



Written Statement of the Record  
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Countering Domestic Terrorism: Examining the Evolving Threat  
on  
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U.S. Senate Committee on Homeland Security and Governmental Affairs

On behalf of the American Civil Liberties Union (ACLU) and our more than three million members, activists, and supporters, we submit this statement for the record for the hearing on “Countering Domestic Terrorism: Examining the Evolving Threat” of the U.S. Senate Committee on Homeland Security and Governmental Affairs on September 25, 2019. In light of recent mass shootings and the surge in white supremacist violence, lawmakers are understandably seeking to take action. In this pursuit, it is critical that Congress place at the forefront the needs of communities of color and other marginalized communities—and the impact of any action on them. Otherwise, measures Congress takes may actually harm the very communities it seeks to protect.

To enhance the safety of all communities, Congress should hold law enforcement agencies accountable for their failure to meaningfully focus on increasing levels of white supremacist violence and ascertain the reasons for that failure. It should ensure agencies have the training and resources to address white supremacist violence effectively and consistent with the Constitution. Congress must not expand or entrench domestic terrorism authorities that have harmed Black and brown communities for decades and continue to do so today.

**I. Under current domestic terrorism authorities, law enforcement has a vast array of authorities, from investigation through prosecution, to address white supremacist violence effectively.**

Congress enacted a broad definition of “domestic terrorism” in the USA Patriot Act to cover acts dangerous to life that violate criminal laws and “appear 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.”<sup>1</sup>

Federal law enforcement has for years claimed expansive authorities to investigate domestic and international terrorism. For example, after 9/11, the Federal Bureau of Investigation (FBI) eliminated safeguards put in place after abusive surveillance and investigation practices in the 1960s and 1970s and expanded its ability to conduct investigations even with little or no suspicion of wrongdoing. In 2008, the FBI issued its Domestic Investigations and Operations Guide (DIOG), in which it claimed new and broad authorities to conduct investigations—including initial “assessments” without a factual predicate—with intrusive techniques.<sup>2</sup> It asserted it could engage in the next level of investigation—preliminary investigation—based on “information or an allegation” of wrongdoing, which it has interpreted to include mere speculation that a crime may be committed in the future.<sup>3</sup> In 2011, 2012, and 2013, the FBI amended the DIOG, claiming more expansive powers, including blanket permission for agents to search law enforcement and commercial databases for information about people without even opening a basic assessment investigation.<sup>4</sup>

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<sup>1</sup> USA Patriot Act § 802, 18 U.S.C. § 2331 (2001).

<sup>2</sup> Fed. Bureau of Investigation, *Domestic Investigations and Operations Guide* (Dec. 16, 2008); See ACLU, *Expanded FBI Authority* (explaining expanded FBI authorities and recommended reforms), <https://www.aclu.org/other/expanded-fbi-authority> (“Expanded FBI Authority”); See also ACLU, *Unleashed and Unaccountable: The FBI’s Unchecked Abuse of Authority* (Sept. 2013), [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) (“Unleashed and Unaccountable”).

<sup>3</sup> ACLU, *Expanded FBI Authority* at 4.

<sup>4</sup> See generally, Rachel Levinson-Waldman, *What the Government Does with Americans’ Data*, Brennan Ctr. for Justice, <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; ACLU, *Unleashed and Unaccountable* at 13-19.

Congress has also given the Department of Justice (DOJ) expansive authorities. It has passed more than 50 statutes that relate to domestic terrorism offenses, and material support for domestic terrorism.<sup>5</sup> It has enacted an entire framework of hate crime laws to protect communities of color and other marginalized communities that are overwhelmingly targeted by white supremacist violence. Hate crime laws date back to the 1870s, when white supremacist groups were carrying out attacks, including lynching, on Black people; those laws include the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, enacted in 2009.<sup>6</sup> DOJ can use an array of laws to prosecute white supremacist violence that falls under the federal definition of domestic terrorism—but in recent years has chosen not to prioritize these cases.

A recent case provides a rare example of what DOJ can do with the authorities at its disposal. In 2019, DOJ charged Cesar Sayoc, who mailed pipe bombs to prominent Democrats, under a federal terrorism-related statute prohibiting use of weapons of mass destruction.<sup>7</sup> Because this statute is one of many predicate offenses for a law that also prohibits material support for terrorism, it could also have triggered support liability for anyone who assisted Sayoc.<sup>8</sup> Other charges DOJ brought against Sayoc stemmed from his use of firearms and explosive materials. He was also charged under federal law for making threats.<sup>9</sup> DOJ used the current legal infrastructure to prosecute credible threats of violence before any act of violence was actually committed. Sayoc ultimately pled guilty to all charges and was sentenced to 20 years in prison followed by 5 years of supervised release.

The ACLU has concerns about the overbroad and abusive investigative powers the FBI and other law enforcement agencies have claimed, and DOJ's interpretation and use of terrorism-related laws, especially against communities of color. But there should be no question that Congress has already given law enforcement the authority to investigate and prosecute domestic white supremacist violence effectively.<sup>10</sup> What is lacking, however, is the will to do so.

## **II. Law enforcement use of existing domestic terrorism authorities harms communities of color and other marginalized communities, including those engaged in First Amendment-protected activities.**

Federal law enforcement has used domestic terrorism authorities to wrongly target marginalized populations—Black civil rights activists, Muslim, Arab, Middle Eastern, and South Asian communities,

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<sup>5</sup> Roy L. Austin Jr. & Kristen Clarke, *Creating a 'Domestic Terrorism' Charge Would Actually Hurt Communities of Color*, Wash. Post (Aug. 26, 2019), <https://wapo.st/2Pg5ucZ>; Michael German & Sarah Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Ctr. for Justice (Oct. 31, 2018), <https://www.brennancenter.org/publication/wrong-priorities-fighting-terrorism>; Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes*, Brennan Ctr. for Justice (July 1, 2019), <https://www.brennancenter.org/publication/fighting-far-right-violence-and-hate-crimes>.

<sup>6</sup> Roy L. Austin Jr. & Kristen Clarke, *Creating a 'Domestic Terrorism' Charge Would Actually Hurt Communities of Color*, Wash. Post (Aug. 26, 2019), <https://wapo.st/2Pg5ucZ>.

<sup>7</sup> 18 U.S.C. § 2332a. See also *United States v. Sayoc*, No. 18-09159, Complaint (S.D.N.Y. October 26, 2018), <https://assets.documentcloud.org/documents/5022033/Sayoc-Complaint.pdf>.

<sup>8</sup> 18 U.S.C. § 2339A (Providing Material Support to Terrorists).

<sup>9</sup> 18 U.S.C. § 875(c).

<sup>10</sup> Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes*, Brennan Ctr. for Justice (July 1, 2019), <https://www.brennancenter.org/publication/fighting-far-right-violence-and-hate-crimes>

animal rights and environmental rights activists, or other groups the government views as having “unpopular” or controversial beliefs.

During the civil rights movement, leaders like Martin Luther King, Jr. were investigated and monitored based upon their organizing and civil disobedience in the pursuit of equal rights. More recently, the FBI has used the USA Patriot Act’s vague, overbroad, and malleable definition of “domestic terrorism” to investigate and surveil individuals with little basis, including those engaged in First Amendment-protected activities. It has disproportionately and unjustly targeted Muslim, Arab, Middle Eastern, and South Asian communities.

These FBI abuses flow in part from loosened safeguards in the DOJ’s investigative guidelines, and the agency’s DIOG, which it issued pursuant to those guidelines.<sup>11</sup> The FBI claims the authority to conduct investigations without even a factual predicate of wrongdoing, using intrusive techniques such as physical surveillance, commercial and law enforcement database searches, searches of people’s trash, and use of informants.<sup>12</sup> It has also collected, analyzed, and “mapped” racial and ethnic demographic information and the location of ethnic-oriented businesses and facilities based on crude stereotypes about specific minority communities’ propensity to crime.<sup>13</sup>

Discriminatory and unjust investigations also flow from bias-based profiling guidelines adopted by the Departments of Justice and Homeland Security. The DOJ’s 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies purported to ban bias-based profiling, but created broad exceptions for national security and at the nation’s borders.<sup>14</sup> When DOJ updated this guidance in 2014—and the Department of Homeland Security (DHS) later adopted it—both entities kept these broad loopholes in place, over the objections of communities of color, and civil and human rights organizations around the country.<sup>15</sup>

The combination of law enforcement agencies’ unjustified and discriminatory investigations and bias-based profiling generates inaccurate or unreliable information used by federal, state, and local agencies in a variety of contexts. Federal intelligence and law enforcement agencies unfairly target people of color, those engaged in First Amendment-protected activities, and other marginalized communities, for investigations and prosecutions, placement on watchlists, and surveillance.<sup>16</sup> The FBI has used domestic

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<sup>11</sup> ACLU, *Unleashed and Unaccountable* at 9-15.

<sup>12</sup> ACLU, *Expanded FBI Authority*.

<sup>13</sup> ACLU, Press Release, *Gov’t Linking Various Criminal Behaviors to Certain Racial and Ethnic Groups, Documents Obtained by ACLU Reveal*, <https://www.aclu.org/press-releases/foia-documents-fbi-show-unconstitutional-racial-profiling> (racial mapping FOIA); ACLU, *ACLU Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial ‘Mapping’* (Oct. 2011), <https://bit.ly/2kUWJGN>.

<sup>14</sup> U.S. Dep’t of Justice, Civil Rights Div., *Guidance Regarding the Use of Race by Fed. Law Enf’t Agencies* (June 2003).

<sup>15</sup> The Leadership Conference on Civil and Human Rights, Coalition Letter to the President, *Re: Concerns with the U.S. Department of Justice Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Feb. 24, 2015), <https://civilrights.org/resource/re-concerns-with-the-u-s-department-of-justice-guidance-for-federal-law-enforcement-agencies-regarding-the-use-of-race-ethnicity-gender-national-origin-religion-sexual-orientation-or-gender-id/>; Chris Rickerd, *A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border?* (Dec. 8, 2014), <https://www.aclu.org/blog/speakeasy/dangerous-precedent-why-allow-racial-profiling-or-near-border>.

<sup>16</sup> See generally ACLU, *Unleashed and Unaccountable*.

terrorism authorities to spy upon Muslim communities, including by infiltrating their places of worship.<sup>17</sup> DHS leads and the FBI participates in a Suspicious Activity Reporting program (SARS), collecting and sharing information about people engaged in activities that are loosely labeled as “suspicious” without even a reasonable suspicion of criminal activity.<sup>18</sup> In addition to encouraging racial and religious profiling, the SARS program targets those engaged in First Amendment-protected activity. Agencies have monitored and infiltrated organizations such as the American-Arab Anti-Discrimination Committee, People for Ethical Treatment of Animals, and Greenpeace,<sup>19</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>20</sup> In 2010, the DOJ Inspector General criticized the FBI for misusing its authority by treating potential crimes such as non-violent civil disobedience and vandalism as justification for conducting investigations of civil rights, social justice, and environmental activists.<sup>21</sup> Muslims in America have also for years been unjustly targeted in sting operations and overbroad prosecutions under the guise of preventing or addressing purported terrorism threats,<sup>22</sup> and law enforcement agencies continue to initiate discriminatory investigations and surveil Muslim, Arab, Middle Eastern, and South Asian communities.

Abusive law enforcement continues to escalate under the Trump administration, including through the surveillance of Black Lives Matters actions, family separation protests, and border groups’ activities. For example, in August 2017, the FBI Counterterrorism Division issued an “intelligence assessment,” identifying “Black Identity Extremists”—an inflammatory term for a group that does not 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>23</sup> It also focused on Black people who, in the bureau’s own words, “perceive[] racism and injustice in American society.” Following criticism, the FBI stated that its made up label is no longer in use, but it appears to simply have renamed it. The Bureau has implemented a program, titled “IRON FIST,” to target FBI resources on spying, surveilling, and investigating Black activists, including through use of undercover agents.<sup>24</sup>

The FBI has used its authorities to target individuals engaged in immigration advocacy, including border groups’ activities and family separation protests. Just this month, government documents indicated that the FBI was conducting surveillance of groups engaged in protests at the border in response to the

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<sup>17</sup> See, e.g., ACLU of S. Cal., *Fazaga v. FBI*, <https://www.aclusocal.org/en/cases/fazaga-v-fbi>.

<sup>18</sup> ACLU, *Gill v. DOJ – Challenge to Government’s Suspicious Activity Reporting Program* (July 11, 2014), <https://www.aclu.org/cases/gill-v-doj-challenge-governments-suspicious-activity-reporting-program>.

<sup>19</sup> ACLU, Press Release, *New Documents Show FBI Targeting Env’tl. and Animal Rights Groups Activities as ‘Domestic Terrorism’* (Dec. 20, 2005), <https://www.aclu.org/news/new-documents-show-fbi-targeting-environmental-and-animal-rights-groups-activities-domestic>.

<sup>20</sup> *Id.*

<sup>21</sup> Office of Inspector Gen., U.S. Dep’t of Justice, *A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups* 186 (Sept. 2010).

<sup>22</sup> Human Rights Watch & Colum. Law Sch.’s Human Rights Inst., *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (July 2014), [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).

<sup>23</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), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/fbi-wont-hand-over-its-surveillance-records-black>.

<sup>24</sup> Ken Klippenstein, *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*, *Young Turks* (Aug. 8, 2019), <https://tyt.com/stories/4vZLChuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>.

Trump administration's immigration policies.<sup>25</sup> A few months ago, documents obtained from DHS indicated that the agency provided information that it received from a private firm regarding family separation demonstrations to Fusion Centers, which are intelligence-gathering hubs in which federal and local law enforcement agencies collaborate and share information.<sup>26</sup> These documents increase 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>27</sup> For years, Fusion Centers have been the cause of bipartisan concern for reasons including their privacy and civil liberties violations, ineffectiveness, mission creep far beyond an original counter-terrorism goal, and lack of transparency. 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>28</sup>

Congress and law enforcement agencies have not implemented meaningful safeguards to protect communities of color and other marginalized communities from law enforcement abuses of domestic terrorism authorities—and the deeply consequential harms to people’s personal and professional lives that result.

### **III. Attempts to enhance domestic terrorism authorities, including the creation of a crime, are short-sighted and will harm the communities Congress seeks to protect.**

Creating more harmful and unnecessary domestic terrorism authorities is not the solution to white supremacist violence. Evidence in the form of government action, policies, and impacted communities’ experiences shows that people of color and other marginalized communities are already the disproportionate targets of these authorities. Enhancing and expanding these authorities will result in more injury to the very communities that Congress seeks to protect—and harm the First Amendment, equal treatment, and due process rights of all people under the Constitution.

Additional “domestic terrorism” crimes are unnecessary and would be harmful. They are unnecessary because, as explained above, existing authorities and crimes can already address domestic terrorism effectively. New domestic terrorism crimes would cause harm by worsening 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>29</sup> Those sentenced to

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<sup>25</sup> Jana Winter and Hunter Walker, *Exclusive: Document reveals the FBI is tracking border protest groups as extremist organizations*, Yahoo News (Sept. 4, 2019), <https://news.yahoo.com/exclusive-document-reveals-the-fbi-is-tracking-border-protest-groups-as-extremist-organizations-170050594.html>.

<sup>26</sup> Jesse Franzblau, *New Documents Expose Government Monitoring of Protests Against Family Separation*, Nat’l Immigrant Justice Ctr. (Apr. 29, 2019), <https://immigrantjustice.org/staff/blog/new-documents-expose-government-monitoring-protests-against-family-separation>

<sup>27</sup> *Id.*

<sup>28</sup> Permanent Subcomm. on Investigations, Senate Homeland Sec. & Governmental Affairs, Press Release, *Investigative Report Criticizes Counterterrorism Reporting, Waste at State & Local Intelligence Fusion Centers*, (Oct. 3, 2012), <https://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers>.

<sup>29</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), [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).

death have always been and continue to be disproportionately Black.<sup>30</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 terrorism-related crimes, criminal penalties, and expansion of the death penalty in many proposals now being made would further incorporate abusive authorities into a discriminatory criminal justice system.

#### **IV. Congress must demand accountability from the Department of Justice and the Federal Bureau of Investigation for their failure to focus on white supremacist violence and protect impacted communities.**

White supremacist violence must be addressed with solutions that protect all communities. But law enforcement agencies have failed to use the vast array of investigative tools and authorities at their disposal to do so.

Congress should hold government agencies accountable for the lack of focus on white supremacist violence. This accountability begins with requiring agencies to provide meaningful data on their failure to use resources and prioritize efforts to address white supremacist violence. Congress must obtain data regarding the investigation and prosecution of white supremacist violence in order to understand how law enforcement agencies, and in particular, the FBI, are focusing resources. With that data, Congress can ensure that agencies focus on white supremacist violence effectively in order to better protect communities around the country.

Additionally, Congress must pass the Khalid Jabara and Heather Heyer NO HATE Act.<sup>31</sup> Acts of white supremacist violence can meet the federal definition of both hate crimes and domestic terrorism. In fact, the FBI's own policy makes clear that a hate crime in which the perpetrator is connected to a "white supremacist group" must be investigated as domestic terrorism as well.<sup>32</sup> Given the overlap of domestic terrorism and hate crimes investigations and the number of incidents of white supremacist violence that target people based upon their protected class, the Jabara-Heyer NO HATE Act serves as a productive tool to enhance community safety. This legislation is particularly significant because Khalid Jabara and Heather Heyer's deaths were both prosecuted as hate crimes, yet neither of them were counted as such in the FBI statistics. Like these terrible tragedies, many other hate crimes are not counted in FBI statistics due to flaws in the reporting system and data collection. It is essential that data reporting is improved because Congress cannot properly address a problem without knowing its scope. Furthermore, this bill provides resources to address these acts of violence by creating state-run hotlines, law enforcement trainings, and resources for impacted individuals.

As Congress seeks to make our communities safer, it must begin here, with productive proposals that address specific problems—not with proposals that harm the very communities Congress seeks to protect.

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<sup>30</sup> ACLU, *The Case Against the Death Penalty*, <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)).

<sup>31</sup> Khalid Jabara and Heather Heyer National Opposition to Hate, Assault, and Threats to Equality Act of 2019, S. 2043, H.R. 2043, 116th Cong. (2019).

<sup>32</sup> Harsha Panduranga and Faiza Patel, "Domestic Terrorism" Bills Create More Problems Than They Solve, Just Security (Aug. 28, 2019), <https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/>.