

Focusing the FBI

A Proposal for Reform

By Michael German and Kaylana Mueller-Hsia PUBLISHED JULY 28 2022

Table of Contents

Introduction	3
Understanding FBI Investigatory Authorities	4
Current FBI Authorities	4
Illusory Protections Against Bias-Based Investigations	5
Social Media Monitoring and Information Overload	6
Expanded FBI Authorities Harm Effective Intelligence Analysis	8
Deluge of Information Irrelevant to Identifying Criminal Activity	8
High False Alarm Rate and Blunted Response	9
Unregulated Intelligence Collection and Bias-Based Profiling	10
A Failed Methodology	10
Recommendations	12
Conclusion	14
Endnotes	15

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Introduction

The failure of the Federal Bureau of Investigation (FBI) and other law enforcement agencies to anticipate and prepare for the January 6, 2021, attack on the U.S. Capitol by far-right insurrectionists has elicited proposals to expand the bureau's authority to investigate domestic terrorism.¹ The FBI already received expansive new powers after the 9/11 terrorist attacks, and its current guidelines place few limits on agents' ability to search broadly for potential threats. Confusion about the current scope of the bureau's powers is understandable, however, as FBI leaders have regularly misstated their authorities in public testimony.² These misstatements deflect FBI accountability by focusing overseers on filling perceived gaps in its authority rather than examining how the bureau uses, misuses, or fails to use the tools it already has.

The real problem is not that the FBI's authorities are too narrow, but rather that they are overbroad and untethered to evidence of wrongdoing. After 9/11, the Department of Justice (DOJ) reduced or eliminated reasonable evidentiary predicates to justify broader collection and sharing of Americans' personal information. This new domestic intelligence process replaced evidence-driven investigations of suspected criminal activities with mass data collection and untriaged reporting of speculative harms unsupported by facts. The sheer volume of threat reporting resulting from this system suffocates effective intelligence analysis, flooding law enforcement leaders with thousands of specious threat warnings a day. In addition to unjustified invasions of privacy, the high rate of false alarms that this process produces naturally dulls the response, and the disconnect from evidence of criminality opens the door to bias-driven law enforcement responses. As they have in the past, the FBI's unbridled authorities have resulted in abuses of civil rights and civil liberties without improving its ability to identify and mitigate real threats.

Misinformation from FBI officials has confused the policy debate. When senators investigating the January 6 attack asked Jill Sanborn, then the assistant director of the FBI's Counterterrorism Division, whether FBI agents monitored the multitude of threats made in public forums prior to the attack, Sanborn replied, "It's not within our authorities."³ Sanborn claimed that the FBI cannot collect information involving First Amendment-protected activities without a predicated investigation or a tip from a community member or law enforcement officer. These statements are inaccurate, yet they featured prominently in the Senate's report on the security, planning, and response failures regarding the attack on the Capitol.⁴

When FBI Director Christopher Wray later testified before Congress, he also claimed that FBI rules restricted agents' authority to investigate threats to the Capitol posted online absent a criminal predicate and authorized

purpose. Wray proposed addressing this purported deficit by expanding the FBI's authorities: "If the policy should be changed," he told the Senate Judiciary Committee, "... that might be one of the important lessons learned coming out of this whole experience."⁵

The FBI's authorities are, however, a matter of public record. Contrary to Sanborn's and Wray's claims, agents are authorized to conduct intrusive investigations even when there is no authorized purpose, allegation, or information suggesting that criminal activity may occur.

Under current rules, bureau agents and analysts are authorized to monitor publicly available information even before opening investigations — and they in fact did so before the January 6 attack. A U.S. Government Accountability Office investigation confirmed that the FBI had received threat information posted on social media regarding potential violence at the Capitol from multiple sources prior to January 6. The FBI obtained this threat information through manual online searches, from other federal, state, and local law enforcement agencies, directly from the companies running social media platforms, and through open source analysis tools that search across platforms.⁶

Misinformation about the scope of the bureau's authority to investigate domestic terrorism obfuscates ongoing inquiries into the FBI's failure to prepare for the January 6 attack, particularly as the Justice Department contemplates seeking new statutory powers and additional resources to fill these imagined gaps.⁷ Reforming the FBI requires restoring reasonable criminal predicates to compel the bureau to focus its investigative activities where evidence of criminal activity exists. This report details the expansive breadth of the FBI's current investigatory authorities, examines how these overbroad authorities hinder the bureau's ability to focus on true threats, and proposes reforms that Congress and the attorney general can undertake now to enhance the bureau's effectiveness while protecting Americans from bias-based investigations and invasions of privacy.

Understanding FBI Investigatory Authorities

For almost 70 years, the FBI operated without a primary, consolidated source of authorities. In the 1970s, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (known as the Church Committee) discovered that the FBI had used covert intelligence tactics to target activists in the civil rights, antiwar, and women’s rights movements not based on criminal activity, but rather to “disrupt,” “discredit,” and “otherwise neutralize” individuals’ First Amendment–protected political activities.⁸

To address the Church Committee’s revelations, Attorney General Edward Levi published the first guidelines governing the FBI’s investigative authorities in 1976: the *Attorney General’s Guidelines for Domestic FBI Operations*.⁹ The Levi Guidelines refocused the FBI on crime detection and prevention rather than political suppression by requiring reasonable criminal predicates to justify investigations. Justice Department officials later attested that these restraints effectively directed FBI resources toward investigating unlawful activities rather than monitoring disfavored political activities. Testifying before Congress in 1979, Attorney General Benjamin Civiletti stated that three years of experience with the Levi Guidelines had “demonstrated that guidelines can be drawn that are well understood by Bureau personnel and by the public and which can be extensively and productively reviewed by the appropriate congressional committees.”¹⁰

Subsequent attorneys general modified and added to these guidelines over the years, but the greatest expansion of FBI authorities came in the wake of 9/11. President George W. Bush’s first attorney general, John Ashcroft, issued new guidelines in 2002 that permitted the FBI 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.”¹¹

President Bush’s third attorney general, Michael Mukasey, made even more significant changes to the FBI’s authorities, promulgating his *Attorney General’s Guidelines for Domestic FBI Operations* in September 2008, three months before Bush ceded power to President-elect Barack Obama.¹² Three months later, the FBI established the *Domestic Investigations and Operations Guide* (DIOG), a regularly updated internal instruction manual for conducting investigations under the Mukasey Guidelines.¹³

Current FBI Authorities

The Mukasey Guidelines’ most significant change to FBI authorities was the creation of a new type of investigation

called an “assessment,” which requires no “factual predicate” to initiate, meaning no allegation or objective facts indicating that the target of the investigation may be involved in criminal activity or threaten national security.

Agents can open assessments so long as they state that they have an authorized purpose — namely, to prevent federal crimes or threats to national security, or to collect foreign intelligence. Agents are authorized to open 30-day assessments on their own initiative, without supervisory approval. A supervisor can authorize the renewal of an assessment for an unlimited number of 30-day extensions. Agents are permitted to employ a broad array of intrusive investigative methods during assessments, including searching public, commercial, and government records; conducting online searches; recruiting and tasking informants; conducting covert and overt interviews; conducting physical surveillance; and obtaining grand jury subpoenas for telephone or email subscriber information.

The FBI updated the DIOG in 2011, granting its agents additional investigative authorities that go beyond the scope of the Mukasey Guidelines.¹⁴ These included the authority to conduct “pre-assessments,” which allow agents to search publicly available records, online resources, subscription-based commercial databases, and government databases without even opening an assessment. Pre-assessments require no documentation stating the nature or purpose of these searches, and information obtained from them may be retained only if it is used to open an assessment or broader investigation, leaving little record of these searches. The 2011 DIOG revision also expanded the tactics available during assessments to include searching an individual’s trash to find compromising information to compel them to become an informant.

As a result of these expanded authorities, contrary to FBI officials’ post-January 6 claims, agents and analysts can search public social media feeds without even opening an assessment or predicated investigation or documenting the results of their searches.¹⁵ Upon opening an assessment — without any factual basis to suspect wrongdoing — an agent can also monitor (but not record) private internet communications by recruiting and tasking a cooperating witness or informant to act as a consenting party.

More intrusive tactics, as described below, are authorized during preliminary investigations, which require only “information or an allegation” that a criminal or national security threat may exist as a predicate to open a six-month investigation, based on a frontline supervisor’s approval. Two six-month extensions are available with higher-level approvals, for a total of 18 months. The “information or allegation” necessary to predicate opening a preliminary investigation does not have to reasonably indicate criminal activity or a threat to national security; the authorizing allegation may be speculative.¹⁶ There is no requirement to open an assessment prior to opening a preliminary investigation if the “information or allegation” predicate is met.

All investigative methods except those that require probable cause warrants (by definition, probable cause does not exist at this stage of investigation) may be utilized during a preliminary investigation, including the use of legal process to compel evidence production; mail covers; undercover operations; and consensual monitoring of communications. (Federal law requires only one party to a conversation to consent to the recording.)

“Information or an allegation” is already an extremely low threshold to subject an individual to a six-month preliminary investigation, but a 2010 DOJ inspector general report revealed that agents were making the required allegations themselves to target domestic advocacy groups, on their own speculation that the targeted individuals or groups might commit federal crimes in the future.¹⁷ The report noted that the Mukasey Guidelines would authorize such conduct.

Being subjected to a preliminary investigation of domestic or international terrorism carries real consequences for those targeted. FBI policy requires that subjects of terrorism-related preliminary investigations be placed on the Terrorist Screening Database (TSDB), commonly known as the terrorist watch list. The TSDB is accessible to customs, border, and immigration authorities as well as federal, state, and local law enforcement agencies, private contractors, and many foreign governments.¹⁸ Placement on the watch list can lead to travel restrictions, prolonged detentions, and increased risk of violence (as law enforcement may react to otherwise routine interactions with heightened alarm).¹⁹

Only full investigations, which allow agents to employ all legal investigative methods, require articulable facts to establish a reasonable indication that criminal activity or a threat to national security has occurred, is occurring, or may occur in the future. This “reasonable indication” standard is still a low evidentiary bar — “substantially lower” than the probable cause necessary to obtain judicially authorized search warrants and nonconsensual electronic monitoring.²⁰ “Reasonable indication” is similar to the “reasonable suspicion” standard that police use to “stop, question, and frisk” people on the street for investigative purposes.²¹ Agents may pursue court-authorized probable

cause search warrants, wiretaps, and Foreign Intelligence Surveillance Court orders during a full investigation once sufficient evidence is obtained.

Illusory Protections Against Bias-Based Investigations

Given the FBI’s history of using its authority to target minority communities and suppress First Amendment-protected activities, the attorney general’s guidelines, the FBI’s DIOG, and the Justice Department’s policies all include provisions that claim to restrict such abuse. However, these protections are weak and provide little protection in practice.

The attorney general’s guidelines identify several “sensitive investigative matters” (SIMs), including 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. Investigations involving SIMs require notification and approvals from higher-level officials, which could in theory curb some abuse, but the standards for opening each type of investigation (i.e., assessments, preliminary investigations, or full investigations) remain unchanged, regardless of which FBI official ultimately approves the matter. Absent a requirement for objectively reasonable criminal predicates, the same institutional and individual biases that might drive an agent’s decision to open an improper investigation might also influence higher-level officials to approve one.

For example, after white supremacists stabbed protesters and a journalist at a racist rally in 2016, a San Francisco FBI agent opened a full investigation of an antiracist group for allegedly violating the rights of the Ku Klux Klan, which the agent described not as the oldest and most violent terrorist group in the United States, but as a group “that some perceived to be supportive of a white supremacist agenda.”²² Along with other errors in the opening memo, the Klan was not among the white supremacist groups present at the rally. Following SIM protocols, the San Francisco FBI’s chief division counsel and special agent in charge approved the investigation despite the memo’s questionable investigative premise and the agent’s inappropriate description of the Klan.

Moreover, internal FBI records show that agents routinely fail to comply with the SIM requirements. As part of a 2019 audit, the FBI’s Inspection Division examined a sample of 353 cases involving SIMs and identified 747 compliance errors, many of which involved failing to make the proper notifications and obtain the required approvals.²³

The Justice Department published another policy document, the *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (hereinafter referred to as the Racial Profiling Guidance), in 2014 to update and expand the guidance originally issued by Attorney General Ashcroft in 2002.²⁴ The 2014 Racial Profiling Guidance prohibits the consideration of race, ethnicity, gender, national origin, religion, sexual orientation, and gender identity during “routine” and “spontaneous” law enforcement decisions, absent a specific subject description. However, it retains broad loopholes that allow consideration of these characteristics in circumstances involving threats to national security, violations of immigration laws, or authorized intelligence activities — the first and last of which constitute two of the FBI’s primary missions.²⁵ Nor does the guidance bar profiling by state and local law enforcement officers who share intelligence with the FBI and work in partnership with agents on task forces and in intelligence fusion centers.

The only bright-line limit that the DIOG places on agents is the prohibition against conducting investigative activity based “solely” on race, gender, ethnicity, national origin, religion, sexual orientation, gender identity, or First Amendment-protected activities. The term “solely” is the infirmity, however, as an agent’s mere assertion of an authorizing purpose can justify an assessment of any person or organization based largely on these protected characteristics.²⁶ For example, FBI policy and the Racial Profiling Guidance expressly permit mapping communities based exclusively on race and ethnicity, and tracking what it calls racial and ethnic “behaviors” and “facilities” without any individualized suspicion of wrongdoing.²⁷ FBI memos authorizing these racial and ethnic mapping initiatives have relied on crude racial and ethnic stereotypes regarding the types of crimes that different groups might commit to justify collecting such data.²⁸ The speculative possibility that a person or group may commit a crime or pose a threat in the future — which is arguably true of anyone — has proven sufficient to overcome this limitation in investigations targeting domestic advocacy groups.²⁹

Social Media Monitoring and Information Overload

The attorney general’s guidelines and the DIOG do not specifically mention social media monitoring.³⁰ Instead, they treat any content posted on public-facing social media platforms as publicly available information. As such, agents may search social media without articulating any basis to suspect criminal activity or opening an investigation of any kind.

FBI agents’ authority to monitor social media once they have initiated formal investigations is even broader. During assessments — which again require no factual predicate suggesting wrongdoing — agents can search, view, and save public social media postings and maintain them in intelligence databases. Further, agents can recruit and task informants to befriend the targets of these assessments and infiltrate organizations to track the public information they disseminate online. When agents deem it necessary to achieve the assessment’s purpose, and they determine that less intrusive methods will be ineffective, they may also task informants to use their access to the targeted individuals or organizations to obtain nonpublic information and monitor (but not record) electronic communications to which they are a party.³¹

The massive volume of public information available online has proven irresistible to intelligence agencies, which after 9/11 envisioned achieving “total information awareness.”³² In addition to amending its rules to allow agents to search online platforms at will and without opening investigations, the FBI has awarded multimillion-dollar contracts to private companies to conduct social media monitoring services on its behalf.³³ But too much information is as serious an impediment to effective intelligence analysis as too little, particularly when the information sources contain factual errors, satire, hyperbole, and intentional disinformation, as social media often does.³⁴

Just as published written materials in books and newspapers or broadcasts over television and radio can sometimes contain evidence or allegations of criminal wrongdoing that agents can use to initiate or further investigations, agents can and should utilize public social media posts when the facts indicate that they are relevant and sufficient to initiate or further properly predicated investigations of criminal activities or national security threats. But no one could reasonably suggest that having the FBI employ a team of agents to collect, digitize, and scour for vague indicators of wrongdoing every book, newspaper, magazine, newsletter, press release, and broadcast interview, song, poem, or speech published would be an effective or cost-efficient way to prevent crime or terrorism, especially given that more than half of the violent crime in the U.S. goes unsolved every year.³⁵

The same holds true for social media. Hoping that data mining algorithms and artificial intelligence could be used to effectively sort such massive data sets and accurately predict rare events like terrorist attacks defies statistical and mathematical realities.³⁶ Obviously, the multiple forms of social media monitoring that the FBI and other law enforcement agencies conducted prior to January 6 was not helpful in preparing for the attack. Yet after the Capitol insurrection, the FBI invested an additional \$27 million into social media monitoring software, effectively doubling down on a failed methodology.³⁷

Of course, public social media posts that express specific and credible threats, when brought to the FBI's attention, can by themselves be all the evidence necessary to justify opening a preliminary or full investigation, as would any other source of information indicating that a crime is taking place or in the works. Likewise, once the FBI opens a properly predicated

investigation, agents may logically conclude that monitoring and recording public or private social media posts would be a fruitful investigative step to gather the evidence necessary for a prosecution. The question is not whether the FBI can ever monitor social media, but rather when and how law enforcement resources should be used in order to be effective.

Expanded FBI Authorities Harm Effective Intelligence Analysis

Scant evidence suggests that expanding the bureau’s investigative authorities has helped the FBI more effectively identify or prevent credible threats.³⁸ The massive amount of data collected that is untethered to evidence of criminal activity overwhelms FBI agents and analysts and obscures evidence of real threats. Individuals who were previously reported to the FBI as potential threats but were not stopped have perpetrated some of the most serious acts of mass violence since 9/11. In reality, the FBI’s expanded authorities have resulted in abusive investigations targeting nonviolent domestic advocacy groups and tens of thousands of assessments that invade innocent Americans’ privacy but lead nowhere — too often, while individuals and groups that do pose a threat fly under the radar.³⁹

Deluge of Information Irrelevant to Identifying Criminal Activity

The FBI rarely measures the effectiveness of its methods.⁴⁰ But independent studies of mass surveillance programs, like the bulk telephone metadata collection that the FBI and its partner intelligence agencies secretly undertook for more than a decade, determined their ineffectiveness in identifying and interdicting terrorist plots, despite previous claims to the contrary.⁴¹

The little evidence that is publicly available about the FBI’s use of unpredicated investigative methods shows that the vast majority of assessments that agents conducted discovered no evidence of criminal activity to justify further investigation. In 2011, data obtained by the *New York Times* via a Freedom of Information Act request showed that over the previous two years, the FBI “opened 82,325 assessments of people and groups in search of signs of wrongdoing.”⁴² Of those, only 3,315 (or barely 4 percent) found evidence to justify opening preliminary or full investigations — only a fraction of which would be likely to result in criminal charges or convictions. Instead of leading the FBI to evidence of dangerous crimes, this overbroad assessment authority has resulted in the collection of volumes of personal information about countless innocent persons and groups. Compelling the roughly 13,000 FBI agents to conduct tens of thousands of assessments that fail to detect criminal activity wastes resources better devoted to investigations that are properly justified with reasonable criminal predicates.

Most violent crime that occurs in the United States is not solved. Data published by the FBI reveals that law enforcement solved just 45.5 percent of violent crimes reported to police in 2019.⁴³ Clearance rates for murders fell to almost 50 percent in 2020, down significantly from rates of around

70 percent seen in the 1980s, despite a relatively steady decline in the annual number of murders over that period.⁴⁴ Rather than trying to analyze millions of social media postings to guess which among them might lead to a violent crime, law enforcement should start where there is evidence of criminal activity and follow logical leads to identify the perpetrators and hold them accountable.

Further evidence that broadscale social media monitoring is an ineffective methodology for detecting threats is that the FBI and other intelligence agencies did monitor and report social media posts warning of plans for violence at the U.S. Capitol prior to the January 6 attack, to no effect. FBI officials initially claimed that they had no warnings of the attack. However, a leaked memo dated January 5, 2021, from the FBI’s Norfolk, Virginia, office told a different story, reporting intelligence gleaned from social media:

An online thread discussed specific calls for violence to include stating “Be ready to fight. Congress needs to hear glass breaking, doors being kicked in, and blood from their BLM [Black Lives Matter] and Pantifa [*sic*] slave soldiers being spilled. Get violent. Stop calling this a march, or rally, or a protest. Go there ready for war. We get our President or we die. NOTHING else will achieve this goal.”⁴⁵

The Norfolk memo circulated widely throughout the FBI and other relevant law enforcement agencies but prompted no response,⁴⁶ likely because this type of fiery rhetoric on social media is commonplace. In her congressional testimony, Assistant Director Sanborn tacitly acknowledged that FBI leaders were overwhelmed with intelligence threat warnings. Explaining why, as the head of the FBI’s counterterrorism division, she did not see the January 5 memo from Norfolk, Sanborn replied, “Thousands and thousands

of tips come in just like this one every day. And not all of those get elevated to senior leadership.”⁴⁷

It is extremely difficult to discern who among the millions of people engaging in hyperbolic and offensive language online might actually present a real threat, absent more specific intelligence about the individuals involved, the context in which a posting was made, and the nature of the criminal activity that may be occurring.⁴⁸ Criminal predicates serve as a triage system to ensure that threat information that is highlighted for investigative attention is supported by objective facts reasonably indicating that a particular individual or group is engaging in a defined criminal activity.

The Norfolk memo failed as an intelligence warning not because the information it presented was inaccurate — it was not — but because the methodology of conducting sweeping social media monitoring untethered to evidence of criminal activity is unsound. While agents should investigate information from any source that reasonably indicates that criminal activity is afoot, the FBI obviously cannot (and should not) react to every social media post in which an anonymous person advocates for “war.” Instead, it should focus on actual crimes, like the relatively unpoliced assaults, stabbings, and shootings that had become commonplace at far-right rallies across the country in the years, months, and weeks before the attack on the Capitol.⁴⁹

For instance, far-right militants, reportedly including three individuals who later participated in the Capitol breach, had attacked the Oregon state legislature just two weeks earlier, breaking windows, assaulting police officers, and beating journalists.⁵⁰ Previous far-right violence like the Oregon attack should have triggered FBI investigations, which could have included monitoring relevant social media accounts. These investigations, in turn, could have put the Norfolk memo’s warning in a more useful context — and maybe even into the right hands to have precipitated an effective response. Reasonable criminal predicates serve dual purposes: protecting the innocent from abusive or unwarranted government scrutiny and focusing investigative resources where there is evidence of wrongdoing, thereby enhancing security while protecting individual rights.

High False Alarm Rate and Blunted Response

Just as false fire alarms can dull firefighters’ response times, conducting a high volume of investigations that do not detect evidence of criminal activity inevitably conditions agents to expect that their cases will lead to dead ends, increasing the chances that genuine threats will not receive thorough attention. FBI agents’ pursuit of tens of thousands of dead-end assessments each year may have contributed to the deficiencies seen in a number of terror-

ism investigations that missed credible evidence indicating that criminal activity was likely to occur, resulting in devastating acts of violence.

Information management failures were at the heart of the 2009 Fort Hood mass shooting, in which U.S. Army psychiatrist Nidal Hasan killed 13 Department of Defense (DOD) employees and wounded over 30 more in Fort Hood, Texas. The subsequent congressional investigation found that while the FBI and DOD “collectively had sufficient information” to recognize the potential threat that Hasan posed, including multiple inappropriate communications sent to the subject of an existing international terrorism full investigation, they failed to search the proper FBI databases and act on the evidence already in their possession.⁵¹ A member of the Webster Commission, which evaluated the FBI’s performance in the Hasan investigation, disclosed that after 9/11, the bureau struggled to adapt to the surge of intelligence data available to it.⁵² The Webster Commission cited agents being overburdened by the “crushing volume” of information collected as a causal factor undermining their ability to properly identify crucial pieces of evidence already in their possession that could have justified a more effective response.⁵³

The Hasan case was not unique. The FBI received timely warnings prior to several other mass shootings and terrorist attacks: The father of so-called underwear bomber Umar Farouk Abdulmutallab warned U.S. officials that his son was a threat before the latter successfully brought a bomb onto a U.S.-bound airplane. Multiple people warned the FBI about the terrorist activities of David Headley, who participated in deadly attacks in Mumbai. The FBI previously investigated both Omar Mateen, who killed 49 people in an Orlando nightclub, and Ahmad Rahami, who conducted bombings in New York and New Jersey. And Nikolas Cruz, who killed 17 students in a school shooting in Parkland, Florida, was reported to an FBI tip line without response.⁵⁴

Similarly, investigations following the Boston Marathon bombing in 2013 exposed that two years earlier, the Russian Federal Security Service sent a letter informing the FBI that one of the attackers, Tamerlan Tsarnaev, was planning to travel to Russia to join a terrorist group.⁵⁵ Tsarnaev had a previous arrest for domestic violence, and his name had come up in two FBI investigations that had been closed before receipt of the Russian letter.⁵⁶ An FBI agent conducted an assessment of Tsarnaev based on the letter but failed to inquire about his alleged travel plans or contacts with the Russian terrorist suspects. The agent closed the assessment, determining that Tsarnaev was not a terrorist threat, but placed him on the terrorist watch list, indicating continuing concern.⁵⁷ Here again, the volume of work created by the low threshold for initiating assessments may explain why the Tsarnaev investigation was cut short; it was just one of approximately 1,000 assessments that the Boston Joint Terrorism Task Force conducted that year alone.⁵⁸

Notably, after receiving an identical letter from the Russian security agency, the CIA also placed Tsarnaev on the TSDB, which included a mandatory detention requirement if Tsarnaev attempted to leave or reenter the United States. The watch list did issue an alert in January 2012, when Tsarnaev arrived at JFK Airport to fly to Russia, but U.S. officials took no action, reporting later that too many other watch-listed individuals were traveling that day. The watch list alerted authorities again when he returned to the U.S. six months later, but the FBI did not follow up before the bombing.⁵⁹ Perhaps more relevant to the threat that Tsarnaev posed, just months after its assessment of him closed, the FBI now alleges that Tsarnaev participated in a September 11, 2011, triple homicide in nearby Waltham, Massachusetts, in which the victims were nearly decapitated. Family members reportedly told local police at the time of the murders that Tsarnaev was close friends with the victims and might have information about the crime. However, the FBI never interviewed him, nor did it investigate the murder until after the marathon bombing.⁶⁰

Unregulated Intelligence Collection and Bias-Based Profiling

Expanding intelligence collection on more individuals and groups without reasonable criminal predicates incentivizes racial and political profiling. Absent a reasonable evidentiary standard to triage the influx of threat reporting, FBI agents and leaders tend to rely on their own biases to determine which of the multitude of potential threats they receive are inherently more dangerous or realistic. This bias-based profiling has resulted in the FBI's collection of volumes of personal information about innocent persons and groups, and the disproportionate targeting of marginalized communities, including communities of color, Muslim communities, and nonviolent political activists.⁶¹ Unregulated government monitoring of political speech, association, and activism has a high potential to threaten these groups' civil rights and chill their civil liberties, just as unregulated government monitoring of printed material or public speeches would.⁶²

For the better part of two decades, the FBI has pursued aggressive terrorism investigations targeting nonviolent peace activists and environmentalists while deprioritizing investigations of white supremacist and far-right militant violence.⁶³ A leaked 2017 FBI intelligence assessment describes the bureau's creation of a new domestic terrorism category called "black identity extremists," based on an analysis that some Black activists opposing police brutality may pose a violent threat to law enforcement.⁶⁴ The term was used to justify a nationwide operation called

"Iron Fist," in which FBI agents conducted enhanced surveillance and investigations of Black activists.⁶⁵ The Justice Department has also exploited the FBI's pervasive authorities to launch a "China Initiative," which targeted Chinese and Chinese American scientists and technologists for investigation and selective prosecution based on their race and national origin and encouraged academic institutions to closely monitor Asian students and faculty in a misguided effort to combat economic espionage.⁶⁶

Bias-based monitoring of advocacy groups' social media accounts also drives inappropriate and overly aggressive policing of protest activities. For example, a Minnesota FBI Joint Terrorism Task Force officer used an informant to monitor the Facebook messages of a local group planning Black Lives Matter protests at the Mall of America, reporting the dates and times of events to local police without any reasonable indication of criminal activity, much less terrorism. Local police charged 11 of the protesters with misdemeanors for unlawful assembly and pursued restitution to recoup purported law enforcement and security costs totaling \$65,000, a penalty clearly designed to inhibit future protests.⁶⁷

Social media can also be misleading and difficult to interpret, leading law enforcement officials to spread misinformation and divert security resources where no genuine threat exists.⁶⁸ Across the country, law enforcement officials were besieged with intelligence reports about purported threats from Black Lives Matter and anti-fascist activists, which were often pulled off social media sites that broadcast intentional disinformation planted by white supremacists.⁶⁹ These reports misdirected resources and amplified unnecessary fear during law enforcement emergencies.⁷⁰

A Failed Methodology

The FBI's failure to identify and prepare for the January 6 attack on the U.S. Capitol demonstrates many of the problems associated with authorizing investigations and intelligence collection unmoored from evidentiary criminal predicates.

The FBI had access to plenty of objective evidence — including social media posts with specific threats brought to the bureau's attention by various sources, reporting in major newspapers, and dozens of previous acts of violence over several years — to establish more than a sufficient basis to conduct investigations of many individuals and groups involved in the Capitol attack. Members of the Proud Boys, whose leaders were later charged with planning the January 6 assault, had engaged in violence that resulted in several arrests during two Washington, DC, rallies in the previous two months, and at many other events across the country over the past four years.⁷¹ But bureau leaders chose not to prioritize investi-

gations into this criminal activity, leaving them ill-prepared to understand the nature of the threat to the Capitol even after it was detailed in FBI intelligence warnings.⁷² The problem was not a lack of authority, but the choice to prioritize the broad collection of “intelligence” unconnected to criminal activity over investigations into actual acts of far-right violence.

A Senate report investigating the January 6 attack noted that “neither the Department of Homeland Security (‘DHS’) nor the Federal Bureau of Investigation (‘FBI’) issued formal intelligence bulletins about the potential for violence at the Capitol on January 6,” and that the FBI did not “deem[] online posts calling for violence at the Capitol as credible.”⁷³ Yet subsequent reporting has found thousands of publicly reported statements and online posts detailing plans to attack the Capitol leading up to January 6, including by individuals and groups like the Proud Boys with a history of committing violence at rallies supporting Donald Trump.⁷⁴ Public posts included open discussion of violence against members of Congress, specific travel plans for the event, and instructions regarding how to leverage a mob to force police officers out of the way.⁷⁵ FBI agents did not need to scour the dark corners of the web with social media monitoring tools to find these threats; a *Washington Post* headline on January 5 read, “Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday’s Rally Against the 2020 Election.”⁷⁶

In addition to this public reporting, elected officials and concerned citizens made independent warnings directly to the FBI. The owner of a website devoted to the architectural infrastructure under Washington, DC, 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 50 specific threats of violence to the FBI in advance of the January 6 attacks.⁷⁷ 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*.⁷⁸ News media reports indicated that several members of the Proud Boys previously served as bureau informants, reporting on their anti-fascist opponents even as they perpetrated violence at rallies across the country.⁷⁹ Two days before the attack, Senator Mark Warner, chairman of the Senate Intelligence Committee, reached out directly to the FBI deputy director to make sure that the bureau was seeing the threats. He was told that the FBI was prepared.⁸⁰

In each of these cases, the FBI had received information that was reasonably indicative of criminal activity, because either a crime had already occurred, credible warnings had been received, or specific threats of violence

had been widely disseminated in public forums. But FBI managers did not take action, perhaps because they were overwhelmed by the vast number of potential threats they received, or because they gave too much credence to misinformation, or because they were simply uninterested in pursuing logical leads due to individual or institutional biases.

A week after the Capitol attack, the *Washington Post* reported that “dozens” of people on the terrorist watch list — mostly violent white supremacists — had been in Washington on January 6 to attend the Trump rally.⁸¹ The terrorism watch list is notoriously bloated and error-prone; it contains more than 1.9 million records entered by security officials without due process or transparency.⁸² 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.⁸³

Some analysts have speculated that the Trump administration’s focus on anti-fascists as the primary domestic terrorist threat distracted the FBI from investigations of far-right violence, despite the fact that white supremacists and far-right militants commit more deadly crimes.⁸⁴ This may be true; the lack of criminal predicates allows agents to prioritize terrorism investigations based on biased assumptions about who might commit violence, while all but ignoring evidence of actual crimes.

Moreover, law enforcement officials would naturally view demonstrations against police violence and racism with some hostility. In a memo to all bureau offices, the FBI deputy director called the 2020 protests against police violence and racism after the police killing of George Floyd a “national crisis” that he likened to the 9/11 terrorist attacks.⁸⁵ Meanwhile, the FBI ignored increasing national violence committed by Proud Boys until after the January 6 attack on the Capitol. 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 nonlethal violence committed by groups it categorizes as “domestic violent extremists.”⁸⁶ If the FBI had been tracking the crimes committed by these disparate groups and opening investigations using those crimes as predicates, white supremacist and far-right violence would have been harder to ignore.

The FBI’s failure to properly investigate credible evidence of actual violence committed by far-right militants who later attacked the U.S. Capitol exemplifies why it is urgently necessary to narrow FBI authorities. Requiring evidentiary criminal predicates helps to prevent unreasonable — and ineffective — scrutiny based on racial profiling or other biases, and instead focuses FBI resources on investigations in which evidence reasonably indicates that criminal activity is taking place, such as the violence and threats of violence by far-right militants that preceded the events of January 6, 2021.

Recommendations

This section outlines critical reforms that will allow the FBI to more effectively identify serious threats of violence while eliminating the systemic abuses of civil rights and liberties seen in recent decades. The attorney general can and should implement these reforms forthwith, and Congress should codify them to prevent future attorneys general from loosening them once again.

Eliminate the assessment authority granted in the 2008 Mukasey Guidelines.

Because assessments often target persons and groups not suspected of wrongdoing, their intrusive investigative methods — namely, collecting personal information that can be retained indefinitely in FBI intelligence databases — are per se abusive. The low threshold for initiation and unlimited supervisory reauthorizations of assessments allows these investigations to persist far beyond what is necessary to determine whether information exists to substantiate an allegation. Investigations collecting tens of thousands of innocent individuals' personal information do not assist in the detection of crime or national security threats, they only flood intelligence databases with irrelevant information and waste investigative resources that should be focused on actual crimes.

Reform investigation standards in the Attorney General's Guidelines for Domestic FBI Operations.

The purpose of a preliminary investigation — to substantiate the facts required to justify opening an investigation — should be accomplished in a short time period, using the least intrusive tactics possible. Preliminary investigations should be capped at 90 days, as in previous versions of the guidelines, and they should be authorized only to determine whether evidence can be obtained that establishes articulable facts providing a reasonable indication that criminal activity is occurring or may occur.

The FBI should revert to its previous terminology, “preliminary inquiry,” to differentiate from full investigations, which unleash the totality of investigative tactics. The tactics allowed under the purview of a preliminary inquiry should be limited to checking law enforcement databases and public information (including public social media posts where relevant) and interviewing complainants, victims, or witnesses if necessary. In extraordinary circumstances in which evidentiary requests are outstanding, the special agent in charge and the U.S. attorney should be allowed to authorize a one-time, 90-day extension.

Furthermore, opening a full investigation should require articulable facts establishing a reasonable indication that criminal activity is occurring or will occur. Full investigations should be based on reasonable crim-

inal predicates and subjected to regular inspector general audits to ensure compliance with all laws, guidelines, and regulations.

Limit social media monitoring authorities.

The FBI should be prohibited from collecting public social media data based to a *substantial degree* on an individual's or group's exercise of First Amendment rights; their race, religion, ethnicity, or other category protected by law; or actual or perceived immigration status. Current regulations only prohibit investigations based *solely* on these factors.

Monitoring in advance of a planned public event — separate from social media analysis related to a criminal investigation — should be undertaken only to make determinations about the resources necessary to keep participants and the public safe, and only where there are articulable and credible facts describing the public safety concerns justifying the monitoring. When the event concludes, no information collected for public safety planning purposes should be collected unless it reasonably pertains to criminal conduct.

Social media data should not be collected for criminal investigations in the absence of specific and articulable facts showing reasonable grounds to believe that the data sought is relevant and material to an extant, ongoing criminal investigation.

Close loopholes that permit racial and ethnic profiling.

The DOJ *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* should be revised to

- expressly ban racial and ethnic mapping, the use of census data to identify neighborhoods by race or ethnicity, and the tracking of racial and ethnic behaviors and facilities, all of which are authorized under the current guidance;
- remove existing loopholes that allow consideration of these characteristics in circumstances involving threats to national security, violations of immigration laws, or authorized intelligence activities; and

- extend the ban on the use of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to cover state and local law enforcement agencies that either receive federal funding or participate in federal task forces.

Finally, the Justice Department should publish a clear statement banning all consideration of protected factors absent a specific subject description.

Conclusion

More than 20 years have passed since 9/11, and U.S. national security policies are overdue for a reckoning. Streamlining the FBI's powers should be a central part of this conversation. Some may argue that pursuing reform at the FBI in the wake of the assault on the Capitol is not possible or that it should not be a priority during the bureau's crackdown on right-wing extremism. To the contrary, this is precisely the time to do so: the failure to prepare for an attack planned in public by far-right militant groups that had committed violence at numerous public rallies over the years demonstrates the urgent need for action to protect our democracy.

Unrest need not deter reform; instead, it only reinforces the need for ensuring that the FBI focuses its resources on genuine threats. The Church Committee successfully conducted its investigation amid rampant international terrorism. Reform was possible — and indeed essential — then, as it is now.⁸⁷

Any expansion of FBI authorities would most likely be used against marginalized communities, as evidenced by the disproportionate targeting of Muslim

and Arab American communities after the 9/11 attacks, along with the more recent targeting of peace activists, environmentalists, anti-fascists, and Black Lives Matter protesters, all while investigations of white supremacist violence have been deprioritized.⁸⁸ It is time for the FBI to finally reverse its shift toward broad intelligence collection about innocent Americans and refocus on reasonable and evidence-based indications of violence and criminality.

Endnotes

- 1 Rachael Levy, "A Domestic Terrorism Law Is Debated Anew After Capitol Riot," *Wall Street Journal*, February 13, 2021, <https://www.wsj.com/articles/a-domestic-terrorism-law-is-debated-anew-after-capitol-riot-11613224800>; Paul Jenks, "Lawmakers Divided over Need for New Domestic Terrorism Law," *Roll Call*, April 19, 2021, <https://www.rollcall.com/2021/04/19/lawmakers-divided-over-need-for-new-domestic-terrorism-law/>; and Lucy Tu, "Defining Domestic Terrorism: Does the U.S. Need New Criminal Penalties for Domestic Terrorism Events?," *Harvard Political Review*, June 4, 2021, <https://harvardpolitics.com/united-states-domestic-terrorism>.
- 2 Emily Berman, *FBI: Fact or Fiction*, Brennan Center for Justice, July 27, 2011, <https://www.brennancenter.org/our-work/research-reports/fbi-fact-or-fiction>; Michael German and Emily Hockett, "Standards for Opening an FBI Investigation So Low They Make the Statistic Meaningless," Brennan Center for Justice, May 2, 2017, <https://www.brennancenter.org/our-work/analysis-opinion/standards-opening-fbi-investigation-so-low-they-make-statistic>; and Tim Cushing, "FBI Cites Guidelines That Don't Actually Forbid Social Media Monitoring as the Reason It Was Blindsided by the January 6 Attack," *Tech Dirt*, July 7, 2021, <https://www.techdirt.com/articles/20210703/17104647111/fbi-cites-guidelines-that-dont-actually-forbid-social-media-monitoring-as-reason-it-was-blindsided-january-6-attack.shtml>.
- 3 *Hearing on U.S. Capitol Attack, Day 2, Part 1, Hearing Before the Senate Rules Committee and Homeland Security Committee*, 117th Cong. (2021) (Senator Kyrsten Sinema: "Was the FBI aware of these specific conversations on social media?" Jill Sanborn: "To my knowledge, no ma'am. . . . Under our authorities, being mindful of the First Amendment and our dual-headed mission to uphold the Constitution, we cannot collect First Amendment-protected activities without the next step which is the intent. So we'd have to have a predicated investigation that allowed us access to those comms and/or a lead or a tip or a report from a community citizen or a fellow law enforcement partner for us to gather that information." Sinema: "So the FBI does not monitor publicly available social media conversations?" Sanborn: "Correct ma'am, it's not within our authorities.").
- 4 U.S. Senate Committee on Homeland Security and Government Affairs and Committee on Rules and Administration, *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, June 8, 2021, 35–36, <https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf>.
- 5 *The Capitol Insurrection: Unexplained Delays and Unanswered Questions (Part II)*, *Hearing Before the Committee on Oversight and Reform, U.S. House of Reps.*, 58, June 15, 2021, <https://www.congress.gov/117/meeting/house/112771/documents/HHRG-117-G000-Transcript-20210615.pdf>.
- 6 U.S. Government Accountability Office, *Capitol Attack: Federal Agencies' Use of Open Source Data and Related Threat Products Prior to January 6, 2021*, May 2022, <https://www.justsecurity.org/wp-content/uploads/2022/05/january-6-clearinghouse-GAO-report-on-federal-agencies-use-of-open-source-data-May-2022.pdf>. See also Andy Kroll, "FBI Documents Expose Bureau's Big Jan. 6 'Lie,'" *Rolling Stone*, April 14, 2022, <https://www.rollingstone.com/politics/politics-features/jan-6-fbi-social-media-privacy-black-lives-matter-1337565>; Betsy Woodruff Swan, "'Keep Your Head on a Swivel': FBI Analyst Circulated a Prescient Warning of Jan. 6 Violence," *Politico*, September 7, 2021, <https://www.politico.com/news/2021/09/07/fbi-warning-jan-6-510020>; Beth Reinhard and Matt Zapposky, "FBI Alert About Possible 'War' Against Congress Reached D.C. and Capitol Police on Eve of Attack, Deepening Security Questions," *Washington Post*, February 23, 2021, https://www.washingtonpost.com/politics/capitol-riot-intelligence/2021/02/23/1cddf126-75f4-11eb-ae66-8b9e3c6918a1_story.html.
- 7 Levy, "Domestic Terrorism Law Is Debated Anew"; Jenks, "Lawmakers Divided over Need for New Domestic Terrorism Law"; Tu, "Defining Domestic Terrorism"; and Ryan J. Reilly, "U.S. Capitol Attack Is Reshaping the Federal Counterterrorism Budget," *Huffington Post*, June 5, 2021, https://www.huffpost.com/entry/justice-department-fbi-budget-capitol-attack_n_60b7e6c5e4b0169ca9709229.
- 8 *Final Report of the Senate Select Committee to Study Government Operations: Intelligence Activities and the Rights of Americans, Book III*, S. Rep. No. 94-755, 1976, 180.
- 9 DOJ Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*, September 2005 (hereinafter *FBI's Compliance with AG's Investigative Guidelines*), 36, <https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf>.
- 10 FBI Charter Act of 1979, S. 1612, Senate Committee on the Judiciary, 96th Cong. (1980), 14.
- 11 John Ashcroft, *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations* § III.A.2.a, Department of Justice, 2002, 22, <https://epic.org/privacy/fbi/FBI-2002-Guidelines.pdf>. The Ashcroft Guidelines also transformed "preliminary inquiries" — which allowed agents receiving "information or an allegation" suggesting the possibility of criminal activity 90 days to determine whether evidence sufficient to open a full investigation could be developed — into "preliminary investigations" that could be used to gather intelligence over 180 days, with two possible renewals, for an 18-month maximum. For a comparison of how consecutive versions of the attorney general's guidelines have eroded oversight of the FBI and expanded its authority through the changes implemented by Attorney General Ashcroft, see DOJ Office of the Inspector General, *FBI's Compliance with AG's Investigative Guidelines*, 36–59.
- 12 Michael B. Mukasey, *The Attorney General's Guidelines for Domestic FBI Operations* § II(A)(4), Department of Justice, 2008, <https://www.justice.gov/archive/opa/docs/guidelines.pdf>; and Emily Berman, *Domestic Intelligence: New Powers, New Risks*, Brennan Center for Justice, January 18, 2011, 22n123, <https://www.brennancenter.org/sites/default/files/legacy/AGGReportFINALed.pdf> (noting the lack of supervisory approval requirements).
- 13 FBI, *Domestic Investigations and Operations Guide*, last updated September 28, 2016 (hereinafter *DIOG*) <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version/fbi-domestic-investigations-and-operations-guide-diog-2016-version-part-02-of-02/view>.
- 14 Charlie Savage, "F.B.I. Agents Get Leeway to Push Privacy Bounds," *New York Times*, June 12, 2011, <https://www.nytimes.com/2011/06/13/us/13fbi.html>; and Brennan Center for Justice, Bill of Rights Defense Committee, and Defending Dissent, "Letter to Senate Judiciary Committee on New FBI Rules," July 27, 2011, <https://www.brennancenter.org/our-work/research-reports/letter-senate-judiciary-committee-new-fbi-rules>.
- 15 Rachel Levinson-Waldman and Jesus A. Rodriguez, "Guardrails Needed for FBI Access to Social Media Monitoring," *Just Security*, January 26, 2021, <https://www.justsecurity.org/74313/guardrails-needed-for-fbi-access-to-social-media-monitoring/>; and Quinta Jurecic, "Why Didn't the FBI Review Social Media Posts Announcing Plans for the Capitol Riots?," *Lawfare*, June 29, 2021, <https://www.lawfareblog.com/why-didnt-fbi-review-social-media-posts-announcing-plans-capitol-riot>.
- 16 DOJ Office of the Inspector General, *A Review of the FBI's*

Investigations of Certain Domestic Advocacy Groups, September 2010, <https://www.oversight.gov/sites/default/files/oig-reports/s1009r.pdf>.

17 DOJ Office of the Inspector General, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups*, 187 ("We also found that FBI case agents sometimes did a poor job of documenting the predication for opening investigations. . . . As a result, in the absence of clear contemporaneous documentation, FBI agents and supervisors sometimes provided the OIG with speculative, after-the-fact rationalizations for their prior decisions to open investigations that we did not find persuasive.").

18 Jeremy Scahill and Ryan Devereaux, "Blacklisted: The Secret Government Rulebook for Labeling You a Terrorist," *Intercept*, July 23, 2014, <https://theintercept.com/2014/07/23/blacklisted>.

19 Memorandum Opinion and Order at 10, Elhady et al. v. Kable et al., 993 F.3d 208 (2021), <https://ij.org/wp-content/uploads/2019/09/18919913387.pdf> ("Plaintiffs . . . have been forcibly arrested (often at gunpoint) and detained for long hours in front of their family."). Even FBI agents have not escaped arrest and detention after being mistaken for a watch-listed person. Gregory Hoyt, "Busted: Sheriff's Deputy Detains FBI Agent After Being Unable to Confirm His Identity," *Law Enforcement Today*, March 14, 2020, <https://www.lawenforcementtoday.com/sheriffs-deputy-detains-fbi-agent-after-being-unable-to-confirm-his-identity>.

20 DOJ Office of the Inspector General, *FBI's Compliance with AG's Investigative Guidelines*, 56.

21 *Terry v. Ohio*, 392 U.S. 1 (1968).

22 Sam Levin, "Revealed: FBI Investigated Civil Rights Group as 'Terrorism' Threat and Viewed KKK as Victims," *Guardian*, February 1, 2019, <https://www.theguardian.com/us-news/2019/feb/01/sacramento-rally-fbi-kkk-domestic-terrorism-california>.

23 Ryan Lovelace, "Audit Reveals FBI Rule-Breaking in Probes Involving Politicians, Religious Groups, Media," *Washington Times*, March 11, 2022, <https://www.washingtontimes.com/news/2022/mar/11/fbi-audit-reveals-agents-rule-breaking-investigati>.

24 DOJ, *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.

25 DOJ, *Guidance for Federal Law Enforcement Agencies*, 1–2 (limiting application of guidance to "Federal law enforcement officers performing Federal law enforcement activities"), 2n2 (specifying that the guidance "does not apply to Federal non-law enforcement personnel, including U.S. military, intelligence, or diplomatic personnel, and their activities," or to "interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities").

26 DIOG § 4.1.2 ("If a well-founded basis to conduct investigative activity exists, however, and that basis is not solely activity that is protected by the First Amendment or on the race, ethnicity, gender, national origin or religion, sexual orientation, or gender identity of the participants — FBI employees may assess or investigate these activities, subject to other limitations in the AGG-Dom and the DIOG."). See also DIOG § 4.3.2.

27 DIOG § 4.3.3.2.2.

28 American Civil Liberties Union, "ACLU Eye on the FBI: The FBI Is Engaged in Unconstitutional Racial Profiling and Racial 'Mapping,'" October 20, 2011, <https://www.aclu.org/aclu-eye-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping?redirect=national-security/aclu-eye-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping>.

29 DOJ Office of the Inspector General, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups*, 186 ("The applicable standard in the Guidelines for predication was low, especially for preliminary inquiries, which required only the 'possibility' of a federal crime. In part as a result of this standard, we

found in most cases that the FBI did not violate the Guidelines in opening these investigations.").

30 This paper only addresses social media surveillance by the FBI; other uses of social media require context-specific analysis and are not addressed herein.

31 DIOG § 18.5.5.3 ("The doctrine of misplaced confidence provides that a person assumes the risk when dealing with a third party that the third party might be a government agent and might breach the person's confidence.").

32 Bruce Schneier, "Why Data Mining Won't Stop Terror," *Wired*, March 9, 2006, https://www.wired.com/2006/03/why-data-mining-wont-stop-terror-2/?tw=wn_index_2. "Total information awareness" refers to an eponymous government tracking system, first reported by the *New York Times* in 2002, that was "envisioned to give law enforcement access to private data without suspicion of wrongdoing or a warrant." Congress cut funding to the program in 2003. See Electronic Privacy Information Center, "Total 'Terrorism' Information Awareness (TIA)," accessed June 8, 2022, <https://archive.epic.org/privacy/profiling/tia>.

33 Lee Fang, "FBI Expands Ability to Collect Cellphone Location Data, Monitor Social Media, Recent Contracts Show," *Intercept*, June 24, 2020, <https://theintercept.com/2020/06/24/fbi-surveillance-social-media-cellphone-dataminr-venntel>; 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>.

34 Alex Young, "Too Much Information: Ineffective Intelligence Collection," *Harvard International Review*, August 18, 2019, <https://hir.harvard.edu/too-much-information>.

35 John Gramlich, "Most Violent and Property Crimes in the U.S. Go Unsolved," Pew Research Center, March 1, 2017, <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved>.

36 Nancy Bilyeau, "'You Can't Solve Domestic Terrorism with an Algorithm,'" *Crime Report*, January 20, 2021, <https://thecrimereport.org/2021/01/20/you-cant-solve-domestic-terrorism-with-an-algorithm>; Jenna McLaughlin, "The White House Asked Social Media Companies to Look for Terrorists. Here's Why They'd #Fail," *Intercept*, January 20, 2016, <https://theintercept.com/2016/01/20/the-white-house-asked-social-media-companies-to-look-for-terrorists-heres-why-theyd-fail>; and Timme Bisgaard Munk, "100,000 False Positives for Every Real Terrorist: Why Anti-Terror Algorithms Don't Work," *First Monday*, September 4, 2017, <https://firstmonday.org/ojs/index.php/fm/article/download/7126/6522>.

37 Aaron Schaffer, "The FBI Is Spending Millions on Social Media Tracking Software," *Washington Post*, April 5, 2022, <https://www.washingtonpost.com/politics/2022/04/05/fbi-is-spending-millions-social-media-tracking-software>.

38 See, e.g., William M. Arkin, "This Shadow Government Agency Is Scarier than the NSA," *Gawker Phase Zero*, June 1, 2015, <http://phasezero.gawker.com/this-shadow-government-agency-is-scarier-than-the-nsa-1707179377>; Justin Elliott and Theodor Meyer, "Claim on 'Attacks Thwarted' by NSA Spreads Despite Lack of Evidence," *ProPublica*, October 23, 2013, <https://www.propublica.org/article/claim-on-attacks-thwarted-by-nsa-spreads-despite-lack-of-evidence>; and McLaughlin, "White House Asked Social Media Companies to Look for Terrorists."

39 See, e.g., Coleen Rowley, "Inspector General Criticism Doesn't Faze FBI Raids on Midwestern Anti-War Activists," *Huffington Post*, September 25, 2010, https://www.huffpost.com/entry/inspector-general-critici_b_738932; Karen J. Greenberg, "Liberty Is Security: The Lesson Not Drawn from the Post-9/11 Government Overreach," *Huffington Post*, October 2, 2016, https://www.huffpost.com/entry/liberty-is-security_b_12302898; and Jake Laperruque, "Secrets, Surveillance, and Scandals: The War on Terror's Unending Impact on

Americans' Private Lives." Project on Government Oversight, September 7, 2021, <https://www.pogo.org/analysis/2021/09/secrets-surveillance-and-scandals-the-war-on-terrors-unending-impact-on-americans-private-lives>.

40 See, e.g., U.S. Government Accountability Office, *Information Sharing: Additional Efforts Could Help Ensure That Efforts to Share Terrorism-Related Suspicious Activity Reports Are Effective*, March 2013, 17, 37, <https://www.gao.gov/assets/gao-13-233.pdf>; and Cynthia Lum et al., "The Effectiveness of Counter-Terrorism Strategies," *Campbell Systematic Reviews* 2 (January 2006), <https://onlinelibrary.wiley.com/doi/full/10.4073/csr.2006.2>.

41 Charlie Savage, "Watchdog Report Says N.S.A. Program Is Illegal and Should End," *New York Times*, January 23, 2014, <https://www.nytimes.com/2014/01/23/us/politics/watchdog-report-says-nsa-program-is-illegal-and-should-end.html>; Bailey Cahall et al., "Do NSA Bulk Surveillance Programs Stop Terrorists?," *New America Foundation*, January 13, 2014, <https://www.newamerica.org/international-security/policy-papers/do-nsas-bulk-surveillance-programs-stop-terrorists>; and Ellen Nakashima, "NSA Phone Record Collection Does Little to Prevent Terrorist Attacks, Group Says," *Washington Post*, January 12, 2014, https://www.washingtonpost.com/world/national-security/nsa-phone-record-collection-does-little-to-prevent-terrorist-attacks-group-says/2014/01/12/8aa860aa-77dd-11e3-8963-b4b654bcc9b2_story.html.

42 Charlie Savage, "F.B.I. Focusing on Security over Ordinary Crime," *New York Times*, August 23, 2011, <https://www.nytimes.com/2011/08/24/us/24fbi.html>.

43 FBI Uniform Crime Reporting Program, *2019 Crime in the United States*, September 28, 2020, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019>. The FBI modified the way it collects and presents this data in 2020 and it warns against year-to-year comparisons, but previous annual reports consistently indicate violent crime clearance rates of less than 50 percent of crimes reported to police. Research also indicates that less than half of violent crimes are reported to police. See, e.g., Gramlich, "Most Violent and Property Crimes in the U.S. Goes Unsolved."

44 Weihua Li and Jamiles Larty, "As Murders Spiked, Police Solved About Half in 2020," *Marshall Project*, January 12, 2022, <https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020>.

45 Devlin Barrett and Matt Zepotosky, "FBI Report Warned of 'War' at Capitol, Contradicting Claims There Was No Indication of Looming Violence," *Washington Post*, January 12, 2021, https://www.washingtonpost.com/national-security/capitol-riot-fbi-intelligence/2021/01/12/30d12748-546b-11eb-a817-e5e7f8a406d6_story.html.

46 Barrett and Zepotosky, "FBI Report Warned of 'War' at Capitol."

47 Paul Sonne et al., "D.C. Guard Chief Says 'Unusual' Restrictions Slowed Deployment of Backup During Capitol Riot," *Washington Post*, March 3, 2021, https://www.washingtonpost.com/national-security/capitol-riot-hearing/2021/03/02/a4867a48-7b81-11eb-85cd-9b7fa90c8873_story.html.

48 See, e.g., *Examining the January 6 Attack on the U.S. Capitol, Hearing Before the Senate Committee on Homeland Security and Government Affairs and Senate Committee on Rules and Administration*, 117th Cong. (2021) (testimony of Melissa Smislova, acting undersecretary for the DHS Office of Intelligence and Analysis) ("[A]ctual 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 and other online platforms."); and Department of Homeland Security Internal Review Team, *Report on DHS Administrative Review into I&A Open Source Collection and Dissemination Activities During Civil Unrest, Portland, Oregon, June Through July 2020*, January 6, 2021, 22–24, http://cdn.cnn.com/cnn/2021/images/10/01/internal_review_report.20210930.pdf.

49 Matt Mathers, "Four Stabbed and One Shot as Violence Erupts at Pro-Trump Rallies Attended by Far-Right," *Independent*, December 13, 2020, <https://www.independent.co.uk/news/world/americas/trump-protest-stabbing-shooting-election-b1772169.html>; Craig Timberg, "Man Arrested in Olympia, Wash., After Pro-Trump Demonstrations Turn Violent," *Washington Post*, December 13, 2020, <https://www.washingtonpost.com/nation/2020/12/13/man-arrested-olympia-wash-after-pro-trump-demonstrations-turn-violent/>; and Jason Wilson, "Portland Suffers Serious Street Violence as Far Right Return 'Prepared to Fight,'" *Guardian*, August 28, 2020, <https://www.theguardian.com/us-news/2020/aug/28/portland-violence-far-right-protests-police>.

50 Sergio Olmos and Conrad Wilson, "At Least 3 Men From Oregon Protest Appear to Have Joined Insurrection at U.S. Capitol," *Oregon Public Broadcasting*, January 10, 2021, <https://www.opb.org/article/2021/01/10/oregon-washington-protest-insurrection-david-anthony-medina-tim-davis>.

51 Joseph I. Lieberman and Susan M. Collins, *A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack*, U.S. Senate Committee on Homeland Security and Governmental Affairs, February 3, 2011, 2, https://www.hsgac.senate.gov/imo/media/doc/Fort_Hood/FortHoodReport.pdf.

52 Mariah Blake, "Internal Documents Reveal How the FBI Blew Fort Hood," *Mother Jones*, August 27, 2013, <https://www.motherjones.com/politics/2013/08/nidal-hasan-anwar-awlaki-emails-fbi-fort-hood>.

53 William H. Webster Commission, *Final Report of the William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas, on November 5, 2009*, July 19, 2012, 35, 87–88, <https://www.hsdl.org/?view&did=717443>; and Blake, "Internal Documents Reveal How the FBI Blew Fort Hood."

54 Kimberly Dozier, "More Details: Intelligence Official on Abdulmutallab Breakdown," *CBS News*, December 30, 2009, <https://www.cbsnews.com/news/more-details-intelligence-official-on-abdulmutallab-breakdown/>; Sebastian Rotella, "Newly Discovered Warnings About Headley Reveal a Troubling Timeline in Mumbai Case," *ProPublica*, November 5, 2010, <https://www.propublica.org/article/newly-discovered-warnings-about-headley-reveal-a-troubling-timeline-in-mumb>; Lindsay Kimble, "Orlando Shooter Allegedly Told Co-workers He Wanted to Become a Martyr and Was Investigated by the FBI Twice, but Cleared: Source," *People*, June 13, 2016, <https://people.com/crime/orlando-mass-shooting-omar-mateen-investigated-by-fbi-twice-2>; Mike Levine and Pierre Thomas, "FBI Opened Previous Inquiry into Bombing Suspect Ahmad Khan Rahami," *ABC News*, September 20, 2016, <https://abcnews.go.com/US/fbi-opened-previous-inquiry-bombing-suspect-ahmad-khan/story?id=42201580>; and Katie Benner et al., "FBI Was Warned of Florida Suspect's Desire to Kill but Did Not Act," *New York Times*, February 16, 2018, <https://www.nytimes.com/2018/02/16/us/fbi-nikolas-cruz-shooting.html>.

55 CIA, DOJ, and Department of Homeland Security Offices of Inspectors General, *Unclassified Summary of Information Handling and Sharing Prior to the April 15, 2013 Boston Marathon Bombings*, April 10, 2014, 7–8, <https://oig.justice.gov/reports/2014/s1404.pdf>.

56 See Josh Gerstein, "FBI Knew Earlier of Boston Bombing Suspect," *Politico*, June 15, 2013, <https://www.politico.com/blogs/under-the-radar/2013/06/fbi-knew-earlier-of-boston-bombing-suspect-166313>; and Deborah Sontag et al., "A Battered Dream, Then a Violent Path," *New York Times*, April 27, 2013, <https://www.nytimes.com/2013/04/28/us/shot-at-boxing-title-denied-tamerlan-tsarnaev-reeled.html>.

57 CIA, DOJ, and DHS Inspectors General, *Unclassified Summary of Information Handling and Sharing*, 9–10.

58 Richard DesLauriers, "Statement by Special Agent in Charge Richard DesLauriers Regarding Information Sharing," *Federal Bureau of Investigation*, May 9, 2013, <https://archives.fbi.gov/archives/>

[boston/press-releases/2013/statement-by-special-agent-in-charge-richard-deslauriers-regarding-information-sharing](https://www.bostonmagazine.com/press-releases/2013/statement-by-special-agent-in-charge-richard-deslauriers-regarding-information-sharing).

59 "Russia Warned U.S. About Boston Marathon Bomb Suspect Tsarnaev: Report," Reuters, March 25, 2014, <https://www.reuters.com/article/us-usa-explosions-boston-congress/russia-warned-u-s-about-boston-marathon-bomb-suspect-tsarnaev-report-idUSBREA2P02Q20140326>.

60 Susan Zalkind, "The Murders Before the Marathon," February 25, 2014, *Boston Magazine*, <https://www.bostonmagazine.com/news/2014/02/25/waltham-murders-boston-marathon>.

61 See generally American Civil Liberties Union, *Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority*, September 2013, <https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf> (noting, for instance, that FBI agents have "mapped" the demographic information of Black, Chinese, Muslim, and Russian communities, among others, through their assessment authority, and have surveilled Native American environmental protesters participating in nonviolent civil disobedience).

62 Faiza Patel et al., *Social Media Monitoring*, Brennan Center for Justice, last updated March 11, 2020, <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>.

63 See Adam Federman, "Revealed: How the FBI Targeted Environmental Activists in Domestic Terror Investigations," *Guardian*, September 24, 2019, <https://www.theguardian.com/us-news/2019/sep/23/revealed-how-the-fbi-targeted-environmental-activists-in-domestic-terror-investigations>; Will Potter, *Green Is the New Red: An Insider's Account of a Social Movement Under Siege* (San Francisco: City Lights, 2011); and Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Center for Justice, October 31, 2018, <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism>.

64 Michael German, *Testimony Before the Congressional Black Caucus on the FBI's 'Black Identity Extremism' Report*, March 20, 2018, <https://www.brennancenter.org/our-work/research-reports/testimony-congressional-black-caucus-fbis-black-identity-extremism-report>.

65 Michael German, "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>; and Defending Rights and Dissent, "Leaked FBI Documents Show FBI Developed 'Iron Fist' to Counter 'Black Identity Extremists,'" September 5, 2019, <https://www.rightsanddissent.org/news/leaked-fbi-documents-show-fbi-developed-iron-fist-to-counter-black-identity-extremists>.

66 Christopher Wray, "The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States," remarks given at the Hudson Institute's video event, "China's Attempt to Influence U.S. Institutions," Washington, DC, July 7, 2020, <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states>; Brennan Center for Justice, "Advocacy Groups, Community Organizations, and Science Associations Urge President-Elect Joe Biden to End the Justice Department's 'China Initiative,'" January 5, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/advocacy-groups-community-organizations-and-science-associations-urge>; Patrick Toomey and Ashley Gorski, "A Chinese American Scientist and His Family Are Battling the FBI's Profiling in Court," American Civil Liberties Union, April 2, 2021, <https://www.aclu.org/news/national-security/a-chinese-american-scientist-and-his-family-are-battling-the-fbis-profiling-in-court>; and Asian Americans Advancing Justice, "Anti-Racial Profiling Project," accessed June 8, 2022, <https://www.advancingjustice-aaajc.org/anti-racial-profiling-project>.

67 Lee Fang, "Why Was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest?," *Intercept*, March 12, 2015, <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest>.

68 Caitlin Dewey, "The FBI Maintains an 83-Page Glossary of Internet Slang. And It Is Hilariously, Frighteningly Out of Touch," *Washington Post*, June 17, 2014, <https://www.washingtonpost.com/news/the-intersect/wp/2014/06/17/the-fbi-maintains-an-83-page-glossary-of-internet-slang-and-it-is-hilariously-frighteningly-out-of-touch/>; and Brennan Center for Justice et al., "Civil Rights Concerns About Social Media Monitoring by Law Enforcement," November 6, 2019, <https://www.brennancenter.org/sites/default/files/2019-11/Social%20media%20monitoring%20statement.pdf>.

69 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>.

70 See, e.g., Brandy Zadrozny and Ben Collins, "Antifa Rumors Spread on Local Social Media with No Evidence," NBC News, June 2, 2020, <https://www.nbcnews.com/tech/tech-news/antifa-rumors-spread-local-social-media-no-evidence-n1222486>; Mara Hvistendahl and Alleen Brown, "Law Enforcement Scoured Protester Communications and Exaggerated Threats to Minneapolis Cops, Leaked Documents Show," *Intercept*, June 26, 2020, <https://theintercept.com/2020/06/26/blueleaks-minneapolis-police-protest-fears/>; and Sam Levin, "Revealed: How California Police Chased a Nonexistent 'Antifa Bus,'" *Guardian*, August 23, 2021, <https://www.theguardian.com/us-news/2021/aug/23/revealed-california-police-antifa-misinformation>.

71 Rachel Treisman, "Prosecutors: Proud Boys Gave Leader 'War Powers,' Planned Ahead for Capitol Riot," NPR, March 2, 2021, <https://www.npr.org/2021/03/02/972895521/prosecutors-proud-boys-gave-leader-war-powers-planned-ahead-for-capitol-riot>; and David D. Kirkpatrick and Alan Feuer, "Police Shrugged Off the Proud Boys, Until They Attacked the Capitol," *New York Times*, March 14, 2021 (updated August 23, 2021), <https://www.nytimes.com/2021/03/14/us/proud-boys-law-enforcement.html>.

72 For a detailed discussion of the FBI's failure to prioritize investigations into white supremacist and far-right militant violence, see German and Robinson, *Wrong Priorities on Fighting Terrorism*.

73 U.S. Senate Committee on Homeland Security and Government Affairs and Committee on Rules and Administration, *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, June 1, 2021, 5, <https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf>.

74 See, e.g., Olmos and Wilson, "At Least 3 Men from Oregon Protest Appear to Have Joined Insurrection"; and Mary Papenfuss, "Proud Boys' Hotel Hangout Shutting Down on Jan. 6 'Wild Protest' Day," *Huffington Post*, December 29, 2020, https://www.huffpost.com/entry/hotel-harrington-closed-proud-boys-january-6_n_5feaac94c5b66809cb33a510.

75 Craig Timberg, "Gallows or Guillotines? The Chilling Debate on TheDonald.win Before the Capitol Siege," *Washington Post*, April 15, 2021, <https://www.washingtonpost.com/technology/2021/04/15/thedonald-capitol-attack-advance-democracy>.

76 Craig Timberg and Drew Harwell, "Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday's Rally Against the 2020 Election," *Washington Post*, January 5, 2021, <https://www.washingtonpost.com/technology/2021/01/05/parler-telegram-violence-dc-protests>.

77 Matt Zapotosky, "Conservative Platform Parler Says It Warned FBI of 'Specific Threats of Violence' Ahead of Capitol Riot," *Washington Post*, March 25, 2021, https://www.washingtonpost.com/national-security/parler-fbi-capitol-riot/2021/03/25/addba25a-8dae-11eb-a6bd-0eb91c03305a_story.html.

78 Hanna Allam et al., "Red Flags," *Washington Post*, October 31, 2021, <https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/>.

79 Aram Roston, "Before Jan. 6, FBI Collected Information From at Least 4 Proud Boys," Reuters, April 26, 2021, <https://www.reuters.com/world/us/exclusive-before-jan-6-fbi-collected-information-least-4>.

[proud-boys-2021-04-26](#); Tom Dreisbach, "Conspiracy Charges Bring Proud Boys' History of Violence into Spotlight," NPR, April 9, 2021, <https://www.npr.org/2021/04/09/985104612/conspiracy-charges-bring-proud-boys-history-of-violence-into-spotlight>; and Kirkpatrick and Feuer, "Police Shrugged Off the Proud Boys."

80 Allam et al., "Red Flags."

81 Devlin Barrett et al., "Dozens of People on FBI's Terrorist Watch List Came to D.C. the Day of the Capitol Riot," *Washington Post*, January 14, 2021, https://www.washingtonpost.com/national-security/terror-watchlist-capitol-riot-fbi/2021/01/14/07412814-55f7-11eb-a931-5b162d0d033d_story.html.

82 Shoshana Wodinsky, "Secret FBI Watchlist Leaks Online, and Boy Do the Feds Think a Lot of People Are Terrorists," *Gizmodo*, August 17, 2021, <https://gizmodo.com/secret-fbi-watchlist-leaks-online-and-boy-do-the-feds-1847500747>.

83 Scahill and Devereaux, "Blacklisted."

84 Adam Goldman et al., "How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat," *New York Times*, January 30, 2021, <https://www.nytimes.com/2021/01/30/us/politics/trump-right-wing-domestic-terrorism.html>; and Jason Wilson, "Violence by the Far-Right Is Among U.S.'s Most Dangerous Terrorist Threats, Study Finds," *Guardian*, June 27, 2020, <https://www.theguardian.com/world/2020/jun/27/us-far-right-violence-terrorist-threat-analysis>.

85 Zolan Kanno-Youngs et al., "From the Start, Federal Agents Demanded a Role in Suppressing Anti-Racism Protests," *New York Times*, July 28, 2020, <https://www.nytimes.com/2020/07/28/us/federal-agents-portland-seattle-protests.html>.

86 FBI and Department of Homeland Security, *Strategic Intelligence Assessment and Data on Domestic Terrorism*, May 2021, 21, <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view>.

87 See Brennan Center for Justice, *Strengthening Intelligence Oversight*, Conference Report, New York, May 27–28, 2015, 9, https://www.brennancenter.org/sites/default/files/analysis/Strengthening_Intelligence_Oversight_Conference_Report.pdf.

88 See, e.g., Adam Gabbatt, "Close to Home: How U.S. Far-Right Terror Flourished in Post-9/11 Focus on Islam," *Guardian*, September 6, 2021, <https://www.theguardian.com/us-news/2021/sep/06/terrorism-far-right-white-supremacists-911-us>; Will Potter, "If Right-Wing Violence Is Up 400%, Why Is the FBI Targeting Environmentalists," *Truthout*, January, 21, 2013, <https://truthout.org/articles/if-right-wing-violence-is-up-400-why-is-the-fbi-targeting-environmentalists>; Levin, "Revealed: FBI Investigated Civil Rights Group as 'Terrorism' Threat"; and Goldman et al., "How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat."

ABOUT THE AUTHORS

► **Michael German** is a fellow with the Brennan Center’s Liberty and National Security Program. He served for 16 years as a special agent with the Federal Bureau of Investigation before becoming a civil rights lobbyist with the American Civil Liberties Union. He has taught courses on terrorism and civil liberties at the FBI National Academy, National Defense University, and John Jay College of Criminal Justice. German is the author of *Thinking Like a Terrorist: Insights of a Former FBI Undercover Agent* (2007) and *Disrupt, Discredit, and Divide: How the New FBI Damages Democracy* (2020). He holds a BA from Wake Forest University and a JD from Northwestern University Law School.

► **Kaylana Mueller-Hsia** is a research and program associate with the Brennan Center’s Liberty and National Security Program. Previously, as a technology policy adviser in the mayor’s office in San Jose, California, she advocated for expanding digital access in underserved communities and strengthening municipal privacy protections. She has also conducted research for the International Organization for Migration and the Indonesian Institute for an Independent Judiciary at the intersection of technology and human rights. Mueller-Hsia graduated from Stanford University with a BA in international relations and honors in international security studies.

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