

January 21, 2021

Chairman Richard Durbin
Ranking Member Chuck Grassley
Senate Judiciary Committee

Chairman Jerrold Nadler
Ranking Member Jim Jordan
House Judiciary Committee

Re: Law Enforcement Authorities in the Wake of the January 6 Capitol Assault

Dear Chairmen Durbin and Nadler and Ranking Members Grassley and Jordan:

We are writing to urge that as you consider appropriate responses to the January 6 assault on the Capitol, and that you refrain from advancing legislation that would expand law enforcement surveillance authorities or create a new crime of “domestic terrorism.” As the perpetrators of the attack on the Capitol are brought to justice, the security failures that permitted that attack should not become the basis for expanded police surveillance authority or for expansion of prosecutorial authority.

On January 6, an angry mob, inspired by President Trump and encouraged by others, ascended Capitol Hill during the ceremonial counting of the votes of the electoral college. They overran the thinly staffed Capitol police who were on patrol, broke into the building, ransacked members’ offices, and called for the hanging of Vice President Pence. They organized their attack in plain sight, on social media platforms accessible to each other and to the public. In the days prior to the attack, news outlets had reported on the violent plans unfolding online, and the Virginia Field Office of the FBI warned of an impending “war.” Despite this information, the police presence was minimal and proved insufficient to stop or repel the attack.

Crime of Domestic Terrorism. Some are arguing that Congress should create a new crime of “domestic terrorism” because the violence at the Capitol was directed at civilians and was politically motivated. We urge you to resist those calls as creating such a crime would threaten civil liberties and civil rights, and because the FBI already has sufficient legal authority to charge the insurrectionists who stormed the Capitol. A new crime of “domestic terrorism” would give license to authorities to investigate based on political motivation, and we have no doubt that it would be turned against marginalized communities and those who protest government abuse, stifling free expression and leading to punitive policing of communities who had no role in the January 6 attack. As the Leadership Conference on Civil and Human Rights stated in a Sept. 6, 2019 [letter](#) to Congress, when similar legislation was contemplated as a response to gun and hate violence:

The federal government has no shortage of counterterrorism powers, and these powers have been used to unjustly target American Muslim, Arab American, South Asian American, African American communities and those who fight for racial and social justice. The creation of a new federal domestic terrorism crime ignores this reality and

does nothing to address the problem of gun violence and hate violence incidents in this country.

Instead of creating a new crime of domestic terrorism, Congress should work to ensure that law enforcement response to a protest turns on evidence of criminality and violence, as opposed to the political motivation of the protesters. Any [documented disparities](#) in police response based on race, religion, political motivation or other protected characteristics must be addressed.

Moreover, a new crime of domestic terrorism is unnecessary. The government already has ample authority under existing law to prosecute those who stormed the Capitol. The FBI has charged more than 140 people with crimes, is investigating more than 330 people, and has indicated that it may level sedition charges that carry a 20-year prison sentence. There is no reported instance in which the FBI has identified someone who participated in the attack but has been unable to bring charges for lack of statutory authority.

Surveillance Authorities. After major national tragedies, Congress has frequently considered legislation that would add to the surveillance authorities and capabilities that law enforcement officials already have. However, new surveillance authority is not needed to prevent an assault like the one that occurred on January 6. The attack on the Capitol was planned and executed in plain sight, and was splashed all over social media as the insurrectionists published pictures and video clips of themselves and each other breaking into the Capitol, invading members' offices, and parading through corridors with the Confederate battle flag. Within a few days of the event, the FBI said it had received over 130,000 videos and photos associated with the attack. The Bureau has commenced one of the largest investigations in U.S. history, and it is being inundated with information, not starved of it.

The information in the public domain and on publicly available social media was more than sufficient to alert law enforcement officials to the danger at hand. Given the ready availability of this information, rather than granting additional surveillance powers, Congress should be asking authorities why they were so unprepared for such a predictable tragedy. Congress should further inquire into what other law enforcement and intelligence agency priorities distracted officials from preparing the Capitol for a literal insurrection. Finally, it should be asking what investigative techniques are being deployed, whether unreliable and invasive technologies such as facial recognition are being used to investigate these crimes (and generate unreliable leads), and whether unconstitutional techniques, such as geo-fence warrants, are being used as well. As with domestic terrorism efforts, expanding surveillance capabilities will inevitably harm marginalized communities while adding little marginal value to law enforcement efforts.

In short, we urge you to ensure that the January 6 assault on the Capitol is not used as an excuse to expand surveillance authority or to create a dangerous new crime of domestic terrorism.

Please direct your response to this letter to Greg Nojeim at the Center for Democracy & Technology, gnojeim@cdt.org.

Sincerely,

Access Now
Brennan Center for Justice
Center for Democracy & Technology
Defending Rights & Dissent
Demand Progress
Downsize DC
Due Process Institute
Fight for the Future
FracTracker Alliance
Free Press Action
Government Information Watch
Institute for Policy Studies New Internationalism Project
Human Rights First
National Association of Criminal Defense Lawyers
National Coalition Against Censorship
New America's Open Technology Institute
Open the Government
Open MIC (Open Media & Information Companies Initiative)
Palestine Legal
Partnership for Civil Justice Fund
Project Blueprint
Project on Government Oversight
Restore the Fourth
ReThinking Foreign Policy
Security Policy Reform Institute

cc: Members of Senate and House Judiciary Committees