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Submitted to the U.S. Senate Committee on Homeland Security and Governmental Affairs

For a Hearing on Countering Domestic Terrorism: Examining the Evolving Threat

September 25, 2019

I thank the U.S. Senate Committee on Homeland Security and Governmental Affairs for investigating the growing threat of domestic terrorism, especially white nationalist violence. As recent events in El Paso, Pittsburgh, and elsewhere have made clear, the scale of this threat requires leadership, prioritization, and resources from a range of government agencies. I submit this statement to caution members of this Committee, and other members of Congress, against establishing new federal terrorism crimes, penalties, or surveillance authorities in an effort to counter this threat.

I am a law professor at Stanford University. I specialize in research and teaching on national security law, civil rights and liberties, and civil procedure. My scholarly work over the past decade has focused on the legal treatment of political violence, including domestic and international terrorism, and on national security oversight through courts and executive agencies.<sup>1</sup> Prior to my appointments at Stanford, I worked as a civil rights lawyer for the Asian Law Caucus and the Lawyers' Committee for Civil Rights in San Francisco.

**I. Existing federal laws provide ample means for the federal prosecution of most domestic terrorism.**

The enactment of a new federal domestic terrorism crime is not required for federal prosecution of most domestic terrorism, and could lead to adverse consequences for individuals and communities. As it is, the terrorism chapter of the U.S. criminal code includes a large number of federal crimes and defines an even wider variety of offenses—under approximately fifty listed statutes—as federal crimes of terrorism when committed with an intent to influence government conduct.<sup>2</sup> Many of these statutes apply to terrorism irrespective of an international link. For instance, federal charges can apply to domestic terrorists who use, or seek to use, explosives or chemical or biological weapons.<sup>3</sup> Earlier this year, on the basis of convictions resulting from such charges, a federal judge sentenced three Kansas militia members to between 25 and 30

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<sup>1</sup> For samples of this academic scholarship, see [Separate and Unequal: The Law of “Domestic” and “International” Terrorism](#), 117 MICH. L. REV. 1333 (2019); [Procedural Experimentation and National Security in the Courts](#), 106 CAL. L. REV. 991 (2018); [Rule of Law Tropes in National Security](#), 129 HARV. L. REV. 1566 (2016); and [Protecting Rights from Within? Inspectors General and National Security Oversight](#), 65 STAN. L. REV. 1027 (2013).

<sup>2</sup> See 18 U.S.C. ch. 113B (2012) (“Terrorism”); *id.* § 2332b(g)(5) (defining a federal crime of terrorism).

<sup>3</sup> See, e.g., *id.* § 229 (acquisition, production, use, or possession of chemical weapons); *id.* § 832 (“Participation in nuclear and weapons of mass destruction threats to the United States”); *id.* § 844(i) (destruction or damage to property used in interstate commerce “by means of fire or an explosive”); *id.* § 2332a (“Use of weapons of mass destruction”).

years in prison for plotting to bomb a mosque and apartment complexes housing Somali immigrants.<sup>4</sup> In addition, existing federal terrorism crimes cover violence or threats of violence against federal officials, federal government facilities, and mass transit or communication systems.<sup>5</sup> These charges have particular utility against individuals acting out of anti-government motives, who often target federal buildings or officials.<sup>6</sup> Moreover, an existing terrorism charge for acts of violence and property damage “transcending national boundaries” could apply to the growing number of acts of white nationalist violence in the United States with international connections.<sup>7</sup>

Federal *terrorism-specific* charges may not be available for all acts of terrorism, especially some acts of violence conducted with a gun or vehicle.<sup>8</sup> Even for cases committed with a gun or vehicle, however, a wide range of other federal criminal charges often apply.<sup>9</sup> Federal civil rights charges are especially applicable to cases involving white nationalists, who often target racial or religious minorities or places of worship.<sup>10</sup> In the past several years, federal prosecutors brought hate crimes and/or obstruction with the free exercise of religion charges against domestic terrorists such as Dylann Roof (the 2015 Charleston church shooter)<sup>11</sup>; James Alex Fields, Jr. (the 2017 Charlottesville assailant)<sup>12</sup>; Robert Bowers (the 2018 Pittsburgh synagogue suspect)<sup>13</sup>; and John Timothy Earnest (the 2019 Poway synagogue suspect).<sup>14</sup> In no sense are

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<sup>4</sup> Roxana Hegeman, *Militia Members Get Decades in Prison in Kansas Bomb Plot*, U.S. NEWS, Jan. 25, 2019 (noting convictions for conspiracy to use a weapon of mass destruction and conspiracy against civil rights). For a discussion of the use or attempted use of weapons of mass destruction by domestic extremists, see Sinnar, *Separate and Unequal*, *supra* note 1, at 1390-91.

<sup>5</sup> See, e.g., 18 U.S.C. § 351 (assassination, kidnapping, or assault of members of Congress, Supreme Court, and Cabinet); id. § 1114 (“Protection of officers and employees of the United States”); id. § 930(c) (killing during an attack in a federal facility involving a firearm or dangerous weapon); id. § 1751 (assault, kidnapping, or assassination of president or presidential staff); id. § 844(f)(2)–(3) (damage or destruction to federal properties causing or risking death or injury); id. § 1362 (“Communication lines, stations or systems”); id. § 1992 (attacks on railroads and mass transportation systems); id. § 2332f (“Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities”).

<sup>6</sup> See DEP’T OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE 10 (Sept. 2019) (describing “anti-government/anti-authority violent extremism” as a “significant motivating force behind domestic terrorism,” and noting examples).

<sup>7</sup> 18 U.S.C. § 2332b (criminalizing murder, serious assaults, and property damage risking serious injury within the United States, including threats, attempts, and conspiracies, where there is “conduct transcending national boundaries”). To be clear, the use of this statute should not be encouraged where international connections are marginal. See Sinnar, *Separate and Unequal*, *supra* note 1, at 1353, 1404. For more on the increasing transnational connections among “white supremacist violent extremists,” see DEP’T OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE 9 (2019).

<sup>8</sup> See Sinnar, *Separate and Unequal*, *supra* note 1, at 1352.

<sup>9</sup> For a list of frequently charged, non-terrorism-specific federal laws in domestic terrorism prosecutions, see BRENNAN CTR. FOR JUSTICE, WRONG PRIORITIES ON FIGHTING TERRORISM 10 (2018).

<sup>10</sup> These charges include 18 U.S.C. § 249 (“hate crimes acts”) and 18 U.S.C. § 247 (“Damage to religious property; obstruction of persons in the free exercise of religious beliefs”).

<sup>11</sup> Indictment, *United States v. Dylann Storm Roof* (D.S.C., July 20, 2015).

<sup>12</sup> Indictment, *United States v. James Alex Fields Jr.* (W.D. Va., June 27, 2018).

<sup>13</sup> Superseding Indictment, *United States v. Robert Bowers* (W.D. Pa., Jan. 29, 2019).

<sup>14</sup> Indictment, *United States v. John Timothy Earnest* (S.D. Cal., May 21, 2019).

the corresponding penalties light: Roof was sentenced to death for the murder of nine African American parishioners,<sup>15</sup> and Fields received a life sentence.<sup>16</sup>

The use of non-terrorism charges is neither unusual nor restricted to domestic terrorism. Even in international terrorism cases, the federal government frequently charges suspects under statutes not specific to terrorism. In fact, the Justice Department's National Security Division divides international terrorism convictions into two categories: Category I comprises cases charged for violations of "federal statutes that are directly related to international terrorism"; and Category II involves "charged violations of a variety of other statutes," including "fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice, as well as general conspiracy charges."<sup>17</sup> Between 2002 and 2015, federal authorities obtained well over 150 convictions in Category II cases.<sup>18</sup> The National Security Division describes Category II charges as an "effective method" of "detering and disrupting potential terrorist planning and support activities" that "underscores the wide variety of tools available in the U.S. criminal justice system for disrupting terrorist activity."<sup>19</sup>

All of this suggests that the creation of a new federal domestic terrorism charge is unnecessary. But the creation of such a charge would also create new risks. One problem stems from the broad definition of domestic terrorism that legislative proposals now seek to adopt for a new terrorism crime. Current federal law defines terrorism as unlawful activities that "involve violent acts or acts dangerous to human life" that "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."<sup>20</sup> This definition could convert conventional crimes that create public fear, or efforts to influence a government official for entirely personal reasons, into terrorism. These concerns are not merely theoretical. Indeed, numerous states have already created terrorism charges modeled on the federal definition, and some have used such charges in cases far removed from standard conceptions of terrorism.

For instance, under a Michigan terrorism law that criminalized violent felonies "intended to intimidate or coerce a civilian population or influence or affect the conduct of government...through intimidation or coercion," a court convicted a man whose anger at the government stemmed from idiosyncratic—and apparently delusional—reasons.<sup>21</sup> The defendant,

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<sup>15</sup> Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES, Jan. 10, 2017.

<sup>16</sup> *White Supremacist James Alex Fields Jr. Sentenced To Life In Prison In Charlottesville Attack*, ASSOC. PRESS, June 28, 2019.

<sup>17</sup> U.S. Dep't of Justice Nat'l Sec. Div., Introduction to the National Security Division's Chart of Public/Unsealed International Terrorism and Terrorism-Related Convictions From 9/11/01 to 12/31/15, at 1 (released in response to FOIA request by Prof. Shirin Sinnar, Stanford Law School).

<sup>18</sup> *Id.* at 1-18 (accompanying NSD chart). This number does not include convictions that arose out of the post-9/11 nationwide investigation, since the NSD observes that such cases were listed "regardless of whether investigators developed or identified evidence that they had any connection to international terrorism." *Id.* at 2.

<sup>19</sup> *Id.*

<sup>20</sup> 18 U.S.C. § 2331(5) (defining domestic terrorism).

<sup>21</sup> *People v. Casteel*, No. 321340, 2015 WL 5440195 (Mich. Ct. App. Sept. 15, 2015).

who shot randomly at vehicles over several days, testified that he believed the government had caused him to lose his job, that agents with clipboards were following him, and that “government-controlled advanced technologies...caused his wife to miscarry twice, killed one of his cats, made the other cat ill for a time, and gave his daughter extreme eczema.”<sup>22</sup> Despite the lack of a broader ideological motive or systemic threat, an appellate court affirmed the man’s terrorism conviction on the grounds that he was aware that his actions made people afraid<sup>23</sup> and that he intended to “send a message” to the government, whom he blamed “for everything that had gone wrong in his life.”<sup>24</sup>

Michigan prosecutors likewise brought terrorism charges against an individual who tried to attack the prosecutor in his sexual assault case.<sup>25</sup> Although a court ultimately dismissed the terrorism charge, prosecutors seem to have brought it on the theory that the defendant attempted to influence government conduct.<sup>26</sup> Threatening a judge or law enforcement official to influence a pending court case might well fall within the plain text of a terrorism statute, but scarcely fits the intended focus on systemic threats of violence in service of ideological or political objectives.<sup>27</sup>

Although one proposal for a federal domestic terrorism charge attempts to mitigate the risk of overbroad use by requiring the Attorney General or a deputy to approve its use,<sup>28</sup> that requirement would not preclude its use in marginal cases. In a polarized political environment, an Attorney General might seek political advantage from approving terrorism charges against domestic opponents. An Attorney General might also endorse federal prosecutors’ use of onerous terrorism charges to extract plea agreements to lesser criminal charges.<sup>29</sup> Once federal authorities have the power to use a broadly defined new terrorism offense, there is no guarantee that self-restraint will confine its use to genuine terrorist threats.

## **II. The expansion of material support charges is neither necessary, nor advisable, to counter domestic terrorism.**

Federal authorities use two primary material support laws today: 18 U.S.C. § 2339B, which bans material support to designated foreign terrorist organizations (FTOs), and 18 U.S.C. § 2339A,

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<sup>22</sup> Id. at \* 5.

<sup>23</sup> Id. at \* 5.

<sup>24</sup> Id. at \* 5.

<sup>25</sup> Matt Mencarini, *Man Faces Terrorism Charge In Connection With Lansing Courtroom Attack*, LANSING STATE JOURNAL, Sept. 22, 2016.

<sup>26</sup> See *id.*; *Judge Throws Out Terrorism Charge In Courtroom Attack*, Assoc. Press, Jan. 26, 2017.

<sup>27</sup> Other state courts have interpreted state terrorism laws patterned on the federal domestic terrorism definition to not require a political motive. See, e.g., *Muhammad v. Commonwealth*, 269 Va. 451, 499-500 (Va. 2005) (“Nothing in the words of these statutes evinces an intent to limit its application to criminal actors with political motives.”).

<sup>28</sup> See *Confronting the Threat of Domestic Terrorism*, 116 H.R. 4192 § 2(e) (introduced by Rep. Adam Schiff on Aug. 16, 2019) (requiring certification of the Attorney General, or the “highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions of the offenses in this chapter,” that the crime meets the intent requirement of the proposed statute).

<sup>29</sup> See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 864 (2014) (describing prosecutors’ incentives to charge penalty-enhancing hate crimes laws in “nonarchetypal cases” to encourage plea agreements to lesser charges).

which bans material support for particular terrorist crimes. Some law enforcement officials have proposed new material support laws to respond to domestic terrorism. Most of these proposals have gained little traction for very good reason: expanding the already broad scope of material support to terrorism laws would present numerous risks for individuals, civil liberties, and our political life.

Any new statute authorizing the listing of purely domestic terrorist organizations could be devastating. The FTO statute already presents significant civil liberties concerns. As it is, the statute prohibits “material support or resources” to listed organizations without regard to the nature of the support or its purpose: thus even speech coordinated with such groups for entirely peaceful purposes might fall within its crosshairs.<sup>30</sup> The expansive reach of the law, the difficulty of challenging designations, the use of the charge in FBI sting operations that risk entrapping individuals, and the stiff penalties associated with it all call for greater oversight, not expansion.<sup>31</sup>

Calls from across the political spectrum to brand movements or groups “terrorist organizations” underscore the risk of expanding designations. Some members of Congress seek to designate groups under the Antifa banner as domestic terrorist organizations;<sup>32</sup> the city of San Francisco passed a resolution labeling the National Rifle Association a domestic terrorist group.<sup>33</sup> Moreover, a statute modeled on the FTO ban might violate the First Amendment, at least as applied to the proscription of speech.<sup>34</sup> Finally, it is unclear whether the designation of domestic organizations would even reach much domestic terrorism, given that intelligence assessments describe such terrorism as primarily stemming from decentralized individuals or small groups.<sup>35</sup>

The second material support statute, § 2339A, is not restricted to international terrorism in its current form. That statute proscribes material support where an individual knows or intends that it will be used to commit, or prepare to commit, enumerated federal terrorism offenses.<sup>36</sup> Most

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<sup>30</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding constitutionality of statute as applied to non-profit organizations’ activities of training designated foreign terrorist organizations in international law and engaging in political advocacy on their behalf); *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (upholding material support conviction of Boston man charged in part with translating materials for a website alleged to be linked to al Qaeda, though on separate grounds).

<sup>31</sup> For more analysis, see Sinnar, *Separate and Unequal*, *supra* note \_\_\_, at 1354-57, 1400, and accompanying citations.

<sup>32</sup> See A Resolution Calling for the Designation of Antifa as a Domestic Terrorist Organization, S. Res. 279, H.R. Res. 525 (introduced July 18, 2019, and July 25, 2019, respectively); Gary LaFree, *Is Antifa a Terrorist Group?* 55 SOC. 248 (2018) (concluding that antifa is not a “group” and that, based on application of Global Terrorism Database criteria through 2017, antifa-associated individuals did not commit terrorist attacks in Charlottesville or “most likely...anywhere else.”).

<sup>33</sup> Mariel Padilla, *San Francisco Declares the N.R.A. a ‘Domestic Terrorist Organization,’* N.Y. TIMES, Sept. 4, 2019.

<sup>34</sup> See *Humanitarian Law Project*, 561 U.S. at 39 (suggesting that an equivalent ban on material support to domestic organizations in the form of speech might fail constitutional scrutiny).

<sup>35</sup> See, e.g., DEP’T OF HOMELAND SEC. & FED. BUREAU OF INVESTIGATION, JOINT INTELLIGENCE BULLETIN: WHITE SUPREMACIST EXTREMISM POSES PERSISTENT THREAT OF LETHAL VIOLENCE 5 (2017) (describing white supremacist violence as likely to come from “lone offenders or small cells,” due to the decentralized nature of the movement).

<sup>36</sup> 18 U.S.C. § 2339A(a). The predicate statutes listed include a “catch-all” offense that includes violations defined as “federal crimes of terrorism.” *Id.* (listing § 2332b(g)(5)(B)).

of the enumerated offenses listed can apply to either domestic or international terrorism.<sup>37</sup> Federal prosecutors have used this charge against at least four individuals accused of providing support to domestic terrorism, and likely could have used it in other domestic terrorism scenarios.<sup>38</sup>

Although the list of predicate offenses in the statute might not cover all domestic terrorism, there are good reasons not to expand the statute to include, for instance, a new domestic terrorism crime. For one thing, the existing charge already facilitates prosecutions of individuals several degrees removed from violent acts—a feature of the law that should be revisited. For instance, because prosecutors can charge conspiracies to provide material support, and the statute includes predicate offenses that are themselves conspiracy crimes, the existing law allows the charging of conspiracies to support conspiracies.<sup>39</sup> Moreover, the manner in which prosecutors have used § 2339A has already raised concern that the government is preemptively punishing individuals who may not have presented a threat.<sup>40</sup> As implemented, this “anticipatory prosecution” approach often raises serious human rights concerns.<sup>41</sup> In sum, the use of material support charges merits greater oversight, not less.

### **III. Federal authorities have sufficient powers to investigate domestic terrorism threats, many of which require greater oversight rather than expansion.**

Federal agencies have broad authority to investigate threats of terrorism, whether international or domestic. In recent decades, successive versions of the Attorney General’s Guidelines for Domestic FBI Operations have expanded the scope of information the FBI may obtain, reduced the degree of connection to criminal activity required, and weakened procedural protections.<sup>42</sup> For instance, the FBI now has the explicit authority to conduct “assessments” of potential criminal activity with “no particular factual predication.”<sup>43</sup> Assessments allow agents to search (potentially vast) commercial databases, track a person’s movements, and even task a confidential informant to report on the person’s activities.<sup>44</sup> While there must be an “authorized

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<sup>37</sup> See BRENNAN CTR. FOR JUSTICE, *WRONG PRIORITIES ON FIGHTING TERRORISM* 5 (2018) (counting 51 of these 57 crimes as applicable to domestic terrorism).

<sup>38</sup> *Id.* at 8; Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017) (describing non-use in factual circumstances that could have justified a charge).

<sup>39</sup> See 18 U.S.C. § 2339A(a) (extending liability to attempts and conspiracies and listing predicate statutes).

<sup>40</sup> For one example, see *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (Tashima, J., dissenting) (describing prosecution of defendant under § 2339A as “a stark demonstration of the unsettling and untoward consequences of the government’s use of anticipatory prosecution as a weapon in the ‘war on terrorism.’”). Hayat’s conviction for material support to terrorism was vacated in 2019 on the basis of constitutionally inadequate assistance of counsel. *United States v. Hayat*, 2019 WL 3423538 (E.D. Cal. July 30, 2019).

<sup>41</sup> For more analysis of these concerns, see HUMAN RIGHTS WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS* (2014); WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* (2015); Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 845–68 (2013).

<sup>42</sup> BRENNAN CTR. FOR JUSTICE, *DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS* 13-22 (2011).

<sup>43</sup> DEP’T OF JUSTICE FED. BUREAU OF INVESTIGATION, *DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE* 5-1 (as released Mar. 2, 2016 and updated Sept. 28, 2016) [DIOG].

<sup>44</sup> *Id.* at 5-34.

purpose” and “clearly defined objective” for such assessments, FBI agents need not demonstrate facts suggesting a basis for suspicion.<sup>45</sup>

Nor are the standards for opening preliminary or full investigations especially demanding. Agents may open a preliminary investigation—permitting more intensive surveillance—on the basis of “information or an allegation” indicating that a federal crime “has or may have occurred, is or may be occurring, or will or may occur” and where the investigation may help elicit relevant information.<sup>46</sup> Full investigations, which permit additional investigative methods, require an “articulable factual basis” that “reasonably indicates” that a federal crime has or *may* occur.<sup>47</sup> In addition, Justice Department guidelines permit the FBI to conduct far-reaching enterprise investigations of groups suspected of supporting domestic terrorism.<sup>48</sup>

Although FBI investigations generally require a tie to a prospective federal criminal violation, there is little indication that this requirement practically limits the FBI’s domestic terrorism investigations. First, as discussed above, a wide range of federal criminal laws are already available for domestic terrorism. Second, even if a federal crime cannot ultimately be charged, investigations can be predicated on the possibility of a future violation—a significantly lower standard. Finally, the FBI has additional jurisdiction to investigate violations of state law in certain circumstances, such as felony killings of state or local law enforcement officers.<sup>49</sup>

Moreover, the Attorney General Guidelines and the FBI’s internal rules explicitly permit investigations implicating First Amendment rights. These guidelines prohibit investigations based *solely* on the exercise of such rights.<sup>50</sup> But they clarify that agents acting with an authorized purpose, such as assessing a potential criminal violation, may observe and collect First Amendment-protected speech and review its content.<sup>51</sup> For example, FBI agents may monitor a political group’s advocacy of unspecified “action” against perceived enemies, even if the government cannot suppress the advocacy itself.<sup>52</sup>

Reviewing these guidelines, the Justice Department Inspector General concluded in 2010 that they “allow the FBI wide latitude to pursue” investigations “that may implicate First Amendment considerations.”<sup>53</sup> The Inspector General further stated that existing policies and guidelines “allow the FBI to open preliminary and full investigations through standards that are easily met.”<sup>54</sup>

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<sup>45</sup> Id.

<sup>46</sup> Id. at 6-3.

<sup>47</sup> Id. at 7-3, 7-7, 7-8.

<sup>48</sup> U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS 23 (2008).

<sup>49</sup> DIOG, *supra* note 43, at 6-2; 28 U.S.C. § 540 (“Investigation of felonious killings of State or local law enforcement officers”).

<sup>50</sup> DIOG, *supra* note 43, at 4-4.

<sup>51</sup> Id. at 4-7.

<sup>52</sup> Id. at 4-7.

<sup>53</sup> U.S. DEP’T OF JUSTICE INSPECTOR GEN., A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 3 (2010).

<sup>54</sup> Id.

Therefore, the idea that the FBI has limited power to investigate white supremacist violence is simply wrong. Existing restrictions are minimal. To the extent that First Amendment guidelines provide any constraint, they do so for good reason: to discourage freewheeling investigations of political speech or ideas in the absence of a genuine criminal threat.

**IV. New terrorism charges or surveillance powers, if enacted, may be misdirected towards unwarranted investigations and prosecutions of communities of color or political dissenters.**

An expansion of terrorism charges or associated surveillance powers is ill-advised in light of both the government's historical response to political threats and systemic racial inequalities in the criminal justice system. The FBI's sweeping programs to surveil and disrupt anti-war protestors and civil rights activists during the 1950s and 1960s, including Dr. Martin Luther King Jr., are well-known. According to historian David Cunningham, the FBI viewed "any challenge by nonwhites...as threatening to a conventional vision of an ideal America."<sup>55</sup> At the same time, the FBI conducted a more limited campaign against the Ku Klux Klan and other white supremacist groups because the agency opposed those groups' violence but accepted their beliefs.<sup>56</sup> Historians have observed that liberal support for the FBI's infiltration of "white hate" groups gave the agency a freer hand for its more intense targeting of black activists and anti-war groups.<sup>57</sup>

There are at least two historical lessons to draw from such accounts: first, that law enforcement agencies' approach to threats may vary based on the underlying ideologies and communities implicated; and second, that political support for addressing white supremacist violence can sometimes lead to diminished oversight of law enforcement powers—to the detriment of marginalized communities.

Law enforcement officials often dismiss such concerns as antiquated. Yet in recent decades, the FBI and other law enforcement agencies have continued to focus inordinate attention on communities of color—particularly U.S. Muslim communities—and on political activists. For example, the FBI and other agencies have "mapped" Muslim communities in the United States, deployed informants throughout these communities, solicited intelligence through community engagement programs, conducted wide-scale "voluntary interviews," and extensively monitored Internet activity—all with little oversight or accountability.<sup>58</sup> According to Professor Amna Akbar, misguided radicalization theories "transformed the project of counterterrorism intelligence gathering into one squarely focused on gathering as much information as possible about Muslim life in the United States, with a particular emphasis on political and religious cultures of Muslim communities."<sup>59</sup>

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<sup>55</sup> DAVID CUNNINGHAM, *THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* 113 (2004).

<sup>56</sup> *Id.* at 127-45.

<sup>57</sup> *Id.* at 111 (citing WILLIAM KELLER, *THE LIBERALS AND J. EDGAR HOOVER* (1989)).

<sup>58</sup> Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809, 854-68 (2013).

<sup>59</sup> *Id.* at 845.

The FBI's investigations of domestic civil society groups or their members have also generated concern. In 2010, the Justice Department Inspector General issued an extensive report on allegations that the FBI had improperly investigated certain anti-war, animal rights, and environmental advocacy groups.<sup>60</sup> The Inspector General concluded that, while the FBI had not targeted the groups solely on the basis of First Amendment activities, it had sometimes opened investigations without a sufficient factual basis, extended investigations that should have ended (leading to individuals remaining on terrorist watchlists without justification), improperly classified lawful protest activities as terrorism, and collected and retained information related to non-violent civil disobedience.<sup>61</sup>

Still more recently, the FBI's publication of a threat assessment on a broadly defined category of "black identity extremists"<sup>62</sup> and its investigations of an indigenous-led oil pipeline protest movement<sup>63</sup> have magnified concerns over how the agency conceptualizes terrorism. For instance, despite the largely peaceful nature of pipeline protests, considerable industry and political support has led to the increasing scrutiny of pipeline disruption as terrorism. In at least 31 states, legislators have introduced bills to curtail pipeline protests, some of which expand definitions of terrorism, and 84 members of Congress wrote to the Justice Department inquiring whether damaging pipelines qualifies as domestic terrorism.<sup>64</sup> While law enforcement agencies should direct attention to individuals credibly threatening actual violence across ideologies, the risk is that individuals from marginalized communities—or those opposing dominant economic or political interests—will receive the greatest scrutiny and most punitive treatment, and in circumstances that blur the line between terrorism and dissent.

## V. Conclusion

This Committee is undertaking a critically important review of the federal government's approach to domestic terrorism. Many have proposed commendable measures to improve understanding of the threat and direct attention and resources towards combatting it. Proposals to create new terrorism offenses or expand surveillance authorities, however, are misguided. The existing legal framework for addressing terrorism merits greater oversight, not expansion.

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<sup>60</sup> U.S. DEP'T OF JUSTICE INSPECTOR GEN., A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010).

<sup>61</sup> *Id.* at 173-91.

<sup>62</sup> See Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'* FOREIGN POLICY, Oct. 6, 2017.

<sup>63</sup> Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists,* THE GUARDIAN, Feb. 10, 2017.

<sup>64</sup> Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say,* WASH. POST, Aug. 22, 2018; Letter from Rep. Ken Buck, et al, to Attorney Gen. Jeff Sessions, Oct. 23, 2017, at [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Protecting%20Energy%20Infrastructure.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Protecting%20Energy%20Infrastructure.pdf). At least two signatories of the congressional letter on pipeline disruption, Rep. Randy Weber and Sen. Martha McSally, have introduced or circulated bills to create new domestic terrorism crimes or penalties. See Domestic Terrorism Penalties Act of 2019, 116 H.R. 4187 (introduced in House by Rep. Weber on Aug. 13, 2019, proposing to amend criminal code to add specific penalties for domestic terrorism-related offenses); Bill to Penalize Acts of Domestic Terrorism (circulated but not yet introduced by Sen. McSally, and proposing to create new federal domestic terrorism crime), <https://assets.documentcloud.org/documents/6270558/OLL19714-1.pdf>.