

April 11, 2019

Re: Domestic Terrorism Prevention Act, S. 894

Dear Senator:

The American Civil Liberties Union has significant concerns regarding S. 894, the Domestic Terrorism Prevention Act. While well-intentioned, this act has repercussions for people of color and other marginalized communities—populations that have long been targeted for unjustified and discriminatory domestic terrorism investigations and surveillance. Law enforcement agencies' use of the existing domestic terrorism frameworks undermines and has violated equal protection, due process, and First Amendment rights. Attempts to further these frameworks will serve to target the very communities that Congress is seeking to protect.



The ACLU urges you not to cosponsor this legislation or to move this bill forward until the concerns have been resolved. If the proposed bill goes to the floor in its current form, the ACLU will oppose it.

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The ACLU has numerous concerns regarding this legislation, which would double down on an already flawed domestic terrorism framework that has long targeted marginalized populations ranging from Muslim, Arab, Middle Eastern, and South Asian communities and Black civil rights activists to animal and environmental rights activists as well as other groups the government views as having “unpopular” or controversial beliefs. Expanding a framework that discriminates against people of color and other marginalized communities reinforces the harm these communities already suffer. Rather than protecting these populations, this legislation would entrench long-standing problems, and result in the further unjustified and discriminatory surveillance, investigation, and prosecution of people of color and other marginalized communities, including those engaged in First Amendment-protected activities.

This bill codifies the authorities and actions of national security and counterterrorism components of the Department of Justice and Department of Homeland Security, authorizing domestic terrorism units or offices to monitor, investigate, and prosecute incidents of domestic terrorism. These agencies have long used the domestic terrorism framework to monitor and investigate people of color and other marginalized communities, rights activists who dissent against government policies, and those with views agencies deem controversial. Agencies have also interpreted the domestic terrorism framework to authorize surveillance and investigation of protest-related conduct posing severe consequences for individuals' First Amendment rights.

These kinds of government abuses are not new, and they are ongoing. Civil rights leaders like Martin Luther King, Jr., were investigated for their organizing and civil disobedience on similar grounds in the past.

More recently, the Federal Bureau of Investigation (FBI) has used these frameworks to spy upon Muslim communities, including by infiltrating their places of worship.¹ The Justice Department leads and participates in a Suspicious Activity Reporting program, collecting and sharing information about people engaged in activities that are loosely labeled as “suspicious,” without even a reasonable suspicion of criminal activity.² In addition to encouraging racial and religious profiling, this program also targets those engaged in First Amendment-protected activity. Agencies have monitored and infiltrated organizations such as the American-Arab Anti-Discrimination Committee (ADC), People for Ethical Treatment of Animals (PETA), and Greenpeace,³ rather than investigating credible threats of actual wrongdoing. One of these investigations even included contact lists for students and peace activists participating in an on-campus conference.⁴ Muslims in America have for years been wrongfully targeted in sting operations and overbroad prosecutions under the guise of preventing or addressing purported terrorism threats,⁵ and law enforcement agencies continue to discriminatorily investigate and surveil Muslim, Arab, Middle Eastern, and South Asian communities.

The proposed bill also authorizes the FBI’s Counterterrorism Division to establish a section to specifically investigate domestic terrorism, ignoring the Division’s record of abuses. For example, the Counterterrorism Division recently issued an “intelligence assessment,” identifying what it calls “black identity extremists”—an inflammatory term for a group that does not even exist—for investigation as a domestic terrorism threat.⁶ The FBI disseminated its intelligence assessment, called “Black Identity Extremists Likely Motivated to Target Law Enforcement Officers,” to more than 18,000 law enforcement agencies; it claims, without evidence, that Black people involved in unrelated police killings shared an ideology that motivated their actions.⁷ It also focuses on Black people who, in the bureau’s own words, “perceive[] racism and injustice in American society.”⁸ This is only one recent example of the FBI’s use of resources to discredit and disrupt the advocacy of Black activists and Black-led organizations. In October 2017, the Congressional Black Caucus (CBC) sent a letter to FBI Director Christopher Wray expressing concern regarding the

¹ See e.g., *Fazaga v. FBI*, ACLU Southern California available at <https://www.aclusocal.org/en/cases/fazaga-v-fbi>.

² *Gill v. DOJ – Challenge to Government’s Suspicious Activity Reporting Program* (July 11, 2014) available at <https://www.aclu.org/cases/gill-v-doj-challenge-governments-suspicious-activity-reporting-program>.

³ ACLU, *New Documents Show FBI Targeting Environmental and Animal Rights Groups Activities as ‘Domestic Terrorism’* (December 20, 2005) available at <https://www.aclu.org/news/new-documents-show-fbi-targeting-environmental-and-animal-rights-groups-activities-domestic>.

⁴ *Id.*

⁵ *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, Human Rights Watch and Columbia Law School Human Rights Institute (2014) available at https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/final_report_-_illusion_of_justice.pdf.

⁶ Nusrat Choudhury and Malkia Cyril, *The FBI Won’t Hand Over Its Surveillance Records on ‘Black Identity Extremists,’ so We’re Suing* (March 21, 2019) available at <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/fbi-wont-hand-over-its-surveillance-records-black>.

⁷ *Id.*

⁸ *Id.*

intelligence assessment and the agency's reliance on unfounded and discriminatory logic.⁹ Rather than addressing the concerns of the CBC, the FBI has yet to repudiate the faulty intelligence assessment. Doubling down on this discriminatory framework by codifying and authorizing these law enforcement authorities does not protect communities of color. It serves to reinforce an already problematic and harmful framework.

This bill also exacerbates long-standing privacy and efficacy concerns arising from the sharing of information through joint terrorism task forces (JTTF) and fusion centers. The proposed legislation seeks to codify the sharing of intelligence by the various agencies that comprise these entities, and the execution of a plan to address domestic terrorism. However, this sharing of information currently operates without meaningful transparency and public oversight of the information that is shared or how such information will be used—and safeguards against civil rights and privacy abuses. JTTFs create a partnership between federal, state, and local agencies, deputizing local and state police as federal agents and sharing information without standards of proof regarding “suspicion.”¹⁰ With over 180 JTTFs nationally, agencies have targeted communities of color, often Muslim and immigrant communities, for unjust profiling, surveillance, and investigation without any suspicion of criminal activity.¹¹ Similarly, fusion centers were designed to organize localized domestic intelligence gathering into an integrated system between federal and local law enforcement. Unfortunately, their participation in the terrorism framework has allowed federal, state, and local law enforcement and homeland security agencies, other state and local government entities, the federal intelligence community, and military and even private companies to spy on law-abiding people in the United States.

Fusion centers have varied widely in their activities and raised significant privacy and civil liberties concerns due to their excessive secrecy, lack of clear supervision, wholesale data collection and manipulation, and the proven risk of widespread data sharing and surveillance by the military and private sector—data they would not have legally been able to gather on their own.¹² Individual fusion centers have also released bulletins that reflect an unjustified focus on people of color and other marginalized communities, individuals' First Amendment-protected beliefs and practices, and activities participating government agencies perceive to be controversial. This unjustified focus includes scrutiny of historically black colleges and universities, which one state's fusion center described as “radicalization nodes;” basic religious accommodations for Muslims in America; and, protestors on both sides of the abortion debate.¹³ The Department of Homeland Security has used fusion centers to monitor those engaged in protest and organizing, like Black Lives Matter.¹⁴

⁹ Congressional Black Caucus Letter to Dir. Christopher Wray (October 13, 2017) available at https://cbc.house.gov/uploadedfiles/cbc_rm_thompson_cummings_conveys_letter_to_fbi_re_intel_assessment.pdf.

¹⁰ Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties* (March 21, 2018) available at <https://tcf.org/content/report/beyond-sanctuary/?agreed=1>.

¹¹ *Id.*

¹² Mike German and Jay Stanley, *Fusion Center Update* (July 2008) available at https://www.aclu.org/files/pdfs/privacy/fusion_update_20080729.pdf.

¹³ ACLU, *More About Fusion Centers* available at <https://www.aclu.org/other/more-about-fusion-centers>.

¹⁴ George Joseph, Exclusive: Feds Regularly Monitored Lack Lives Matter Since Ferguson, Intercept (July 24, 2015) available at <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/>.

Government documents have shown that fusion centers yield little intelligence of value and waste resources while trampling on the civil liberties of innocent people.¹⁵ In 2012, the Senate Homeland Security Subcommittee published a bipartisan report citing both the civil liberties harms and wasted resources of fusion centers.¹⁶ Despite this long-standing experience and the significant concerns raised by civil liberties organizations as well as members of Congress, the proposed bill seeks to codify the role of fusion centers with these federal components, reinforcing the problematic sharing of data without insight into who federal law enforcement agencies deem to be “suspicious,” how and when such information is being shared with local law enforcement, and how such information is being used. Sharing of information for law enforcement monitoring or investigation without transparent standards or proof should not be enhanced or bolstered, as this proposed legislation seeks to do.

Congress must not reinforce deeply problematic frameworks and systems that have long targeted people of color and other marginalized communities. Enacting “domestic terrorism” legislation would not only entrench a system that lacks meaningful oversight, transparency, and legitimate standards, but also codifies a framework that is used to target and discriminate against the very communities Congress hopes to protect. We urge members not to cosponsor or support this dangerous bill unless these concerns are resolved.

If you have any questions, please feel free to contact Manar Waheed at mwaheed@aclu.org.

Sincerely,



Ronald Newman
National Political Director



Manar Waheed
Senior Legislative and Advocacy Counsel

¹⁵ Associated Press in San Francisco, ACLU releases files showing innocent Americans caught up in surveillance (September 19, 2013) *available at* <https://www.theguardian.com/world/2013/sep/19/ordinary-americans-spying-fusion-center-program-aclu>.

¹⁶ Senate Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Investigative Report Criticizes Counterterrorism Reporting, Waste at State and Local Intelligence Fusion Centers* (October 3, 2012) *available at* <https://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers>.