



West Virginia

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Senator Shelley Moore Capito  
500 Virginia Street East  
Suite 950  
Charleston, WV 25301

February 4, 2021

**Re: ACLU Opposition to Domestic Terrorism Legislation**

Dear Senator Capito,

On behalf of the ACLU of West Virginia, I write to express our opposition to any legislation that would expand harmful domestic terrorism authorities or create additional domestic terrorism crimes. Following the January 6<sup>th</sup> attack on the Capitol, there have been calls for heightened police powers and the creation of domestic terrorism-related crimes. Unfortunately, law enforcement agencies have for decades used existing authorities and crimes to wrongly and unfairly target communities of color, without the safeguards, transparency, and accountability these communities have long sought. Any further expansion of police powers and criminalization will harm the very communities that Congress 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. It should pass legislation prohibiting biased profiling without exceptions for national and border security in order to protect Black and Brown communities that have been targeted by law enforcement. 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.**

The ACLU has concerns about the overbroad and abusive investigative powers the Federal Bureau of Investigation (FBI) and other law enforcement agencies have claimed, and Department of Justice's (DOJ) 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>1</sup> What is lacking, however, is the will to do so.

When Congress passed the USA Patriot Act, it enacted a broad definition of “domestic terrorism” 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>2</sup>

Federal law enforcement has for years used this definition and claimed expansive authorities to investigate domestic and international terrorism. For example, after 9/11, the FBI eliminated safeguards imposed in response to 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. From 2008 through 2013, the FBI repeatedly claimed new and broad authorities to conduct investigations in its Domestic Investigations and Operations Guide (DIOG)—including initial “assessments” without a factual predicate—with intrusive techniques.<sup>3</sup> It asserted it could engage in the next level of 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>4</sup>

Congress has also given 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 with the goal of protecting 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 has an abundance of laws to prosecute white supremacist violence, including those related to domestic terrorism—but has chosen not to prioritize these cases.

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<sup>1</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>.

<sup>2</sup> USA Patriot Act § 802, 18 U.S.C. § 2331 (2001).

<sup>3</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*, at 4, 13-19 (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”); 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>.

<sup>4</sup> ACLU, *Expanded FBI Authority* at 4 (describing standards for preliminary investigations).

<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>.

## **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, 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 on 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>7</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>8</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>9</sup>

Discriminatory and unjust investigations also flow from bias-based profiling guidelines adopted by DOJ and the Department of Homeland Security (DHS). The DOJ’s 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies purported to ban biased profiling but created broad exceptions for national and border security.<sup>10</sup> When DOJ updated this guidance in 2014—and DHS later largely adopted it—both entities kept these broad loopholes in place, over the objections of communities of color, and civil and human rights organizations nationwide.<sup>11</sup>

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<sup>7</sup> ACLU, *Unleashed and Unaccountable* at 9-15.

<sup>8</sup> ACLU, *Expanded FBI Authority*.

<sup>9</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>10</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>11</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>.

The combination of law enforcement agencies' unjustified and discriminatory investigations and biased 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 and other marginalized communities, including those engaged in First Amendment-protected activities, for surveillance, investigation, prosecution, and placement on watchlists.<sup>12</sup> The FBI has used domestic terrorism authorities to spy on Muslim communities, including by infiltrating their places of worship.<sup>13</sup> DHS leads and the FBI participates in the Nationwide Suspicious Activity Reporting Initiative, collecting and sharing "suspicious activity reports" about people engaged in activities that are loosely labeled as "suspicious" without even a reasonable suspicion of criminal activity.<sup>14</sup> In addition to encouraging racial and religious profiling, the SAR Initiative targets those engaged in First Amendment-protected activity. 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>15</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>16</sup>

Abusive law enforcement continued to escalate under the Trump administration, including through the surveillance of Black Lives Matter actions, family separation protests, and border groups' activities. In May 2020, then Attorney General Barr announced that the DOJ would use its broad and abusive domestic terrorism investigative and information-sharing powers in response to mass demonstrations against police killings of Black people.<sup>17</sup> The government has not yet undertaken or made public a full accounting of how those powers were used. Just a few years prior, the FBI Counterterrorism Division issued an "intelligence assessment" to over 18,000 law enforcement agencies identifying "Black Identity Extremists"—an inflammatory term for a group that does not exist—for investigation as a domestic terrorism threat. Among other flaws, the FBI assessment claimed, without evidence, that Black people involved in unrelated police killings shared an ideology that motivated their actions.<sup>18</sup> It also focused on Black people who, in the FBI's own words, "perceive[] racism and injustice in American society." Following criticism, the FBI withdrew that inflammatory label but then implemented a

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<sup>12</sup> See generally ACLU, *Unleashed and Unaccountable*.

<sup>13</sup> See, e.g., ACLU of S. Cal., *Fazaga v. FBI*, <https://www.aclusocal.org/en/cases/fazaga-v-fbi>.

<sup>14</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>15</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); see also 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>16</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>17</sup> U.S. Dep't of Justice, Press Release, *Attorney General William P. Barr's Statement on Riots and Domestic Terrorism* (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>; Hina Shamsi, *More Military Deployment and Terrorism Investigations are an Outrageous Response to Black Pain, Grief, and Anger* (June 4, 2020), <https://www.aclu.org/news/criminal-law-reform/more-military-deployment-and-terrorism-investigations-are-an-outrageous-response-to-black-pain-grief-and-anger/>.

<sup>18</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>.

program called “IRON FIST” to target FBI resources on spying, surveilling, and investigating Black activists, including through use of undercover agents.<sup>19</sup>

The FBI has also used its authorities to target individuals engaged in immigration advocacy, including border groups’ activities and family separation protests. For example, government documents indicated that the FBI conducted surveillance of groups engaged in protests at the border in response to the Trump administration’s immigration policies.<sup>20</sup> DHS also 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>21</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 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>22</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—let alone provided transparency and accountability for 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, reinforce a discriminatory criminal legal system, and will harm the communities Congress seeks to protect.**

Creating more harmful and unnecessary domestic terrorism authorities and crimes is not the solution to white supremacist violence. New domestic terrorism crimes are not only unnecessary, but would actually cause harm by worsening the over-criminalization of Black and Brown communities.

Racial and religious discrimination in the criminal legal system is not a new phenomenon. From arrest through incarceration, racial disparities in the criminal legal system are one of the most severe forms of discrimination against Black and Brown people.<sup>23</sup> Those sentenced to death have

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<sup>19</sup> Ken Klippenstein, *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*, Young Turks (Aug. 8, 2019), <https://tyt.com/stories/4vZLCHuOrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>.

<sup>20</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>21</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>22</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>23</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).

always been and continue to be disproportionately Black.<sup>24</sup> Efforts to address these stark disparities and systemic and institutional racism in the criminal legal system are finally underway—and more efforts are needed. The additional terrorism-related crimes, criminal penalties, and expansion of the death penalty in previous proposals would further incorporate abusive authorities into a discriminatory criminal legal 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.**

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, 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.

If Congress seeks to better protect marginalized communities, it should prohibit biased profiling and surveillance that has long harmed Black and Brown people. It can pass a modified version of the End Racial and Religious Profiling Act, prohibiting any local, state, or federal law enforcement agency or officer from engaging in profiling people on the basis of race, religion, ethnicity, national origin, sexual orientation, and gender identity without any exceptions. Current law enforcement practices not only violate our basic constitutional commitment to equality under the law, but also international principles aimed at eliminating racism.

As Congress seeks to address white supremacist violence and make communities safer, it must begin with productive proposals that address specific problems. Enhancing and expanding domestic terrorism authorities and crimes 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.

Please do not hesitate to contact me at [joseph.cohen@acluw.org](mailto:joseph.cohen@acluw.org) if you have any questions. Thank you for your attention to this matter.

Sincerely,



Joseph Cohen  
ACLU-WV Executive Director

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<sup>24</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)).