

Written Testimony of

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*“Why the FBI Failed to Anticipate Violence at the U.S. Capitol on January 6th, and How to Prevent it
From Happening Again”*

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Chairman Thompson and Members of the Select Committee, thank you for the opportunity to submit this testimony. The FBI's failure to anticipate and prepare its law enforcement partners for the January 6, 2021, attack on U.S. Capitol by white supremacist and far-right militants was a result of the bureau's decades-long de-prioritization of investigations into white supremacist and far-right violence within its counterterrorism program.

The January 6th attack on the Capitol was planned in public by individuals and groups that had engaged in violence at public events many times over the previous decade. Numerous people working inside the FBI and the broader post-9/11 law enforcement intelligence network saw the threat and provided warnings before the attack, which FBI managers simply ignored. Journalists, researchers, members of Congress, and ordinary citizens also warned the FBI in public and private about specific threats of violence, to no avail.

The FBI's public excuses—that there is not sufficient legal authority to properly investigate and prosecute domestic terrorism and that legal limits on its authorities prevented it from collecting publicly available information regarding the threat of far-right violence—are false. The first claim is proven false by my own experience as an FBI special agent for over 16 years, including two undercover operations targeting violent white supremacist and far-right militia groups in the 1990s, and by an accounting of the multitude of federal terrorism, hate crimes, organized crime, violent crime, and other statutes the Justice Department has used to prosecute domestic terrorism cases for decades, as documented in the Brennan Center report, "Wrong Priorities on Fighting Terrorism."¹ The second claim is belied by the plain language of the 2008 Attorney General Guidelines that currently govern the bureau's domestic operations, by the FBI's policy interpreting those guidelines as modified in 2011, and by now-released pre-January 6th intelligence reporting that demonstrated that FBI and other law enforcement analysts and agents did in fact monitor the public threat stream and raised the proper alarms about the threat to the U.S. Capitol in the days and weeks before the attack. The problem is not a lack of authority, but Justice Department and FBI policies and practices that mismanage counterterrorism resources and discount white supremacist and far-right militant violence.

The Biden administration can be commended for issuing the U.S. government's first national strategy for countering domestic terrorism.² It appropriately highlighted white supremacists and far-right militias as the "most persistent and lethal threats" and pledged to collect better data. But it was hampered by problematic lexicon recently adopted by the FBI that tends to obscure how it distributes its domestic terrorism resources. While the Biden national strategy and the

Justice Department guidance implementing it are positive steps, more must be done to compel the FBI to focus its domestic terrorism resources on evidence of deadly violence rather than protest groups it opposes.³ Put simply, the Biden strategy and the Justice Department guidance are insufficient to correct FBI behavior with regard to white-supremacist and far-right violence.

Preventing another intelligence failure will require:

- rectifying the persistent mismanagement and pervasive racial, religious, and ideological bias at the FBI that undermine objective analysis of threats to the American people;
- narrowing the FBI's investigative authorities to require agents and analysts to focus on evidence of violent criminal activity in prioritizing terrorism investigations to reduce the risk of bias in driving investigative decisions, protect innocent persons, and stem the collection of erroneous and irrelevant information that drowns out warnings of genuine threats;
- compelling the Justice Department to produce accurate, objective, and complete statistics regarding domestic terrorism, hate crimes, and any other types of white supremacist and far-right militant violence, however categorized;
- requiring the Justice Department to produce national strategies designed specifically to combat white supremacist and far-right militant violence; and
- requiring the Justice Department to produce a national strategy to address racism, white supremacy, and far-right militancy within federal, state, and local law enforcement.

FBI Mismanagement and Misinformation

Congress has highlighted FBI mismanagement as a serious concern for decades. At a June 2001, Senate Judiciary Committee FBI oversight hearing, Sen. Chuck Grassley complained that: "The history of congressional response to the FBI's problems has usually been that the FBI ends up with a bigger budget, more program jurisdiction, and the director walks out of this room with a nice pat on the back." A long-time critic of FBI mismanagement, Sen. Grassley followed his complaint with a prescription for reform: "I believe the FBI will become a more efficient and accountable organization through the narrowing of its investigative focus."⁴ Of course, an even greater intelligence failure was unfolding as he spoke, and after the 9/11 attacks, Congress again expanded the FBI's resources and authorities, just as Grassley had predicted it would.

The Justice Department had twice contracted with outside management consulting companies to conduct comprehensive studies of FBI management during my 16-year career—once in 1992-1994 and again in 2001. The reports from these studies were never publicly released. The 1994 report circulated within the bureau, but FBI management dismissed it after director William Sessions, who had ordered it, was fired. The 2001 study was conducted by Arthur Andersen LLP, whose accounting arm was later embroiled in the Enron scandal, providing sufficient excuse to dismiss it. Its criticism of deficiencies in FBI training was referenced, however, in a critical 2005 Justice Department Inspector General’s special report documenting high rates of non-compliance with the bureau’s confidential informant guidelines and the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, which had been expanded by Attorney General John Ashcroft in 2002.⁵ These reports, while dated, may still prove useful in understanding FBI management culture and its resistance to reform. Non-compliance with internal policies, regulations, and laws remains a problem today, as indicated by more recent Inspector General audits of the FBI’s most sensitive programs, such as the confidential informant validation processes, procedures involving Foreign Intelligence Surveillance Act applications, and its efforts to identify “home grown extremists” through counterterrorism assessments.⁶

The 2002 Ashcroft Guidelines increased the FBI’s power to investigate individuals and groups even where there was no reasonable indication of wrongdoing. It permitted FBI agents to attend First Amendment-protected gatherings, such as religious events, political meetings, and protests, without any suspicion of criminal activity, and to “conduct online search activity and access online sites and forums on the same terms and conditions as members of the public generally.”⁷ Abuse soon followed. In addition to the widespread administrative non-compliance with these guidelines, the Inspector General found the FBI inappropriately targeted domestic advocacy groups like PETA, the Thomas Merton Center, Greenpeace, and Catholic Worker with terrorism investigations.⁸ During this time period, from about 2005 through 2008, FBI officials began publicly identifying “eco-terrorism” as the number one domestic terrorism threat, despite the fact that not a single U.S. homicide was attributable to environmental activism.⁹ By comparison, from 2005-2008 white supremacists and far-right militants killed 104 people, according to a 2012 report by the Combating Terrorism Center at West Point.¹⁰

Despite these abuses, in 2008 President George W. Bush’s third Attorney General, Michael Mukasey, expanded the FBI’s authorities even more significantly. Mukasey’s Attorney General’s

Guidelines for Domestic FBI Operations authorized a new category of investigations called “assessments.” Agents can open assessments so long as they state they have an authorized purpose—i.e., to prevent federal crimes or threats to national security, or to collect foreign intelligence. No “factual predicate,” meaning no objective facts or allegation indicating the target of the investigation may be involved in criminal activity or threaten national security, is required for agents to open a 30-day assessment, which a supervisor can renew for an unlimited number of 30-day extensions.

Agents are allowed to employ a broad array of intrusive investigative methods during assessments including recruiting and tasking informants, conducting covert and overt interviews, and obtaining grand jury subpoenas for telephone or electronic mail subscriber information.¹¹ In 2011, data obtained by the New York Times via a FOIA request showed that over the prior two years, the FBI “opened 82,325 assessments of people and groups in search for signs of wrongdoing.”¹² Of these, barely four percent were turned into preliminary investigations, which require only “information or an allegation” that a crime might occur.¹³ Instead of leading the FBI to evidence of dangerous crimes, this overbroad investigative net has resulted in the FBI’s collection of volumes of personal information about innocent persons and groups.

The FBI’s Domestic Investigations and Operations Guide (hereafter the DIOG) was published in 2008 as internal policy and procedures for implementing the Mukasey Guidelines.¹⁴ The Mukasey Guidelines were so expansive and the DIOG so complex that Congress demanded the FBI establish a training program to ensure agents and supervisors understood the new rules. The Inspector General later reported widespread cheating on the exams associated with this training, including by an Assistant Director, multiple supervisors, and hundreds of agents.¹⁵

The guidelines and DIOG do identify several “sensitive investigative matters” (SIMs) that require a higher level of approvals at the FBI, as a measure of accountability. SIMs include corruption or national security investigations targeting public officials; investigations of religious or political organizations, or prominent leaders of them; investigations with an academic nexus; and investigations of members of the news media. The FBI updated the DIOG in 2011 to authorize additional investigative activities that go beyond the scope of the Mukasey Guidelines. These new authorities included searching publicly available records and government databases without opening an assessment (called a “Pre-assessment”), expanding the tactics available during assessments, and narrowing the circumstances in which SIMs require higher-level

approvals.¹⁶ A 2019 internal FBI audit of 353 cases involving SIMs found 747 compliance errors.¹⁷ Part of the reason there are so many compliance errors is that many FBI managers don't bother to learn the regulations governing their work. Others use such misinformation about FBI authorities to inhibit agents from working the types of cases they disfavor, to deflect criticism of their performance, and to support requests for new authorities.

When senators investigating the January 6 attack asked FBI Assistant Director for Counterterrorism Jill Sanborn whether FBI agents could have monitored threats made in public social media forums prior to the attack, Sanborn replied, "It's not within our authorities."¹⁸ Sanborn claimed that the FBI cannot collect information on First Amendment-protected activities without a predicated investigation or a tip from a community member or law enforcement officer. These statements are inaccurate, as the FBI's public rules make clear, yet they featured prominently in the Senate's report on the security, planning, and response failures regarding the attack on the Capitol.¹⁹

When FBI Director Christopher Wray later testified before Congress in June 2021, he also claimed the FBI rules restricted agents' authority to investigate threats to the Capitol posted online absent a criminal predicate and authorized purpose, and proposed that this false deficit should be addressed by once again expanding the FBI's authorities: "Now, if the policy should be changed to reflect that [the FBI should monitor social media "just in case"], that might be one of the important lessons learned coming out of this whole experience."²⁰ This misinformation from FBI leaders scope of the bureau's authority to investigate white supremacist and far-right militant violence taints ongoing inquiries into the FBI's failure to prepare for the January 6th attack, particularly as the Justice Department contemplates seeking new statutory powers and additional resources to fill these imagined gaps.²¹

In fact, under current rules bureau agents and analysts are allowed to monitor publicly available information even before opening assessments or investigations, *and did so before the January 6th attack*. On November 9, 2020, an FBI analyst in Alabama sent an email to her colleagues warning that "militia groups are espousing increasingly violent rhetoric, expressing a new level of escalation," including making death threats to President-elect Biden, other Democrats, and journalists.²² A January 5, 2021, memo from a Norfolk FBI analyst warned that anonymous Trump supporters were threatening "war" at the Capitol on January 6th.²³ Sanborn and Wray both acknowledged they didn't read this memo until after the January 6th attack.

This misinformation conveyed by FBI leaders also reflects the confusion about its domestic terrorism authorities among bureau managers overseeing these cases. It isn't a new problem. I once sought approval to open a domestic terrorism case in the 1990s, when the then-existing Attorney General Guidelines required a reasonable indication of criminal activity to open an investigation. The headquarters supervisor told me I needed to have evidence proving the subject committed a federal crime before opening an investigation. I responded that if I had such proof, I would be writing an indictment, not opening an investigation. After the 1995 Oklahoma City bombing, then-Attorney General Janet Reno explored lowering the standard to open an investigation. But her inquiry determined that the problem wasn't the standard itself, but the apparent confusion among FBI managers as to what "reasonable indication" meant. Instead of changing the guidelines, the FBI circulated a memo to managers explaining that the "reasonable indication" standard was "substantially lower than probable cause," or the standard necessary to obtain a search warrant.²⁴

Even as the Justice Department lowered the standards for opening intrusive investigations after 9/11, FBI managers continued to impose artificially high standards to opening domestic terrorism investigations into white supremacist and far-right militant violence.²⁵ Such standards were not imposed when opening investigations into less violent groups like environmentalists, anarchists, or anti-racist protesters.²⁶ Shortly after the January 6th attack, the FBI arrested and the Justice Department prosecuted Daniel Baker, an anti-fascist activist in Florida, for posting social media calls for armed resistance to a potential far-right attack against the state legislature, even though he had no group of armed followers and no capacity to accomplish such a plan on his own. Baker was sentenced to 44 months in prison, longer than many of the sentences given to U.S. Capitol rioters, despite the fact that no far-right attack on the Florida legislature occurred, and therefore it was not possible to violently resist it.²⁷

Racial and Ideological Bias at FBI Undermines Objective Analysis of Threats

Director Wray's and Assistant Director Sanborn's statements are even more misleading in their implication that there was no factual basis to predicate an investigation of participants in the attack on the U.S. Capitol prior to January 6, 2021. In fact, the mob was led by organized conspiracies among Proud Boys, Oath Keepers, and Three Percent militia members, according to the government's allegations. Members of these groups had committed public violence all across the country multiple times over the previous decade, often unimpeded by law enforcement, but not entirely.

Several prominent members of the Proud Boys had been arrested by local police prior to the January 6th attack on the U.S. Capitol for engaging in violence at public events in Berkeley, California in 2017, New York City in 2018, Portland, Oregon in 2018, 2019, and 2020, in Seattle, Washington in 2020, and in Washington, D.C. in both November and December of 2020.²⁸ Public violence that didn't receive police attention was often broadcast in news reporting, providing the FBI ample evidence on which to base investigations. Rather than hide from it, the Proud Boys often boasted about the violence they committed on their own public-facing social media platforms.

The Oath Keepers, founded in 2009, engaged in armed standoffs against federal agents in Nevada in 2014, and in Oregon in 2016, and participated in the violent Unite the Right rally in Charlottesville, VA in 2017. Numerous Oath Keepers have been arrested over the years on firearms and explosives violations, and armed members have been a menacing presence at several Black Lives Matter protests.²⁹ The Three Percent Militia is more loosely organized, but groups of individuals affiliated with this militia have been arrested for various acts of violence, firearms, bombings, and conspiracies, including an FBI domestic terrorism operation foiling a terrorism plot in 2020.³⁰ It is hard to understand how federal law enforcement, especially the FBI Joint Terrorism Task Forces that are designed for this purpose, failed to account for the serious violence these three groups had committed as they saw them mobilizing to participate in the January 6 Stop the Steal rally.

The Washington Post reported that “dozens” of people on the terrorist watch list, mostly violent white supremacists, were in Washington, D.C. on January 6th to attend the Trump rallies.³¹ The terrorism watch list is notoriously bloated and error-prone, containing over 1.9 million records entered by security officials without due process or transparency.³² But given the watch list nomination criteria, it is at least possible that some of these “dozens” of individuals were subjects of FBI terrorism investigations at the time of the assault on the Capitol.³³ There was certainly no shortage of evidence of violent criminal activity that the FBI could have used as a predicate for an investigation into why so many violent white supremacists were converging on the Capitol on January 6th.

Moreover, the FBI received several direct warnings from multiple sources that violence was planned for January 6th. The owner of a website devoted to the architectural infrastructure under Washington, D.C. noticed a significant uptick in downloads of maps detailing tunnels under the

Capitol, which he traced to suspected militia groups. He temporarily shut down his website and reported the information to the FBI. Lawyers for Parler, a social media platform frequently used by far-right militants, claimed to have reported more than fifty specific threats of violence to the FBI in advance of the 1/6 attacks.³⁴ On December 20, the FBI received a tip from a caller who reported that “Trump supporters were discussing online how to sneak guns into Washington to ‘overrun’ police and arrest members of Congress in January,” according to the Washington Post.³⁵ Jackson Reffitt called the FBI tip line on Christmas Eve 2020, to report that his father, a member of the Three Percent Militia, planned commit violence at the Capitol on January 6th. An FBI agent testified Reffitt’s tip was treated as a “pre-assessment,” indicating it was considered not an immediate threat.³⁶ Two days before the attack, Senator Mark Warner, Chairman of the Senate Intelligence Committee, reached out directly to FBI Deputy Director David Bowdich to make sure the bureau was seeing the threats.³⁷ Bowdich reportedly told Sen. Warner the FBI was prepared. It wasn’t, but it should have been.

The reasons for the FBI’s de-prioritization of investigations into white supremacist and far-right militant violence within its domestic terrorism program are complex and multi-faceted. Institutional, structural, political, and individual biases all play a role in directing an organization like the FBI, and the people in it, to make decisions regarding which threats to prioritize. As the nation’s premiere law enforcement and domestic intelligence agency, the FBI has always institutionally seen social movements seeking changes to the political status quo as dangerous to the national security, even when they use non-violent means. Violence that tends to reinforce the political and social status quo, however, is often not seen as an issue of national importance and therefore not a primary concern for the FBI. The FBI also remains a predominantly white, male organization, which it has been for more than a century. More than 83 percent of special agents are white, and 80 percent are male, according to the most recently published statistics.³⁸ While consecutive FBI directors since J. Edgar Hoover’s death have acknowledged the importance of expanding diversity within the ranks, their efforts have been insufficient to drive significant change. The lack of diversity reinforces conformity in thought and action, which then allows prejudice to fester, particularly as the nation becomes increasingly polarized politically.

The al Qaeda terrorist attack on 9/11 allowed that underlying bigotry to find expression in FBI training materials and in policy. Counterterrorism training materials with crass anti-Muslim and anti-Arab themes became prevalent in the FBI, as well as the Justice Department, Defense Department, and Department of Homeland Security.³⁹ It soon spread to include anti-Asian

materials in counter-intelligence training.⁴⁰ By 2009, the FBI initiated a racial and ethnic mapping program, which used census data to map communities based on race and ethnicity to inform FBI intelligence based on crass stereotypes about the types of crimes committed by people in different racial and ethnic groups.⁴¹ As the national white supremacist far-right movement was mobilizing for a violent coming-out party at the Unite the Right rally in 2017, FBI analysts were manufacturing an imaginary domestic terrorism movement they called “Black Identity Extremists,” based on six violent attacks on police over three years by individuals who did not know one another, were not part of an organization, and did not share an ideology. Their only commonality was that they were Black. Worse, the analysis suggested that Black activists protesting police violence and racism were part of this domestic terrorism movement that posed a threat to law enforcement.

It is important to remember that the FBI does not live in a vacuum. It is one bureau, albeit a powerful one, within the U.S. Department of Justice, so its leaders must be attentive to the policies and priorities of the Attorney General. Likewise, the FBI director serves at the pleasure of the President, so the FBI is also influenced by concerns publicly expressed by White House officials. During the Trump administration, the President and Attorney General were very clear in their antipathy for anti-fascists, and their intent to brand them as the top domestic terrorism threat, while often publicly playing down the threat posed by white supremacists and far-right militias. Local politicians often courted far-right militant groups, appearing with them at rallies. Indeed, President Trump publicly instructed the Proud Boys to “stand back and stand by,” before the election, so it becomes easier to understand how a politicized FBI might shy away from pursuing aggressive investigations targeting them. Reporting indicates that FBI agents were in contact with several members of the Proud Boys, and perhaps used them as informants to gather information about anti-fascists, rather than their violent colleagues.⁴²

Current and former FBI officials told the New York Times that the Trump administration’s emphasis on investigating anti-fascists redirected agents and prosecutors from investigations of white supremacist violence to search for an “antifa” conspiracy that didn’t exist.⁴³ FBI intelligence reports also amplified and distributed right-wing disinformation and debunked satirical social media postings about spurious “antifa” threats, distracting state and local law enforcement recipients and at times provoking over-reactions to protest activities.⁴⁴

Explicit racism also remains a problem in the FBI and the broader intelligence community. An administrator of classified intelligence community chat rooms recently reported that they

were a “dumpster fire” of racist hate speech, including support for the January 6th insurrection.⁴⁵ As a member of the intelligence community, FBI officials have access to these internal platforms. Though an investigation would be needed to determine if FBI officials were aware of or participated in this misconduct, a group of Black former FBI executives recently went public with complaints of “institutionalized racism” that undermined the recruitment and retention of Black agents. One Black executive who ran the FBI’s security division analyzed bureau polygraph exams and found that FBI polygraphers failed Black agents disproportionately, but her proposed solutions were resisted.⁴⁶

Bias also causes distraction from real threats within law enforcement. For decades, the FBI has routinely warned its agents that the white supremacist and far-right militant groups it investigates often have active links to law enforcement, as documented in a 2006 intelligence report and a 2015 Counterterrorism Policy Guide.⁴⁷ In Oct. 2020, Rep. Jamie Raskin held a hearing on the topic and asked an FBI representative to update the bureau’s intelligence report and testify at the hearing. The FBI representative instead disavowed the earlier intelligence report and declined the invitation to testify, indicating the bureau did not consider it a current problem.⁴⁸ After it was discovered that active and former police officers participated in the attack on the Capitol included active police officers, an updated FBI intelligence report leaked to the press, indicating that white supremacist infiltration did indeed remain a problem.⁴⁹ This episode is a microcosm of the larger problem of bias in the FBI. When agents and analysts produce accurate intelligence that does not fit the policy preference of FBI leaders, they simply ignore or disavow it.

Law enforcement participation in far-right militia activity is also prevalent. Oath Keeper membership applications leaked in 2021 revealed more than 200 people identified themselves as current and former law enforcement officers.⁵⁰ It isn’t just state and local police attracted to these groups. One of the alleged Oath Keepers arrested for participating in the January 6th attack claimed in court filings to have been employed by the FBI, and a reporter given access to Oath Keeper membership records identified one person claiming to be a Secret Service and two claiming to be FBI employees.⁵¹ Yet despite the scope of this problem, the Justice Department (DOJ) has no national strategy designed to protect the communities policed by these dangerously compromised law enforcers. As our nation grapples with how to tackle white supremacist and far-right violence, it is past time for the Justice Department to confront and resolve the persistent problem of explicit racism in law enforcement.

Lack of FBI Response to Far-Right Violence in Oregon

White supremacist and far-right militant violence in Oregon in the four years before January 6th served as a proving ground for the attack on the U.S. Capitol, enabled by a remarkable lack of federal law enforcement. Proud Boys and other violent white supremacist and far-right militant groups regularly came into Oregon to commit violence, many of them from out of state, and often with the acquiescence and at times the assistance of state and local law enforcement.⁵² During an official city inquiry, one Portland, Oregon police lieutenant explained law enforcement's apparent affinity for the far-right militants by stating they were "much more mainstream than the left-wing protesters."⁵³ The lenient law enforcement treatment of far-right militants stood in sharp contrast to the hyper-aggressive and indiscriminately violent response to Black Lives Matter and anti-racism protesters over the same time period.⁵⁴ Portland Police facilitated far-right militants coming across state lines to engage in violent rallies through direct communications, including providing information on the movements of their political opponents and instructions on how a Proud Boy fighter with an outstanding warrant could avoid arrest.⁵⁵ U.S. Justice Department lawyers accused the Portland Police Bureau of violating a 2014 consent decree by repeatedly violating its use of force guidelines during the Black Lives Matter protests, but the U.S. Attorney in Oregon did not charge a single police officer with a civil rights violation.⁵⁶

Federal officers also reacted violently to anti-racism protests while at times soliciting militia support in arresting them.⁵⁷ The Oregon U.S. Attorney's Office charged almost 100 people during anti-racism and police violence protests, mostly with misdemeanors, about half of which were later dismissed. But there was not a single federal prosecution of a Proud Boy or other far-right militant who travelled interstate to commit violence in Oregon. The lack of enforcement encouraged more violence, including an attack on the Oregon State Legislature two weeks before the attack on the U.S. Capitol, in which far-right militants fought with police, broke into the legislature, and beat journalists.⁵⁸ It should be no surprise that several Proud Boys and other far-right militants who engaged in violence at the U.S. Capitol had previously been involved in violence in Oregon. The lack of federal enforcement allowed them to recruit more violent members, build networks, and establish logistics to facilitate the necessary travel to conduct a more complex attack on the Capitol.⁵⁹

Preventing Another Failure

Fortunately, Congress has already done the work necessary to provide federal law enforcement with all the statutory tools it needs to properly address white supremacist and far-right militant violence. It passed 52 federal crimes of terrorism that apply to domestic acts, and dozens of other civil rights, organized crime, violent crime, and conspiracy statutes that prosecutors regularly use to prosecute twice as many domestic terrorism cases as international terrorism cases, using only one-fifth of the investigative resources.⁶⁰ The problem is that the Justice Department and FBI choose not to prioritize the investigation and prosecution of white supremacist and far-right violence as a matter of policy and practice. They do not even collect accurate data regarding such attacks.

Instead, the Justice Department and FBI use their domestic terrorism authorities most aggressively against groups that are far less violent and rarely, if ever, commit fatal attacks, such as environmentalists, animal rights activists, peace activists, anti-racism activists, anti-fascists, and most recently revealed, Concerned Women of America.⁶¹ The Justice Department's failed attempt to prosecute more than 200 anti-Trump activists who happened to be near where some windows were broken during the 2017 Disrupt J20 post-inauguration protests stands in sharp contrast to the relative handful of federal arrests arising from more than four years of far-right rioting across the country where counter-protesters, journalists, and police officers have been beaten, maced, stabbed, run over, shot, and killed.⁶²

Expanding FBI authorities has not helped the bureau to more effectively identify or prevent credible threats.⁶³ On the contrary, it has resulted in abusive investigations targeting non-violent domestic advocacy groups and tens of thousands of assessments that led nowhere.⁶⁴ Moreover, some of the most serious acts of mass violence since 9/11 were perpetrated by individuals previously reported as potential threats to the FBI.⁶⁵ The mass of data collected with unbridled intelligence collection authorities untethered to evidence of criminal activity overwhelms FBI agents and analysts and obscures evidence of real threats. The unfettered access to this data and the low evidentiary threshold for conducting intrusive investigations opens the door to abusive investigations driven by bias or error rather than evidence. Eliminating the assessment and pre-assessment authorities in the current Attorney General's Guidelines would focus resources, reduce waste, and limit abuse.

Congress Needs Accurate Data to Enact Sound Policies

Organized white supremacist violence has posed an enduring threat in the United States since its founding, but the Justice Department does not collect or publish data that measures the true nature or scope of this problem. A May 2021 report required by the National Defense Authorization Act of 2020 confirmed that the FBI does not track the annual incidents of lethal and non-lethal violence committed by groups it categorizes as “domestic violent extremists.”⁶⁶ Though white supremacist and far-right militant attacks represent just a tiny proportion of the violence that takes place in the U.S. each year, these crimes demand extra attention because they pose a persistent threat to vulnerable communities, particularly communities of color, immigrants, LGBTQ people, women, the disabled, and religious minorities. White supremacists and far-right militants also kill law enforcement officers more often than other groups the FBI categorizes as domestic terrorists.⁶⁷ Moreover, the organized nature of the groups that often commit this violence enables them to quickly replace any member who is arrested and incarcerated and continue committing further acts of violence after any previous crime is successfully prosecuted.

Congress has repeatedly made clear its intent for the Justice Department to investigate and prosecute these crimes. In 1871, Congress passed what was arguably the first domestic terrorism law, the Ku Klux Klan Act.⁶⁸ It later passed five federal hate crimes statutes to address the bias crimes that many white supremacists commit, and 52 terrorism laws that apply to domestic acts. It passed organized crime, violent crime, and conspiracy statutes that the Justice Department can and does use effectively at times, to prosecute violent white supremacist gangs. These statutes all impose substantial penalties for violations. Congress also funded 200 FBI Joint Terrorism Task Forces all across the country, which are designed to leverage state and local laws in the pursuit of terrorists, when federal prosecution, for whatever reason, is unwarranted. All the necessary tools already exist.

Indeed, the Justice Department has been using these tools to charge more than 725 people with crimes related to the January 6th attack, including federal crimes of terrorism.⁶⁹ Yet, with an estimated 2,500 individuals having participated in the attack, there is still much to be done. Judges presiding over the Capitol breach cases have criticized the Justice Department for their charging decisions, particularly for allowing misdemeanor pleas that limit the sentences they could impose.⁷⁰ And militant groups like the Proud Boys have reorganized since January 6th and continue to menace local communities across the U.S. with little intervention from law

enforcement.⁷¹ Most shockingly, militants involved in the January 6th attack continue to engage in public violence, yet federal prosecutors have not brought new charges.⁷²

The Biden national strategy recognizes the need for better data about white supremacist and far-right militant violence, yet the FBI's apparent inattention to this continuing violence remains a concern. What the Justice Department has refused to do thus far, is to properly prioritize these domestic terrorism resources by producing a comprehensive national strategy specifically designed to combat white supremacist and far-right militant violence, or even to collect accurate data about these attacks across all its programs.

Indeed, the multiple pathways Congress has provided to prosecute white supremacist and far-right militant violence inadvertently gave the Justice Department another way to obscure the true nature of the threat. If a white supremacist murders someone, the FBI could consider the crime an act of domestic terrorism, a hate crime, or simply a violent crime. If the FBI categorized it as domestic terrorism, the case would be treated as a top priority (though second in the counterterrorism program to international terrorism) and would be well-resourced and robustly investigated.

If the victim belonged to a protected class, the FBI could categorize the murder as a hate crime, a type of civil rights violation which is the bureau's fifth priority. FBI hate crime investigations typically have a narrow focus, seeking to identify evidence to prove the biased motive for the attack rather than to determine whether the perpetrator was part of a continuing criminal enterprise. But the FBI probably wouldn't conduct an investigation because the Justice Department has a longstanding policy of deferring investigations of hate crimes to state and local law enforcement, even though some states don't have hate crime laws and many more rarely use them. Only a small percentage (14 percent in 2019) of police agencies acknowledge that hate crimes occur in their jurisdiction in federal reporting.⁷³ Crime victim surveys estimate there are approximately 230,000 violent hate crimes annually, but despite five federal hate crime statutes, the Justice Department prosecutes only about 25 defendants each year.⁷⁴

The Biden domestic terrorism strategy recognizes the need for collaboration between federal domestic terrorism prosecutors and hate crimes prosecutors, and the FBI created fusion cells to link domestic terrorism and hate crimes investigations long before the January 6th attack.⁷⁵ But the Justice Department has not changed its policy of deferring hate crimes investigations to local authorities. It is unclear in the Justice Department guidance implementing the domestic

terrorism strategy whether hate crimes prosecuted locally will be accounted for, and of course, it is impossible to count cases not investigated or charged as hate crimes because of a lack of interest, rather than lack of evidence.⁷⁶

A significant percentage of Justice Department prosecutions of violent white supremacists are not products of Joint Terrorism Task Force investigations or civil rights cases, but federal violent crimes task force investigations. These investigations are sometimes led by the Bureau of Alcohol, Tobacco, and Firearms or the Drug Enforcement Agency rather than the FBI. These cases receive surprisingly little attention, even though serious violent crimes are often alleged, including murders, and dozens of white supremacist gang members are arrested at a time in multi-agency raids. Twenty-four members of Aryan Circle were arrested in Texas in October, 2020, for instance, and 54 members of the New Aryan Empire were arrested in Arkansas in 2019, in just two examples.⁷⁷ The 2018 arrests of 40 members and associates of the United Aryan Brotherhood in Florida recovered 110 illegal firearms, including two pipe bombs and a rocket launcher.⁷⁸ These cases probably do not appear in Justice Department domestic terrorism statistics, but certainly, Congress needs this data to understand the full scope of white supremacist violence in the United States in order to establish effective policies to address it.

To be clear, these federal organized crime and violent crime prosecutions are effective tools the Justice Department can and should use to prosecute violent white supremacist and far-right militant groups. Indeed, this methodology could be effective in addressing violent crimes committed by organized groups like the Proud Boys, whose members have been arrested for acts of violence all across the country, including at the U.S. Capitol. But the Justice Department needs to capture the data from these prosecutions, and the intelligence collected during these investigations, to develop a comprehensive national strategy to address this violence.

I have to say these violent crimes prosecutions *probably* do not appear in Justice Department domestic terrorism data because the Justice Department redacts the docket numbers when it discloses non-sensitive prosecutive data to the public, making it impossible to cross-check the statistical accomplishments it claims against case records. The Brennan Center sued the Justice Department to obtain these docket numbers in terrorism prosecutions so the public could better understand how the government uses its counterterrorism authorities.⁷⁹ Though the Justice Department acknowledged that it used this prosecution data in congressional reporting, in litigation it argued that a substantial number of the defendants convicted in cases it reports as domestic terrorism prosecutions are not actually terrorists. In contrast, the Department routinely

releases data on cases that it considers to be linked to international terrorism, even where the crimes charged bear no relation to terrorism. The judge hearing the case wrote that, “the public has an interest in knowing that the [Justice Department’s prosecutions] database contains inaccuracies and that those inaccuracies may have resulted in erroneous public reporting from the Department.”⁸⁰

Without a national strategy focused on documenting the full scope of white supremacist and far-right violence, cases involving these militants will continue to fall through the cracks. Recent examples of far-right violence that appear to have met the statutory definition of domestic terrorism but resulted in no federal charges include the 2018 slaying of a gay Jewish man in California by a member of the violent neo-Nazi group Atomwaffen Division; the 2017 murder of a black man in New York City by a white supremacist intent on starting a race war; and the 2016 vehicular homicide of a black man in Oregon by a member of European Kindred, a white supremacist prison gang.⁸¹ State and local prosecutors charged these perpetrators with hate crimes and, in the New York City case, with violating a state terrorism statute. The crimes likely met the federal definition of domestic terrorism as well, as they were deadly and intended to intimidate a civilian population. These crimes did not go unpunished, and pursuing state charges may have been an appropriate choice in these cases. But the Justice Department does not properly account for them as potential acts of domestic terrorism that need to be recorded in threat assessments that inform a national strategy. The failure to acknowledge the organized and interstate nature of violent white supremacist and far-right militant groups forfeits intelligence that could be used to prepare for and perhaps prevent future attacks.

The FBI has also thwarted congressional demands for data regarding its domestic terrorism program. In 2017, Sen. Durbin introduced the Domestic Terrorism Prevention Act, which would have required the FBI to produce data regarding how it used its domestic terrorism resources.⁸² The bill sought data documenting the number of terrorist incidents and corresponding fatalities, and the number of investigations and prosecutions for each of the FBI’s domestic 11 terrorism categories, which included white supremacists, anarchists, environmentalists, far-right militants, and Black Identity Extremists, and others. This data would allow Congress to determine if the FBI was disproportionately investigating categories that produced fewer fatal attacks.

Though the bill had not passed yet, Sen. Durbin requested an FBI briefing on the matter for members of the Senate Judiciary Committee. When the FBI finally provided this briefing in April of 2019, it revealed it had collapsed the white supremacist and Black Identity Extremist

categories into a new Racially Motivated Violent Extremist (RMVE) category, and the far-right militia and the anarchist categories into a single Anti-Government and Anti-Authority Violent Extremist category (AGAAVE). These groupings make little operational sense. Subjects of an investigation of white supremacists would rarely overlap or work together with subjects of an investigation into Black Identity Extremists, and likewise for militias and anarchists. Some Proud Boys chapters are openly white supremacist, while others disavow racism, leaving it unclear if different FBI field offices will categorize cases against the same group differently.⁸³ What these misguided groupings would appear to accomplish, however, as Sen. Durbin suggested in a letter to the Justice Department, is obscuring the comparative data his bill sought.⁸⁴ These groupings confuse which groups are receiving investigative attention, as the relatively high rate of violence committed by white supremacists can be used to justify resources for the RMVE category, which can then be used to investigate less violent Black extremists. Likewise, the relatively high rate of violence from far-right militants could be used to direct resources to the AGAAVE category, which could then be used to investigate less-violent anarchists.

Other FBI categories include Animal Rights/Environmental Violent Extremists and Abortion-Related Violent Extremists, which it says includes pro-choice violent extremists. Including these categories among its domestic terrorism program signals to Joint Terrorism Task Force members that they should have investigations targeting these groups, despite the fact that there is not a single homicide relating to animal rights or environmental activism in the U.S., and there are no examples of pro-choice terrorists.⁸⁵ The FBI claims its domestic terrorism investigations are focused on violence and not ideology, but using ideologies as categories for its domestic terrorism program promotes ideology-based investigations. The FBI establishment of these categories was arbitrary, based its own subjective preferences rather than a complete and objective analysis of domestic terrorism incidents that occur in the U.S., which it admitted it does not collect.⁸⁶ Investigations should be focused where evidence indicates deadly violence is most likely to occur, not distributed among ideological categories that include protest groups and individual activists that do not regularly commit deadly violence. Some animal rights and environmental activists have engaged in non-violent civil disobedience and damaged property. These lesser crimes should never be mistaken for terrorism, and most often can better be addressed by local law enforcement. The FBI should not be using its domestic terrorism resources and authorities to target non-violent crimes and civil disobedience, particularly when bombings, mass casualty shootings, and other homicides by white supremacist and far-right militants are not properly accounted for and addressed in its domestic terrorism program.

The National Strategy on Countering Domestic Terrorism Helpful But Insufficient

The Biden administration's domestic terrorism strategy is a positive step toward reform, but it is hampered by the FBI's improper categorization scheme. The strategy highlights the fact that white supremacist and far-right militant violence are the most prevalent and most deadly of the domestic terrorism categories, but it has to wrestle with the FBI's language to make its intent clear. It uses the FBI's language identifying "racially and ethnically motivated violent extremists" but then has to add a parenthetical, "(principally those who promote superiority of the white race)" to make clear that it intends the focus of cases in this category to be white supremacists rather than so-called "Black Identity Extremists," which go unmentioned.⁸⁷ The intelligence community assessment of the domestic terrorism threat that is embedded in the strategy includes a similar caveat, referring to "RMVEs who promote the superiority of the white race" as the most serious trans-national threat. But in describing the most lethal threats, it uses "racially and ethnically motivated violent extremists (RMVEs) and militia violent extremists (MVEs)," adopting the FBI's revised category that includes groups other than white supremacists, but abandoning the use of the AGAAVE category to focus on one element within it.⁸⁸ These tortured addendums and reductions inject unnecessary confusion that could have been avoided if the FBI had not awkwardly combined dissimilar groups into a single category.

The domestic terrorism strategy also references other "ideologies" that may motivate domestic terrorism and specifically mentions animal rights and environmental activism, reinforcing the perception that domestic terrorism investigators and prosecutors should pursue cases targeting these groups despite the lack of deadly violence attributed to them.⁸⁹ The FBI's establishment of an entire domestic terrorism category focused on animal rights and environmental activism creates a false equivalency with white supremacists and far-right militants that pose significantly more persistent deadly threats.

The FBI has shown a stubborn determination to resist reform efforts and to utilize its domestic terrorism authorities to harass disfavored political activism involving protest activities or non-violent civil disobedience. Compelling FBI managers and Justice Department prosecutors to focus on white supremacist and far-right militant violence they otherwise choose to ignore requires specificity in the language used to set its domestic terrorism strategy, policy, and practices.

Recommendations for A New Approach to White Supremacist Violence:

1. Reject Calls to Create a New Domestic Terrorism Crime

Congress and other stakeholders should categorically reject calls for a new federal statute that gives federal law enforcement greater authorities or resources to investigate and prosecute domestic terrorism. As detailed above, such legislation is unnecessary and would likely intensify existing discriminatory impacts of domestic terrorism investigations and prosecutions that are targeted at groups protesting government policies rather than terrorists.

2. Strengthen Congressional Oversight of Counterterrorism Resources

Domestic terrorism and hate crime data are rife with error, often arbitrary, and based on vague and conflicting categorization schemes. Congress should require the Justice Department to revamp its data collection policies and practices to ensure that it captures the true nature and scope of white supremacist and far-right violence across all programs.⁹⁰

3. Require the Justice Department to Produce a Data-Based National Strategy to Fight White Supremacist and Far-Right Violence

The Justice Department needs a comprehensive national strategy to properly prioritize and sufficiently resource investigations and prosecutions of white supremacist and far-right violence and document the true impact it has on American society. The Biden administration has taken positive steps to prioritize domestic terrorism, to require better data collection, and to highlight that white supremacist and far-right violence are the most persistent and lethal threats. But more must be done to focus the FBI on these most violent threats. Congress should require the FBI and Justice Department to allocate domestic terrorism resources based on an objective assessment of the threat to human life posed by particular groups, with fewer resources devoted to groups that engage in property crimes rather than violence targeting people. The FBI should treat all cases where white supremacist and far-right militants engaged in deadly violence among its top investigative priorities, whether currently classified as domestic terrorism, hate crimes, or violent crimes, rather than deferring these investigations and prosecutions to state and local law enforcement.

5. Require the Justice Department to Produce a National Strategy to Address Racism, White Supremacy, and Far-Right Militancy in Law Enforcement

The Justice Department has acknowledged that law enforcement involvement in white supremacist and far-right militia organizations poses an ongoing threat, but it has not produced a national strategy to address it. Not only has the department failed to prosecute police officers involved in patently racist violence, it has only recently begun collecting national data regarding use of force by law enforcement officials. This problem is more thoroughly discussed in the Brennan Center report, “Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement.”⁹¹

To address this problem, Congress should direct the Justice Department to:

- Immediately establish a working group to examine law enforcement associations with white supremacist and other far-right militant groups to assess the scope and nature of the problem in a report to Congress.
- Develop an evidence-based national strategy designed to protect the security and civil liberties of communities policed by law enforcement officers who are active in white supremacist or far-right militant organizations. A national strategy will ensure U.S. attorneys and FBI offices across the country properly prioritize these investigations and harmonize their tactics to guarantee equal justice for all. The national strategy should include data and metrics to evaluate the effectiveness of the methodologies it employs.
- Require the FBI to survey its domestic terrorism investigations involving white supremacists and other overtly racist or fascist militant groups to document and report to the DOJ all indications of active links between these groups and law enforcement officials.
- Require the FBI to determine whether any law enforcement officials it investigates for civil rights violations or other criminal matters have connections to violent white supremacist organizations or other far-right militant groups, have a record of discriminatory behavior, or have a history of posting explicitly racist commentary in public or on social media platforms. This information should be provided to FBI agents assigned to domestic terrorism matters for investigative and intelligence purposes, and to federal, state, and local prosecutors to consider their inclusion on Brady lists.

- Require the FBI to report any federal, state, or local official assigned to a federal task force who is discovered during initial screenings or periodic background investigations to have active links to any white supremacist or other militant groups, to have engaged in racist behavior, or to have posted overtly racist commentary to on social media to the DOJ and to their departments. Where appropriate based on available evidence, the Justice Department should bar these officials from further participation with federal task forces and report the information to appropriate departmental heads and state and local prosecutors for potential inclusion on Brady lists.

- Analyze the data collected by the FBI in its law enforcement use of force database to evaluate each use of force complaint for indications that racial, ethnic, or political bias motivated the violence.

- Establish a formal mitigation plan to implement when evidence indicates that an identified law enforcement officer poses a public security threat or a risk of harm to any protected class or community. Such a plan could include federal, state, or local investigations and prosecutions; civil rights lawsuits and consent decrees; reporting information identifying the officer to other federal, state, or local authorities for appropriate employment action; and placement of identified officers on Brady lists maintained by federal, state, and local prosecutors to ensure that defendants in criminal cases and plaintiffs in civil actions against these officers have appropriate impeachment evidence available.

- The Domestic Terrorism Prevention Act of 2021 (H.R. 350) includes a provision that requires the FBI to assess the threat posed by white supremacist and neo-Nazi infiltration of law enforcement and the military. This assessment should be informed by data collected from FBI investigations and surveys of federal, state, and local law enforcement agencies, and from data collected for the law enforcement use of force database.

- Congress should pass the Ending Racial and Religious Profiling Act of 2019 to ban all federal, state, and local law enforcement agencies from profiling based on actual or perceived race, ethnicity, religion, national origin, gender, gender identity, or sexual orientation. Banning racial profiling would mark a significant step toward mitigating the potential harm caused by racist officers undetected within the ranks.

Conclusion

The FBI's failure to prepare for the January 6th attack on the U.S. Capitol was a result of its long-standing de-prioritization of investigations regarding white supremacist and far-right militant violence and hate crimes, its mismanagement of domestic terrorism resources and intelligence, and a persistent racial and ideological bias that undermines its effectiveness. Reforming the FBI to ensure that a similar failure does not occur requires narrowing its authorities to focus its resources where there is a reasonable indication that serious criminal activity may be occurring. Congress must increase its oversight so it can better understand and correct FBI management deficiencies, particularly its ability to recruit and retain an agent population that reflects the diversity of the population it serves. Requiring the Justice Department to develop a comprehensive national strategy to address racism, white supremacy and far-right militancy in law enforcement is essential to restoring trust and providing equal justice under the law.

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