai, Board Member
Privacy and Civil Liberties Oversight Board
800 North Capitol Street, N.W., Suite 565
Washington, D.C. 20002

Dear Chairman Klein and Board Members Felten, Nitze, LeBlanc, and Bamzai,

The act of protesting has played a central role in advancing civil rights in our country, and our Constitution protects the right of Americans to engage in peaceful protest unencumbered by government interference. We are, therefore, concerned that the federal government is infringing on this right, and we ask that the Privacy and Civil Liberties Oversight Board (PCLOB) investigate the federal government's surveillance of recent protests, the legal authorities for that surveillance, the government's adherence to required procedures in using surveillance equipment, and the chilling effect that federal government surveillance has had on protesters.

History of Protests and Protest Surveillance

The right of Americans to peacefully protest government action, without subjecting themselves to surveillance, is protected by our Constitution. The First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹ The Fourth Amendment protects "[t]he right of the people to be secure in their persons... against unreasonable searches and seizures."² The Supreme Court has also held that the "[f]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment," and the Court has "recognized the vital relationship between freedom to associate and privacy in one's associations."³

Protests have played an essential role in social change movements throughout our country's history, including the movements for our country's independence, women's suffrage, civil rights, and LGBTQ rights.⁴ Jacob Blake, George Floyd, and Breonna Taylor are only the most recent cases of Black Americans who have been brutally harmed by law enforcement officials in our country. We stand with the millions of Americans in hundreds of communities who are peacefully calling for transformational changes to better our nation by addressing the systemic racism and injustice embedded in our society. By some estimates, the recent protests represent the largest movement in U.S.

history⁵ and seem to have shifted public perceptions on policing and racism in our country.⁶

Sadly, governmental efforts to surveil and thwart civil rights activism also play a repeated role in our country's history. Between 1956 and 1971, the Federal Bureau of Investigation (FBI) conducted widespread surveillance of various groups advocating for social change, including the Nation of Islam, the Black Panther Party, the Southern Christian Leadership Conference, the American Indian Movement, Puerto Rican independence organizations, and Students for a Democratic Society, along with tracking Dr. Martin Luther King and Malcolm X, as part of the Counterintelligence Program (COINTELPRO).⁷ Unfortunately, the FBI went further than surveilling, devoting significant efforts to disrupt, neutralize, and destroy social movements.⁸

The Intelligence Community has even surveilled Members of Congress active in anti-war efforts. In 1975, hearings at the Government and Individual Rights Subcommittee of the House Committee on Government Operations revealed that the Central Intelligence Agency (CIA) collected or maintained information on 75 Members of Congress, including positions they took on the Vietnam War.⁹

More recently, the federal government has surveilled several protests and social movements. In 2014, the Department of Homeland Security (DHS) tracked people protesting the fatal police shooting of Michael Brown in Ferguson, Missouri.¹⁰ In 2015, the FBI used spy planes to track protesters in Baltimore, Maryland, following the death of Freddie Gray.¹¹ In 2017, the FBI, DHS, the Department of Justice (DOJ), the U.S. Marshall Service (USMS), and the Bureau of Indian Affairs conducted surveillance of Indigenous-led protests of the Dakota Access Pipeline.¹²

Recent Surveillance of Protesters

Because several federal agencies have gathered information about protesters, we ask that PCLOB investigate whether these activities infringe on fundamental rights or violate laws. Aerial surveillance of recent protests has become so common that an analyst at the American Civil Liberties Union (ACLU) observed that “[f]or activists across the country who have taken to the streets to demand racial justice and police accountability, the sound of protest has been not just the sound of chants, but the sound of helicopters.”¹³

Many agencies have or may have surveilled protesters, according to press reports and agency documents.

- The Customs and Border Protection (CBP) deployed various aircraft – including AS350 helicopters, a Cessna single-engine airplane, and Predator drones – that logged 270 hours of aerial surveillance footage over 15 cities, including Minneapolis, New York City, Buffalo, Philadelphia, Detroit, and Washington, D.C.¹⁴

- The FBI flew Cessna 560 aircraft over protests in Washington, D.C., in June, and reporting shows that the FBI has previously equipped such aircraft with ‘dirtboxes,’ equipment that can collect cell phone location data, along with sophisticated cameras for long-range, persistent video surveillance.¹⁵
- In addition to specific allegations of protester surveillance, the Drug Enforcement Agency (DEA) was granted broad authority to “conduct covert surveillance” over protesters responding to the murder of Mr. Floyd.¹⁶

Separate investigations and congressional inquiries have clarified that certain alleged protest surveillance did not include collection of personal information. In response to congressional inquiries, the Air Force Inspector General (AFIG) investigated seven National Guard flights of RC-26B aircraft – equipped with infrared sensors, electro-optical cameras, and full-motion video capabilities, including the ability to transmit real-time video – over protests in Minnesota, Arizona, California, and Washington, D.C.¹⁷ The AFIG investigation concluded that “[t]he RC-26B flights flown by the National Guard during recent protests did not collect U.S. person information.”¹⁸

A House Intelligence Committee investigation also found that DHS’s Federal Protective Service (FPS) “seized phones from protesters and asked [DHS’s Office of Intelligence and Analysis (I&A)], a member of the Intelligence Community, to extract data from those phones. Thankfully that request appears not to have been ultimately fulfilled.”¹⁹

In response to a congressional inquiry, a USMS official stated that a single engine Cessna Caravan owned and operated by USMS was deployed over Portland on June 13, 2020. A camera attached to the aircraft took still pictures of the protesters, though images did not contain “personally identifiable information of any kind;” “no videos were recorded;” “[c]ell site simulators were not used during this short deployment;” and “[n]o other surveillance systems other than the identified camera platform were utilized.”²⁰

Beyond potential direct surveillance of protesters, DHS troublingly was also compiling intelligence reports on journalists covering protests in Portland, Oregon. On July 30th, the *Washington Post* reported that I&A disseminated information about a *New York Times* reporter and the editor in chief of the blog *Lawfare*, both of whom had published articles critical of DHS with respect to protests in Portland.²¹ While DHS has since ceased this practice, this action raises First Amendment issues in two regards because it directly threatens the “freedom...of the press” and also indirectly threatens “the right of the people peaceably to assemble.”²² On the impact of compiling intelligence reports on journalists, *Lawfare* Editor-in-Chief Benjamin Wittes, one of the journalists involved, stated:

“I don’t think the principal threat here is to journalism. The principal threat is to protesters. The right to protest is no less First Amendment-protected than the right to do journalism...it’s the same basic idea...I do worry that what we’ve seen here is the tip of the iceberg, and the tip is

journalists, but the iceberg is surveillance of protesters themselves. That's my concern."²³

Legal Authorities, Processes, and Procedures

In addition to concerns about surveillance, we ask that PCLOB investigate and enumerate the legal authorities under which agencies are surveilling protests and whether agencies have followed required processes for use of intelligence equipment domestically.

PCLOB should investigate what legal authorities federal agencies are using to surveil protesters to help Congress understand if agencies' interpretations of specific provisions of federal statutes or of the Constitution are consistent with congressional intent. This will help inform whether Congress needs to amend existing statutes or consider legislation to ensure agency actions are consistent with congressional intent.

As mentioned earlier, the House Intelligence Committee found that FPS seized cell phones from protesters. While I&A appears to have denied FPS's request to extract data from those cell phones, PCLOB should investigate the legal authority FPS used to confiscate protester cell phones with the intent of extracting data.

With respect to required legal processes and procedures, the AFIG investigation found several failures of the National Guard Bureau to meet appropriate legal procedures and processes, including failing to receive approvals from the Secretary of Defense for using intelligence and misclassifying flights as training missions.²⁴

In a response to congressional inquiries, CBP referenced a Privacy Impact Assessment (PIA) for Aircraft Systems of CBP, as required by federal law.²⁵ The document is dated September 9, 2013. While CBP released a more recent PIA on April 6, 2018, it is largely limited to discussions of only small unmanned aircraft systems (UAS), and not other UAS.²⁶ The 2013 PIA on UAS states that "[a]s technology improves, operating environments change, and policies adapt, this PIA will be updated and amended to refresh the analysis of these changes..."²⁷ Surveillance technologies have evolved drastically in the seven years since this PIA was published, yet CBP has not updated its PIA as required.²⁸

Notably, CBP and FBI have both fallen short of privacy and civil liberties-related requirements recently. A DHS Inspector General investigation in 2018 into CBP's privacy and data protection policies concluded that "CBP has not ensured effective safeguards for information, such as images and video, collected on and transmitted from its UAS."²⁹

Chilling Effect of Surveillance on Protests

Government surveillance has a chilling effect on the constitutionally protected act of peacefully protesting. Downloads for encrypted messaging apps have spiked during recent demonstrations,³⁰ showing a broad concern about surveillance among protesters.

As further evidence of the concerns of protesters, many news organizations³¹ and civil society groups³² published guides to help Americans considering protesting protect themselves from surveillance.

Chilling is not a mere byproduct of surveillance; it's often a primary objective. In a book about the history of aerial surveillance, Arthur Holland Michel, founder and co-director of the Center for the Study of the Drone at Bard College, states that the surveillance technologies used in domestic policing stem from systems designed for military use, where "the potential to create fear...is a function of design just as much as it is a consequence of use."³³ The book cites a Pentagon operating paper describing a primary goal of surveillance systems as making an adversary feel that he "is constantly looking over his shoulder, sure he is being watched, followed, tracked, and heard."³⁴ Technologies with such dire objectives have no place anywhere near domestic activities protected by the First Amendment.

This intended chilling effect was part of the goal of the Arizona National Guard's aerial missions. The mission briefing materials explicitly state that a goal of the mission was to "deter planned/unplanned demonstrations, protests or looting."³⁵ As the AFIG concludes, "[d]eterring protests and demonstrations, assuming they are lawful, is not consistent with constitutional rights."³⁶ This finding is highly troubling, and we worry that while the Arizona National Guard may be unique in putting this objective in writing, it serves as an implicit goal of too many other agencies' use of aerial surveillance.

Recent Congressional Inquiries

Dozens of Representatives and Senators have raised concerns about surveillance of protests, including the following. Copies of the letters are enclosed.

- 35 Representatives, led by Representatives Anna G. Eshoo and Bobby L. Rush, wrote to the FBI, National Guard Bureau, DEA, and CBP demanding that the agencies "cease any and all surveilling of Americans engaged in peaceful protests"³⁷ and sent follow up letters to the FBI and CBP.³⁸
- 15 Senators, led by Democratic Leader Chuck Schumer and Judiciary Committee Ranking Member Dianne Feinstein, wrote to DOJ and DHS raising concerns about "collecting information on and monitoring Americans it believes pose a threat to statues or monuments."³⁹
- 7 members of the Senate Select Committee on Intelligence, led by Vice Chairman Mark R. Warner, wrote to DHS raising concerns and asking questions about the role of DHS in protests in Portland, Oregon, including about surveillance, among other issues.⁴⁰
- 5 Senators, including Democratic Leader Schumer and the Ranking Members of four committees, wrote to DOJ, Department of Defense (DOD), Department of Interior, and DHS raising concerns about the surveillance of protesters.⁴¹

- 2 Senators and 3 Representatives from Oregon wrote to USMS about surveillance flights over Portland, Oregon.⁴²
- 5 members of the House Committee on Oversight and Reform, led by Chairwoman Carolyn Maloney, wrote to DHS raising concerns about surveillance of protesters.⁴³
- 2 Senators and 2 Representatives from Oregon wrote to DHS asking questions about alleged cell phone surveillance of protesters in Portland, Oregon.⁴⁴
- 2 Representatives and 1 Senator, led by Representative Ted Lieu, wrote to DOJ expressing “great concern about law enforcement agencies targeting and surveilling protesters who are engaged in constitutionally protected expressions of free speech.”⁴⁵
- 3 Representatives, led by Representative Andy Levin, wrote to DOJ, stating that the “DEA’s stated intention to ‘conduct covert surveillance’ is extremely distressing.”⁴⁶
- Representatives Eshoo and Rush wrote to the Inspectors General of DHS, DOJ, the Intelligence Community asking for an investigation of alleged cell phone surveillance of protesters in Portland, Oregon.⁴⁷
- Representative Jerrold Nadler, Chairman of the House Judiciary Committee, and Representative Karen Bass, Chair of the House Judiciary Subcommittee on Crime, wrote to DOJ and DEA “deeply concerned with reports” about DEA’s expanded authorities, including surveillance.⁴⁸
- Representative Adam Schiff, Chairman of the House Permanent Select Committee on Intelligence, wrote to DHS about “unprecedented, expanded intelligence and related activities” related to protesters.⁴⁹
- Senator Ed Markey wrote to the CEO of Clearview AI about the use of facial recognition by law enforcement agencies during protests.⁵⁰

PCLOB Investigation Needed

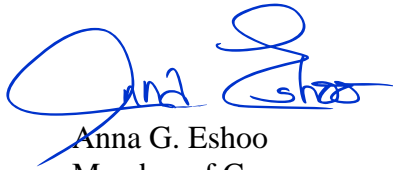
PCLOB is an independent agency⁵¹ that has the statutory mandate to analyze and review the actions of the federal government to ensure that they protect privacy and civil liberties.⁵² Congress established the PCLOB as a check on governmental overreach. In granting additional authorities to the federal government following September 11th, Congress found that the “shift of power and authority to the Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life and to ensure that the Government uses its powers for the purposes for which the powers were given.”⁵³

PCLOB's statutory purposes and functions are focused on actions the Executive Government takes in response to efforts to protect the Nation from terrorism.⁵⁴ This focus is appropriate for the current wave of protests because President Donald Trump and Attorney General William Barr have labeled protesters who disagree with them terrorists on multiple occasions.⁵⁵

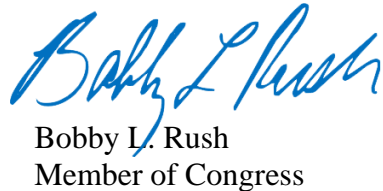
Recent surveillance of protests involves serious threats to liberty and requires a thorough investigation. We ask that PCLOB thoroughly investigate, including by holding public hearings, the following issues and issue a public report about its findings:

- (1) Whether and to what extent federal government agencies surveilled protests by collecting or processing personal information of protesters.
- (2) What legal authorities agencies are using as the basis for surveillance, an unclassified enumeration of claimed statutory or other authorities, and whether agencies followed required procedures for using surveillance equipment, acquiring and processing personal data, receiving appropriate approvals, and providing needed transparency.
- (3) To what extent the threat of surveillance has a chilling effect on protests.

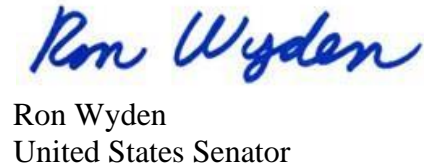
Most gratefully,



Anna G. Eshoo
Member of Congress



Bobby L. Rush
Member of Congress



Ron Wyden
United States Senator

Enclosures

cc: The Honorable William P. Barr, Attorney General
The Honorable Mark T. Esper, Secretary of Defense
The Honorable Chad F. Wolf, Acting Secretary of Homeland Security
The Honorable Christopher A. Wray, Director, Federal Bureau of Investigation
The Honorable Timothy Shea, Acting Administrator, Drug Enforcement Administration
The Honorable Mark A. Morgan, Acting Commissioner, Customs and Border Protection
General Joseph L. Lengyel, Chief, National Guard Bureau
Lieutenant General Sami D. Said, Inspector General, U.S. Air Force

¹ U.S. Constitution, Amendment I.

² U.S. Constitution, Amendment IV.

³ *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (U.S. Supreme Court, 1958).

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²⁵ Section 208(b) of the E-Government Act of 2002 (44 U.S.C. §3501 note).

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³⁵ Lt. Gen. Sami D. Said, “Report of Investigation (S8934P): RC-26B Operations 1—4 June 2020,” 47–48.

³⁶ *Id.* at 48.

³⁷ Letter from Reps. Anna G. Eshoo, Bobby Rush, et al. to FBI Director Christopher A. Wray, National Guard Bureau Chief Joseph L. Lengyel, DEA Acting Administrator Timothy Shea, and CBP Acting Commissioner Mark A. Morgan (June 9, 2020), <https://eshoo.house.gov/media/press-releases/rep-eshoo-rush-house-colleagues-demand-federal-agencies-cease-surveillance>.

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⁴⁷ Letter from Reps. Anna G. Eshoo and Bobby L. Rush to DHS Inspector General Joseph V. Cuffari, DOJ Inspector General Michael E. Horowitz, Acting Inspector General of the Intelligence Community Thomas A. Monheim (September 23, 2020), <https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-Rush%20Letter%20to%20IGs%20of%20DHS%2C%20DOJ%2C%20and%20IC%20on%20Portland%20Protester%20Surveillance%20-%2009.23.20.pdf>.

⁴⁸ Letter from Reps. Jerrold Nadler and Karen Bass to Attorney General William P. Barr and DEA Acting Administrator Timothy J. Shea (June 5, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2997>.

⁴⁹ Letter from Rep. Adam Schiff to DHS Acting Secretary Chad Wolf and DHS Office of Intelligence and Analysis Acting Undersecretary Brian Murphy (July 22, 2020), <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=1031> (internal quotes omitted).

⁵⁰ Letter from Sen. Edward J. Markey to Clearview AI Founder and CEO Hoan Ton-That (June 8, 2020), <https://www.markey.senate.gov/news/press-releases/senator-markey-presses-clearview-ai-on-facial-recognition-monitoring-during-nationwide-protests>.

⁵¹ Intelligence Reform and Terrorism Prevention Act of 2004, as amended, § 1061(a); 42 U.S.C. § 2000ee(a).

⁵² Intelligence Reform and Terrorism Prevention Act of 2004, as amended, § 1061(c); 42 U.S.C. § 2000ee(c).

⁵³ Intelligence Reform and Terrorism Prevention Act of 2004, as amended, § 1061(b)(2); 42 U.S.C. § 2000ee(b)(2).

⁵⁴ Intelligence Reform and Terrorism Prevention Act of 2004, as amended, §§ 1061(c)(1), (d)(1)(A), (d)(1)(B), (d)(2)(A), (d)(2)(B), and (d)(2)(C); 42 U.S.C. §§ 2000ee(c)(1), (d)(1)(A), (d)(1)(B), (d)(2)(A), (d)(2)(B), and (d)(2)(C).

⁵⁵ Angela Dewan, “Trump Is Calling Protesters Terrorists. That Puts Him in the Company of the World’s Autocrats,” *CNN*, July 26, 2020, <https://www.cnn.com/2020/07/25/politics/us-protests-trump-terrorists-intl/index.html>; “Attorney General William P. Barr’s Statement on Riots and Domestic Terrorism” (Office of Public Affairs, Department of Justice, May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>.