

September 3, 2019

Chairman Jerrold Nadler  
U.S. House Judiciary Committee  
2138 Rayburn House Office  
Building  
Washington, D.C. 20515

Ranking Member Doug Collins  
U.S. House Judiciary Committee  
2142 Rayburn House Office  
Building  
Washington, D.C. 20515

**Re: Oppose H.R. 4192, Confronting the Threat of Domestic  
Terrorism Act**

Dear Chairman Nadler and Ranking Member Collins:



National Political  
Advocacy Department  
915 15th St. NW, 6th FL  
Washington, D.C. 20005  
aclu.org

Susan Herman  
*President*

Anthony Romero  
*Executive Director*

Ronald Newman  
*National Political  
Director*

The American Civil Liberties Union (ACLU) strongly urges you to oppose H.R. 4192, which is unnecessary because the offenses it creates largely duplicate existing crimes, and harmful because it expands authorities that law enforcement has abused to target marginalized communities. In light of recent mass shootings and the surge in white supremacist violence, lawmakers are understandably seeking to take action. But proposals like H.R. 4192 are the wrong approach. This bill is yet another iteration in a series of problematic proposals that would further entrench domestic terrorism frameworks, and cause more harm to the communities that Congress is seeking to protect.

People of color and other marginalized communities have long been targeted under domestic terrorism authorities for unfair and discriminatory surveillance, investigations, and prosecutions. Law enforcement agencies' use of these authorities undermines and has violated equal protection, due process, and First Amendment rights. Law enforcement agencies already have all the authorities they need to address white supremacist violence effectively. We therefore urge you instead to require agencies to provide meaningful public data on their use of resources and failure to prioritize white supremacist violence.

**The ACLU strongly urges you to oppose H.R. 4192, Confronting the Threat of Domestic Terrorism Act because it is unnecessary and would serve to target the very communities that Congress is seeking to protect.**

- I. H.R. 4192 unnecessarily expands authorities that law enforcement uses to target communities of color and fails to provide sufficient protections for civil rights and liberties.

As the proposed legislation's reference to existing terrorism-related statutes and penalties demonstrates, the crimes it would create largely duplicate existing laws, which cover a range of wrongful conduct as well as expansive attempt and conspiracy charges. Indeed, more than 50 federal terrorism-related statutes and additional hate crimes statutes already give law enforcement the authority necessary to investigate and prosecute domestic

white supremacist violence effectively.<sup>1</sup> The Department of Justice has used these and other laws to prosecute cases that would fall under the federal definition of domestic terrorism.

H.R. 4192 would do more harm than good because it fails to recognize law enforcement agencies' use of existing authorities to target communities of color and other marginalized communities (discussed in detail below) and does not provide any meaningful safeguards. To the contrary, the bill expands charges that could be brought under an already vague, overbroad, and malleable definition of "domestic terrorism." In addition to further harming already marginalized communities, these charges could be used to brand as terrorists people who protest against government injustices by engaging in civil disobedience or actions that result in property damage. Reifying and expanding a system that law enforcement has used to target communities of color and those who dissent—without safeguards for which communities have long advocated—is not the way to address white supremacist violence.<sup>2</sup>

The bill purports to add certain civil rights protections, but these are entirely inadequate. It requires a certification by the Attorney General that a prosecution meets part of the definition of "domestic terrorism" enacted in the USA PATRIOT Act. But that requirement does nothing to narrow the overly broad and vague language of the USA PATRIOT Act definition.<sup>3</sup> Nor does it safeguard against politically-motivated or otherwise improper use of this broad prosecutorial authority against communities of color or those protesting government injustices. The bill also requires a report from the Privacy and Civil Liberties Oversight Board four years after enactment, without mitigating the abuses that could and likely would occur during those four years. In short, these provisions would not achieve any of the safeguards communities of color have long sought to prevent improper targeting of Black and Brown communities or create law enforcement accountability. Nor does it require public data on law enforcement investigations or prosecutions of white supremacist violence.

## II. Law enforcement's abuse of domestic terrorism authorities harms marginalized communities and H.R. 4192 fails to protect against these harms.

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<sup>1</sup> Roy L. Austin Jr. & Kristen Clarke, *Creating a 'Domestic Terrorism' Charge Would Actually Hurt Communities of Color*, Wash. Post, Aug. 26, 2019, available at <https://wapo.st/2Pg5ucZ>; Michael German & Sarah Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Ctr. for Justice (Oct. 31, 2018), available at [https://www.brennancenter.org/sites/default/files/publications/2018\\_10\\_DomesticTerrorism\\_V2%20%281%29.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%20%281%29.pdf); Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes*, Brennan Ctr. for Justice (July 1, 2019), available at <https://www.brennancenter.org/publication/fighting-far-right-violence-and-hate-crimes>.

<sup>2</sup> See, e.g., ACLU, *More About FBI Spying*, available at <https://www.aclu.org/other/more-about-fbi-spying> (summarizing the history of FBI surveillance and the lack of safeguards); ACLU, *Expanded FBI Authority*, available at <https://www.aclu.org/other/expanded-fbi-authority> (explaining expanded FBI authorities and recommended reforms). See also ACLU, *Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority* (Sept. 2013), available at [https://www.aclu.org/sites/default/files/field\\_document/unleashed-and-unaccountable-fbi-report.pdf](https://www.aclu.org/sites/default/files/field_document/unleashed-and-unaccountable-fbi-report.pdf).

<sup>3</sup> The USA PATRIOT Act defined "domestic terrorism" to include conduct that appears to be intended to (1) intimidate or coerce a civilian population; (2) influence the policy of a government by intimidation or coercion; or (3) affect the conduct of a government by mass destruction, assassination, or kidnapping. USA Patriot Act § 802, 18 U.S.C. § 2331 (2001).

Domestic terrorism frameworks have long targeted marginalized populations--whether Black civil rights activists, Muslim, Arab, Middle Eastern, and South Asian communities, animal and environmental rights activists, or other groups the government views as having “unpopular” or controversial beliefs. During the civil rights movements, leaders like Martin Luther King, Jr. were investigated and monitored based upon their organizing and civil disobedience for equal rights. These authorities escalated under the USA PATRIOT Act, which vastly expanded surveillance and investigative authorities while simultaneously reducing checks and balances on those powers. The definition of “domestic terrorism” under the USA PATRIOT Act is overly broad and vague, and communities of color and civil rights groups raised serious concerns about how this overbroad definition would be used.

Since passage of the USA PATRIOT Act, law enforcement has greatly expanded and abused its authority to investigate and prosecute domestic terrorism.<sup>4</sup> The Justice Department, the FBI, and other intelligence and law enforcement agencies unfairly targeted people of color, those engaged in First Amendment-protected activities, and other marginalized communities, resulting in discriminatory investigations and prosecutions, watchlists, and surveillance. The FBI has used domestic terrorism authorities to spy upon Muslim communities, including by infiltrating their places of worship.<sup>5</sup> The Justice Department leads and participates in a Suspicious Activity Reporting program, collecting and sharing information about people engaged in activities that are loosely labeled as “suspicious” without even a reasonable suspicion of criminal activity.<sup>6</sup> In addition to encouraging racial and religious profiling, this program also targets those engaged in First Amendment-protected activity. Agencies have monitored and infiltrated organizations such as the American-Arab Anti-Discrimination Committee (ADC), People for Ethical Treatment of Animals (PETA), and Greenpeace,<sup>7</sup> rather than investigating credible threats of actual wrongdoing. One of these investigations even included contact lists for students and peace activists participating in an on-campus conference.<sup>8</sup> Muslims in America have for years been unjustly targeted in sting operations and overbroad prosecutions under the guise of preventing or addressing purported terrorism threats,<sup>9</sup> and law enforcement agencies continue to initiate discriminatory investigations and surveil Muslim, Arab, Middle Eastern, and South Asian communities.

In fact, in 2010, the DOJ Inspector General (IG) criticized the FBI for misusing its authority by treating potential crimes such as non-violent civil disobedience and vandalism as justification for conducting domestic terrorism investigations of civil rights, social justice, and environmental activists. The report noted that in multiple investigations the FBI’s basis was “factually weak” and had “little indication of any possible federal crime as

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<sup>4</sup> Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes*, *supra* note 1.

<sup>5</sup> See, e.g., ACLU of Southern Cal., *Fazaga v. FBI*, available at <https://www.aclusocal.org/en/cases/fazaga-v-fbi>.

<sup>6</sup> ACLU, *Gill v. DOJ – Challenge to Government’s Suspicious Activity Reporting Program* (July 11, 2014), available at <https://www.aclu.org/cases/gill-v-doj-challenge-governments-suspicious-activity-reporting-program>.

<sup>7</sup> Press Release, ACLU, *New Documents Show FBI Targeting Environmental and Animal Rights Groups Activities as ‘Domestic Terrorism’* (Dec. 20, 2005), available at <https://www.aclu.org/news/new-documents-show-fbi-targeting-environmental-and-animal-rights-groups-activities-domestic>.

<sup>8</sup> *Id.*

<sup>9</sup> Human Rights Watch & Columbia Law Sch.’s Human Rights Inst., *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (July 2014), available at [https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/final\\_report\\_-\\_illusion\\_of\\_justice.pdf](https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/final_report_-_illusion_of_justice.pdf).

opposed to local crime.”<sup>10</sup> Moreover, the IG noted real-life negative consequences; those who become “subjects of domestic terrorism investigations are normally placed on watchlists, and their travels and interactions with law enforcement may be tracked.”<sup>11</sup>

Abusive use of law enforcement authorities escalated under the Trump administration, including through the surveillance of Black Lives Matters actions and family separation protests. For example, in August 2017, the FBI Counterterrorism Division issued an “intelligence assessment,” identifying what it called “Black Identity Extremists”—an inflammatory term for a group that does not even exist—for investigation as a domestic terrorism threat. The FBI disseminated its intelligence assessment to over 18,000 law enforcement agencies claiming, without evidence, that Black people involved in unrelated police killings shared an ideology that motivated their actions.<sup>12</sup> Following criticism, the FBI stated that this made-up label is no longer in use, but it appears simply to have renamed it. The FBI implemented a program, titled “IRON FIST,” to target FBI resources on spying, surveilling, and investigating Black activists, including through undercover agents.<sup>13</sup>

Furthermore, law enforcement has used its authority to target individuals protesting the Trump administration’s family separation policy. Documents obtained from DHS earlier this year indicate that the agency provided information that it received from a private firm regarding family separation demonstrations to law enforcement agencies participating in fusion centers across America.<sup>14</sup> These documents raise concerns that the Trump administration is using fusion centers to facilitate surveillance of those engaged in First Amendment-protected activities—including those calling for children not to be unlawfully separated from their parents.<sup>15</sup> For years, fusion centers have been the cause of bipartisan concern, for their ineffectiveness and lack of transparency, as well as their privacy and civil liberties violations. Indeed, in 2012, the Senate Homeland Security Permanent Subcommittee on Investigations published a bipartisan report on fusion centers in which it criticized DHS for “sometimes endangering citizens’ civil liberties and Privacy Act protections.”<sup>16</sup> H.R. 4192 would entrench these systems by creating more harmful and unnecessary authorities.

### III. H.R. 4192 would worsen the over-criminalization of Black and Brown communities.

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<sup>10</sup> Off. of Inspector Gen., U.S. Dep’t of Justice, *A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups* 186 (Sept. 2010), available at <https://oig.justice.gov/special/s1009r.pdf>.

<sup>11</sup> *Id.* at 188.

<sup>12</sup> Nusrat Choudhury and Malkia Cyril, *The FBI Won’t Hand Over Its Surveillance Records on ‘Black Identity Extremists,’ so We’re Suing* (March 21, 2019) available at <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/fbi-wont-hand-over-its-surveillance-records-black>.

<sup>13</sup> Ken Klippenstein, *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*, *Young Turks* (Aug. 8, 2019), available at <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>.

<sup>14</sup> Jesse Franzblau, *New Documents Expose Government Monitoring of Protests Against Family Separation*, *Nat’l Immigrant Justice Ctr.* (Apr. 29, 2019), available at <https://immigrantjustice.org/staff/blog/new-documents-expose-government-monitoring-protests-against-family-separation>.

<sup>15</sup> *Id.*

<sup>16</sup> Press Release, Permanent Subcomm. on Investigations, Senate Homeland Sec. & Governmental Affairs, *Investigative Report Criticizes Counterterrorism Reporting, Waste at State & Local Intelligence Fusion Centers*, (Oct. 3, 2012), available at <https://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers>.

The attempt to create additional “domestic terrorism” crimes is not only unnecessary, it would also worsen the over-criminalization of Black and Brown communities. Racial and religious discrimination in the criminal justice system is not a new phenomenon. From arrest through incarceration, racial disparities in the criminal justice system are one of the most severe forms of discrimination against Black and Brown people.<sup>17</sup> Those sentenced to death have always been and continue to be disproportionately Black.<sup>18</sup> Efforts to address these stark disparities and systemic and institutional racism in the criminal justice system are finally underway—and more efforts are needed. The additional crimes, criminal penalties, and expansion of the death penalty in H.R. 4192 would instead further incorporate abusive terrorism authorities into a discriminatory criminal justice system. White supremacist violence must be addressed with solutions that protect all communities instead of hurting those already vulnerable to law enforcement abuses.

Law enforcement already has all the authority it needs to investigate and prosecute white supremacist violence effectively under current law. Congress should demand meaningful data and accountability for law enforcement’s failure to address white supremacist violence even as it wrongly targets Black and Brown people. Instead, H.R. 4192 proposes to unnecessarily expand authorities used by this administration to target and discriminate against the very communities Congress hopes to protect.

**For these reasons, we urge you to oppose H.R. 4192.**

If you have any questions, please feel free to contact Manar Waheed at [mwaheed@aclu.org](mailto:mwaheed@aclu.org).

Sincerely,



Ronald Newman  
National Political Director



Manar Waheed  
Senior Legislative and Advocacy Counsel

cc: Members of U.S. House Judiciary Committee

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<sup>17</sup> ACLU Testimony, *Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, Inter-American Commission on Human Rights, 153rd Sess. (Oct. 27, 2014), available at [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf).

<sup>18</sup> ACLU, *The Case Against the Death Penalty*, available at <https://www.aclu.org/other/case-against-death-penalty> (citing Hugo Adam Bedau, *Recidivism, Parole, and Deterrence*, in *The Death Penalty in America* (3d ed. 1982)).