



The Leadership Conference
on Civil and Human Rights

BRENNAN
CENTER
FOR JUSTICE

Confronting White

Supremacist Violence:

An Effective and

Inclusive Path Forward

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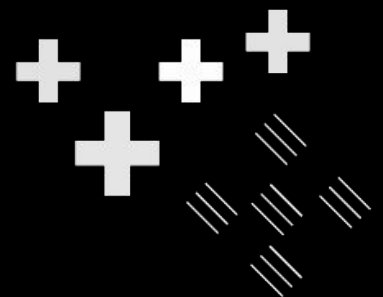
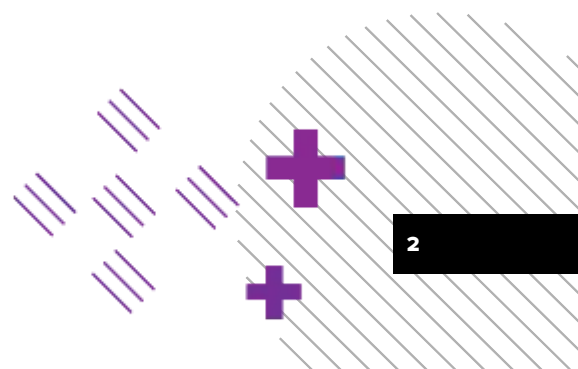
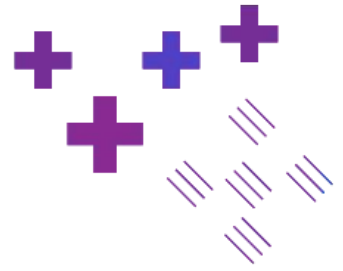


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Introduction

Our nation’s strength lies in its rich diversity and its embrace of people of all races and genders, regardless of where they come from, how they worship, or whom they love. In recent years, violent white supremacists have attacked this diversity, carrying out attacks across the country — from Charleston, South Carolina, to Pittsburgh, Pennsylvania, to El Paso, Texas, to Charlottesville, Virginia, to Buffalo, New York. These assaults are tragic reminders that our nation’s long history of racial terror endures. In 2020, the country saw the highest number of reported hate crimes since the aftermath of September 11, 2001. The key role played by violent white supremacist groups in the January 6 attack on the U.S. Capitol only underscores the seriousness of the threat they pose.

The United States has in place laws and authorities necessary to investigate and prosecute white supremacist violence, including as hate crimes and domestic terrorism. The U.S. Code has more than 50 laws that can be used to prosecute acts that meet the definition of domestic terrorism under the USA PATRIOT Act. There are at least six federal statutes that can be used to prosecute bias-motivated crimes committed by white supremacists. But for too long, the federal government has failed to adequately prioritize and resource these types of investigations and prosecutions. Indeed, it has

even failed to collect data on the extent of white supremacist violence in the country, mostly relying on voluntary reporting by state and local authorities who may not have the capacity or incentives to accurately track this information.

In this context, the Brennan Center for Justice and The Leadership Conference on Civil and Human Rights welcome the Biden administration’s commitment to addressing white supremacist violence, as reflected in the first-ever National Strategy for Countering Domestic Terrorism (DT Strategy) issued in 2021 by the White House. The strategy includes important elements, such as improving the tracking of domestic terrorism cases and recognizing the need to protect civil rights and civil liberties in combating this threat. However, it also extends a counterterrorism framework that has afforded immense discretion and authority to federal agents regarding whom to surveil and investigate. This discretion, and an expansive view of what counts as “terrorism,” has resulted in the targeting of communities of color and political dissent. Indeed, the counterterrorism framework incorporated into the strategy often obscures the threat of white supremacist violence, hiding it under categories such as “racially motivated violent extremism,” which also covers movements that have been conjured up by the FBI such as those involving people motivated by “racism or injustice in American society, [or] the desire for a separate black homeland.”¹



“The United States has in place laws and authorities necessary to investigate and prosecute white supremacist violence, including as hate crimes and domestic terrorism.”

This doubling down on a national security framework has already caused damage to so many people in America, including many of the same communities who are the targets of white supremacist violence. Instead, the Biden administration should take an inclusive and more effective approach that:

- Accounts for and prosecutes white supremacist violence using the laws already on the books;
- Implements tangible civil rights and civil liberties safeguards to constrain the use of counterterrorism authorities against protestors and communities of color; and
- Does not further expand the footprint and authority of national security agencies.

This paper details concerns about the DT Strategy, sets forth requests for clarification, and contains recommendations for additional steps that the administration should take to protect civil rights and civil liberties as part of a robust response to white supremacist violence.

Addressing long-standing problems in counterterrorism policy

As a threshold matter, the DT Strategy does not rectify overbroad authorities and failed policies of the post-9/11 period. These authorities and policies have disproportionately harmed communities of color; relied on surveillance of constitutionally protected speech, belief, and conduct; and denied fundamental due process protections to those impacted by them.

Underlying all Justice Department investigative authorities and policies are the *Attorney General's Guidelines for Domestic FBI Operations* issued by Attorney General Michael Mukasey in December 2008 (2008 AG Guidelines).² The 2008 AG Guidelines created a new type of inquiry called an “assessment.” During an assessment, FBI agents — without any factual or criminal predicate — may recruit and task informants; map communities on the basis of race and ethnicity; and conduct physical surveillance, database searches, and interviews. Agents can open assessments based on only an “authorized purpose,” such as preventing crime or terrorism, which gives them immense discretion regarding whom or what to look into.³ The *FBI Domestic Investigation and Operations Guide* (DIOG), also issued in 2008 and last updated in September 2016, implements the 2008 AG Guidelines.⁴ It explicitly allows, for example, the targeting of communities that possess the same “religion-based characteristics or practices” as a terrorist group;⁵ the collection of information regarding ethnic and racial behaviors; and the mapping of communities based on factors including race, ethnicity, national origin, and religion, as referenced above.⁶

These broad authorizations enable law enforcement to baselessly tar entire communities with suspicion, and the FBI has over the past decades routinely marked Muslims, activists, and protest movements for investigation absent connections to criminal activity.⁷

The 2014 *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (DOJ Guidance on Profiling) does little to constrain these authorities.⁸ Although this guidance purports to ban bias-based profiling by federal law enforcement, it explicitly exempts “interdiction activities in the vicinity of the border,” which U.S. Customs and Border Protection has interpreted to extend 100 miles from it, as well as “protective, inspection or screening activities.”⁹ It further functionally permits profiling in the national security, immigration, and intelligence gathering contexts; does not apply to state and local law enforcement agencies; and has no mechanisms for enforcement or accountability for harms caused by bias-based investigations.¹⁰

These fundamental shortcomings in the DOJ Guidance on Profiling have long enabled law enforcement agencies to view communities of color through a “security threat” lens and wrongly target Black, Brown, Muslim, and — increasingly — Asian communities for suspicion, surveillance, and harassment. The Biden administration’s call for an assessment of the implementation and effects of the DOJ Guidance on Profiling is a welcome development.¹¹ We look forward to seeing the results of the assessment and working with the administration to strengthen these anti-discrimination rules.

The DT Strategy also leaves open the possibility of enacting a new law criminalizing domestic terrorism, which the civil rights community has adamantly opposed because it is unnecessary and would risk further harm to constitutionally protected rights,

particularly of communities of color. Federal law enforcement agencies’ current authority to investigate potential acts of terrorism, including white supremacist violence, is more than adequate. A new law broadly criminalizing domestic terrorism — a fraught and easily politicized concept — would dramatically expand authorities used disproportionately and unfairly against Black, Brown, and Muslim communities and those engaged in dissent.¹²

Other parts of the DT Strategy rely on tools that have proven ineffective, abusive, or discriminatory, including:

- Continuing the use of flawed surveillance and information sharing practices through mechanisms such as fusion centers, despite numerous documented abuses and a lack of demonstrated benefits;
- Repackaging discredited Countering Violent Extremism programs under another new label;
- Utilizing a watchlisting system that has ballooned to more than 1 million names and lacks basic due process protections; and
- Expanding dragnet social media surveillance, which threatens free expression worldwide and has not been shown to be effective.

The DT Strategy cannot promote fairness, accountability, and transparency in government programs and policies while continuing to rely on the systems that have long eroded those values. As the administration continues to implement the DT Strategy, it should reevaluate the tools listed above in favor of alternative methods that have fewer avenues for abuse and discrimination.

Focusing resources to address lethal violence

Tracking and disclosing data on domestic terrorism cases

The administration's recognition of the need to prioritize the tracking of domestic terrorism-related investigations and prosecutions is a welcome development. Also noteworthy is the fact that the acting deputy attorney general's March 2021 *Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism* (DAG Guidance) asks federal prosecutors to notify the Counterterrorism Section of the DOJ National Security Division of all criminal "investigations and prosecutions involving conduct related to domestic violent extremism."¹³

Recommendations

- The framework that the DAG Guidance implements excludes state and local cases. The administration should take steps to capture such information, which — as the DT Strategy recognizes — is crucial to understanding the domestic terrorism landscape.¹⁴
- The federal government should commit to publicly disclosing on an annual basis comprehensive data on its domestic terrorism investigations and prosecutions. Section 5602(b)(4) of the National Defense Authorization Act (NDAA) of 2020 required the FBI and the Department of Homeland Security (DHS) to produce specific data regarding domestic terrorism incidents, investigations, and prosecutions, broken down by category. The FBI and DHS produced two reports, one in May 2021 and the other in October 2022, that failed to

include all the required data, specifically domestic terrorism incident and prosecution data.¹⁵ These agencies should collect and report all domestic terrorism data as required by the NDAA of 2020.

Clarifying terminology and categories

The DT Strategy and the DAG Guidance use different terminology: The former is primarily focused on domestic terrorism (DT), while the latter specifically seeks reporting of cases tied to domestic violent extremism (DVE). DT is defined by statute to involve criminal acts dangerous to human life that are intended to intimidate the public or affect government conduct.¹⁶ DVE is defined in the DAG Guidance to "include all violent criminal acts in furtherance of ideological goals stemming from domestic influences, such as racial bias or anti-government sentiment," including DT, which suggests DOJ's concept of DVE is broader than DT.¹⁷ In contrast, the FBI, DHS, and the Director of National Intelligence (DNI) seem to equate DVE with DT.¹⁸

Recommendation

- The term "violent extremism" has no definition in law and has been used to describe beliefs and views far removed from violence.¹⁹ The administration should clarify if it considers DT to be synonymous with DVE and, if not, provide an explanation of the differences.

While the administration recognizes that it must not target people for investigation based on their speech, beliefs, and protest activities,²⁰ the FBI's framework — which DHS and the intelligence community have adopted in the 2021 NDAA report and other public documents — is organized around ideologies rather than operational links or criminal activities.²¹ The administration recognizes that far-right actors — in particular, violent white

supremacists and militia members — comprise “the most persistent and lethal threats,”²² yet it groups violent white supremacy with the illusory phenomenon of Black separatism under the umbrella of Racially or Ethnically Motivated Violent Extremism.²³ Similarly, the Abortion-Related Violent Extremists category includes pro-choice DVEs, although only anti-abortion militants have a history of committing deadly violence,²⁴ and anarchists are lumped in with violent far-right militias, even though they are responsible for a fraction of the lethal attacks carried out by such militias.²⁵ Animal Rights/Environmental Violent Extremists constitute their own category, even though they do not have a history or current practice of perpetrating deadly violence.²⁶

Such a framework — one that is oriented around ideology — obscures serious threats of violence and elevates less serious or non-existent ones, enabling law enforcement to selectively target people for investigation based on whether they are perceived to have “extremist” views rather than whether they have engaged in, or credibly threatened to engage in, violence that fits the legal definition of terrorism. Furthermore, such a framework provides little operational benefit as these ideological boundaries do not correspond with investigative realities. For example, some Proud Boys members and chapters consider themselves white supremacists, while others claim to disavow racism; far-right militia members are in the same category as anarchists, to whom they stand in opposition, but in a different category from white supremacists, with whom they work.

Recommendation

- The government should use categories that are based on the actual threat of violent activity or concrete operational links between actors rather than conflating threats based on an arbitrary ideological framework.

Ensuring quality control and safeguards for information sharing and cooperation

The DT Strategy emphasizes a renewed focus on “information sharing on domestic terrorism threats,” both among federal agencies and with state, local, tribal, and territorial partners.²⁷ According to the DT Strategy, the purpose of such information sharing includes providing “warnings of specific, credible threats of violence” as well as “broader indicators and warnings” of potential violence to non-federal partners.²⁸ However, the administration does not detail how it intends to ensure the credibility or relevance of what agencies disseminate or applicable privacy and due process safeguards outside of the unspecified “legal and policy limitations on the sharing of sensitive law enforcement information” referenced in the DT Strategy.²⁹

While it is important to ensure that law enforcement agencies share credible information about actual threats of violence, the intelligence apparatus built in the wake of 9/11 has promoted the unaccountable dissemination of false, biased, and unreliable information, often untethered from criminal activity.

For example, DHS has disseminated intelligence reports with no links to criminal activity, instead focusing on protected speech.³⁰ An internal review concluded that intelligence collectors face fundamental challenges in discerning threat from hyperbole or political speech and pressure to find threats where none may exist.³¹ Fusion centers are often at the center of this misguided information-sharing process. As a 2012 bipartisan Senate investigation documented, fusion centers “yielded little, if any, benefit to [f]ederal counterterrorism intelligence efforts,”

instead producing reams of low-quality information and putting scrutiny, notably, on Muslim groups engaging in innocuous activities such as hosting events on subjects like marriage and “positive parenting.”³² While improvements have been made to some aspects of fusion center operations, serious concerns remain.³³ More recently, fusion centers have been caught monitoring racial justice activism and Juneteenth celebrations,³⁴ as well as promoting fake social media posts by far-right provocateurs — sourced from FBI and DHS reports — as intelligence regarding potential violence at protests against police brutality.³⁵ Other targets have included environmental activists, as well as demonstrators on issues from women’s rights to the response to Hurricane Maria in Puerto Rico.³⁶

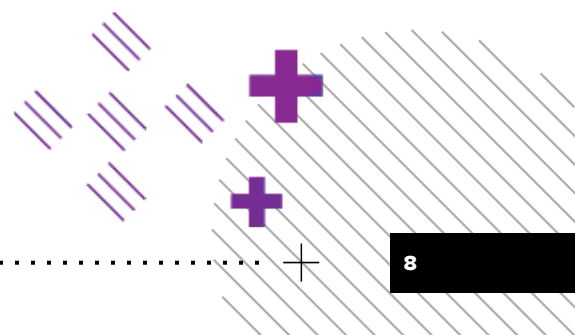
Recommendation

- Before building on this flawed system, the administration should undertake a full, public audit of fusion centers to evaluate their usefulness and their impact on civil rights and liberties, including privacy and First Amendment activity. Safeguards for intelligence networks should be strengthened, including by limiting fusion centers to only disseminating information that is tethered to reasonable suspicion of criminal activity.

Additionally, according to the DT Strategy, the administration intends to “introduce a new systematic approach for utilizing pertinent external, non-governmental analysis and information that will provide enhanced situational awareness of today’s domestic terrorism threat.”³⁷ Media reports indicate that DHS and the FBI will work more closely with companies that mine data online for intelligence, for example.³⁸

Recommendations

- The administration should disclose (a) the identity of all non-governmental entities that will provide information or analysis for awareness of domestic terrorism threats, (b) the nature of any information exchanged (particularly whether such exchanges involve personally identifiable information), and (c) any agreements, contracts, rules, regulations, and policies governing these relationships.
- The agencies charged with this effort should implement rules, regulations, and policies necessary to ensure that any information gathering and analysis conducted by these non-governmental entities as a part of this program is objective, reliable, and tailored to an appropriate law enforcement purpose; that material obtained by the government from these entities is not integrated into federal government databases unless it is reasonably indicative of criminal activity fitting the definition of domestic terrorism; and that the collection of information based on First Amendment-protected activity, or race, ethnicity, religion, gender, gender identity, national origin, sexual orientation, or immigration status, is prohibited. Agencies should require non-governmental entities to be transparent about their methodology for identifying and categorizing persons or groups as domestic terrorists, which should be made available to the public.



Identifying transnational aspects of domestic terrorism

As the administration assesses the “international dimension” of the domestic terrorism landscape,³⁹ the probability that this assessment will be based on ideological affinity rather than on operational and financial links is concerning. In the last two decades, DOJ has often treated actions of individuals in the United States said to be influenced by groups like al Qaeda and ISIS as international terrorism, even absent any indication of operational links or other concrete connections, on the theory that they promoted a common “foreign” ideology.⁴⁰ As the DT Strategy indicates, accounting for the international dimension of domestic terrorism would potentially further allow the use of foreign intelligence surveillance and other wide-ranging authorities,⁴¹ which come with few safeguards, posing a serious threat to civil rights and civil liberties.

Recommendations

- The administration should do away with policies and programs that distinguish between Americans based on the location of the persons or organizations that may have influenced their behavior. Instead, the government should categorize subjects of terrorism investigations and prosecutions based on where their actions occur, consistent with the statutory definitions of terrorism.
- The government should provide clarification regarding criteria it uses to link domestic actors and those overseas, any role that the National Counterterrorism Center (NCTC) is expected to play, and how the administration will guard against overbroad use of foreign intelligence authorities against domestic actors.

Ending failed approaches to prevention and disruption

Though the DT Strategy claims to have learned from the failures of DHS’s Countering Violent Extremism (CVE) programs and avows a commitment to an evidence-based approach,⁴² it seems to have taken only one main lesson: that the programs should not be solely targeted at Muslims. The rebranded Center for Prevention Programs and Partnerships (CP3) is built on the same flawed foundation as CVE and raises many of the same concerns.⁴³

According to the DT Strategy, DHS is taking a “public health” approach to preventing violence.⁴⁴ The claim that this a public health approach is undercut by the fact that elements of the U.S. intelligence community, such as NCTC and DHS’s Office of Intelligence and Analysis (I&A), are the entities developing “markers” of violent extremism. Moreover, public health programs are not, and should not be, led or primarily supported by police law enforcement agencies. The initiatives funded and promoted by DHS weave law enforcement and the intelligence apparatus into efforts by civil society representatives to connect people with mental health and social services because they may display some combination of vague and commonly occurring indicators far removed from deadly violence — turning unexceptional problems such as schoolyard fights into potential law enforcement matters. Inserting law enforcement into public health undermines these services by discouraging people from getting the help they need and allows well-documented racial and religious biases to influence who is considered a potential mass shooter or terrorist.

Recommendation

- The administration should forgo this strategy and manage social services through the agencies best equipped to provide them, walled off from police participation and security agencies like DHS and DOJ, absent an objectively reasonable indication of an imminent threat of violence.

The DT Strategy's plan to ramp up the use of "existing watchlisting mechanisms and systems" is also troubling.⁴⁵ The federal government's current watchlisting system, which is almost wholly a product of the post-9/11 era, has metastasized to include well over 1 million people.⁴⁶ It disproportionately harms Muslim, Arab, and immigrant communities and has proven deeply stigmatizing to those it ensnares.⁴⁷ The strategy refers to "robust mechanisms that are available" for people to contest their placement on watchlists,⁴⁸ but the existing redress procedures for watchlisted people lack essential due process safeguards. The vast majority of watchlisted people are never notified of their inclusion on these lists. The redress process for the No Fly List, for example, does not provide people who are watchlisted with any justifying information, evidence, or a hearing through which they can clear their names. And because the process lacks these basic procedural protections, placement on a watchlist can be indefinite. Moreover, federal agencies like DHS operate other additional watchlists as part of programs such as Secure Flight, which have been thoroughly discredited by oversight bodies such as the DHS inspector general and which have no notice or redress provisions at all.⁴⁹

“ Inserting law enforcement into public health undermines these services by discouraging people from getting the help they need and allows well-documented racial and religious biases to influence who is considered a potential mass shooter or terrorist.”

Recommendation

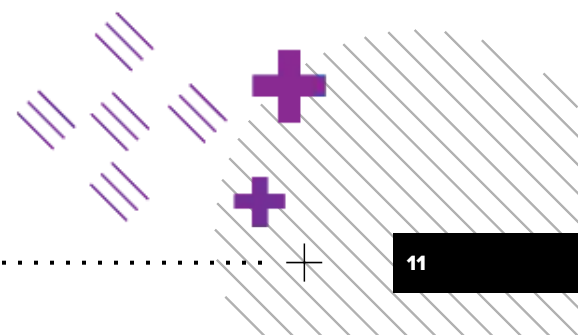
- The administration should not use watchlists to identify people for enhanced physical searches or screening, restrictions on travel or movement, or any other infringement on individual liberty or property unless essential due process safeguards are in place that include (a) clear and meaningful standards to substantiate initial inclusion on the watchlist based on articulated information specific to the individual, (b) meaningful notice of the basis for placement on the watchlist, (c) a hearing before a neutral decision-maker empowered to order removal from the list, and (d) time limits that ensure these safeguards are implemented, and watchlist status reviewed, promptly and periodically.

Monitoring social media

While the DT Strategy purports to focus on violence, it features a number of measures aimed at online activity unconnected to actual violence. For example, the administration intends to draw on “open-source information” — some of which will be derived from social media — to identify potential domestic terrorism threats⁵⁰ and to partner with social media companies to suppress “violent extremist” content.⁵¹ Such measures raise serious concerns because they can blur the line between scrutiny of constitutionally protected or simply innocuous activity and genuine threats of violence, as well as open the door for the targeting of communities that too often bear the brunt of abusive law enforcement and intelligence practices.

As national security officials have repeatedly acknowledged, communication on social media is difficult to interpret — often because it is highly context-specific and can be riddled with slang, jokes, memes, sarcasm, and references to popular culture.⁵² For example, in 2021, the acting chief of DHS I&A noted, “actual intent to carry out violence can be difficult to discern from the angry, hyperbolic — and constitutionally protected — speech and information commonly found on social media,”⁵³ a sentiment FBI Director Christopher Wray has also echoed.⁵⁴ Further, the anonymous or semi-anonymous nature of social media also makes it difficult to attribute a specific view to a given person, even if their posts or group memberships appear to reflect a particular perspective. Far-right activists, for instance, have been known to pose online as left-wing groups and encourage violence to mislead law enforcement.⁵⁵

The government’s own assessments have highlighted some of these problems and have failed to show that social media review is of value in identifying threats within the context of screening individual people coming into the United States. For example, in a 2016 brief prepared for the incoming Trump administration, DHS reported that in three of the four programs it used to vet refugees, information from social media “did not yield clear, articulable links to national security concerns,” even when an applicant was flagged as a potential threat through other channels. The department did not identify any derogatory information at all from the fourth program. Officials also pointed out the difficulty of understanding “with any level of certainty” the context and reliability of what they were reviewing. They concluded that “mass social media screening” was a poor use of resources, taking people away from “the more targeted enhanced vetting they are well trained and equipped to do.”⁵⁶ Indeed, the DHS inspector general in 2017 released a review of the department’s social media monitoring pilot programs and explicitly stated it could not justify scaling the practice because DHS did not define criteria for success against which to measure the programs.⁵⁷ The order repealing the Muslim ban required a review of the use of social media identifiers for screening and vetting purposes, including whether their use had “meaningfully improved screening and vetting.” We understand that this review was completed in 2021, but no information about its findings has been made public.⁵⁸



As the investigations guide of the FBI recognizes, “[o]nline information, even if publicly available, may still be protected by the First Amendment.”⁵⁹ When a government agency collects social media information, it has the ability to create detailed dossiers of Americans’ views, including political matters that lie at the heart of First Amendment protections, as well as their social networks and even where they are located and the places they go. Members of minority communities and protest movements are most likely to feel the negative impacts of social media monitoring.⁶⁰ Indeed, in 2020 DHS I&A did just that in Portland when it created “baseball card” dossiers on demonstrators who were arrested for petty criminal violations during racial justice protests to validate the claim they were conspiring together.⁶¹

Recommendations

- The administration should stop conducting broadscale social media surveillance, whether directly administered by the government or delegated to third parties.
- The administration should also release the review of the use of social media ordered by President Biden on January 20, 2021, which was meant to be completed by May 20, 2021.

Investigating and prosecuting domestic terrorism cases

According to the DT Strategy, federal law enforcement is enhancing the ability of investigators and prosecutors to tackle domestic terrorism, including providing “significant additional resources” for the DOJ and FBI “to ensure that they have the analysts, investigators, and prosecutors they need to thwart domestic terrorism.”⁶² DOJ has established a new unit dedicated to addressing domestic terrorism cases within the National Security Division (NSD).⁶³

Recommendations

- Making NSD the focal point for domestic terrorism or other white supremacist crimes currently prosecuted by the DOJ’s Civil Rights and Criminal Divisions may cement and expand the use of the very approaches and authorities about which concerns have been raised in the context of international terrorism, particularly in light of the lack of information about the criteria the administration uses to link domestic actors and those overseas, as noted above.
- The deputy attorney general’s commitment to closer coordination between the NSD and the DOJ’s Civil Rights Division to address white supremacist violence is welcome, but further clarification about how this coordination is undertaken and what safeguards, if any, have been developed to prevent abuse of broad counterterrorism authorities is needed.
- Additional resources to combat domestic terrorism must be accompanied by public information that permits oversight on how domestic terrorism investigations and



prosecutions are being targeted — at whom, and for what conduct, for example — as discussed above, and the changes to the 2008 AG Guidelines and DIOG and the 2014 DOJ Guidance on Profiling that are proposed below.

The enactment of laws creating a new crime of domestic terrorism or otherwise enhancing authorities and penalties is unnecessary and would risk targeting the very communities that have borne the brunt of unwarranted law enforcement suspicion and white supremacist attacks.

Recommendation

- The administration should not pursue any new legislation creating a new crime of domestic terrorism.

“There is much that the administration can do to protect the safety of communities that have been the target of white supremacist violence without relying on an expanded surveillance and security infrastructure.”

Conclusion

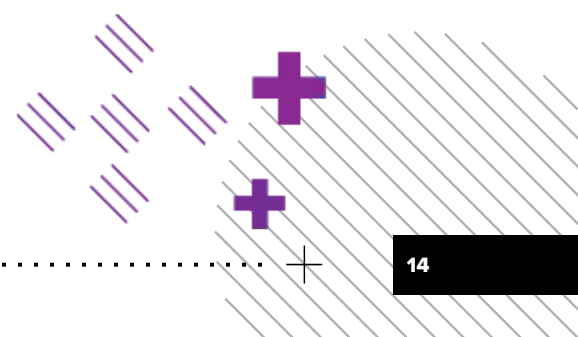
There is much that the administration can do to protect the safety of communities that have been the target of white supremacist violence without relying on an expanded surveillance and security infrastructure. Concrete and positive measures include instituting better safeguards for law enforcement and counterterrorism investigations to protect against bias, while communicating the administration’s commitment to enforcing them.

In addition to carrying out the above recommendations, the administration should lead an effort to provide more robust protections in the key documents identified herein with the following steps:

- Revise the 2008 AG Guidelines and DIOG to prohibit the FBI from using highly intrusive investigative techniques unless there is some basis in fact to suspect criminal wrongdoing⁶⁴ and affirmatively bar practices such as racial, religious, and ethnic mapping that treat entire communities as suspicious.
- Strengthen the 2014 DOJ Guidance on Profiling by (a) removing exemptions permitting profiling for border interdiction and protective, inspection, or screening activities; (b) closing loopholes applicable in the national security, immigration, and intelligence gathering contexts; (c) ensuring that state and local law enforcement agencies are covered to the maximum degree legally feasible; and (d) adding concrete provisions that permit enforcement and accountability for harms caused by bias-based investigations.

- Further, the administration should ensure that DHS is covered by similar guidance and work with Congress to secure passage of the End Racial and Religious Profiling Act to fully prohibit law enforcement — and, in particular, the state and local law enforcement not covered by the DOJ Guidance on Profiling — from targeting people on the basis of race, religion, ethnicity, national origin, sexual orientation, and gender identity.⁶⁵
- Address the reasons for public mistrust of federal law enforcement and intelligence, including by fostering institutional cultures that are grounded in a respect for our constitutional values and the diversity of people who live in and come to America. Leadership from the highest levels of government must clearly communicate this priority to their staff and tangibly implement it by ensuring that the civil rights and liberties implications of any law enforcement or surveillance measures are meaningfully considered when they are being designed, before they are implemented, and during their operation. To this end, the administration should take concrete steps to empower the oversight offices within its agencies with a substantive role in the policymaking process and enforce accountability for abusive practices if necessary.

Every person deserves to live in this country free from hate and bigotry. Yet, for far too long, policymakers have failed to address white supremacist violence in a manner commensurate with the threat it poses to Americans. By issuing a DT Strategy that focuses on this pressing subject and recognizes the specific impacts of such violence on a range of marginalized “communities deliberately and viciously targeted on the basis of hatred and bigotry,” the Biden administration is demonstrating that it takes this threat seriously.⁶⁶ Furthermore, the administration has demonstrated leadership in bringing to light the nation’s troubling history of violent white supremacy — from visiting the Greenwood neighborhood of Tulsa, Oklahoma, in June 2021 to naming violent white supremacy as the poison it is. But as discussed in this paper, concerns remain about the DT Strategy and approach. To effectively respond to white supremacist violence, this nation’s history must be confronted if we are to move forward to a safer, more equitable future for all.



Endnotes

¹ Federal Bureau of Investigation. “Domestic Terrorism Reference Guide: Racially or Ethnically Motivated Violent Extremism.” 2020. https://www.scribd.com/document/489466086/RM-VE-FBI-Terrorism-Guide#from_embed.

² Michael B. Mukasey. Dept. of Justice. “The Attorney General’s Guidelines for Domestic FBI Operations.” September 29, 2008. <https://www.justice.gov/archive/opa/docs/guidelines.pdf> (hereinafter AG Guidelines).

³ AG Guidelines, II.

⁴ Federal Bureau of Investigation. “Domestic Investigations and Operations Guide.” updated September 28, 2016. <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version> (hereinafter DIOG).

⁵ DIOG, § 4.2.2.

⁶ DIOG, § 4.3.3.

⁷ In the post 9/11 era, the FBI has routinely targeted Muslims absent suspicion of any criminal activity, infiltrating mosques and manufacturing terrorism prosecutions of young Muslim men using sting operations. For example, the FBI conducted surveillance operations in Southern California, targeting the large Muslim population living in the area. The FBI planted informants in mosques to spy on Muslim individuals and sent agents to homes occupied by Muslim families to question them about their religious practices. These operations targeted individuals based on their religion and were not based in evidence of criminal activity. See, e.g., Rafei, Leila. “How the FBI Spied on Orange County Muslims And Attempted to Get Away With It.” American Civil Liberties Union. November 8, 2021.

<https://www.aclu.org/news/national-security/how-the-fbi-spied-on-orange-county-muslims-and-attempted-to-get-away-with-it>; and Ali, Rozina. “The ‘Herald Square Bomber’ Who Wasn’t.” New York Times. April 15, 2021.

<https://www.nytimes.com/2021/04/15/magazine/fbi-international-terrorism-informants.html>. The FBI also has a notable history of targeting political activists, from COINTELPRO in the 1950s to more recently Black activists participating in Black Lives Matter protests. See “More About FBI Spying.” American Civil Liberties Union.

<https://www.aclu.org/other/more-about-fbi-spying>; Joseph, George and Hussain, Murtaza. “FBI Tracked An Activist Involved With Black Lives Matter As They Traveled Across The U.S., Documents Show.” The Intercept. March 19, 2018. <https://theintercept.com/2018/03/19/black-lives-matter-fbi-surveillance/>; German, Michael. “The FBI Targets a New Generation of Black Activists.” Brennan Center for Justice. June 26, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists>.

⁸ Dept. of Justice. “Guidance For Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity.” December 2014. https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf (hereinafter DOJ Guidance on Profiling).

⁹ DOJ Guidance on Profiling, 2. By statute, U.S. Customs and Border Protection may stop vehicles and search them within “a reasonable distance from any external boundary of the United States.” Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3). Regulations interpret a “reasonable distance” to mean “within 100 air miles from any external boundary of the United States.” 8 C.F.R. § 287.1(a)(2). See also Rickerd, Chris. “A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border?” *American Civil Liberties Union*. December 8, 2014. <https://www.aclu.org/blog/speakeasy/dangerous-precedent-why-allow-racial-profiling-or-near-border>.

¹⁰ See, e.g., Patel, Faiza. “Ending the ‘National Security’ Excuse for Racial and Religious Profiling.” Brennan Center for Justice. July 22, 2021. <https://www.brennancenter.org/our-work/analysis-opinion/ending-national-security-excuse-racial-and-religious-profiling>.

¹¹ Executive Order 14074 of May 25, 2022. “Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety.” 87 FR 32945. <https://www.federalregister.gov/documents/2022/05/31/2022-11810/advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and>.

¹² Fifty-two federal crimes of terrorism apply to domestic acts, and prosecutors regularly use dozens of other civil rights, organized crime, violent crime, and conspiracy statutes in domestic terrorism cases. German, Michael and Robinson, Sara. “Wrong Priorities on Fighting Terrorism.” Brennan Center for Justice. October 31, 2018. <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism> ; The Leadership Conference on Civil and Human Rights to Members of Congress. “Civil Rights Organizations Opposing a New Domestic Terrorism Charge.” January 19, 2021. <https://civilrights.org/resource/135-civil-rights-organizations-oppose-a-new-domestic-terrorism-charge/>.

¹³ Office of the Deputy Attorney General, Dept. of Justice. “Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism.” March 8, 2021, https://www.scribd.com/document/507550668/DV-E-Guidance#fullscreen&from_embed.

¹⁴ *DT Strategy*, 15-16.

¹⁵ Federal Bureau of Investigation & Dept. of Homeland Security. “Strategic Intelligence Assessment and Data on Domestic Terrorism” (hereinafter May 2021 NDAA Report). May 2021. <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view>. See also

Federal Bureau of Investigation and Department of Homeland Security. “Strategic Intelligence assessment and Data on Domestic Terrorism.” October 2022.

https://www.dhs.gov/sites/default/files/2022-10/22_1025_strategic-intelligence-assessment-data-domestic-terrorism.pdf. As with retrospective disclosures, subsequent annual disclosures of case data should also contain the information laid out in of Section 5602(b)(4) of the National Defense Authorization Act (NDAA) of 2020. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>. For example, they should include a description of each completed or attempted act of domestic terrorism, the types of crimes implicated (separated by nonviolent, property crimes, and violent crimes), and the number of people injured or killed as a result. Disclosures should also identify each kind of investigation (assessment, preliminary/full investigation, enterprise investigation) that was opened, pending, or closed and the associated domestic terrorism investigative classification and sub-classification. Other categories of information missing from the May 2021 NDAA report include: the number of staff working on domestic terrorism matters and the time and recordkeeping data bearing on the time spent on each threat category and sub-category, the criteria or methodology used to identify or assign terrorism classifications (in contrast to the classification framework itself), and mention of FBI assessments as an investigative category in the context of discussion surrounding the criteria for opening, managing, and closing domestic terrorism and international terrorism investigations. This is not an exhaustive list of our concerns with the May 2021 report, which include further omissions, factual errors, and claims lacking substantiation. We would welcome the opportunity to follow up with the administration on matters to be addressed in a re-issued report.

¹⁶ 18 U.S.C. § 2331(5). The *DT Strategy* does, however, delineate categories of “violent extremists” that it says comprise the *DT threat*. *DT Strategy*, 8-11.

¹⁷ Office of the Deputy Attorney General, Dept. of Justice. “Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism.” March 8, 2021. 1. https://www.scribd.com/document/507550668/DV-E-Guidance#fullscreen&from_embed.

¹⁸ The FBI and DHS suggest the terms are coextensive: “In our discussion of DT threats, we use the words “violent extremism” to define DT threats[.]” Federal Bureau of Investigation & Dep’t of Homeland Security, May 2021 NDAA Report, 4. According to the DNI: “Domestic violent extremists are US-based actors who conduct or threaten activities that are dangerous to human life in violation of the criminal laws of the United States or any state; appearing to be intended to intimidate or coerce a civilian population; and influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping, as per the definition of domestic terrorism in 18 U.S. Code 2331 (5).” Director of National Intelligence, “(U) Domestic Violent Extremism Poses Heightened Threat in 2021,” 1, March 2021, <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.

¹⁹ Clancy, Benjamin. Furl, Katherine. Marwick, Alice. “Far-Right Online Radicalization: A Review of the Literature.” *The Bulletin of Technology and Public Life, Center for Information, Technology, and Public Life, University of North Carolina at Chapel Hill*. 2022. Page 16. <https://assets.pubpub.org/9694oeej/31648241763479.pdf>.

²⁰ See, e.g., *DT Strategy*, 13 (“Our country and its laws leave wide open the space for political and ideological views and their articulation, including through peaceful protest. But they leave no room for unlawful violence. This Strategy is designed to preserve the former while preventing the latter.”).

²¹ The FBI, DHS and DNI currently divide DVEs into five broad categories: Racially or Ethnically Motivated Violent Extremists, Animal Rights / Environmental Violent Extremists, Abortion-Related Violent Extremists, Anti-Government / Anti-Authority Violent Extremists, and All Other Domestic Terrorism Threats. See Federal Bureau of Investigation & Dep’t of Homeland Security, *May 2021 NDAA Report*, 5; and Director of National Intelligence, *(U) Domestic Violent Extremism Poses Heightened Threat in 2021*, 4, <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>. The ideologically-oriented framework initially created by the FBI equated the demonstrated threat from white supremacists with an imaginary threat from so-called Black identity extremists, a distinction further obscured by the Trump administration, which collapsed such categories under the umbrella of “Racially or Ethnically Motivated Violent Extremism.” See, e.g., “Confronting Violent White Supremacy (Part II): Adequacy of the Fed. Response Before the Subcomm. on Civ. Rights and C.L. of the H. Comm. on Oversight and Reform.” *116th Cong.* (2019). <https://www.govinfo.gov/content/pkg/CHRG-116hrg36828/html/CHRG-116hrg36828.htm>; Congressional Black Caucus. “Letter to FBI about ‘Black Identity Extremists’ Assessment.” October 13, 2017. <https://cbc.house.gov/news/documentsingle.aspx?DocumentID=773>; and Natasha Lennard. “Trump Administration Is Making It Harder to Find Out Whether It’s Fighting White Supremacist Terror.” *Intercept*. June 8, 2019,. <https://theintercept.com/2019/06/08/white-supremacist-domestic-terrorism-fbi-justice/>.

²² *DT Strategy*, 6.



²³ Federal Bureau of Investigation. “Domestic Terrorism Reference Guide: Racially or Ethnically Motivated Violent Extremism.” 2020. https://www.scribd.com/document/489466086/RM-VE-FBI-Terrorism-Guide#from_embed.

²⁴ Spencer Ackerman and Emily Shugerman,. “The FBI Makes Bizarre Claim About Pro-Choice Terrorism.” Daily Beast. updated February 11, 2020. <https://www.thedailybeast.com/the-fbi-makes-a-bizarre-claim-about-pro-choice-terrorism>.

²⁵ See, e.g., Adam Goldman, Katie Benner, and Zolan Kanno-Youngs. “How Trump’s Focus on Antifa Distracted Attention From the Far-Right Threat.” New York Times. updated February 1, 2021. <https://www.nytimes.com/2021/01/30/us/politics/trump-right-wing-domestic-terrorism.html>.

²⁶ Fox News. “FBI: Eco-Terrorism Remains No. 1 Domestic Terror Threat.” January 14, 2015. <https://www.foxnews.com/story/fbi-eco-terrorism-remains-no-1-domestic-terror-threat>; and Alleen Brown. “The Green Scare: How a Movement that Never Killed Anyone Became the FBI’s No. 1 Domestic Terrorism Threat.” Intercept. March 23, 2019. <https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/>.

²⁷ *DT Strategy*, 16-17.

²⁸ *DT Strategy*, 16-17.

²⁹ *DT Strategy*, 16.

³⁰ For example, in the summer of 2020, DHS’s Office of Intelligence & Analysis (I&A) compiled and disseminated reports summarizing tweets written by two journalists — a reporter for *The New York Times* and the editor in chief of the blog *Lawfare* — regarding its surveillance of racial justice demonstrators, highlighting their publication of leaked, unclassified documents that appeared to sanction this practice. Shane Harris. “DHS Compiled ‘Intelligence Reports’ On Journalists Who Published Leaked Documents.” *Washington Post*. July 30, 2020.

https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html. The finding prompted concerns in Congress and triggered an investigation by DHS’s inspector general as well as a review by its general counsel’s office. The general counsel’s review detailed failures of leadership, management, and rule compliance and raised questions about the overall value of I&A. DHS Office of the General Counsel. “Report on DHS Administrative Review into I&A Open Source Collection and Dissemination Activities During Civil Unrest, Portland, Oregon, June Through July 2020.” *Dep’t of Homeland Security*. January 6, 2021, <http://cdn.cnn.com/cnn/2021/images/10/01/internal-review.report.20210930.pdf> (hereinafter *DHS Internal Review*).

³¹ For example, the DHS Internal Review found that finding “true threats of violence before they happen is a difficult task filled with ambiguity,” compounded by a pressure to issue threat reports, which are graded on quantity, not quality. *DHS Internal Review* at 22-24.

³² Permanent Subcomm. on Investigations, S. Comm. on Homeland Security and Governmental Affairs. “Federal Support for and Involvement in State and Local Fusion Centers.” October 3, 2012.27, 38. <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>.



³³ “Information Sharing: DHS Is Assessing Fusion Center Capabilities and Results, but Needs to More Accurately Account for Federal Funding Provided to Centers.” *United States Government Accountability Office Report to Congressional Requesters*. November 2014. <https://www.gao.gov/assets/gao-15-155.pdf>.

³⁴ See, e.g., Mara Hvistendahl. “Austin Fusion Center Spied on Nonpolitical Cultural Events.” *Intercept*. November 30, 2020. <https://theintercept.com/2020/11/30/austin-fusion-center-surveillance-black-lives-matter-cultural-events>; Micah Lee. “How Northern California’s Police Intelligence Center Tracked Protests.” *Intercept*. August 17, 2020. <https://theintercept.com/2020/08/17/blueleaks-california-ncric-black-lives-matter-protesters>; Amanda Peacher. “Why Is the State of Oregon Conducting Intelligence Work?.” *OPB (Oregon Public Broadcasting)*. April 26, 2016. <https://www.opb.org/news/article/oregon-department-of-justice-intelligence>; and Isiah Holmes. “How Should Fusion Centers Be Used During Protests?.” *Wisconsin Examiner*. December 22, 2021. <https://wisconsinexaminer.com/2021/12/22/how-should-fusion-centers-be-used-during-protests>.

³⁵ Nathan Bernard. “Maine Spy Agency Spread Far-Right Rumors of BLM Protest Violence.” *Mainer News*. July 7, 2020. <https://mainernews.com/maine-spy-agency-spread-far-right-rumors-of-blm-protest-violence/>.

³⁶ Policing Project at New York University School of Law. “Press Release: Oregon Sued Over Domestic Spying Operation.” December 14, 2021. https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61b89768c753e45b6d99f872/1639487337182/Oregon+TITAN+Lawsuit+Press+Release_12.12.21+FINAL.pdf; Aileen Brown. “Tilting at Windmills: the FBI Chased Imagined Eco-Activist Enemies, Documents Reveal.” *Intercept*. August 24, 2020.

<https://theintercept.com/2020/08/24/fbi-fusion-center-environmental-wind>; Ken Klippenstein. “How Homeland Security Blurs Jurisdictions.” *The Nation*. December 17, 2020. <https://www.thenation.com/article/society/fusion-centers-dhs>.

³⁷ *DT Strategy*, 16.

³⁸ See, e.g., Rachael Levy. “Homeland Security Considers Outside Firms to Analyze Social Media After Jan. 6 Failure.” *Wall Street Journal*. August 15, 2021. <https://www.wsj.com/articles/homeland-security-considers-outside-firms-to-analyze-social-media-after-jan-6-failure-11629025200>; and Ken Dilanian. “Why Did the FBI Miss The Threats About Jan. 6 On Social Media?” *NBC News*. March 8, 2021. <https://www.nbcnews.com/politics/justice-department/fbi-official-told-congress-bureau-can-t-monitor-americans-social-n1259769>.

³⁹ *DT Strategy*, 17.

⁴⁰ The Brennan Center for Justice recently submitted comments to the Privacy and Civil Liberties Oversight Board discussing many of the issues associated with the government’s approach to domestic and international terrorism. See, Brennan Center for Justice Comment, Docket No. PCLOB-2022-0001, June 30, 2022, https://downloads.regulations.gov/GSA-GSA-2022-0009-0014/attachment_1.pdf.

⁴¹ *DT Strategy*, 17-18.

⁴² *DT Strategy*, 20.

⁴³ Brennan Center reports examining CP3 and CVE have identified common—and foundational—criticisms of the programs’ violence prevention strategy. Compare Panduranga. “Community Investment, Not Criminalization.” with Faiza Patel and Meghan Koushik. “Countering Violent Extremism.” March 16, 2017. https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf.

⁴⁴ *DT Strategy*, 20.

⁴⁵ *DT Strategy*, 26.

⁴⁶ Watchlists are notoriously overinclusive, and have included everyone ranging from Sen. Ted Kennedy to young children. See, e.g., Swarns, Rachel L. “Senator? Terrorist? A Watch List Stops Kennedy at Airport.” *The New York Times*. August 20, 2004. <https://www.nytimes.com/2004/08/20/us/senator-terrorist-a-watch-list-stops-kennedy-at-airport.html>; Cohen, Andrew. “It’s About Time a Federal Judge Declared the ‘Terrorist Watchlist’ Unconstitutional.” Brennan Center for Justice. September 6, 2019. <https://www.brennancenter.org/our-work/analysis-opinion/its-about-time-federal-judge-declared-terrorist-watchlist>; and “U.S. Government Watchlisting: Unfair Process and Devastating Consequences.” American Civil Liberties Union. March 2014. https://www.aclu.org/sites/default/files/assets/watchlist_briefing_paper_v3.pdf.

⁴⁷ Muslims are substantially overrepresented on the main federal terrorism watchlist. As of 2013, for example, Dearborn, Michigan — with a population of 100,000 that is roughly 40 percent Arab-Muslim — had the second-most residents on the watchlist, behind only New York City (population 8.5 million) and in front of much larger cities such as Houston, San Diego, and Chicago. Most U.S. legal challenges against discriminatory watchlisting have been filed by Muslims, who have presented evidence suggesting that being Muslim is essentially a suspicious factor or the primary reason for watchlisting. *El Ali v. Sessions*, No. 8:18-cv-02415, (D. Md., Aug. 08, 2018), 46–50, <https://www.clearinghouse.net/chDocs/public/NS-M-D-0002-0001.pdf> (describing how “Watchlist Practices Target and Disproportionately Harm American Muslims”). See also Jeremy Scahill and Ryan Devereaux. “Watch Commander: Barack Obama’s Secret Terrorist-Tracking System, by The Numbers.” *Intercept*. August 5, 2014. <https://theintercept.com/2014/08/05/watch-commander/>.

⁴⁸ *DT Strategy*, 26.

⁴⁹ See, e.g., DHS Office of Inspector General. “TSA Needs to Improve Management of the Quiet Skies Program (Redacted).” DHS. November 25, 2020. <https://www.oig.dhs.gov/sites/default/files/assets/2020-11/OIG-21-11-Nov20-Redacted.pdf>.

⁵⁰ *DT Strategy*, 16-17. Administration officials have suggested in Congressional testimony that online surveillance is a key piece of proactively identifying threats of domestic terrorism. See, e.g., “Racially and Ethnically Motivated Violent Extremism: The Transnational Threat, Hearing Before the H. Comm. on Homeland Sec. Subcomm. on Intelligence and Counterterrorism.” 117th Cong. (2021) (testimony of John Cohen, Assistant Secretary of Homeland Security for Counterterrorism and Threat Prevention).

⁵¹ Dep’t of Homeland Security, Office of Intelligence and Analysis, Heightened Domestic Violent Extremist Threat to Persist in 2021, March 1, 2021, 5, <https://www.scribd.com/document/496919423/Domestic-Violent-Extremism-2021>.

⁵² We caution that turning to automated tools to conduct such surveillance will only exacerbate these issues. See generally Natasha Duarte, Emma Llansó, and Anna Loup. “Mixed Messages? The Limits of Automated Social Media Content Analysis.” Center for Democracy and Technology. November 2017. <https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>; and Carey Shekman, Dhanaraj Thakur, and Emma Llansó. “Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis.” Center for Democracy & Technology. May 2021. <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>.

⁵³ “Examining the January 6 Attack on the U.S. Capitol, Hearing Before the S. Comm. on Homeland Sec. and Gov’t Affairs and S. Comm. on Rules and Admin.” 117th Cong. (2021) (testimony of Melissa Smislova, Acting Under Secretary for the Office of Intelligence and Analysis).

⁵⁴ “The Capitol Insurrection: Unexplained Delays and Unanswered Questions (Part II), Hearing Before the H. Comm. On Oversight and Reform.” 117th Cong. (2021) (testimony of Christopher Wray, Director of the Federal Bureau of Investigation).

⁵⁵ Graham Kates, “Twitter Says Fake ‘Antifa’ Account Was Run By A White Supremacist,” *CBS News*, June 2, 2020, <https://www.cbsnews.com/news/twitter-fake-antifa-account-white-supremacists-removal/>.

⁵⁶ U.S. Citizenship and Immigration Services. “USCIS Presidential Transition Records.” December 12, 2016. 199, 201, 202. <https://www.dhs.gov/sites/default/files/publications/USCIS%20Presidential%20Transition%20Records.pdf>.

⁵⁷ Office of Inspector General, Dep’t of Homeland Security. “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success (Redacted).” February 27, 2017. <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

⁵⁸ Proclamation No. 10141, 86 Fed. Reg. 7005 (January 20, 2021).

⁵⁹ DIOG, Appendix L.

⁶⁰ For example, slang and lingo used by some individuals from minority communities are especially susceptible to misinterpretation, and automated tools fare worse on speakers of such “non-standard” English. John Eligon. “Speaking Black Dialect in Courtrooms Can Have Striking Consequences.” *New York Times*, January 25, 2019.

<https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html>; and Su Lin Blodgett and

Brendan O’Connor. “Racial Disparity in Natural Language Processing: A Case Study of Social Media African-American English.” *Proceedings of the Fairness, Accountability, and Transparency in Machine Learning Conference* (2017), <https://arxiv.org/pdf/1707.00061.pdf>. With regard to content moderation, efforts to partner with social media companies to suppress ostensibly terrorist or violent content have often been opaque, overbroad, disproportionately targeted Muslims and led to takedowns of political speech by activists around the globe. See Faiza Patel and Mary Pat Dwyer. “Facebook’s New Dangerous Individuals and Organizations Policy Brings More Questions Than Answers.” July 20, 2021. <https://www.justsecurity.org/77503/facebook-new-dangerous-individuals-and-organizations-policy-brings-more-questions-than-answers/>.

⁶¹ *DHS Internal Review*, 54; Kaitlin Flanigan, “DHS Officials Called Arrested Protester Reports ‘Baseball Cards’: Review,” *KOIN 6 News*, October 1, 2021, <https://www.koin.com/news/protests/us-department-homeland-security-intelligence-analysis-team-2020-protests-portland/>.

⁶² *DT Strategy*, 23. DOJ’s FY2022 budget request allocates \$45 million to the FBI and \$40 million to U.S. Attorneys for domestic terrorism personnel and resources. DOJ, “FY 2022 Budget Request: Addressing Domestic Terrorism,” Accessed January 31, 2022, 1, <https://www.justice.gov/jmd/page/file/1398831/download>.



⁶³ Lisa O. Monaco, Dept. of Justice. “Deputy Attorney General Lisa O. Monaco Delivers Keynote Address at ADL-McCain Institute Domestic Violent Extremism Policy Summit.” June 13, 2022. <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-address-adl-mccain-institute>.

⁶⁴ The 2008 AG Guidelines overturned precedent enshrined in its predecessor document that required a factual predicate to use investigatory tools. Emily Berman. “Domestic Intelligence: New Powers, New Risks.” *Brennan Center for Justice*. January 18, 2011. 22, <https://www.brennancenter.org/sites/default/files/legacy/AGGReportFINAled.pdf>.

⁶⁵ “George Floyd Justice in Policing Act of 2021.” H.R. 1280. 117th Cong. (2021); “End Racial and Religious Profiling Act of 2021.” S. 597. 117th Cong. (2021).

⁶⁶ *DT Strategy*, 5.





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