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VIA EMAIL - FOIARequest@state.gov

Kellie Robinson, Public Liaison
U.S. Department of State
A/GIS/IPS/PP
2201 C Street N.W., Suite B266
Washington, D. C. 20520-0000

Freedom of Information Act Request: State Department's Records Regarding Invitation to U.N. Special Rapporteur on Contemporary Forms of Racism to Investigate Systemic Racism in U.S. Police.

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

I. Background

On July 13, 2021, United States Secretary of State Antony Blinken announced he had invited the United Nations (“UN”) Special Rapporteur on Contemporary Forms of Racism to investigate “systemic racism” in law enforcement in the United States, as well as the UN Special Rapporteur on Minority Issues.¹ This is startling on many accounts, not the least of which is the documented extreme radicalism of the UN Special Rapporteur on Contemporary Forms of Racism.

First, it is highly questionable why the State Department has engaged on matters of domestic law enforcement. The State Department’s mission includes, “lead[ing] America’s foreign policy through diplomacy, advocacy, and assistance by advancing

¹ Anthony Blinken, *U.S. Leadership on Human Rights and Ending Systemic Racism*, United States Department of State, THE STATE DEPARTMENT (July 13, 2021), <https://www.state.gov/u-s-leadership-on-human-rights-and-ending-systemic-racism/>.

the interests of the American people, their safety and economic prosperity.”² Nowhere in the State Department’s mission or in its authorizing authorities is anything related to domestic law enforcement; that is—and always has been—delegated to the Attorney General, and in some cases more recently, the Secretary of Homeland Security.³ Moreover, policing and law enforcement in the United States is a function that has traditionally been left to the States.⁴ To the extent policing and law enforcement does fall to the federal government, there are generally well-defined boundaries and limits over what is federal jurisdiction and what is state or local. This is an area that the Departments of Justice and Homeland Security have extensive experience in, and which should have been consulted before invitations to international organizations were ever sent.

With respect to the invitation itself, the Administration would have been hard pressed to find someone more radical to invite to conduct such a review than the Special Rapporteur on Contemporary Forms of Racism, E. Tendayi Achiume. Ms. Achiume is a Professor of Law at the University of California at Los Angeles where she is also a core faculty member of the Critical Race Studies program.⁵ Her self-described current focus “is the global governance of racism and xenophobia; and the legal and ethical implications of colonialism for contemporary international migration.”⁶

Professor Achiume is clearly not able to conduct a fair assessment of the situation as she has an inherent contempt for the United States and is a leading voice in a radical push to deconstruct its institutions. In fact, she has already written that it is an “urgent project” of “moral, economic, political, and legal responsibility[y]” for States to “transform contemporary structures of racial injustice, inequality, discrimination and subordination that are the product of the centuries of racial machinery built through slavery and colonialism.”⁷ She believes that the United States not only has an obligation to pay vast sums for reparations, but also to fundamentally reconstruct

² U.S. Department of State, *About the U.S. Department of State*, <https://www.state.gov/about/> (last visited Aug. 2, 2021).

³ Contrast the State Department’s Mission with that of the Department of Justice’s: “[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans” or the Department of Homeland Security’s: “[w]ith honor and integrity we will safeguard the American people, our homeland, and our values.” See U.S. Department of Justice, *Our Mission Statement*, <https://www.justice.gov/about> (last visited Aug. 2, 2021); U.S. Department of Homeland Security, *Mission*, <https://www.dhs.gov/mission> (last visited Aug. 2, 2021).

⁴ See THE FEDERALIST NO. 17 (Alexander Hamilton).

⁵ UCLA Law, *E. Tendayi Achiume*, <https://www.law.ucla.edu/faculty/faculty-profiles/e-tendayi-achiume> (last visited Aug. 2, 2021).

⁶ *Id.*

⁷ E. Tendayi Achiume, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, U.N.DOC. A/74/321 at 4/23 (Aug. 21, 2019).

the institutions that made the United States the most free and prosperous world in human history.

One could speculate that whatever Ms. Achiume writes about racial bias in policing in the United States for the U.N. will be a condemnation. However, speculation is not necessary, as she has already written about the United States, at length. In one United Nations report she wrote:

Even today, black people are killed and brutalized at alarming rates by law enforcement authorities and vigilantes, who have little to no accountability. Currently, 2.2 million people are incarcerated in jails and prisons in the United States, which extract free or low-wage labour from those behind bars. Black adults are 5.9 times more likely to be incarcerated than white adults. Such racial disparities do not occur by accident: mass incarceration is a vestige of slavery and the “Jim Crow” era of racial segregation that followed. . . . The racial subordination of black people, consolidated during the peak of chattel slavery, persisted for generations, and remains in effect today.⁸

For a further preview of what she is likely to write about the United States, we can also look to the report she has just finished writing about race relations in the United Kingdom. In that report, she paints the country in a deeply unflattering light, as would be expected after reading her academic work. One excerpt reads, “The UK Government’s policies exacerbate discrimination, stoke xenophobic sentiment and further entrench racial inequality.”⁹ Further, she says, “the harsh reality is that race, ethnicity, religion, gender, disability status and related categories all continue to determine the life chances and well-being of people in Britain in ways that are unacceptable and, in many cases, unlawful.”¹⁰

Any report from Professor Achiume will not be an impartial assessment into the state of race and policing in the United States. It will be a predetermined hit piece, conducted at the express invitation of our own government. Indeed, it seems that she does not need an invitation to examine race in policing, because she has already reached and published her conclusions on that front.

⁸ E. Tendayi Achiume, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, U.N.DOC. A/74/321 at 9/23 (Aug. 21, 2019), <https://undocs.org/A/74/321>.

⁹ E. Tendayi Achiume, *United Kingdom: UN Expert Condemns Entrenched Racial Discrimination and Inequality* (Jun. 14, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24698>.

¹⁰ *Id.*

Further, she has praised the results of the World Conference Against Racism originally held in Durban, South Africa (“Durban Conference”), an event that, despite its admirable name, promoted anti-Semitism.¹¹ Copies of “The Protocols of the Elders of Zion” were sold on the conference grounds.¹² The delegations from Israel and the United States walked out of the conference due to the sheer volume of anti-Semitism. At Durban II, conducted ten years later, the president of Iran was allowed to state that the Holocaust was an “ambiguous and dubious question,” after which he was invited to speak at Durban III, to be held later this year.¹³ So far, Germany, Israel, the U.S., Canada, Australia, the United Kingdom, Hungary, Austria, the Netherlands, and Austria have announced that they will not attend Durban III. Professor Achiume, however, has spoken positively the Durban conferences, saying that nations “must ensure momentum in the implementation of the commitments made in Durban.”¹⁴

All of this leads to the question why has the Administration sought out a report that will undoubtedly castigate American institutions and law enforcement? For the answer, one need look no further than Secretary Blinken’s press release and current events. In the same statement in which he invited the radical Achiume to critique America, he also stated, “I also welcome the UN Human Rights Council’s adoption today ... of a resolution to address systemic racism against Africans and people of African descent in the context of law enforcement. I look forward to engaging with the new mechanism to advance racial justice and equity.”¹⁵ Equity is, of course, this Administration’s buzzword for engaging in racial discrimination and advancing “critical race theory” and policies based on it. It would seem as though the Administration has invited an assessment, that it well knows the outcome of, to serve as the predicate and justification for additional, radical changes in America. It is laying the groundwork to usher in a new wave of radical, regressive, racially discriminatory policies, and it will use this report as the “top-cover” and justification for those policies.

Finally, attention must be paid to the Secretary’s comment related to welcoming a UN Human Rights Council resolution on systemic racism. This is laughable as on the Human Rights Council sit some of the world’s worst despots and human rights abusers. Indeed, the Council is composed of representatives from Somalia, Libya, Russia, Venezuela, Cuba, China, and Pakistan. The State Department knows these

¹¹ E. Tendayi Achiume, *On the Occasion of the International Day for the Elimination of Racial Discrimination* (Mar. 23, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25737>.

¹² Lahav Harkov, *Germany will boycott the Durban IV Conference*, JERUSALEM POST (July 25, 2021), <https://www.jpost.com/diaspora/antisemitism/germany-will-boycott-the-durban-iv-conference-674831>

¹³ *Id.*

¹⁴ Achiume, *supra* note 11.

¹⁵ Blinken, *supra* note 1.

countries to be human rights violators, as reports detailing each nation's abuses are produced annually by the State Department.¹⁶

These reports paint a picture of police activity that is entirely foreign to policing in America. For instance, in 2020, the State Department found that China had engaged in widespread extrajudicial killings, kidnappings and use of forced labor.¹⁷ Many of these abuses are targeted at the genocide of the Uyghur ethnic minority in Xinjiang province.¹⁸ The report states that, “[g]enocide and crimes against humanity occurred during the year against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang.”¹⁹ More than a million Uyghurs are being held in forced detentions, subject to this treatment on a daily basis.²⁰ Further, “authorities subjected individuals in custody to electric shock, waterboarding, beatings, rape, forced sterilization, forced prostitution, stress positions, forced administration of unknown medication, and cold cells.”²¹ At the same time, citizen journalists attempting to investigate the origins and dangers of COVID-19 frequently disappeared or were arrested.²² Among those detained, reports of physical torture, degradation, sexual abuse, and sleep deprivation were common. While common prisoners were frequently subject to this type of abuse, political prisoners were singled out for even harsher treatment by authorities.²³

The 2020 report Russia details many of the same practices, including government sanctioned assassination attempts directed at political dissidents.²⁴ These included a partially successful attempt targeting Aleksey Navalny in 2020 (poisoned with Novichok, a nerve agent long favored by the KGB) and the successful assassination of Boris Nemtsov in 2015.²⁵ Russian officials in the Chechen region reportedly detained and tortured some 1,500 political dissidents between April and October.²⁶ There are also widespread allegations that LGBT individuals are being subjected to torture and extrajudicial killings; including two individuals who died in custody as a

¹⁶ Bureau of Democracy, *Human Rights, and Labor, 2020 Country Reports on Human Rights Practices*, THE STATE DEPARTMENT (March 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>.

¹⁷ THE STATE DEPARTMENT, CHINA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/> (last visited Aug. 2, 2021).

¹⁸ *Id.* at 2-3, 64-68.

¹⁹ *Id.* at 1.

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ THE STATE DEPARTMENT, RUSSIA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/russia/> (last visited Aug. 2, 2021).

²⁵ *Id.* at 2-4.

²⁶ *Id.* at 6.

result of torture.²⁷ Russia’s prison colonies are also incredibly brutal; the severity of the torture frequently drives inmates to commit suicide.²⁸ There are also widespread allegations of government sanctioned kidnappings and systemic physical abuse of prisoners in these colonies by the police and guards.²⁹ In fact, the report states that “*physical and sexual abuse by prison guards was systemic*” as a tool of control and torture.³⁰ The State Department report describes the testimony of one prisoner saying, “Aliyev told media that prison officials would beat him, tie him to the bars for a prolonged length of time causing his legs and arms to swell up, and force other inmates to assault him sexually while recording their actions. . . . Officials threatened to leak the recording to other inmates and officials if he did not behave.”³¹ Prosecution of political dissidents is also common, often resulting in forced stays in psychiatric institutions as a form of punishment.³²

The reports for Cuba,³³ Libya,³⁴ Somalia,³⁵ and Venezuela³⁶ read much the same way.

To understand, and share with the public, how and why the Biden-Harris Administration has chosen to invite radical activists from the U.N. to critique law enforcement in America, despite the State Department’s utter lack of jurisdiction over

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ *Id.* at 10.

³⁰ *Id.* (emphasis added).

³¹ *Id.*

³² *Id.*

³³ THE STATE DEPARTMENT, CUBA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/cuba/> (last visited Aug. 2, 2021) finding that Cuba was engaged in widespread suppression of dissent, arbitrary arrests and killings, and frequent government sponsored kidnappings and that it used torture as a means to obtain these ends.

³⁴ THE STATE DEPARTMENT, LIBYA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/libya/> (last visited Aug. 2, 2021) finding that the Libyan government committed numerous arbitrary and unlawful killings (as evidence by the uncovering of multiple mass graves), that government linked militias in Tripoli used machine guns and truck mounted anti-aircraft weapons to attack anti-corruption protestors in August of 2020, and that torture is common in prisons in government controlled territories and often includes government sanctioned beatings, electrocutions, and rape.

³⁵ THE STATE DEPARTMENT, SOMALIA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/somalia/> (last visited Aug. 2, 2021) finding pervasive issues with government sanctioned killings, violence against protestors, and kidnappings by government agents as well as use of torture on detainees, including government-sanctioned rape.

³⁶ THE STATE DEPARTMENT, VENEZUELA 2020 HUMAN RIGHTS REPORT, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/venezuela/> (last visited Aug. 2, 2021) finding that Venezuela had committed thousands of extrajudicial killings throughout the year, largely aimed at allowing Nicholas Maduro to stay in power despite his loss in the elections, and that the UN suggested that that abuses in Venezuela have risen to the level of crimes against humanity.

the matter, AFL requests access to the following records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552:

II. Requested Records

The timeframe for each request is January 20, 2021, to the date the requested records are processed.

- A. All communications, including, but not limited to, electronic mail, texts, memoranda, and handwritten notes, between the United States State Department and the United Nations related to “systemic racism” or “institutional racism” in policing.
- B. All records, relating, regarding, or referring to Secretary Blinken’s invitation to the United Nations Special Rapporteurs to have them investigate systemic racism in America.
- C. All correspondence between any person in the Executive Office of the President and any person in the Department of State regarding, referring, or relating to Secretary Blinken’s invitation to the United Nations Special Rapporteurs to investigate systemic racism in America. For purposes of this request, “any person in the Executive Office of the President” means any communication with an electronic mail address containing “eop.gov” or with any person who the Department of State knows to work in the Executive Office of the President.
- D. All communications, including, but not limited to, electronic mail, texts, memoranda, and handwritten notes, between any employee at the Department of State and any person affiliated with the Human Rights Council, the U.N. Special Rapporteur on Contemporary Forms of Racism, or the U.N. Special Rapporteur on Minority Issues regarding, referring, or relating to systemic racism in American policing.
- E. All records of, regarding, referring, or relating to the Department of State’s legal and/or working definition of the term “systemic racism” as used in the invitation to the U.N. Special Rapporteur on Contemporary Forms of Racism.
- F. All records sufficient to identify each person(s) employed by the Department of State responsible for determining what is or is not “systemic racism” in American policing.
- G. All communications between employees at the Department of State and the Department of Justice regarding, referring, or relating to Secretary Blinken’s

invitation to the United Nations Special Rapporteurs to investigate systemic racism in America.

III. Redactions

Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass 'n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then the Department of State must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; see also *Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, the Department of State should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records

Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and your department's regulations, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL's mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of

operations or activities of the government.”³⁷ The public has a significant interest in knowing how our streets are policed, and why the Biden Administration is seeking input on race and policing from a racial radical who has supported past anti-Semitic events where a stage was given to holocaust deniers. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government. The Biden Administration has repeatedly accused the prior administration of racism, so if this administration is seeking input on policy from radicals and anti-Semites that would be of great public interest.

V. Production

To accelerate the release of responsive records, AFL welcomes production on an agreed rolling basis.

If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VI. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at foia@aflegal.org. Finally, if AFL’s request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Gene P. Hamilton
Gene P. Hamilton
America First Legal Foundation

³⁷ 5 U.S.C. § 552(a)(4)(A)(iii).