



**Statement of**

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**to the**

**United States House of Representatives  
Select Committee to Investigate the January 6th Attack on the United States Capitol**

**on**

**“Lessons Learned and Caveats for the Future: The January 6, 2021, Attempted Insurrection”**

**Submitted on May 19, 2022**

Chairman Thompson, Vice Chair Cheney, members of the Select Committee, I appreciate the opportunity to offer my views on the events leading up to and after the January 6, 2021, attempt to prevent the peaceful transfer of power between Administrations. Let me state at the outset that the views I express herein are mine alone and do not necessarily represent the views of the Cato Institute, its management, or board of directors.

In the nearly 18 months since the attempted insurrection, many have searched for answers as to why the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) failed to anticipate the attempted insurrection. Today, I'll convey two overarching themes in that regard. The first has to do with organizational culture and bureaucratic incentives and mindset that have often led law enforcement organizations, and particularly the FBI, to target individuals or groups absent a demonstrable criminal predicate. The second has to do with the nature of the current domestic political threat, the likes of which our country has not seen since the period immediately before the outbreak of the Civil War.

While much of the media coverage on the attempted insurrection has focused on the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS), my remarks today will be confined to the FBI's performance, as under existing federal law and historical precedent it is the FBI that has had a de facto domestic security investigative mandate for over a century.

To help illustrate the problems, my statement is structured in to five sections:

- A brief historical background on the American experience with politically motivated surveillance, repression, and violence--by individuals and groups, as well as that perpetrated by the federal government itself.
- An examination of the history and uses of the Attorney General Guidelines for Domestic FBI Investigations, and the risks the Guidelines and FBI implementing regulations pose to constitutional rights.
- Cato's own findings, based on Freedom of Information Act (FOIA) requests and litigation, regarding FBI domestic surveillance abuses targeting domestic civil society organizations over roughly the last 15 years, and the potential dire consequences for American's constitutional rights and our basic domestic tranquility of a failure to reexamine FBI investigative practices and policies.
- Reasons for concern about the viability of pre-emptively detecting alleged or actual planned violent activity, as well as legitimate concerns about extremist penetration of law enforcement organizations.
- The need to focus on governmental and process protections beyond reforms regarding law enforcement or Defense Support to Civilian Authorities (DSCA) response to another attempted coup.

In brief, I believe Congress avoid any expansion of domestic terrorism bureaucracies, much less legal authorities, in response to the events of January 6, 2021. To help you understand why I counsel caution, let me provide some very relevant history.

## Political Extremism and Government Repression: An American Tradition

Individuals or groups holding and seeking to act on what prevailing government authorities view as extreme political views is a phenomenon that has been a part of the American experience since pre-Revolutionary times. Sam Adams and his "Sons of Liberty" --famous for tar-and-feathering British Crown officials in Massachusetts--were viewed by British colonial authorities as traitors and terrorists.<sup>1</sup> Most Americans today view them as the ultimate patriots, men who helped lead 13 separate colonies in a successful war for independence and in doing so created a nation unlike any other in history.

Yet less than a decade after the ratification of the Constitution, the new central government of the United States would itself, under the control of the Federalist Party, conduct a campaign of de facto political terror against its opponents via the infamous Alien and Sedition Acts.<sup>2</sup> Critically, the use of federal government power against other groups viewed unfavorably or as potential threats (real or manufactured) did not end with the repeal or expiration of the Alien and Sedition Acts during President Jefferson's time in office.

Under intense pressure from then-President Andrew Jackson, the Congress in late May 1830 passed legislation authorizing the forcible removal of Native Americans from the southeastern United States.<sup>3</sup> The infamous "Trail of Tears" episodes remains one of the most disgraceful in U.S. history.

After the defeat of the Confederacy in 1865, the rise of the Ku Klux Klan sparked an era of de facto state-sponsored murder, terrorism, and political repression against recently freed slaves across the South, with state and local officials giving covert or even open support to Klan activities or serving in the Klan. Ultimately, then-President Grant employed the Secret Service as a domestic counterterrorism force against the KKK. The then-head of the Secret Service, Hiram Whitley, used threats of summary executions and other forms of torture on KKK members or sympathizers in order to extract confessions from them and ultimately effectively destroy the organization for a period of time.<sup>4</sup>

In the roughly 150 years since the Secret Service's campaign against the KKK, there have been other cycles of violence and repression involving domestic groups and the federal government. Among the more prominent examples:

- The 1903 Anarchist Exclusion Act, passed in response to the assassination of President McKinley by an anarchist adherent, was complemented by an aggressive effort at the federal, state, and local levels to identify and persecute anarchists regardless of whether they had committed violent acts.

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<sup>1</sup> See Les Standiford, *Desperate Sons: Samuel Adams, Patrick Henry, John Hancock, and the Secret Bands of Radicals Who Led the Colonies to War* (New York: HarperCollins, 2012).

<sup>2</sup> See Wendell Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798* (Cambridge: Harvard University Press, 2020).

<sup>3</sup> See Claudio Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory* (New York: W.W. Norton & Co., 2020), pp. 68-83.

<sup>4</sup> See Charles Lane, *Freedom's Detective: The Secret Service, the Ku Klux Klan, and the Man Who Masterminded America's First War on Terror* (Toronto: Hanover Square Press, 2019), pp. 83-84.

- The passage of the Espionage Act, Food and Fuel Control Act, and the Sedition Act during WW I saw the Secret Service and Bureau of Investigation (the name change to FBI would not happen until 1935) targeting German Americans, socialists, and others deemed threats to national security with little or no basis.
- In the months after the Pearl Harbor attack, plans put in place years earlier to detain more than 100,000 Japanese Americans were unleashed via President Franklin Roosevelt's infamous Executive Order 9066, despite the fact that federal authorities had already determined that the overwhelming majority of Japanese Americans were loyal to the United States.
- The Cold War would see congressional committees--the House Un-American Activities Committee (HUAC) and the Senate Internal Security Subcommittee (SISS)--compete with the FBI and other federal law enforcement and intelligence services in the hunt for domestic "subversives"--a term never defined in law. The professional and personal lives of thousands of Americans were destroyed at the hands of HUAC and SISS during their existence.
- From 1956 to 1971, the FBI's Counterintelligence Program (COINTELPRO) became the most infamous civil society surveillance and subversion scheme in American history. Among those targeted were the Reverend Martin Luther King, Jr. and the Southern Christian Leadership Conference, among many others.
- Between 1945 and 1975, the NSA's SHAMROCK and MINARET swept up the international cable traffic of specifically targeted Americans absent any criminal predicate.

The legislative reforms enacted during and after the Church Committee era--the passage of the Foreign Intelligence Surveillance Act (FISA), the Inspector General Act, and the creation of the House and Senate Intelligence Committees--were designed to help preclude a repeat of such domestic surveillance abuses and related political repression. But as the subsequent Senate Intelligence Committee investigation of the FBI's predicate-free targeting of the Committee in Solidarity with the People of El Salvador (CISPES) in the 1980s demonstrated, the failure to pursue an aggressive reform agenda regarding the FBI in the Church Committee era all but ensured a repeat of past Bureau domestic surveillance abuses.<sup>5</sup>

Yet even as the FBI continued to pursue some domestic groups with international connections, a new surge in the formation of domestic white supremacists or vocally anti-government groups did not escape the Bureau's attention.

Aryan Nations, The Order, the American Nazi Party, and other groups and individuals with racially repellant and often virulently anti-government views emerged from the mid-1960s onward. The FBI investigated or otherwise monitored such groups. Armed confrontations between federal agents and armed anti-government activists at Ruby Ridge, Idaho in 1992 and the Branch Davidian compound near Waco, Texas in 1993 served as rallying cries for further attacks against federal targets by those in the anti-government movement. Two anti-government

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<sup>5</sup> See *The FBI and CISPES: Report of the Select Committee on Intelligence, United States Senate together with Additional Views*. 101st Congress (1st Session), Committee Print 101-46, July 1989.

extremists and former U.S. Army members--Timothy McVeigh and Terry Nichols--would conspire to perpetrate the deadliest single act of domestic terrorism in the nation's history: the April 19, 1995, truck bombing of the Alfred P. Murrah Federal Building in Oklahoma City.

In the six years after the Murrah Federal Building bombing, the rise of the Salafist terrorist group Al Qaeda shifted the attention of senior federal officials back to international terrorism. The attacks on American embassies in Kenya and Tanzania in August 1998, the attack on the USS Cole in Aden, Yemen in October 2000, and finally the 9/11 attacks themselves would lead to the final transformation of the FBI from a law enforcement agency with intelligence components to a massive intelligence agency with law enforcement functions. From an organizational culture and practices perspective, the nature and consequences of that transformation can be traced to the evolution of the Attorney General Guidelines for Domestic FBI Investigations over a three-decade period.

### **The Attorney General Guidelines for Domestic FBI Investigations and the creation of "Assessments"**

As noted earlier, one proposed legislative reform of the Church Committee era never materialized: an actual statutory charter governing the FBI's domestic investigations and authorities. That legislative effort was preempted by then-Attorney General Edward Levi, who on April 6, 1976, introduced the Domestic Security Investigation Guidelines.<sup>6</sup> The guidelines stated that FBI domestic "internal security" investigations could only be opened on the basis of "specific and articulable facts giving reason to believe that an individual or group is or may be engaged in activities which involve the use of force or violence."<sup>7</sup> That standard would be eliminated during the Reagan administration, a fact that contributed directly to the unjustified targeting of CISPEs, referenced above.

During the 1980s and 1990s, the Guidelines were revised downwards vis a vis protection against unwarranted or unjustified investigations. In the wake of the Oklahoma City bombing, then-Director Louis Freeh reinterpreted the Guidelines to, in the words of the September 2005 DoJ IG report, "justify the investigation of domestic groups that advocate violence provided that they have the ability to carry out violent acts that may violate federal law."<sup>8</sup>

In the post-9/11 era, the Guidelines underwent their biggest revision in decades during then-Attorney General Michael Mukasey's last few months in office in 2008. The version of the AG Guidelines he issued in December 2008 created a new, proto-investigative category called "Assessments." The change was revolutionary in that FBI agents could open an Assessment on an individual or group with no criminal predicate—only an "authorized purpose" was required. And it was the FBI--through its Domestic Investigations and Operations Guide (DIOG), the multi-hundred page implementing regulations for the AG Guidelines--that ultimately decided whether something amounted to an "authorized purpose" as a basis for opening an Assessment.

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<sup>6</sup> *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (redacted). Special Report, Office of the Inspector General, Department of Justice, September 2005, footnote 53. Available online at <https://oig.justice.gov/sites/default/files/archive/special/0509/chapter2.htm#54>.

<sup>7</sup> *Ibid.*, footnote 56.

<sup>8</sup> *Ibid.*, footnote 148.

In spite of the low threshold for opening an assessment, the FBI is allowed to deploy intrusive investigative means including physical surveillance and tasking confidential human sources. Bureau agents can also search both commercial and classified databases for information on the subject of an Assessment and gather data from other law enforcement partners at the federal, state, and local level for the same purpose.

In March 2011, the *New York Times* announced, via a FOIA lawsuit, that it had discovered that just between December 2008 and March 2009, “the F.B.I. initiated 11,667 Assessments of people and groups. Of those, 8,605 were completed. And based on the information developed in those low-level inquiries, agents opened 427 more intensive investigations...”<sup>9</sup> And by August 2011, the *Times* had obtained further data showing that between March 2009 and March 2011, the FBI had opened over 82,000 Assessments on people and groups. Few of these Assessments ever lead to an actual predicated investigation resulting in criminal charges. In other words, thousands of such Assessments were opened on innocent Americans.<sup>10</sup>

### **Cato's FOIA Campaign: Exposing Questionable Federal Surveillance of Domestic Groups**

In an effort to build off of the prior work by the *New York Times* and the Brennan Center for Justice regarding the FBI's use--or misuse--of Assessments and related investigative methods,<sup>11</sup> in April 2019 Cato initiated a wide-ranging FOIA campaign designed to determine whether, and at what scale, the FBI was engaged in domestic surveillance or other forms of monitoring of domestic civil society groups absent a legitimate criminal predicate. This FOIA effort spans a diverse range of groups and organizations--from Arab- and Muslim Americans to those groups working on women's rights, the Israeli-Palestinian conflict, immigration and refugee issues and case work, professional academic societies, religious organizations, think tanks, gun rights groups, charitable foundations, and more.

Cato also has FOIA activity and litigation underway aimed at other federal agencies and departments suspected or known to be engaged in such surveillance or monitoring, including components of the Departments of Homeland Security, Commerce, Defense, and the Postal Service, among others. However, the scope of the FBI's investigative mandates, as well as its well-documented history of engaging in such surveillance activities, make it the principal agency of concern with respect to potential or actual violations of the constitutional rights of Americans. It is thus the primary focus of Cato's FOIA work in the Bill of Rights context.

I should note that in the FBI context, committee staff requested that I address the issue of social media exploitation (or SOMEX) as an investigative tool. Let me address that issue first.

Clearly, anyone who records and posts to social media sites their efforts to unlawfully invalidate a free and fair election, attack and injure Capitol Police or other law enforcement officers protecting the Capitol, threaten House or Senate members or staff with death or bodily harm, or willfully cause destruction of federal property, enjoy no First or Fourth Amendment

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<sup>9</sup> Charlie Savage, “F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show”, *New York Times*, March 26, 2011 (online edition).

<sup>10</sup> Charlie Savage, “F.B.I. Focusing on Security Over Ordinary Crime”, *New York Times*, August 23, 2011 (digital edition).

<sup>11</sup> See “Community Outreach or Intelligence Gathering?” by the Brennan Center for Justice, New York University, January 29, 2015. Available online at <https://www.brennancenter.org/our-work/research-reports/community-outreach-or-intelligence-gathering>.

protections for such unlawful acts and should be prosecuted under all relevant federal and local statutes.

As for whether FBI (or any other law enforcement) agents should be permitted to scour the internet or social media sites--at will and in an unlimited fashion, whether manually or through the use of e-discovery tools--my answer is no. The potential for both needless First Amendment violations and the waste of time by law enforcement argue against such an approach.

Law enforcement investigations should be based on credible threats to violate federal laws or credible reports that such violations have already occurred. Members of the public who believe they have a valid tip for the FBI can use the FBI's tip line or report the tip through the FBI website. Social media companies have generally been very cooperative with federal, state, and local law enforcement in passing along what appear to be credible threats of violence posted on their platforms. I also believe that the 1968 Supreme Court decision in *Brandenburg v. Ohio*, which I will discuss in more detail later in this statement, is yet another reason why caution in this area is warranted.

Let me turn now to Cato's FOIA program, its purpose, and some of our most significant findings to date with respect to FBI domestic surveillance activities.

Over the course of the last three years, Cato has obtained via FOIA requests or litigation specific examples of the FBI wrongfully targeting domestic civil society groups for Assessments or other forms of investigation:

- In December 2020, Cato received an FBI FOIA response seeking information on the League of Women Voters that revealed that in November 2011, the FBI Albany Field Office contacted the local League of Women Voters chapter as part of a “Public Corruption” Type 3 Assessment for which there was no criminal predicate. Indeed, as the document shows, the Albany LWV chapter initially had no idea why the FBI was contacting LWV, as the chapter had no information alleging corruption by any member of the New York state legislature. After a subsequent meeting with LWV officials, the FBI agents memorialized the conversation with the LWV chapter members, describing constitutionally protected activities by not only LWV but other civil society organizations in New York state.<sup>12</sup>
- In April 2021, Cato made public FBI documents showing that the Bureau is surveilling First Amendment protected public protests and educational activities, including a University of Oregon coordinated “kayak field trip,” organized by groups opposing the Jordan Cove liquified natural gas (LNG) terminal project in Coos Bay, Oregon. The FBI monitoring took place despite the fact that there is no physical LNG infrastructure in place yet.<sup>13</sup>

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<sup>12</sup> FBI Albany Field Office FD-542 Type 3 Assessment, November 8, 2011. Obtained via FOIA by the Cato Institute.

<sup>13</sup> *Jordan Cove Pipeline Protests: Is the FBI Still Spying on Activists*, CATO Institute (Apr. 29, 2021) (online at [www.cato.org/commentary/jordan-cove-pipeline-protests-fbi-still-spying-activists](http://www.cato.org/commentary/jordan-cove-pipeline-protests-fbi-still-spying-activists)).

- In July 2021, Cato received an FBI "charity Assessment" from July 2016 that targeted Concerned Women for America (CWA) in the absence of *any* criminal predicate.<sup>14</sup> I note that CWA is a strong "right to life" focused organization. That the FBI would target an openly religiously focused nonprofit organization is a throwback to the worst abuses of the COINTELPRO era.
- Additional documents obtained by Cato via FOIA during the 2020-2021 period also show FBI has opened assessments to surveil domestic political and religious organizations serving Muslim communities, such as the Massachusetts-based Muslim Justice League and the Denver, Colorado, chapter of the International Rescue Committee, allegedly to assist these groups in identifying potential terrorists in their communities.<sup>15</sup>

I should further note that Cato has received FBI FOIA responses confirming the targeting of other domestic civil society groups with Assessments, apparently absent a criminal predicate. When Cato receives such responses, our policy is to reach out to the affected group to determine whether they would prefer that Cato publish or not publish that material. When asked not to publish, Cato abides by the request out of respect for a group's concern about potential reputational impact. This form of "chilling effect" is another pernicious aspect of FBI's domestic surveillance activities.

Some might suggest that while the incidents described above are disturbing, they may only represent outliers of investigative overreach. The FBI's own internal audits show otherwise.

Cato's concerns about the scope of FBI targeting of domestic persons or groups engaged in First Amendment protected activity have only been heightened by revelations from another of our FOIA lawsuits against FBI, *Cato v. FBI*, 21-CV-2434, which seeks FBI records regarding "significant DIOG noncompliance incidents" from October 1, 2008, through September 14, 2020. In March 2022, Cato shared some of the initial FBI Inspection Division (INSD) DIOG noncompliance audit reports we had obtained via the litigation with the *Washington Times*.

In a story published on March 11, 2022, the *Times* noted that "FBI agents violated agency rules at least 747 times in 18 months while conducting investigations involving politicians, candidates, religious groups, news media and others." The violations "included agents' failure to obtain approval from senior FBI officials to start an investigation, failure to document a necessary legal review before opening an investigation and failure to tell prosecutors what they were doing."<sup>16</sup> Those revelations caused several House members to subsequently question the veracity of FBI Director Chris Wray's prior assurances to the House Judiciary Committee that FBI investigations were conducted "with proper predication" and did not target domestic civil society groups on the basis of their First Amendment protected activities.<sup>17</sup>

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<sup>14</sup> Patrick Eddington, "The FBI's unjustified targeting of Concerned Women for America", *The Orange County Register* (July 14, 2021). <https://www.ocregister.com/2021/07/14/the-fbis-unjustified-targeting-of-concerned-women-for-america/>

<sup>15</sup> *FBI "Assessments": Cato FOIA Lawsuit Edition*, Cato Institute (Apr. 16, 2021) (online at [www.cato.org/blog/fbi-assessments-cato-foia-lawsuit-edition](http://www.cato.org/blog/fbi-assessments-cato-foia-lawsuit-edition)).

<sup>16</sup> Ryan Lovelace, "EXCLUSIVE: Audit reveals FBI rule-breaking in probes involving politicians, religious groups, media," *Washington Times*, March 11, 2022 (online edition).

<sup>17</sup> Ryan Lovelace, "Lawmakers question if FBI director misled Congress after audit revealed agents' rule-breaking," *Washington Times*, March 22, 2022 (online edition).



Of particular note is the FBI's policy of sharing closed Assessments, including closed "Sensitive Investigative Matter" (SIM) Assessments (discussed in more detail below), with entities outside of the FBI.

The FBI INSD DIOG noncompliance audit from October 2018 (obtained via the FOIA litigation described above) revealed the following on pp. 5-6:

Moreover, any FBI employee who shares information outside the FBI from such a closed Assessment file must ensure the following caveat is included in the dissemination: "This person [or group] was identified during an Assessment but no information was developed at that time that warranted further investigation of the person [or group]."<sup>18</sup>

The audit noted that "closed Assessments were missing the required caveat language."<sup>19</sup> Thus, any closed Assessments shared with entities outside FBI that lacked the caveat language would give the receiving entity the impression that the person or group targeted in the Assessment was still a subject of active FBI investigation.

In theory, after an integration of the FBI's SENTINEL case management system with another, unidentified FBI database or program (redacted in the 2018 INSD audit) in July 2017, the caveat language in question was purportedly automatically added to case files as they were closed.<sup>20</sup> Even so, other law enforcement and intelligence organizations--whether at the federal, state, or local level--who receive closed Assessments with the caveat language will likely be under the impression, based on the FBI's status and reputation, that Bureau agents would not have opened an Assessment on a particular person or group absent a belief the person or group represented a threat at some level.

At present, Cato is engaged in FOIA litigation against FBI (*Cato v. FBI*, 21-CV-1054) seeking copies of all Type 1/2 and Type 3 Assessments, especially those involving FBI SIMs, which are defined in Section 10 of the DIOG as

an investigative matter involving the activities of a domestic public official or domestic political candidate (involving corruption or a threat to the national security), a religious or domestic political organization or individual prominent in such an organization, or the news media ; an investigative matter having an academic nexus ; or any other matter which, in the judgment of the official authorizing the investigation, should be brought to the attention of FBI Headquarters (FBIHQ) and other DOJ officials. (Attorney General's Guidelines for Domestic FBI Operations (AGG Dom), Part VII.N.) As a matter of FBI policy, "judgment" means that the decision of the authorizing official is discretionary.<sup>21</sup>

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<sup>18</sup> FBI Inspection Division, External Audit and Compliance Section, Compliance and Mitigation Unit: *2018 Domestic Investigations and Operations Guide Audit, 10/10/2018--10/19/2018*, pp. 5-6. Obtained via FOIA litigation in *Cato v. FBI*, 21-CV-2434.

<sup>19</sup> *Ibid.*, p. 6.

<sup>20</sup> *Ibid.*

<sup>21</sup> FBI Domestic Investigations and Operations Guide (DIOG), Section 10.1.2.1, p. 10-1, version dated September 2016.

The Justice Department's March 18, 2022, motion for summary judgment in our case admits that the FBI has identified nearly 76,000 Assessments that may be responsive to Cato's FOIA request--an absolutely staggering figure.<sup>22</sup> The Justice Department has yet to reveal to Cato or the court exactly how many of these Assessments involve SIMs.

So far as I am aware, the abandonment of the traditional 4th Amendment probable cause standard in connection with the creation and use of Assessments has done nothing to detect actual plots or prevent violence, even as it has led to FBI monitoring individuals and groups with politically repellant views while missing real plots unfold (i.e., the "Underwear Bomber," the Pulse night club shooter, etc.). Indeed, based on the tiny number of Assessments that are converted to Preliminary or Full investigations, I believe the FBI's use of Assessments has likely contributed to a bureaucratic "paper chase" that makes it more difficult to focus in on real, potentially lethal threats, in addition to causing the FBI to collect data on individuals and groups who are engaged in First Amendment protected activities. Accordingly, Congress should consider legislation that would mandate a pure, constitutional, probable cause-based standard for any investigation initiated by *any* federal law enforcement agency.

### **Detecting Real Threats: The Challenges**

The public's desire to see all potential threats, particularly terrorist threats, thwarted before lives are lost is natural and understandable. Unfortunately, past experience and existing published, peer-reviewed research tells us that this a goal is unattainable. A key reason is that, as the FBI itself has acknowledged in an internal study in 2012, there is no way to predict who will become the next Mohamed Atta or Timothy McVeigh.<sup>23</sup>

Also of note is an October 5, 2021, Council on Criminal Justice (CCJ) report on major criminal justice trends, based on CCJ's analysis of the FBI's aggregated annual crime information reported by law enforcement agencies nationwide. As CCJ observed, the homicide clearance rate has declined from a high of 82% in 1976 to 50% by 2020.<sup>24</sup>

The fact that half of murders go unsolved should be a warning sign that the notion that the FBI or any other law enforcement agency can, with any consistency or precision, predict, much less preempt, potential violent acts is a public policy version of magical thinking. Even so, the FBI has attempted to predict and preempt would-be domestic terrorists, in spite of the findings of its own internal study on radicalization showing such efforts to be essentially futile.

Indeed, FBI reports obtained by Cato via FOIA on multiple white-supremacist or militia groups, some of which have been the subject of FBI investigation in connection with the events on January 6, 2021, clearly show active FBI use of Assessments or even regular Preliminary or Full Investigations to monitor the activities of such groups for over a decade before the U.S. Capitol was stormed.

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<sup>22</sup> Declaration of Michael G. Seidel, Section Chief, Record/Information Dissemination Section, Information Management Division, Federal Bureau of Investigation in *Cato v. FBI*, 21-CV-1054, p. 10.

<sup>23</sup> Murtaza Hussain and Cora Currier, "'U.S. Military Operations Are Biggest Motivation for Homegrown Terrorists, FBI Study Finds," *The Intercept*, October 11, 2016.

<sup>24</sup> Homicide Trends: What You Need to Know, Council on Criminal Justice, October 5, 2021. Available online at <https://counciloncj.org/homicide-trends-report/>.

A November 27, 2013, Charlotte FBI Field Office (FO) FD-1057 (Electronic Communication, or EC) obtained by Cato via FOIA indicates that the website associated with the "Modern Militia Movement" (<https://modernmilitiamovement.com/>) had been the subject of a Full Investigation since at least March 5, 2007.<sup>25</sup> The same EC gave specific information on the structure and most recent activities of the Oath Keepers, including the launch of so-called "Civilization Preservation" teams, modeled on the U.S. Army Special Forces "A-Teams" -- 12-man elements designed to be "inserted into a community to train and lead the community in resistance to oppressive regimes."<sup>26</sup>

As the full FBI EC was not released to Cato, it's unclear the extent to which the directive, issued by Oath Keeper founder and leader Stewart Rhodes, was carried out. The data in the portion of the EC released to Cato was obtained by the FBI via unclassified public website searches, as well as searches of the FBI's own SENTINEL case management system. The released portion of the report revealed no actual or alleged violations of federal law by either the modernmilitiamovement.com or the Oath Keepers during the period in question.

Several months before Charlotte FO published its report, the Atlanta FO issued an EC on Oath Keeper activity in the Hinesville and Savannah, Georgia areas. The July 31, 2013, Atlanta EC on "Militia Extremists" noted a tip from a Savannah area source (redacted in the document) claiming that Oath Keeper billboards in Hinesville and Savannah were "an effort by the Oath Keepers to recruit U.S. Army soldiers...."<sup>27</sup> Despite the document being designated "Unclassified/For Official Use Only (U/FOUO)," the FBI redacted nearly all of the document under FOIA's b7 "law enforcement" exemption. Nothing in the released portions of the document indicated any unlawful actions by Oath Keeper elements in Georgia, as paying for billboard space is clearly a First Amendment protected activity.

A Jacksonville FO EC of January 9, 2014, clearly part of a case designated as "Domestic Terrorism-Sovereign Citizen Extremists," described Oath Keeper elements in or near Alachua County, Florida attempting to recruit Alachua County Sheriff's Office personnel to join the group. The unidentified Alachua County Sheriff's Office deputy who reported the attempted recruitment by the Oath Keeper to the Jacksonville FBI FO noted that "a Levy County Sheriff's Office Deputy as well as members of the Alachua County and Gainesville Fire Rescue departments were part of the group" as well.<sup>28</sup> The Jacksonville FO EC also noted that database and records checks on the Oath Keeper member engaged in recruitment activity "met with negative results" -- meaning that the Oath Keeper member in question had no prior criminal record or other derogatory information in FBI databases at the time the report was written.<sup>29</sup>

However, that same Jacksonville FO EC contained considerable data on Rhodes, the Oath Keeper organization, and two specific, relatively recent incidents of Oath Keeper members arrested or charged with felonious activity. An Oklahoma Oath Keeper member was charged in January 2010 with possessing a stolen grenade launcher, while in May 2010 a George Oath Keeper member was arrested in Tennessee "with an assault rifle...enroute to execute 24 citizens' arrest

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<sup>25</sup> FBI Charlotte FO FD-1057 Electronic Communication (EC) of November 27, 2013, p. 6. Obtained by Cato via FOIA.

<sup>26</sup> Ibid., p. 7.

<sup>27</sup> FBI Atlanta FO FD-1057 EC of July 31, 2013, p. 1. Obtained by Cato via FOIA.

<sup>28</sup> FBI Jacksonville FO FD-1057 EC of January 9, 2014, p. 2. Obtained by Cato via FOIA.

<sup>29</sup> Ibid.

warrants for government officials."<sup>30</sup> The remainder of the Jacksonville FO EC is, like many others received by Cato, heavily redacted via FOIA b3 (the "other applicable statute" exemption, not identified in this case) and b7, despite being designated "U/FOUO" (i.e., unclassified).

Even so, it is clear that the FBI faced no real impediments to investigating OK associated individuals and sharing data and assisting local law enforcement with the apprehension and charging of OK members clearly guilty of felonious--but not seditious--activity.

The FBI's investigative interest in white supremacists or militia groups has extended well beyond the Oath Keepers, to entities such as the Traditionalist Workers Party (TWP), Patriot Front, the Three Percenters, Patriot Prayer, Rise Above Movement, and many others. The FBI is also receiving information from civil society groups hostile to white supremacist or militia organizations, including information on First Amendment protected activity.

On or about May 31, 2016, the FBI Los Angeles FO received a tip from the Anti-Defamation League (ADL) that the TWP was, according to the LA FO EC,

planning a white nationalist rally at an undisclosed location in Sacramento, California, on 6/26/2016....The time and location of the is apparently being withheld to maintain secrecy and operational security for the event. Attendees have been encouraged not to mention the rally prior to the event in order to ensure everyone's safety."<sup>31</sup>

TWP's efforts to keep the location and time of the rally failed.

George Granada, public information officer for the California Highway Patrol's Capitol Protection Section, told the *Los Angeles Times* that that counter-protesters swarmed toward them (i.e., the TWP contingent) and a fight ensued.<sup>32</sup> Fourteen people were stabbed or otherwise injured. Three Antifa activists pled guilty to counts of unlawful assembly and were given 90 days community service. One TWP member received a four-year prison term.<sup>33</sup>

Also of note from this episode is that the California Highway Patrol officer charged with investigating the violence at the rally, Donovan Ayers, admitted in court proceedings that while he investigated the political affiliations and related activities of the Antifa counter-protesters arrested at the event, he did no such thing regarding the TWP and related white supremacist elements.<sup>34</sup>

Such bias in law enforcement and with intelligence officials at the federal, state, and local levels should be among the very top concerns of Members as you consider legislative and regulatory reforms based on the Select Committee's work and findings. The aforementioned account of OK elements in Georgia actively attempting to recruit local law enforcement and even active duty servicemembers into the organization is clearly a concern, though white supremacist

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<sup>30</sup> Ibid., p. 3.

<sup>31</sup> FBI Los Angeles FO EC, May 31, 2016. Obtained by Cato via FOIA.

<sup>32</sup> Jazmine, Ulloa, John Myers, Emily Alpert Reyes, and Victoria Kim, "7 stabbed at neo-Nazi event outside Capitol in Sacramento," *Los Angeles Times*, June 26, 2016 (online edition).

<sup>33</sup> Don Thompson, "3 in melee with white supremacists plead to lesser charges," *Associated Press*, November 15, 2019.

<sup>34</sup> Sam Levin, "'How a California officer protected neo-Nazis and targeted their victims,'" *The Guardian*, January 25, 2019 (online edition).

organizations engage in such recruitment activity as well. These recruitment activities raise a host of fundamental questions.

Should hiring practices for law enforcement and intelligence personnel be modified to automatically include investigations to determine whether an applicant has been or is now a member of an "extremist" organization?

Should checks for such affiliations be added to the list of suitability screening criteria currently used by federal law enforcement or intelligence agencies?

Should federal funding for state and local law enforcement organizations be tied to the implementation of such screening mechanisms?

What are the constitutional implications of the implementation of such policies for job applicants or existing federal law enforcement or intelligence personnel?

In answering at least some of these questions, our own history is a reliable guide about how *not* to approach these questions.

During WW II and the Cold War, the United States implemented a federal employee "loyalty program" that sought to ferret out Nazis/fascists and Communists or their sympathizers. Job applicants and existing federal employees were subject to the program, which contained no judicial or even administrative appeal process for those wrongly accused of such associations or who had only tenuous connections with groups that were alleged or actual Soviet front organizations. In many cases, all it took was an allegation from a co-worker or neighbor to trigger such an investigation. Thousands of otherwise loyal employees were separated from government service in this way.

And it was not just federal agencies and departments that engaged in such investigations. HUAC and SISS also conducted extensive hearings and investigations into federal employee loyalty, and of course the late Senator Joseph McCarthy (R-WI) was most infamous for his attempts to run out of government workers he claimed (invariably falsely) were Communists or Soviet agents.

Existing federal government employee or applicant suitability screening criteria, codified at 5 C.F.R. § 731.202, steer clear of any *overt* references to political activities and associations. However, in this connection, criteria (7) is potentially relevant and states as follows: "(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force."<sup>35</sup> Also relevant are criteria (2) (criminal or dishonest conduct) and (3) (material, intentional false statement, or deception or fraud in examination or appointment).<sup>36</sup>

There is also a critical federal court case that may have implications for any attempt to modify suitability criteria to include reference to political ideologies viewed as extremist or even violent in character. In its landmark 1968 decision in *Brandenburg v. Ohio*, the Supreme Court

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<sup>35</sup> 5 CFR § 731.202 - Criteria for making suitability determinations. Viewable online at <https://www.law.cornell.edu/cfr/text/5/731.202>.

<sup>36</sup> *Ibid.*

drew a clear distinction between speech that is offensive or even hateful and speech that is designed to incite imminent violence.

Clarence Brandenburg, a Ku Klux Klan leader in Ohio, was convicted under an Ohio statute for “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” When the case ultimately made its way to the Supreme Court, the justices ruled that “Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>37</sup>

Clearly, belonging to what most people in society would consider to be an extremist, morally repellant organization and protesting on the streets is one thing. Being an active member of such an organization while simultaneously serving in a law enforcement capacity with the responsibility to enforce the law--fairly and impartially regardless of race, ethnicity, religion, gender, sexual orientation, etc.--is another.

In the case of existing law enforcement officers, regular, periodic reviews of their records--the investigations they open, their quality, how impartial they are in obtaining and reviewing testimony, evidence, and related facts, etc.--can provide a fairly clear indicator of whether an officer is biased. There is nothing preventing Congress from enacting legislation to mandate such reviews by an independent body outside of the control or influence of the leadership or rank-and-file of a given federal law enforcement agency.

Given the ability of the human resources and investigative elements of federal agencies and departments to avail themselves of both commercial and government databases, interviews with co-workers, family, friends, etc. in the interview process, I believe the existing, codified suitability criteria to be more than adequate for most cases of applicant or employee vetting. Outside of my suggestion above, I believe Congress should approach any changes to the existing standards with an extreme degree of caution.

### **Preserving The Republic: A Mission Beyond Law Enforcement's Ability**

I have spent much of this statement describing the history of past domestic surveillance abuses by the FBI and why a return to traditional Fourth Amendment-based standards in police work are vital to prevent such abuses in the future. I have also noted the past violent acts and potential peril to public safety and the integrity of law enforcement organizations posed by certain types of politically extreme groups in our country. Unfortunately, these kinds of groups have been with us in one form or another for over 150 years.

The most notorious and murderous of those groups is, of course, the Ku Klux Klan. But even at the height of the revived Klan's power in the early 1920s, it was never able to actually *formally* seize the reins of governmental power--even though many inside the federal government were sympathetic to the Klan's twisted world view. The same was true of other extremist groups that surfaced in the succeeding decades: the Silver Shirts, the American Nazi Party, the John Birch Society, Aryan Nations, The Order, and so on. These groups or individuals affiliated with them

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<sup>37</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

engaged in criminal conduct, including murder, but they never represented an actual threat to the political integrity of the Republic because they never enjoyed overt, political support from existing elected leaders.

Between November 3, 2020, and January 6, 2021, that dynamic changed.

I need not go into detail about the hundreds of investigations the FBI has underway into that terrible day. However, there is one recent revelation that does bear mentioning. It concerns the May 4, 2022, Department of Justice Statement of Offense in *U.S. v. Williams*, 22-cr-00152-APM, in which former North Carolina Oath Keeper chapter leader William Todd Wilson admits, in relevant part, as follows:

At the Phoenix Hotel, Rhodes gathered Wilson and other co-conspirators inside of a private suite. Rhodes then called an individual over speaker phone. Wilson heard Rhodes repeatedly implore the individual to tell President Trump to call upon groups like the Oath Keepers to forcibly oppose the transfer of power. This individual denied Rhodes's request to speak directly with President Trump. After the call ended, Rhodes stated to the group, "I just want to fight."<sup>38</sup>

Beyond chilling. To the best of my knowledge, nothing like it has happened in American history.

A full-on, armed insurrection by Rhodes and his fellow Oath Keepers was averted—this time. But even if ongoing and future prosecutions have the effect of destroying the Oath Keeper organization, others may well arise in its place. The challenge for law enforcement at all levels then will be separating those engaged in loud, offensive, but otherwise First Amendment protected activities from those moving from simply talking about revolution to taking active steps to foment one.

It's worth noting that the FBI does great harm to itself and the fair administration of justice when its own agents attempt to further alleged plots that could not move forward absent direct technical or related FBI support to the alleged plotters. The recent Wolverine Watchmen case in Michigan is a prime example of this kind of failure, and why strict adherence to both the Constitution and truly sound law enforcement practices is essential in such investigations.<sup>39</sup>

There are also deep reasons for alarm about how federal agencies and departments could still potentially be suborned into committing massive violations of constitutional rights.

I'm familiar with published reports that the defeated President Trump tried, in turn, to get the Departments of Homeland Security, Justice, and Defense to seize voting machines.<sup>40</sup> What if there is a next time, involving a future president who installs--with or without Senate advice and consent--absolute loyalists in every key federal agency and department with surveillance and coercive police powers?

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<sup>38</sup> Statement of Offense, *U.S. v. William Todd Wilson*, 22-cr-00152, p. 11 at 44.

<sup>39</sup> Edward Helmore, "Michigan governor kidnap case: hardened terrorists or FBI dupes?" *The Guardian*, March 19, 2022 (online edition).

<sup>40</sup> Alan Feuer, Maggie Habberman, Michael S. Schmidt, and Luke Broadwater, "Trump Had Role in Weighing Proposals to Seize Voting Machines," *New York Times*, January 31, 2022 (online edition).

The Attorney General Guidelines on domestic investigations could be altered to allow the FBI to use even more intrusive investigative and surveillance techniques than currently allowed under Assessments, absent a criminal predicate.

Could the Drug Enforcement Administration once again be used to target protestors, as was authorized by then-Attorney General Barr in the wake of the murder of George Floyd in 2020?<sup>41</sup>

The Department of Defense could be directed to expand domestic surveillance of anti-war or similar protestors, as it did with the infamous Counterintelligence Field Activity (CIFA) during the Bush 43 presidency.<sup>42</sup>

The potential scenarios I've described are based on past incidents of abuse of federal surveillance and law enforcement powers. Unless the Congress reviews--and where necessary and possible, rescinds--on an urgent, expedited basis these and many other such authorities, the possibility of the creation of a turn-key tyranny will loom over the nation like the proverbial Sword of Damocles.

I thank the Select Committee for its invitation to submit my views.

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<sup>41</sup> Jason Leopold and Anthony Cormier, ""The DEA Has Been Given Permission To Investigate People Protesting George Floyd's Death," *Buzzfeed News*, June 2, 2020 (online edition).

<sup>42</sup> Nate Anderson, ""US to shutter DoD TALON database as it works on replacement," *Ars Technica*, August 21, 2007 (online edition).