

September 4, 2019

The Honorable Lindsey Graham  
Chairman  
U.S. Senate Committee on the Judiciary  
290 Russell Senate Office Building  
Washington, D.C. 20510

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

The Honorable Ron Johnson  
Chairman  
U.S. Senate Committee on Homeland  
Security and Government Affairs  
328 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Bennie Thompson  
Chairman  
U.S. House Committee on Homeland Security  
H2-176 Ford House Office Building  
Washington, D.C. 20515

The Honorable Elijah Cummings  
Chairman  
U.S. House Committee on Oversight and  
Reform  
2157 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Dianne Feinstein  
Ranking Member  
U.S. Senate Committee on the Judiciary  
331 Hart Senate Office Building  
Washington, D.C. 20510

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

The Honorable Gary Peters  
Ranking Member  
U.S. Senate Committee on Homeland  
Security and Government Affairs  
724 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Mike Rogers  
Ranking Member  
U.S. House Committee on Homeland  
Security  
H2-117 Ford House Office Building  
Washington, D.C. 20515

The Honorable Jim Jordan  
Ranking Member  
U.S. House Committee on Oversight and  
Reform  
2105 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairmen and Ranking Members,

The attacks in Charleston, Pittsburgh, El Paso, and many other places clearly demonstrate the need for a robust response to deadly white nationalist violence aimed at racial, religious, ethnic, and LGBTQ communities around our nation.<sup>1</sup> We must seriously consider how best to address white nationalist violence without causing further harm to vulnerable communities. New laws and policies have been proposed from many quarters. Laudable efforts focus on requiring the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) to provide meaningful data on the use of government

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<sup>1</sup> For purposes of this letter, the term white nationalist violence should be read to also cover white supremacist violence.

resources to address white nationalist violence. Other efforts, however, would duplicate existing laws and, worse, result in harms to the communities that our organizations seek to protect.

Set out below are the views of the undersigned organizations on the proposals that have been made to date, and our recommendations for more effective responses to white nationalist violence.

## 1. No Expansion of Already Overbroad Authorities or Ineffective and Discriminatory Programs

Responses to white nationalist violence must not harm the communities that have been the victims of such violence. The federal government already has ample tools at its disposal to investigate and prosecute white nationalist violence, and new authorities would only facilitate the continued targeting of minority communities and dissenting voices.

- A. We oppose the enactment of laws creating a new crime of domestic terrorism and urge Congress to reject legislation, such as the Confronting the Threat of Domestic Terrorism Act (H.R. 4192) and the Domestic Terrorism Penalties Act of 2019 (H.R. 4187), that would attempt to do so.<sup>2</sup>

Such an expansion of legal authorities is unnecessary. The FBI already has a multitude of legal authorities to properly address white nationalist violence.<sup>3</sup> Congress has enacted 51 federal crimes of terrorism that apply to entirely domestic acts, and it has further prohibited material support toward the commission of these crimes.<sup>4</sup> It has passed five federal hate crimes laws, targeting bias-motivated violence.<sup>5</sup> The DOJ has used dozens of other federal laws in prosecuting cases it labels as domestic terrorism, including organized crime statutes that can be used to dismantle violent groups.<sup>6</sup>

The proposed bills open another avenue for law enforcement to target the very communities that have borne the brunt of white nationalist attacks. The FBI has long used its authorities to investigate and monitor African-American activists, most recently by concocting a threat of “black identity extremism.”<sup>7</sup> It has used post-9/11 counterterrorism authorities to target Muslims, Arabs, and people

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<sup>2</sup> H.R. 4192, 116<sup>th</sup> Cong. (2019); H.R. 4187, 116<sup>th</sup> Cong. (2019). Sen. Martha McSally has drafted a bill that would similarly make domestic terrorism a new federal crime, but it has not yet been introduced. *See* Discussion Draft (Aug. 14, 2019), <https://www.mcsally.senate.gov/sites/default/files/2019-08/Discussion%20Draft%20DT.pdf>.

<sup>3</sup> *See generally* MICHAEL GERMAN AND SARA ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM, BRENNAN CTR. FOR JUSTICE (2018), <https://www.brennancenter.org/publication/wrong-priorities-fighting-terrorism>; *See also* Kristen Clark and Roy L. Austin, *Creating a ‘Domestic Terrorism’ Charge Would Actually Hurt Communities of Color*, WASHINGTON POST (Aug. 26, 2019), [https://www.washingtonpost.com/opinions/domestic-terrorism-doesnt-need-to-be-a-chargeable-offense-we-already-have-powerful-hate-crime-laws/2019/08/26/14c6f354-c4eb-11e9-b72f-b31d77212\\_story.html](https://www.washingtonpost.com/opinions/domestic-terrorism-doesnt-need-to-be-a-chargeable-offense-we-already-have-powerful-hate-crime-laws/2019/08/26/14c6f354-c4eb-11e9-b72f-b31d77212_story.html).

<sup>4</sup> GERMAN AND ROBINSON, WRONG PRIORITIES ON TERROR, 5-7.

<sup>5</sup> 18 U.S.C. § 249; 42 U.S.C. § 3631; 18 U.S.C. § 247; 18 U.S.C. § 245; 18 U.S.C. § 241.

<sup>6</sup> GERMAN AND ROBINSON, WRONG PRIORITIES ON TERROR, 5-14.

<sup>7</sup> Letter from Congressional Black Caucus to Christopher Wray, Director, Federal Bureau of Investigation (Oct. 13, 2017), [https://cbc.house.gov/uploadedfiles/cbc\\_rm\\_thompson\\_cummings\\_conyers\\_letter\\_to\\_fbi\\_re\\_intel\\_assessment.pdf](https://cbc.house.gov/uploadedfiles/cbc_rm_thompson_cummings_conyers_letter_to_fbi_re_intel_assessment.pdf).

from the Middle East and South Asia.<sup>8</sup> And dissenting voices are too often perceived as a threat to public order and subjected to surveillance and prosecution.<sup>9</sup>

- B. We oppose the reintroduction or funding of countering violent extremism (CVE) programs. There is no evidence that these programs prevent violence.<sup>10</sup> In fact, empirical evidence shows that there are no visible and reliable indicators of people who are likely to commit violence because they believe in some “extremist” ideology.<sup>11</sup> CVE programs have almost exclusively targeted Muslim communities, reflecting and reinforcing false stereotypes about their proclivity for violence and unjustly painting these communities as suspicious. The failure and flaws of the CVE model account for the enormous backlash these programs have faced among American Muslim communities as well as civil rights and civil liberties groups. Reviving CVE will only give life to programs that have been used to target minority communities and support the false premise that a person’s race, ethnicity, or religion can be used to predict their propensity for violence.
- C. Finally, we oppose the expansion of surveillance authorities, including social media monitoring, as well as the expansion of the security infrastructure. Since the 9/11 attacks, security agencies have been given or claimed a raft of new surveillance authorities, including via the Patriot Act, the FISA Amendments Act, and the 2008 Attorney General Guidelines for Domestic FBI Investigations.<sup>12</sup> These laws and regulations provide the legal justification for massive surveillance programs that sweep up information about all Americans and subject American Muslims, Arab Americans, minority communities, and dissenting voices to investigation without suspicion of wrongdoing.

Since 9/11, the federal government has established security institutions with overlapping, opaque, and overbroad missions. In many cases, these institutions have provided little security utility, but they have used their broad powers to target minority communities and dissenting voices. For example, according to a bipartisan Senate investigation, fusion centers — which have been proposed

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<sup>8</sup> MUSLIM ADVOCATES, *LOSING LIBERTY: THE STATE OF FREEDOM 10 YEARS AFTER THE PATRIOT ACT* at 4, 10 (2011), [https://muslimadvocates.org/wpcontent/uploads/2019/06/Losing\\_Liberty\\_The\\_State\\_of\\_Freedom\\_10\\_Years\\_After\\_the\\_PATRIOT\\_Act.pdf](https://muslimadvocates.org/wpcontent/uploads/2019/06/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf).

<sup>9</sup> Natasha Lennard, *In the J20 Trials, the Feds Said They Went After “Bad Protesters.” That Just Means Another Crackdown on Dissent*, INTERCEPT (July 14, 2018), <https://theintercept.com/2018/07/14/inauguration-protest-prosecutions/>.

<sup>10</sup> FAIZA PATEL AND MEGHAN KOUSHIK, *COUNTERING VIOLENT EXTREMISM*, BRENNAN CTR. FOR JUSTICE (2017), <https://www.brennancenter.org/publication/countering-violent-extremism>; *Countering Violent Extremism in the Trump Era*, BRENNAN CTR. FOR JUSTICE (June 15, 2018), <https://www.brennancenter.org/analysis/countering-violent-extremism-trump-era> (finding that, despite the prevalence of high-profile attacks by white perpetrators, Muslims and other minority groups are explicitly targeted in 85 percent of Department of Homeland Security CVE grants); *Fact Sheet: Countering Violent Extremism: Myths and Facts*, BRENNAN CTR. FOR JUSTICE (Nov. 2, 2015), <https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf>. PATEL AND KOUSHIK, *COUNTERING VIOLENT EXTREMISM*, 14-15.

<sup>11</sup> See, e.g., Declaration of Marc Sageman in Opposition to Defendants’ Cross-Motion for Summary Judgment at ¶ 14-18, *Latif v. U.S. Dep’t of Justice et al.*, No. 3:100-cv-00750, 2015 WL 1883890 (D. Or. Aug. 7, 2015), available at [https://www.aclu.org/sites/default/files/field\\_document/268\\_declaration\\_of\\_marc\\_sageman\\_8.7.15.pdf](https://www.aclu.org/sites/default/files/field_document/268_declaration_of_marc_sageman_8.7.15.pdf).

<sup>12</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001); *Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008*, Pub. L. No. 110-261, 122 Stat. 2435 (2008); U.S. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, *THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS* (2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

to play a leading role in combating domestic terrorism — have “yielded little, if any, benefit to federal counterterrorism intelligence efforts” and have violated civil liberties.<sup>13</sup>

## 2. Effective Strategies to Combat White Nationalist Violence and Protect Vulnerable Communities

There is much that the DOJ can do to protect the safety of communities that have been the target of white nationalist violence, and Congress has a critical role to play in ensuring that the DOJ’s considerable resources are allocated to protecting rather than targeting these communities.

A. The DOJ and the FBI must provide information regarding their use of resources to address white nationalist violence, including data regarding investigations, prosecutions, and convictions. Though the DOJ regularly provides this type of information in other contexts,<sup>14</sup> it has failed to provide equivalent information concerning white nationalist violence and domestic terrorism despite requests from members of Congress<sup>15</sup> and litigation.<sup>16</sup> The DOJ’s portfolio of domestic terrorism investigations has too often been misdirected or based on bias. For example, press reports in 2017 revealed that the FBI had manufactured the concept of “black identity extremism” around a handful of unrelated violent attacks against police officers by black men who were not associated with one another, facilitating the targeting of African-American activists.<sup>17</sup> Earlier this year, the FBI eliminated the category it had used to track white nationalist incidents and investigations, replacing it with a new category for “racially motivated violent extremism,” which inappropriately combined investigations of so-called black identity extremists and white nationalists, falsely equating the threat

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<sup>13</sup> MAJORITY AND MINORITY S. STAFF REPORT, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 112<sup>TH</sup> CONG., FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS 27 (2012), <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>.

<sup>14</sup> U.S. DEP’T OF HOMELAND SECURITY & U.S. DEP’T OF JUSTICE, EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES INITIAL SECTION 11 REPORT (Jan. 2018), <https://www.justice.gov/opa/press-release/file/1026436/download>; U.S. DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION, DOJ PUBLIC/UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS 9/11/01-12/31/14, [https://web.archive.org/web/20170129031427/http://www.sessions.senate.gov/public/\\_cache/files/6e9a95e6-3552-45f7-bb0c-4fd41f5a28ca/01.13.16-original-doj-nsd-list.pdf](https://web.archive.org/web/20170129031427/http://www.sessions.senate.gov/public/_cache/files/6e9a95e6-3552-45f7-bb0c-4fd41f5a28ca/01.13.16-original-doj-nsd-list.pdf) (updated Aug. 7, 2015). Selective disclosures about international terrorism investigations, and the overcounting of terrorism convictions, have been used to inflate the threat it poses and advance anti-immigrant narratives. *See, e.g., Protect Democracy & Brennan Center v. Departments of Justice and Homeland Security*, BRENNAN CTR. FOR JUSTICE (Sept. 28, 2018), <https://www.brennancenter.org/legal-work/protect-democracy-brennan-center-v-departments-justice-and-homeland-security>; Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, STANFORD LAW SCHOOL BLOGS (March 6, 2017), <https://law.stanford.edu/2017/03/06/more-misleading-claims-on-immigrants-and-terrorism/>; Alex Nowrasteh, *42 Percent of “Terrorism-Related” Convictions Aren’t for Terrorism*, CATO AT LIBERTY (March 6, 2017), <https://www.cato.org/blog/42-percent-terrorism-related-convictions-arent-terrorism>.

<sup>15</sup> Letter from Rep. Bennie G. Thompson, Chairman, H. Comm. on Homeland Security, and Rep. Jerrold L. Nadler, Chairman, H. Comm. on the Judiciary, to Christopher Wray, Director, Federal Bureau of Investigation (Feb. 14, 2019), <https://homeland.house.gov/imo/media/doc/190214%20BGT%20JN%20T%20Wray%20FBI%20re%20DT%20Terrorism%20Report.pdf>.

<sup>16</sup> *Brennan Center Sues Department of Justice for Terrorism Data*, BRENNAN CTR. FOR JUSTICE (Aug. 9, 2018), <https://www.brennancenter.org/analysis/brennan-center-sues-department-of-justice-for-terrorism-data>.

<sup>17</sup> Jana Winter and Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists,’* FOREIGN POLICY (Oct. 6, 2017), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.

posed by white nationalists with that coming from others.<sup>18</sup> This change also hides from policymakers and the public the specific number of investigations into white nationalist violence.

B. The DOJ should expeditiously develop and publish a document setting out its strategy for combating white nationalist violence, which should include information on:

- The level of priority that the FBI assigns to investigating white nationalist violence as compared to other domestic terrorism targets.
- How the FBI determines whether to label a deadly act of white nationalist violence as domestic terrorism, a civil rights violation/hate crime, or as a violent crime worked by the Violent Crime Task Forces.
- The number of agents and other resources allocated to addressing white nationalist violence in each program category: terrorism, civil rights, and violent crimes.<sup>19</sup>
- How these agents are trained to identify when a hate crime or violent crime should be deferred to state and local authorities and when it should be investigated federally.
- What cooperation and assistance, if any, the DOJ is providing state and local authorities responding to white nationalist violence.

The Domestic and International Terrorism DATA Act (H.R. 3106) includes provisions that would help clarify the scope of the administration's efforts by requiring the DOJ, the FBI, and the Department of Homeland Security (DHS) to provide specific information on domestic terrorism investigations.<sup>20</sup> Its provisions will most effectively clarify the administration's response to white nationalist violence.

C. White nationalist violence may also be investigated and prosecuted under numerous state and federal hate crimes laws as well as other criminal laws.<sup>21</sup> However, there is no comprehensive public accounting of these prosecutions. Under the Hate Crimes Statistics Act of 1990, which requires the DOJ to collect data on bias-motivated crimes, the FBI publishes annual statistics based on hate crimes reported by state and local law enforcement agencies. While these statistics provide the best picture of hate crime incidents in the country, they woefully underrepresent the nature and extent of

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<sup>18</sup> Byron Tau, *FBI Abandons Use of Term 'Black Identity Extremism,'* WALL STREET JOURNAL (July 23, 2019), <https://www.wsj.com/articles/fbi-abandons-use-of-terms-black-identity-extremism-11563921355>

<sup>19</sup> Such information has already been requested by members of Congress. See Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Gov. Affairs, and Sen. Gary C. Peters, Ranking Member, S. Comm. on Homeland Security and Gov. Affairs, to Kevin K. McAleenan, Acting Sec., Dep't of Homeland Security (May 8, 2019), <https://www.hsgac.senate.gov/imo/media/doc/2019-05-08%20HSGAC%20DHS%20re%20domestic%20terrorism%20prevention.pdf>; Letter from Sen. Ron Johnson and Sen. Gary C. Peters to Christopher Wray, Director, Federal Bureau of Investigation (May 8, 2019), [https://www.hsgac.senate.gov/imo/media/doc/190508\\_Letter\\_FBI\\_DomesticTerrorismInvestigation.pdf](https://www.hsgac.senate.gov/imo/media/doc/190508_Letter_FBI_DomesticTerrorismInvestigation.pdf); Letter from Sen. Ron Johnson and Sen. Gary C. Peters to William Barr, Att'y Gen., U.S. Dep't of Justice (May 8, 2019), [https://www.hsgac.senate.gov/imo/media/doc/190508\\_Letter\\_DOJ\\_DomesticTerrorismInvestigation.pdf](https://www.hsgac.senate.gov/imo/media/doc/190508_Letter_DOJ_DomesticTerrorismInvestigation.pdf).

<sup>20</sup> H.R. 3106, 116<sup>th</sup> Cong. (2019).

<sup>21</sup> MICHAEL GERMAN AND EMMANUEL MAULEÓN, FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES: RESETTING FEDERAL LAW ENFORCEMENT PRIORITIES, BRENNAN CTR. FOR JUSTICE, at 21-41 (2019), [https://www.brennancenter.org/sites/default/files/publications/2019\\_06\\_HateCrimes\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/2019_06_HateCrimes_FINAL.pdf).

the problem. Estimates from the DOJ based on victim surveys suggest that 30 to 40 times more hate crimes occur in the United States each year than what is reported in FBI statistics.<sup>22</sup>

The Khalid Jabara and Heather Heyer NO HATE Act (H.R. 3545/S. 2043) would promote more accurate data collection under the Hate Crime Statistics Act and improve state and federal hate crime enforcement.<sup>23</sup>

D. Law enforcement too must be reformed. For years, marginalized communities have sought safeguards for law enforcement and counter-terrorism frameworks to protect against biased investigations, prosecutions, and sentencing. They have also warned against law enforcement cultures that reflect institutional racism and bias. Indeed, even as the country is again roiled by white nationalist violence, there has been a cascade of reports about racist social media posts by law enforcement officers.<sup>24</sup> Combating organizational cultures that denigrate and dehumanize the people these agencies are meant to serve will require a concerted and multi-pronged effort. As a start, Congress must act to fully prohibit law enforcement from targeting people on the basis of race, religion, ethnicity, national origin, sexual orientation, and gender identity by passing the End Racial and Religious Profiling Act (S. 2355).<sup>25</sup>

## Conclusion

Meaningful transparency and public data are critical to ensure that FBI counterterrorism resources are objectively focused on violence and that members of Congress have the information necessary to promote effective policies. We urge Congress to demand greater insight into efforts to address white nationalist violence and to ensure those efforts effectively use existing tools without targeting communities of color and other vulnerable communities. New domestic terrorism laws would facilitate this type of targeting, and we urge Congress to reject them.

American Civil Liberties Union  
Brennan Center for Justice at NYU School of Law  
Lawyers' Committee for Civil Rights Under Law  
South Asian Americans Leading Together (SAALT)

Arab American Institute  
Color of Change  
Muslim Advocates  
Southern Poverty Law Center

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<sup>22</sup> *Id.*, 5. Underreporting in hate crime statistics can be traced to multiple factors, including barriers and other disincentives for victims to report hate crimes to law enforcement, outdated reporting systems, data collection errors, reluctance by law enforcement to acknowledge bigotry and hate in their communities, and a lack of sufficient training for law enforcement personnel to identify, report, and respond to hate crimes.

<sup>23</sup> H.R. 3545, 116<sup>th</sup> Cong. (2019); S. 2043, 116<sup>th</sup> Cong. (2019). Among other things, the bill would help law enforcement agencies transition to a modernized form of crime reporting, provide grants for state-run hate crime hotlines, encourage law enforcement agencies to adopt policies and programs that would improve reporting, require the DOJ to conduct research on hate crime reporting and data collection, and allow courts to require certain hate crime offenders to participate in community service or education programs as a condition of supervised release; *See also* Susan Bro and Haifa Jabara, *Hate Crimes Are Slipping Through The Cracks*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/opinion/hate-crime-statistics-heather-heyer.html>.

<sup>24</sup> *See, e.g.*, A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, SLATE (July 1, 2019), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.

<sup>25</sup> S. 2355, 116<sup>th</sup> Cong. (2019).