

**Written Statement  
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***“Examining the ‘Metastasizing’ Domestic Terrorism Threat  
After the Buffalo Attack”***

**United States Senate  
Committee on the Judiciary**

**June 7, 2022**

**I. Introduction**

Chairman Durbin, ranking member Grassley, members of the Committee of the Judiciary, my name is Jonathan Turley, and I am a law professor at George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.<sup>1</sup> It is an honor to appear before you today to discuss the threat of domestic terrorism, a subject that should unify all Americans. We live in an age of rage where political and personal attacks are, regrettably, the norm. Yet, today’s hearing with my esteemed fellow witnesses offers an opportunity to have a good-faith and civil discussion on the constitutional and policy issues raised by the fight against domestic terrorism. You will find no disagreement among the witnesses on that worthy end, and while the means may be subject to qualifications, we all share a common purpose in combating domestic terrorism.

These are dangerous times where disagreements on the law or politics are often expressed through personal insults and even violent attacks. Extremist and violent speech is not an abstraction for me and many others who work in the public domain.<sup>2</sup> Indeed, House members were shot in 2017, and members of both houses were rushed to safety during the 2020 attack on the Capitol. We all have ample reason to oppose these violent elements on both the left and the right. The Constitution imposes limits on the range of action for Congress in addressing such issues, from the First Amendment to the doctrine of the separation of powers. The “Domestic Terrorism Prevention Act” is an example of how such means can be well-intended but still contravene constitutional principles. I

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<sup>1</sup> I appear today on my own behalf, and my views do not reflect those of my law school or the media organizations that feature my legal analysis. My testimony was written exclusively by myself, though I received inspired editing assistance from Seth Tate and Jordyn Johnson. Any errors are, of course, entirely my own.

<sup>2</sup> Through the years, I have received hundreds of threats against myself, my family, and even my dog. My home has been targeted, and multiple campaigns have sought my termination as a professor. Thus, while I am generally viewed as something of a “free speech purist,” I have no illusions about the harm of extremist speech in our society.

encourage the Senate to reconsider this approach to address those concerns. Other groups like the American Civil Liberties Union (ACLU) have also raised objections to this type of legislation as a threat to free speech and associational interests.<sup>3</sup>

I come to this subject as someone who has written,<sup>4</sup> litigated,<sup>5</sup> and testified<sup>6</sup> in the areas of terrorism, extremist advocacy, and free speech for decades. I have also represented the United States House of Representatives in litigation.<sup>7</sup>

The Act fits uncomfortably in the space between the legislative and executive branches. Congress clearly has a role to play in the war on terrorism from both foreign and domestic sources. The separation of powers is not some hermetically sealed division of powers. On the contrary, there are shared powers, even in foreign affairs:

“The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory.”<sup>8</sup>

The proposed expansion of domestic terrorism investigations falls admittedly within that “ambiguous territory.” For that reason, it is critical to evaluate any legislation with reference to the underlying purposes of the separation of powers. I will then address free speech concerns over the use of domestic terrorism laws that I hope the Committee will consider in going forward with any legislation.

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<sup>3</sup> The ACLU sent a letter addressing an earlier version of this legislation. See ACLU Letter to the Senate on the Domestic Terrorism Act, S. 894, <https://www.aclu.org/letter/aclu-letter-senate-domestic-terrorism-prevention-act-s-894>.

<sup>4</sup> I have previously written about constitutional interpretation, national security law, and the separation of powers. See, e.g., Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 *UNI. OF CHI. L. REV.* 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Function Follows Form in Constitutional and Architectural Interpretation*, 83 *GEO. WASH. L. REV.* 305 (2015); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation* 2103 *WIS. L. REV.*; Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 *SMU L. REV.* 205-49 (2000) (Symposium). Many of my academic and journalistic publications focus on free speech. See, e.g., Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 *HARV. J.L. & PUB. POL'Y* (forthcoming 2022); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 *EMORY L.J.* 1905 (2015); Jonathan Turley, *Registering Publicis: The Supreme Court and Right to Anonymity*, 2002 *SUP. CT. REV.* 57-83.

<sup>5</sup> This includes serving as lead counsel in various terrorism and national security cases. See, e.g., *Kasza v. Browner*, 133 F.3d 1159 (1988); see also Matthew Barakat, *Islamic Scholar Ordered Released*, *ASSOCIATED PRESS*, Aug. 18, 2020, <https://apnews.com/article/virus-outbreak-us-news-taliban-courts-69644a163982bd2af8b565bf19b29ec0>; Letitia Stein, *Former Florida Professor Deported from U.S. over Palestinian Terrorism Ties*, *REUTERS*, Feb. 6, 2015, <https://www.reuters.com/article/us-usa-security-al-arian/former-florida-professor-deported-from-u-s-over-palestinian-terrorist-ties-idUKKBN0LA2KA20150206>; Scott Shane, *House Staff Member Cleared in Inquiry on Leak of Iraq Intelligence Estimate*, *N.Y. TIMES*, Nov. 22, 2006, <https://www.nytimes.com/2006/11/22/washington/house-staff-member-cleared-in-inquiry-on-leak-of-iraq.html>.

<sup>6</sup> See, e.g., *Fanning the Flames: Disinformation and Extremism in the Media: Hearing before the Sucomm. on Comm'n & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. (2021); *The Right of The People Peacefully to Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 116th Cong. (2020); Presidential Commission on Law Enforcement and the Administration of Justice, “*Respect for Law Enforcement and the Rule of Law*,” July 21, 2020; United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006.

<sup>7</sup> See *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), <https://casetext.com/case/us-house-of-representatives-v-capacity-1>

<sup>8</sup> Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts*, 37 *HARV. L. REV.* 1010, 1016 (1924).

## II. The Domestic Terrorism Prevention Act

At the outset, I should confess to a bias as a Madisonian scholar and frequent defender of the legislative powers under Article I. I tend to favor the legislative branch in many conflicts and have served as legal counsel for the House of Representatives in conflicts with the Judicial Branch. My prior testimony before both the Senate and the House of Representatives warned of increasing executive encroachment on legislative authority and asserted the need for Congress to be more aggressive in defending its Article I authority, particularly in its appropriation and oversight functions. Ye, there is obviously a countervailing danger of legislative encroachment into areas of executive authority.

Madison believed that the separation of powers within the Constitution could defeat a natural tendency to aggrandize power within any government structure. Such expansion of power in any one branch or any one office invites tyranny and oppression. In Madison's view, "the interior structure of the government"<sup>9</sup> distributed the pressures and destabilizing elements of nature in the form of factions<sup>10</sup> and unjust concentration of power.<sup>11</sup> He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" to divide governance among co-equal branches.<sup>12</sup>

Our system of checks and balances allows for branches to protect their authority. For Congress, this includes oversight authority and the tools to acquire information from the other branches. Indeed, John Stuart Mill famously wrote:

[T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them from office, and either expressly or virtually appoint their successors.<sup>13</sup>

Legislative authority means nothing without the ability to understand, and at times uncover, the insular actions of the institutions and organizations that influence public policies and programs. For that reason, the Supreme Court readily recognized that the scope of legislative investigatory powers must be commensurate with the scope of legislative jurisdiction. In *McGrain v. Daugherty*,<sup>14</sup> the Supreme Court held that "the

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<sup>9</sup> THE FEDERALIST NO. 51, at 320 (James Madison).

<sup>10</sup> See THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man").

<sup>11</sup> See THE FEDERALIST NO. 51, *supra* note 9, at 320 (James Madison); see also Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348-57 (1957).

<sup>12</sup> THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

<sup>13</sup> JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 42 (1861).

<sup>14</sup> See generally *McGrain v. Daugherty*, 273 U.S. 135 (1927).

power of inquiry-with process to enforce it is an essential and appropriate auxiliary to the legislative function.”<sup>15</sup> The Court emphasized that the ability of Congress to compel is essential for members to understand “the conditions which the legislation is intended to affect or change.”<sup>16</sup>

This inherent power supports some of what has been proposed in connection with domestic terrorism investigations regarding disclosures, assessments, and training. Other elements, however, push legislative prerogatives under Article I into the legislative encroachment of Article II of the Constitution.

#### A. Information-Forcing Provisions of the DTPA

There are components of the DTPA that are, in my view, clearly constitutional. For example, the effort to compel greater transparency in this area through compelled and regular disclosure fits squarely within the mandate of Article I. Congress must fulfill its responsibilities over legislation and appropriations. That requires the ability to conduct oversight and, at times, force information exchange. Thus, in *McGrain v. Daugherty*,<sup>17</sup> the Court noted that Congress must often seek to force information from opposing or reluctant parties but that such information is essential to determining what, if any, legislative actions are needed:

“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate-indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”<sup>18</sup>

In so holding, the Court not only reaffirmed the power of Congress to compel testimony but also rejected the notion that it would evaluate the motivations or wisdom of the use of that inherent power:

[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins*, *supra*, “a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our

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<sup>15</sup> *Id.* at 174

<sup>16</sup> *Id.* at 175.

<sup>17</sup> 273 U.S. 135 (1927).

<sup>18</sup> *Id.* at 175.

function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.”<sup>19</sup>

That position is in line with other holdings, including *Braden*.<sup>20</sup> Thus, the analysis turns on the scope of congressional jurisdiction, not congressional motivation, in these cases.<sup>21</sup>

*Wilkinson* factors continue to guide this analysis. The Court established a standard for whether the congressional investigatory authority is properly used: (1) whether the Committee’s investigation of the broad subject matter area is authorized by Congress, (2) whether the investigation is pursuant to “a valid legislative purpose,” and (3) whether the specific inquiries involved are pertinent to the broad subject matter areas which have been authorized by Congress.<sup>22</sup> In this legislation, Congress seeks a statutorily mandated system of disclosure in an area of profound concern for the public. In my view, it is permitted to do so consistent with limitations on privileged or classified information.

#### B. Assessment-Forcing Provisions of the DTPA

The DTPA also requires these agencies to assess “the domestic terrorism threat posed by White supremacists and neo-Nazis, including White supremacist and neo-Nazi infiltration of Federal, State, and local law enforcement agencies and the uniformed services.” This language has obviously drawn criticism from law enforcement and political groups. The basis for the emphasis on white supremacy elements in our government is beyond the scope of my testimony. Moreover, there are obvious questions of whether such obligations add unnecessarily to the burden of these offices and their staff. Congress can demand an accounting of specific enforcement areas from agency heads at any time without requiring an additional reporting obligation. However, the merits aside, the Congress has the authority, in my view, to order such assessments from the executive branch.

Likewise, the legislation also mandates training on “understanding, detecting, deterring, and investigating acts of domestic terrorism and White supremacist and neo-Nazi infiltration of law enforcement and corrections agencies.” As with training on racial and gender discrimination, it is within the authority of Congress to mandate such training and education for federal employees so long as these programs do not run afoul of First Amendment or other constitutional protections.

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<sup>19</sup> *Wilkinson v. United States*, 365 U.S. 399, 412 (1961).

<sup>20</sup> *See generally Braden v. United States*, 365 U.S. 431 (1961).

<sup>21</sup> I have previously expressed my unease with these decisions from the McCarthy period. *Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas: Hearing before the H. Comm. on Science, Space & Tech.*, 114th Cong. (2016) (testimony and prepared statement of Jonathan Turley). The Supreme Court at the time had a narrower view of free speech protections and indeed reaffirmed the authority to pursue communists simply because of their beliefs (though, as discussed below, the Court did limit some congressional actions). In *Barenblatt*, the Court described the crackdown on communists as a public policy that was “hardly debatable.” The Court’s acquiescence to such crackdowns on free speech is, of course, highly “debatable” and in my view, reprehensible. It was one of the lowest points in the Court’s history.

<sup>22</sup> *Wilkinson*, 365 U.S. at 409.

### C. Investigation-Forcing Provisions of the DTPA

The DTPA raises more difficult constitutional questions in provisions that one could read as investigation-forcing mandates. Indeed, it presents a particularly novel question of what constitutes legislative encroachment upon prosecutorial discretion. As the Supreme Court stated in *United States v. Nixon*, “The Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”<sup>23</sup> That authority is based on the Take Care Clause and the inherent Article II powers over the enforcement of federal law.<sup>24</sup> It is not simply the power to prosecute but to make all the decisions identifying and developing prosecutorial cases. That includes “[t]he Executive’s charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought.”<sup>25</sup> Courts have stressed that, while Congress has its own investigatory powers, “the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our constitution to the Executive and the Judiciary.”<sup>26</sup>

Congress clearly has the authority to create an agency or sub-agency office. It has the authority to create criminal laws so long as they meet constitutional requirements. Under Section 3(a), “Domestic Terrorism” units or offices would be established in the Department of Homeland Security, the Justice Department’s National Security Division, and the Federal Bureau of Investigation. It is relatively rare for Congress to micromanage the division of sections within agencies, but the creation of such units and added resources is not in isolation a contravention of Article II powers.

However, it appears the intent of Congress to push the Administration to prioritize domestic terrorism cases with this legislation. That intent is evident in Section 3(d) in which Congress stipulates that

“The domestic terrorism offices authorized under paragraphs (1), (2), and (3) of subsection (a) shall focus their limited resources on the most significant domestic terrorism threats, as determined by the number of domestic terrorism-related incidents from each category and subclassification in the joint report for the preceding 6 months required under subsection (b).”

The report specifically mandates a domestic terrorism category that includes “White-supremacist-related incidents or attempted incidents.” Thus, the use of the mandatory

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<sup>23</sup> 418 U.S. 683, 693 (1974); see also *U.S. v. Armstrong*, 517 U.S. 456, 467 (1996) (“[O]ne of the core powers of the Executive Branch of the Federal Government [is] the power to prosecute.”).

<sup>24</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[T]he decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch” comes from U.S. Const., Art. II, § 3, which charges the Executive “to take Care that the Laws be faithfully executed.”).

<sup>25</sup> *U.S. v. Fokker Service B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016).

<sup>26</sup> *Quinn v. U.S.*, 349 U.S. 155, 161 (1955). Likewise, Justice Douglas stressed that “Congress is not a law enforcement agency; that power is entrusted to the Executive. Congress is not a trial agency; that power is entrusted to the Judiciary.” *U.S. v. Welden*, 377 U.S. 95, 117 (1964) (Douglas, J., dissenting); see also *Trump v. Mazars USA, LLP*, 940 F.3d 710, 755 (D.C. Cir. 2019) (Rao, J., dissenting), *vacated*, 140 S. Ct. 2019 (2020) (“[C]ongress cannot prosecute and decide specific cases against individuals. Such powers properly belong to the executive branch and the independent judiciary – a division essential to maintaining fundamental aspects of our separation of powers and protecting the rights of individuals accused of illegal actions.”).

“shall” would suggest that Congress is ordering the Executive Branch to “focus” on specific domestic terrorism subjects.

In this legislation, Congress can argue that it is not requiring the Administration to prosecute domestic terrorism but merely setting aside resources for that purpose. However, the mandate to focus on certain categories would cross the line from a consideration to a command in legislation. Courts could well “avoid” this issue by adopting an interpretation that leaves the matter as an expression of congressional priority as opposed to a command for prosecutorial priority. The avoidance doctrine allows a court to choose between two plausible interpretations to avoid a constitutional deficiency. However, Congress should never rely on such judicial correction. Indeed, justices have objected the use of the doctrine as an invitation to rewrite statutes.<sup>27</sup>

If it is not the intent of Congress to statutorily prioritize areas of federal enforcement, it should remove this mandatory language in favor of an expression of congressional support for such prioritization. If not, Congress must be prepared to defend this mandate in court despite the considerable risk of creating adverse precedent. As someone who has represented the House of Representatives in litigation, I would strongly discourage such a course of legislation. Congress has long been risk-averse in such litigation to avoid lasting damage to the authority of this institution. This is an interbranch conflict that Congress would be wise to avoid.

While my focus is on the constitutionality of such a mandate, I would like to express reservations about the costs of such intervention into this area. We all have an interest in combating domestic terrorism. However, while creating offices and mandating enforcement can satisfy a desire for action, it may have a counterproductive impact in disrupting the current system and overriding investigative and prosecutorial judgments. The Justice Department and related agencies already have a robust investigative system that targets violent extremists in the United States that has been significantly increased in recent years.<sup>28</sup> The Justice Department has already announced the creation of a special domestic terrorism unit and has shifted resources to increase investigations in that area.<sup>29</sup> The Biden Administration has implemented a National Strategy for Countering Domestic Terrorism (“National Strategy”) that coordinates the work of not just FBI and U.S. Attorney’s office but the National Security Division, the Civil Rights Division, the Tax Division, and the Criminal Division.<sup>30</sup> Joint Terrorism Task Forces are tasked with the

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<sup>27</sup> For example, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 706 (2012), the four dissenting justices objection that the Court used the doctrine “to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax...The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching.”

<sup>28</sup> Luke Barr & Alexander Mallin, *FBI More Than Doubles Domestic Terrorism Investigations: Christopher Wray*, ABC NEWS, Sept. 21, 2021, <https://abcnews.go.com/Politics/fbi-doubles-domestic-terrorism-investigations-christopher-wray/story?id=80145125>.

<sup>29</sup> *Justice Department Announces the Creation of a Unit Focusing on Domestic Terrorism*, ASSOCIATED PRESS, Jan. 11, 2022, <https://www.pbs.org/newshour/politics/watch-live-senate-judiciary-committee-hearing-on-domestic-terrorism-following-the-jan-6-attack>.

<sup>30</sup> *Domestic Terrorism Threat One Year After January 6: Hearing before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Matthew G. Olsen, Assistant Att’y Gen., Dep’t of Just. & Jill Sanborn, Exec. Assistant Dir., Nat’l Sec. Branch, Fed. Bureau of Investigation)

investigation and prosecution of a wide array of Domestic Violent Extremists (“DVEs”), Homegrown Violent Extremists (“HVEs”), Racially or Ethnically Motivated Violent Extremists (“RMVEs”), Anti-Government or Anti-Authority Violent Extremists (“AGAAVEs”), Militia Violent Extremists (“MVEs”), and Anarchist Violent Extremists (“AVEs”). This alphabet soup reflects the mix of motives and threats posed by extremist groups from the left and the right. The underlying cases are all extremist violence prioritized by the government by the severity and immediacy of the risk to the public.

Putting a thumb on the scale of prosecutorial discretion risks the introduction of political or extrinsic considerations into this risk-based assessment. White supremacists are legitimately a focus of this Administration. However, RMVEs involve the full range of racially identified groups. Indeed, Buffalo<sup>31</sup> and other mass-casualty incidents like the one in Waukesha<sup>32</sup> often reveal views that are a wicked brew of racist, anti-Semitic, and other hateful ideologies. The Justice Department must sort through such violent extremist chatter to identify the most serious threats to public safety. Many of us will disagree with the insular choices made on charging and sentencing issues. This week the Justice Department took a controversial step in cutting a plea deal with two New York attorneys who firebombed a police vehicle, and one attempted to distribute additional Molotov cocktails.<sup>33</sup> Originally charged with domestic terrorism, the two attorneys were allowed to withdraw an earlier plea to a more serious offense to accept a deal that recommends less than two years of incarceration. Others have criticized the dropping of attacks on federal courthouses and rioting in cities like Portland.<sup>34</sup> I have criticized charging some of these cases as terrorism, but it is important that these decisions be free of any questions of political influence from Congress or the White House.

On a policy level, the Congress needs to think seriously about how restructuring these offices and their staffing may hamper rather than advance greater enforcement. It is akin to trying to change the course of a ship but rearranging the navigational and command rooms. It may only serve to add a disjunctive element to the system.

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<https://www.judiciary.senate.gov/imo/media/doc/Statement%20for%20the%20Record.Matthew%20Olsen-DOJ%20and%20Jill%20Sanborn-FBI.pdf>.

<sup>31</sup> Payton Gendron’s manifesto was a vile mix of racist and anti-Semitic views. He discussed how he was radicalized on social media. Justin Ling, *How 4Chan’s Toxic Culture Helped Radicalize Buffalo Shooting Suspect*, THE GUARDIAN, May 18, 2022. It included attacks on Fox News figures as well as other media. David Meyer, *Payton Gendron’s Manifesto Featured Anti-Semitic Memo Attacking Fox News*, N.Y. POST, May 15, 2022, <https://nypost.com/2022/05/15/payton-gendrons-manifesto-featured-anti-semitic-fox-news-meme/>

<sup>32</sup> Darrell Brooks Jr. posted racist diatribes on his social accounts that showed deeply disturbed and hateful views. Brad Hunter, *Accused Hunter Waukesha Parade Driver Posted Toxic Anti-White Rhetoric*, TORONTO SUN, Nov. 21, 2021, <https://torontosun.com/news/world/accused-killer-waukesha-parade-driver-posted-toxic-anti-white-rhetoric>; Karen Ruiz, *Waukesha Suspect Shared Social Media Posts Promoting Violence Towards White People and Claiming Black People were the 'True Hebrews'*, DAILY MAIL, Nov. 23, 2021, <https://www.dailymail.co.uk/news/article-10235869/Waukesha-suspect-shared-social-media-posts-promoting-violence-white-people.html>.

<sup>33</sup> Deanna Paul, *New York Lawyers Plead Guilty to Conspiracy in Molotov-Cocktail Case*, WALL STREET JOURNAL, June 2, 2022, <https://www.wsj.com/articles/new-york-lawyers-plead-guilty-to-conspiracy-in-molotov-cocktail-case-11654203046>.

<sup>34</sup> Aruna Viswanatha and Sadie Gurman, *Almost Half of Federal Cases Against Portland Rioters Have Been Dismissed*, WALL STREET JOURNAL, Apr. 15, 2021, <https://www.wsj.com/articles/almost-half-of-federal-cases-against-portland-rioters-have-been-dismissed-11618501979>.



### III. Free Speech and Domestic Terrorism Investigations

It is often difficult for free speech advocates to raise concerns over such rights in the context of domestic terrorism. Free speech remains an abstraction against the real and chilling images of terrorism. For that reason, free speech is often the first victim in times of fear and danger. The chilling effect can be glacial. To raise free speech concerns is to invite attacks of being sympathetic or even supportive of terrorism.

#### A. America's Struggle with Free Speech Protections in Times of Unrest

As discussed in a forthcoming law review publication, our history is checkered with periods of crackdowns on minority and dissenting groups accused of being enemies of the state.<sup>35</sup> Early in the Republic, the anti-sedition laws were used not only to intimidate but also to arrest those with opposing views. Back then, sedition was the operative word rather than terrorism to seek the arrest of one's opponents. The use of the Sedition Act by President John Adams and the Federalists was recognized at the time as not just an abuse, but also the height of hypocrisy. Adams and the Federalists routinely engaged in false and malicious writings about Thomas Jefferson, including declaring that, if elected, "[m]urder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes."<sup>36</sup> Jefferson and James Madison denounced the law, which made it illegal for anyone to "print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . . ."<sup>37</sup> This included a Vermont congressman who was prosecuted for criticizing John Adams's "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."<sup>38</sup> The prosecution proved the point, but the irony was lost on Adams. It was not, however, lost on Jefferson, who remarked that "our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England."<sup>39</sup> At least twenty-five leading Republicans were arrested, from journalists to politicians, though that number may not fully capture the full extent of the government crackdown.<sup>40</sup> President Jefferson would later pardon all those convicted. The Sedition Act was never found unconstitutional and, fittingly, expired on Adams's last day in office as a lasting and indelible mark on his presidency.<sup>41</sup>

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<sup>35</sup> Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y (forthcoming 2022). Portions of this section were taken from this law review.

<sup>36</sup> Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, Miller Ctr., <https://millercenter.org/president/jefferson/campaigns-and-elections> [<https://perma.cc/C9GM-PKN6>] (last visited Mar. 6, 2022).

<sup>37</sup> Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798) (expired 1801).

<sup>38</sup> See CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON AND THE MISFITS WHO SAVED FREE SPEECH 114, 127-28 (2015).

<sup>39</sup> *Id.* at 16-64 (citing Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), in 2 *The Bill Of Rights: A Documentary History* (1971)).

<sup>40</sup> Wendell Byrd, *New Light on The Sedition Act of 1798: The Missing Half Of The Population*, 34 L. & HIST. REV. 514, 545-46 (2016).

<sup>41</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 71 (2004).

Prosecutions for unlawful speech continued periodically in the United States, becoming particularly abusive during periods like the Civil War and other times of armed conflict.<sup>42</sup> For example, under President Woodrow Wilson, the country experienced a crackdown on dissenting views when the United States entered World War I in April 1917.<sup>43</sup> Wilson called for new laws to punish dissenters, dismissing free speech concerns by declaring that “[disloyalty] was not a subject on which there was room for . . . debate” since such disloyal citizens “sacrificed their right to civil liberties.”<sup>44</sup> To carry out the crackdown on free speech, Wilson needed, and found, an eager partner in Congress. Congress enacted the Espionage Act of 1917, introducing the criminalization of any acts that “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States” or willfully to “obstruct the recruiting or enlistment service of the United States.”<sup>45</sup> At the time, Attorney General Charles Gregory made clear the menacing intent of such laws, declaring: “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”<sup>46</sup>

It was during this period that Congress rediscovered the allure of sedition laws. One year after passing the Espionage Act, Congress passed the Sedition Act of 1918.<sup>47</sup> From 1918 to 1921, Gregory’s successor Attorney General Mitchell Palmer prosecuted hundreds of individuals under these laws -- gaining infamy as the architect of the “Palmer Raids.”<sup>48</sup> Communists, socialists, and anarchists faced repressive measures across the country.<sup>49</sup>

Outside of wartime crackdowns, our struggle to protect free speech hit another low during the Cold War and the “Red Scare.” Again, this period revealed a total failure of all three branches in supporting a crackdown on free speech. The Executive Branch arrested suspected Communists, and Congress enacted new powers under the Internal Security Act to allow the mass detention of dissidents.<sup>50</sup> The grand jury process was regularly used to target political dissidents and coerce people to reveal their associations and beliefs.<sup>51</sup> Of course, the most visible abuses occurred in the hearings on “Un-American Activities” with figures like Senator Joseph McCarthy.<sup>52</sup>

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<sup>42</sup> ANTHONY R. FELLOW, *AMERICAN MEDIA HISTORY* 131-33, 136 (2d ed. 2010).

<sup>43</sup> Jack A. Gottschalk, *Consistent with Security . . . A History of American Military Press Censorship*, 5 *COMM. & L.* 35, 38 (1983).

<sup>44</sup> PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 53 (1979).

<sup>45</sup> Espionage Act of 1917, Ch. 30, Tit. I, § 3, 40 Stat. 217, 219 (1917).

<sup>46</sup> *All Disloyal Men Warned by Gregory*, *N.Y. TIMES* (Nov. 21, 1917), [<https://perma.cc/9EMV-CQCD>]. For a discussion of this period see Geoffrey R. Stone, *Free Speech and National Security*, 84 *IND. L.J.* 939 (2009).

<sup>47</sup> Sedition Act of 1918, Ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921).

<sup>48</sup> EDWIN P. HOYT, *THE PALMER RAIDS, 1919-1920: AN ATTEMPT TO SUPPRESS DISSENT* 6 (1969).

<sup>49</sup> *See generally* CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* 30, 32-34 (2007).

<sup>50</sup> David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 16, 19 (2003).

<sup>51</sup> David J. Fine, *Federal Grand Jury Investigation of Political Dissidents*, 7 *HARV. C.R.-C.L. L. REV.* 432 (1972).

<sup>52</sup> Notably, however, some academics supported this crackdown. For example, Professor Carl Auerbach reconstructed the premise of the early anti-sedition laws by claiming that certain speech cannot be protected because it is inimical to the constitutional system. Carl A. Auerbach, *The Communist Control*

Attacks on free speech through private and public censorship, blacklisting, and accusations of treason have again emerged in contemporary politics. Our divisions and rage offer the same fertile environment for the resurgence of such draconian measures. While much of that trend is beyond the scope of today's hearing, we must all be cognizant of our history of such abuses. The impulse to use the criminal process to retaliate against unpopular individuals or groups rests like a dormant virus in our body politic. With that background, I would now like to address the concerns raised generally by the expansion of the domestic terrorism investigations.

B. Violent Extremism, Terrorism Designations, and Constitutional Clarity.

The DTPA focuses on white supremacy and neo-Nazi elements in legislating domestic terrorism measures. It is certainly true that such groups have been repeatedly identified by the FBI as a major security threat to our country. Moreover, our fight against white supremacy groups like the KKK has left deep and still unhealed wounds in our country. FBI Director Christopher Wray has repeatedly reaffirmed that targeting white supremacy groups is a priority of the department. He has also called the riot on January 6<sup>th</sup> an act of "domestic terrorism."<sup>53</sup> I share the Director's outrage over the January 6 riot, which was a desecration of our constitutional process.<sup>54</sup> I condemned President Trump's remarks at the rally while they were still being given on that day and opposed the challenge to the electoral certification. However, the blanket characterization of the riot as domestic terrorism raises serious civil liberties concerns. As legally defined, I do not believe that the riot was an act of domestic terrorism and believe that such a sweeping characterization could be used against a host of groups across the political spectrum. For that reason, I have long opposed such designations of protests turned violent. For example, despite being one of the most vocal critics of Antifa for over a decade, I still opposed the move during the Trump Administration to treat the organization as a terrorist group.<sup>55</sup> I also criticized calls to treat some Black Lives Matter protesters as terrorists.<sup>56</sup>

The use of terrorism laws for such violent protests is inimical to free speech. Despite supporting the prosecution of those who stormed our Capitol, I believe that Director Wray's characterization of the riot as domestic terrorism is overbroad and unsustainable. Notably, only a handful of defendants among hundreds of arrested individuals have been charged with sedition stemming from January 6<sup>th</sup>. Most are charged with forms of trespass or unlawful entry. It does not belittle the horrible actions

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*Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 184 (1956); see also *id.* at 189.

<sup>53</sup> Brian Naylor & Ryan Lucas, *Wray Stresses Role of Right-Wing Extremism in Hearing About Jan. 6<sup>th</sup> Riot*, NPR, March 2, 2021.

<sup>54</sup> Jonathan Turley, *A Desecration of Our Democracy*, The Hill, Jan. 7, 2020, <https://thehill.com/opinion/judiciary/533084-a-desecration-of-our-democracy/>.

<sup>55</sup> Jonathan Turley, *Why Trump's tweet about labeling 'antifa' a terrorist group is so dangerous*, L.A. TIMES June 1, 2020, 4:14 PM), <https://www.latimes.com/opinion/story/2020-06-01/antifa-protests-donald-trump-terrorist-group>.

<sup>56</sup> Jonathan Turley, *Should protesters be classified as terrorists?*, THE HILL (Aug. 13, 2017, 6:00 PM), <https://thehill.com/blogs/pundits-blog/civil-rights/347702-opinion-should-protesters-be-classified-as-terrorists>.

on that day to call them criminal rather than terroristic acts.<sup>57</sup> Once a group or protest is tagged under the terrorism laws, the government can use a host of powerful surveillance and investigatory powers. It also can label whole groups as terroristic when only associated members are accused of such acts. Terrorist investigations tend to be blunt tools when used against groups rather than individuals. That is why I have generally opposed the expansion of terrorism definitions for thirty years. Others in the civil liberties community have also raised similar concerns, including the ACLU. In addition to the free speech and associational concerns raised by the broadening of terrorism investigations, there are other dangers for civil liberties, including arbitrary or inconsistent application of vague definitions. Individual rights tend to die in ambiguity. That is why civil libertarians often argue for clarity in the form of bright-line rules or definitions. The risk is that any hate crime case with multiple victims can be defined as an act of terrorism. The FBI has been clear about expanding its investigation of domestic terrorism threats but less clear on how it distinguishes between cases. The Buffalo case is a good example. The indictment contained both hate crime and domestic terrorism components under New York law.<sup>58</sup> Likewise, on the federal side, there are lingering questions about the decision this week to drop domestic terrorism charges in favor of a lenient plea agreement in the cases of Urooj Rahman and Colinford Mattis. After the attack, Rahman declared that firebombing is justified because “the only way they hear us is through violence.”<sup>59</sup> For those of us who prefer a narrow definition of terrorism, the decision to drop the charges is not as problematic as the relatively light plea deal on lesser offenses. There was no explanation how the department is drawing the distinction between a terrorism and non-terrorism charge even in a case that seemed to seesaw between the two categories.

Moreover, there are other legitimate concerns raised with the significant increase in terrorism investigations. With offices and personnel assigned to specifically root out domestic terrorism, the fear is that the policy of prioritization will create pressure to develop less compelling or urgent cases. That can lead to questions of entrapment and grooming by the FBI, including the Whitmer kidnapping plot where agents appeared to direct, frame, and fund the underlying conspiracy.<sup>60</sup> The jury in the Michigan case recently declined to convict a single defendant.<sup>61</sup>

Political violence is not the sole domain of one end of our political spectrum. There are also violent groups on the far left. Indeed, I have previously testified about one

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<sup>57</sup> Jonathan Turley, *The Oath Keepers: What the Indictment Says and Does Not Say About the Jan. 6<sup>th</sup> Riot*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Jan. 14, 2022, <https://jonathanturley.org/2022/01/14/the-oath-keepers-what-the-indictment-says-and-does-not-say-about-the-january-6-riot/comment-page-2/>.

<sup>58</sup> The People of State of New York v. Payton Gendron, Indictment, June 1, 2022, <https://www.wivb.com/wp-content/uploads/sites/97/2022/06/CUSERSBZAKIADOCUMENTSSMART-TOUCHI1100OUTPUT2022-06-01-3.pdf>.

<sup>59</sup> Jonathan Turley, *New York Attorneys Accused of Firebombing Police Car Given Generous Plea Deal*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), June 5, 2022, <https://jonathanturley.org/2022/06/05/new-york-attorneys-accused-of-firebombing-police-car-given-generous-plea-deal/#more-189550>.

<sup>60</sup> Edward Helmore, *Michigan Governor Kidnap Case: Hardened Terrorists or FBI Dupes*, THE GUARDIAN, Mar. 19, 2022, <https://www.theguardian.com/us-news/2022/mar/19/michigan-governor-kidnap-case-terrorists-fbi-dupes-gretchen-whitmer>.

<sup>61</sup> Jonathan Turley, *The Whitmer Prosecution and the Entrapment Defense*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Apr. 12, 2022, <https://jonathanturley.org/2022/04/12/the-serpent-beguiled-me-the-whitmer-prosecution-and-the-entrapment-defense/comment-page-1/>.

of the most active and violent of these anti-free speech movements: Antifa.<sup>62</sup> Antifa is a good example of the fluidity of such groups and the care that needs to be taken in using anti-terrorism measures against such individuals. While self-labeling as an “anti-fascist” movement, Antifa embraces tactics that are the very signature of fascist organizations—from attacking the homes of critics to beating journalists, academics, and opposing speakers. The Antifa movement is arguably one of the most organized and most successful anti-free speech movements in our history. Free speech is viewed as inherently harmful in shielding the enemies of radical social reconstruction.<sup>63</sup> Antifa members have justified their use of violence to combat the Alt-Right, arguing that “[if more] people brawled with actual Nazis then Hitler and the Nazi party would have never risen to power.”<sup>64</sup> Like its counterparts in right-wing groups like Proud Boys, Antifa has a long and well-documented history of such violence.<sup>65</sup> Violence between Antifa and Alt-Right protestors has been addressed in the courts.<sup>66</sup>

Antifa has gradually expanded its targets for violent opposition from white supremacists to those who are deemed supportive of the system of white supremacy, authoritarianism, or other social ills.<sup>67</sup> For those who become the focus of such protests, Antifa and its associated groups have become more open and menacing in their often violent opposition. The author of *Antifa: The Anti-Fascist Handbook*, Professor Mark Bray admits that the movement has a strong anti-free speech foundation and remains focused on fighting voices on the right of the political spectrum:

“Since the establishment of ARA and its growth in the nineties, most Americans in Antifa have been anarchists or antiauthoritarian communists. Certainly, some have been Stalinists and other kinds of authoritarians who have supported the efforts of the Soviet Union and similar regimes to very narrowly delineate the range of acceptable speech. From that standpoint, ‘free speech’ as such is merely a bourgeois fantasy unworthy of consideration.”<sup>68</sup>

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<sup>62</sup> *The Right of The People Peacefully To Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing before the Subcom. on the Const. of the S. Comm. on the Judiciary*, 16th Cong. (2020).

<sup>63</sup> That purpose is evident in what is called the “bible” of the Antifa movement: Mark Bray’s *Antifa: The Anti-Fascist Handbook*. Bray emphasizes the struggle of the movement against free speech: “At the heart of the anti-fascist outlook is a rejection of the classical liberal phrase that says, ‘I disapprove of what you say, but I will defend to the death your right to say it.’”

<sup>64</sup> Robin Young & Serena McMahon, *What is Antifa? Separating Fact From Fiction*, WBUR (June 11, 2020), <https://www.wbur.org/hereandnow/2020/06/11/what-is-antifa-trump-protests>.

<sup>65</sup> See generally United States Senate, Committee on the Judiciary, Subcommittee on the Constitution, *The Right of The People Peacefully To Assemble: Protecting Speech By Stopping Anarchist Violence*, August 4, 2020.

<sup>66</sup> An example is the case in Virginia where “people were hurt and beaten on both sides” after Antifa members attacked protesters with baseball bats, mace spray, canes, sticks, bricks, bottles, and a metal pipe *Kessler v. City of Charlottesville*, No. 3 :19-cv-00044, 2020 U.S. Dist. LEXIS 31420, at \*12–13 (W.D. Va. Feb. 21, 2020).

<sup>67</sup> See *Who are Antifa?*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/who-are-antifa>.

<sup>68</sup> *Id.* at 148.

Fascism itself is a term that often morphs into a wide range of issues deemed unacceptable by Antifa, from capitalism to patriarchy to police.<sup>69</sup> Indeed, in France and other countries, Antifa considers all of the major parties as having “manifested fascistic traits.”<sup>70</sup> Moreover, the *Antifa Handbook* states, “Anti-fascists don’t oppose fascism because it is illiberal in the abstract, but because it promotes white supremacy, hetero-patriarchy, ultra-nationalism, authoritarianism, and genocide.”<sup>71</sup> Thus, all of these opposing figures are deemed fascistic and thus unworthy of being heard.<sup>72</sup> The absolutism of their goals is used to justify any means to achieve them. Antifa followers refuse to recognize the views of opponents as legitimate or “a difference of opinion.” Their goal is not co-existence but, as stated in the *Antifa Handbook*, “to end their politics.” It is the very mindset that was once used against Communists and Marxists in the 1950s. Some civil rights leaders have spoken out publicly to condemn the violence of Antifa members and related groups at these protests.<sup>73</sup> Similarly, Black Lives Matter representatives in Sacramento denounced outside groups that were “breaking things for no reason” in protests involving Antifa members.<sup>74</sup>

Given the history and tactics of Antifa, it would be easy to define the movement as terroristic. However, Antifa is an informal and amorphous collection of individuals and groups who hold militant and anarchist views. The designation of such an ambiguously defined group would allow the government to trigger criminal investigative and prosecution powers over a loose association of political activists. Moreover, many people in the Antifa movement engage in traditional acts of civil disobedience from blocking roads to chaining themselves to doors. Many organizations have had members who have been investigated and prosecuted for criminal activity without being declared terrorist entities, ranging from hate groups like the Ku Klux Klan to more traditional political groups like Greenpeace. If the government can designate a terrorist organization based on the conduct of some members, the criminalization of political speech could be virtually unlimited.

Once again, extreme right-wing groups have also facilitated violence in protests and the disgraceful riot in the Capitol on January 6, 2021, shows just how dangerous groups like the Proud Boys are for the country.<sup>75</sup> Many of these groups have the same

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<sup>69</sup> *Id.* at 159.

<sup>70</sup> *Id.* at 159.

<sup>71</sup> *Id.* at 162.

<sup>72</sup> In this way, Antifa bears a striking resemblance to groups that emerged during earlier periods of attacks on free speech. Simply replacing anti-communism with anti-fascism does not materially change the same anti-free speech purpose of these movements. The purpose of governmental or non-government threats are the same in seeking to not only silence opponents, but to deter others from joining them.

<sup>73</sup> The president of Portland’s NAACP, E.D. Mondaine, wrote in the Washington Post to denounce what he called a “white spectacle of violence.” E.D. Mondainé, *Portland’s protests were supposed to be about black lives. Now, they’re white spectacle.*, THE WASH. POST (July 23, 2020, 1:51 PM), <https://www.washingtonpost.com/opinions/2020/07/23/portlands-protests-were-supposed-be-about-black-lives-now-theyre-white-spectacle/>.

<sup>74</sup> Vincent Moleski, *City Hall, jail vandalized during Sacramento march*, SACRAMENTO BEE (July 26, 2020, 3:51 PM), <https://www.sacbee.com/news/local/crime/article244503162.html>.

<sup>75</sup> Jonathan Turley, *The Desecration Of The Capitol*, THE HILL, Jan. 8, 2020; *see also Domestic Terrorism and the 2020 Election: Hearing before the S. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Professor Jonathan Turley).

amorphous structure and membership profile. The challenge has been pursuing the most violent actors in these groups while protecting the underlying speech of groups, even those with deeply offensive or hateful philosophies.

The calls for expanded domestic terrorism investigations in Congress are understandable in light of the disgraceful attack on our Capitol and the violence in many cities across the United States. However, recent history should be a cautionary example of how expanded enforcement can have pronounced and deleterious impacts on groups and individuals. After 9/11, I represented Muslim defendants accused of terrorism and heard from many in the Muslim community about the intense surveillance of mosques and conferences. Such surveillance can impact free speech, associational, and free exercise rights. The ACLU has opposed the prior DTPA bills on domestic terrorism as a threat to such minority communities.

Political and social tensions have only risen since 9/11. There is a deep division in our country that has been characterized by reckless rhetoric from both sides. Many politicians now routinely call their opponents “terrorists” or “traitors.” It is a time tragically reminiscent of the violent divisions between the Jeffersonians and the Federalists. With that tension is a lack of trust in the motivations and means of both sides. That was evident in the recent controversy over the letter from the National School Boards Association (NSBA) requesting federal intervention to address threats against school boards, including use of the Patriot Act as domestic terrorism. I am less interested in the content of that letter than the reaction to it. There is a widespread fear that the government is prepared to use such powers to target groups and citizens on the right.

In this environment, it is more important than ever for the Justice Department and other agencies to prioritize terrorism cases independent of any political influence or pressure. These decisions should be based entirely on the level of risk presented by alleged terrorist activity regardless of the identity or cause of the group or individual. Otherwise, Congress could prioritize prosecutions that either targeted or protected groups based on their racial, political, or religious associations.

Rather than seek legislative prioritization, Congress should seek to add protections for free speech and associational rights that may be impacted by expanding domestic terrorism investigations. This can include requiring regular reports on any political, religious, journalistic, or charitable organizations subject to national security investigations. This should encompass detailed reports on the use of national security letters and other demands made without a warrant to gain data and information from the cloud.<sup>76</sup> It could also reinforce civil liberties by demanding greater clarity and definition in the designation of domestic terrorism cases.

#### **IV. Conclusion**

It was once said that “a politician thinks of the next election; a statesman, of the next generation.” We have never needed such leadership more acutely in our history than we do today. We are living in dangerous times not only due to the scourge of extremist violence but also due to the deep anger and divisions in our country. This is the time that

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<sup>76</sup> *Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power: Hearing before H. Comm. on the Judiciary, 117th Cong. (2021)* (testimony of Professor Jonathan Turley).

the country needs people of good faith in both parties to seek to lower the level of conflict in our society. Fortunately, the Framers gave us a system that can withstand such factional pressures. The Madisonian system is designed for bad times, not good times. Indeed, it was written in the worst of times of violence and intolerance. Yet, throughout that history, we have been joined as a people by a common article of faith in our Constitution. It is a covenant not with our government but with each other. That faith has sustained us through some of the worst periods of our history, from the Civil War to segregation to economic collapse. We prevailed despite our own failings and the failures of our political leaders. Yet, I implore this Committee not to assume that this constitutional system is indestructible. The current political tensions in our country threaten to tear our nation apart. We are living through a crisis of faith where our foundational institutions and defining values are under attack. No one is above criticism for bringing us to this point, but we have to reestablish those bonds that unite and define us. The expanded use of domestic terrorism powers is a dangerous element to introduce into this tinderbox without careful considerations and clear limitations. I hope that you will view my testimony today as constructive in advancing that needed national dialogue.

Once again, thank you for the honor of appearing before you to discuss these important issues, and I would be happy to answer any questions from the Committee.

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