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Barbara L. McQuade

University of Michigan Law School, bmcquade@umich.edu

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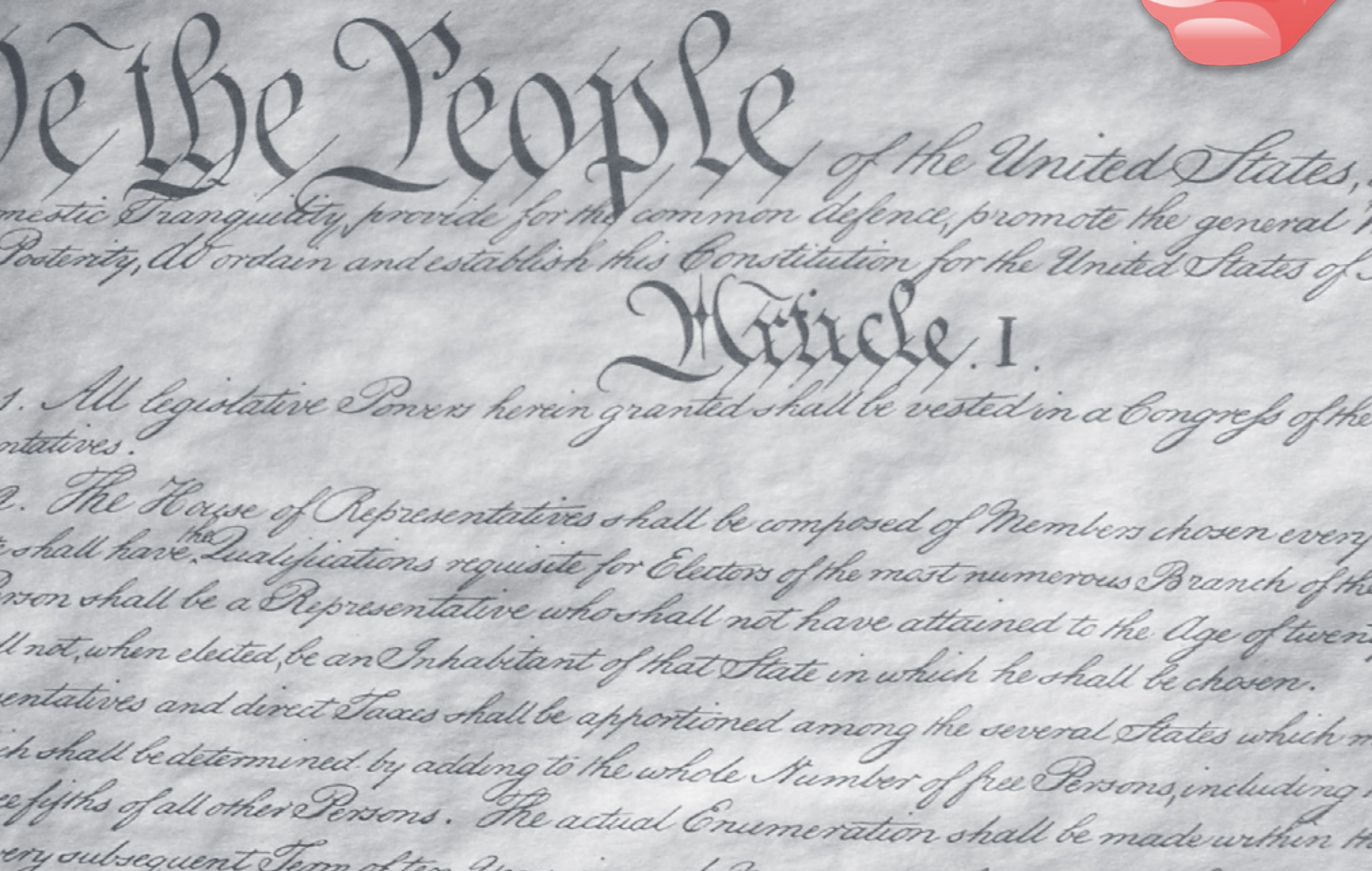
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Not a Suicide Pact: Urgent Strategic Recommendations for Reducing Domestic Terrorism in the United States

Barbara L. McQuade



Barbara McQuade reviews the Biden administration's National Strategy for Countering Domestic Terrorism, discusses the constitutional challenges of combating domestic terrorism, and proposes some additional steps that are necessary for addressing this growing problem.

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.¹

— Justice Robert L. Jackson

America's Bill of Rights protects U.S. citizens' rights to free speech, to bear arms, and to be free from unreasonable searches and seizures, among other things. But, as the Supreme Court has consistently held, no right is absolute. All rights must be balanced against other societal needs, including and especially public safety. As the threat of domestic terrorism metastasizes in the United States, Americans need to use the practical wisdom that Justice Robert L. Jackson advised in 1949 to ensure the survival of the republic.

In recognition of this growing threat, the Biden administration issued the nation's first *National Strategy for Countering Domestic Terrorism* in 2021.² The strategy recognizes a shift in recent years in the threat the United States faces — from foreign terrorism to domestic violent extremists. The strategy document focuses on four pillars for combating domestic terrorism: enhancing research, increasing resources for prevention, enabling investigation and prosecution, and addressing long-term contributors, such as economic disparities and racism. While the strategy provides a good structure for addressing domestic terrorism, the rapid growth of this problem requires a strategy that goes even further. Perhaps recognizing the limitations of the current polarized political environment, the strategy stops short of some of the more politically fraught but essential steps to countering domestic terrorism with the urgency it requires. But concerns about politics

should not prevent the country from taking action. As Attorney General Merrick Garland stated in his remarks regarding the strategy, government intervention is “focused on violence, not on ideology.”³

This paper looks at the White House strategy and the constitutional challenges of combating domestic terrorism and proposes additional steps that are essential to addressing this growing problem. While domestic terrorism is not a new phenomenon for the United States, the threat has been escalated by a toxic cocktail of social media, mental health challenges, and an abundance of high-powered assault weapons. To address this problem in a meaningful way, the country needs to overcome the political obstacles that prevent it from employing the practical wisdom that Justice Jackson advised.

National Strategy on Domestic Terrorism

In June 2021, the National Security Council issued the *National Strategy for Countering Domestic Terrorism*. The strategy recognized the “wrenching pain of domestic terrorism” that has become all too pervasive in American life — noting the deadly attacks in recent years on a church in Charleston, a synagogue in Pittsburgh, and a Walmart store in El Paso, among others. These attacks are nothing new. As the strategy notes, Americans have experienced domestic terrorism since the emergence of the Ku Klux Klan after the Civil War. The Tulsa Massacre in 1921, the 16th Street Baptist Church bombing in Birmingham, Alabama in 1963, and the deadly attack on the Murrah Building in Oklahoma City in 1995 all can be described as acts of domestic terrorism.⁴ But in recent years, domestic terrorism has become shockingly commonplace in American life, highlighted by the breathtaking attack on the U.S. Capitol on Jan. 6, 2021, designed to prevent the certification of the

1 *Terminiello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson J. dissenting opinion).

2 *National Strategy for Countering Domestic Terrorism*, The White House, June 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

3 “Attorney General Merrick B. Garland Remarks on Domestic Terrorism Policy Address,” Department of Justice, June 15, 2021, <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-remarks-domestic-terrorism-policy-address>.

4 The White House, *National Strategy for Countering Domestic Terrorism*, 2. For more readings on these events, see “Tulsa Race Massacre,” History.com, updated May 26, 2021, <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre>; “Birmingham Church Bombing,” History.com, updated Jan. 25, 2021, <https://www.history.com/topics/1960s/birmingham-church-bombing>; “Oklahoma City Bombing,” History.com, updated April 16, 2021, <https://www.history.com/topics/1990s/oklahoma-city-bombing>.

2020 presidential election.

This threat landscape deserves our urgent attention. In the national strategy, the intelligence community assessed that domestic violent extremists pose an elevated threat in 2021 because of “contentious sociopolitical factors.”⁵ It judged that domestic violent extremism would continue to be spurred by narratives of fraud in the 2020 election, conditions related to the COVID-19 pandemic, and “conspiracy theories promoting violence.”⁶ The primary motivations for today’s domestic violent extremism are “biases against minority populations” and “perceived government overreach.”⁷ According to the strategy document, racially or ethnically motivated violent extremists are most likely to carry out attacks against civilians, while “militia violent extremists” typically target law enforcement and government personnel and facilities.⁸

Domestic violent extremists are now radicalizing recruits in the same way that the Islamic State did a few years ago. With online messaging, recruiters are able to crowdsource individuals to carry out violent attacks. The intelligence community notes that “DVEs [domestic violent extremists] exploit a variety of popular social media platforms, smaller websites with targeted audiences, and encrypted chat applications” in order to “recruit new adherents, plan and rally support for in person actions, and disseminate materials that contribute to radicalization and mobilization to violence.”⁹ With ready access to lethal weapons and various communications channels to disseminate disinformation and coordinate planning, domestic violent extremists have the capability to mobilize mass casualty attacks like never before.

But unlike foreign terrorist organizations, domestic violent extremists are entitled to the full protections of the law that are enjoyed by all U.S. persons. The national strategy recognizes the tensions between the competing societal values that are at stake when addressing domestic terrorism: protecting public safety while safeguarding civil rights and civil liberties — “values that make us who we are as a nation.”¹⁰ Constitutional rights to free speech,

to free assembly, and to the bearing of arms create unique challenges when navigating the domestic terrorism landscape. America was founded by protest. Today, one man’s weapon of war is another’s symbol of freedom.

With these realities in mind, the national strategy focuses on four pillars for combating domestic terrorism: enhancing research and analysis, increasing resources for prevention, enabling investigation and prosecution, and addressing long-term contributors, such as economic disparities and racism.¹¹

Enhancing Research and Analysis

The first pillar of the strategy is to enhance capabilities for research and analysis of the domestic terrorism threat.¹² Achieving this goal requires data sharing between government agencies at various levels of the federal, state, local, and tribal governments. The strategy states rather vaguely that its research and data sharing will be done in a way that is “consistent with civil liberties and privacy protections.”¹³ This promise is no small detail, and lawyers will need to ensure appropriate safeguards against unreasonable searches and seizures of private information. But that concern should not paralyze U.S. leaders from taking action. This effort will also need to overcome the turf battles that sometimes cause agencies to withhold information from each other.

In addition, this pillar recognizes the need to identify the transnational aspects of domestic terrorism. Racially or ethnically motivated domestic terrorism is not confined to the United States, and white supremacists overseas connect across international boundaries. The strategy recommends including the Departments of State and Treasury to work with foreign allies to address the international component of this strategy.

Strengthen Prevention Resources and Services

The second pillar of the strategy is to strengthen prevention resources and services.¹⁴ This pillar suggests reducing online recruitment material, bolstering

5 The White House, *National Strategy for Countering Domestic Terrorism*, 10–11.

6 The White House, *National Strategy for Countering Domestic Terrorism*, 10.

7 The White House, *National Strategy for Countering Domestic Terrorism*.

8 The White House, *National Strategy for Countering Domestic Terrorism*, 10–11.

9 The White House, *National Strategy for Countering Domestic Terrorism*, 11.

10 The White House, *National Strategy for Countering Domestic Terrorism*.

11 The White House, *National Strategy for Countering Domestic Terrorism*, 7.

12 The White House, *National Strategy for Countering Domestic Terrorism*, 15.

13 The White House, *National Strategy for Countering Domestic Terrorism*, 16.

14 The White House, *National Strategy for Countering Domestic Terrorism*, 19.

the resilience of those who might receive such material, and reducing access to deadly weapons. The strategy advocates for funding for enhancing media literacy and critical thinking skills as a method for building resilience against disinformation online.¹⁵ In particular, the strategy emphasizes the need to train servicemembers who are leaving the armed services about potential targeting by violent extremists of those with military training.¹⁶

The strategy makes passing mention of how “mental health experts are complementing traditional law enforcement response” and states that it intends to “launch a new approach” that includes the Departments of Health and Human Services and Education in a “one-stop website” to increase accessibility of resources.¹⁷ While short on details, this recognition of the link between mental health and domestic extremism is an important step toward combating domestic terrorism.

The strategy discusses plans to “pursue innovative ways to foster and cultivate digital literacy,” including “interactive online resources such as skills-enhancing online games.”¹⁸ While a laudable goal, previous efforts by the FBI to create online games have failed to capture the hearts and minds of the target audience.¹⁹ Partnering with members of the media, marketing, and gaming industries might yield better results.

Disrupt and Deter Domestic Terrorism Activity

The strategy notes that the president’s budget for Fiscal Year 2022 includes significant additional resources for hiring and training more federal analysts, investigators, and prosecutors to address domestic terrorism, and for training state, local, and tribal law enforcement partners.²⁰ The strategy also recommends augmenting pre-employment screening for government employees and members of the military to prevent domestic terrorists from gaining access to sensitive positions.²¹

The strategy barely dips its toe into legislative recommendations, stating only that the Department of

Justice “is examining carefully what new authorities might be necessary and appropriate,” promising “to, in consultation with Congress, consider whether seeking legislative reforms is appropriate, and, if so, which to pursue.”²² Perhaps this hesitancy reflects the political reality and role of the White House in developing a strategy to counter domestic terrorism. Nevertheless, a meaningful strategy should include laws that address high-powered assault weapons, crimes of domestic terrorism, and paramilitary activity of private militias.

Confront Long-Term Contributors of Domestic Terrorism

The strategy recognizes that certain dynamics in American society contribute to domestic terrorism.²³ Racism, gun violence, and mental health all play a role in domestic violent extremism. The strategy recommends civics education that promotes tolerance, as well as condemnation of violence from government leaders. It also recommends financial relief to Americans who are suffering from economic despair to enhance their faith in democracy.

The national strategy includes a number of good recommendations and perhaps seeks to advance the incremental change that the Biden administration believes it can achieve in today’s turbulent political climate. However, free from the need to worry about those political constraints, this paper offers some additional ideas for combating domestic terrorism with the urgency that this requires.

Legal and Political Challenges

Policymakers developing a strategy to counter domestic terrorism should be mindful of overreach that could infringe upon civil rights and civil liberties. Laws governing domestic terrorism present unique concerns. For example, questions of federalism create a tension between the extent to which Congress can outlaw acts of domestic terrorism or

15 The White House, *National Strategy for Countering Domestic Terrorism*, 20.

16 The White House, *National Strategy for Countering Domestic Terrorism*.

17 The White House, *National Strategy for Countering Domestic Terrorism*, 21.

18 The White House, *National Strategy for Countering Domestic Terrorism*, 22.

19 Michael Price, “Can You Really Fight Terrorism with a Video Game?” Brennan Center for Justice, Feb. 18, 2016, <https://www.brennancenter.org/our-work/research-reports/can-you-really-fight-terrorism-video-game>.

20 The White House, *National Strategy for Countering Domestic Terrorism*, 23–24.

21 The White House, *National Strategy for Countering Domestic Terrorism*, 27.

22 The White House, *National Strategy for Countering Domestic Terrorism*, 26.

23 The White House, *National Strategy for Countering Domestic Terrorism*, 27.



whether that space belongs in the exclusive domain of the states.²⁴ Domestic terrorism also implicates First Amendment rights because of the ideological motivations of its actors.²⁵ While inciting violence, threatening to kill others, or communicating to mobilize violent plots are all illegal under current law,²⁶ the relevant statutes have been interpreted narrowly so as to protect constitutional rights.²⁷ Charging someone with a crime for making a general statement to “fight” the government for one’s rights, for example, will not withstand judicial scrutiny. Divining exactly where the line falls between illegal conduct and constitutionally protected speech is not an exact science.²⁸

America's history has seen abuses of constitutional rights in the name of protecting security. Sometimes, when the country has found itself in the midst of a crisis, it has erred on the side of public safety at the expense of constitutional values.

First Amendment rights to free association are also implicated in domestic terrorism. While not textually articulated in the First Amendment, the Supreme Court has recognized “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends.”²⁹ This implied right to free association makes it difficult to disrupt militia groups or protests that pose threats of violence, such as the “Unite the Right” rally that took place in Charlottesville in 2017.³⁰

The Fourth Amendment’s guarantee against

unreasonable searches and seizures also creates checks on law enforcement agencies in their surveillance of domestic actors.³¹ Unlike foreign intelligence collection, for which a court has recognized a special needs exception to the warrant requirement when directed at foreign powers reasonably believed to be located outside the United States,³² domestic terrorism cases do not qualify for that exception. In addition, the Second Amendment’s right to keep and bear arms has been held to be an individual right.³³ Although the Supreme Court continues to recognize that “the right secured by the Second Amendment is not unlimited,”³⁴ political support for gun rights is making it ever more difficult to impose even modest restrictions.

America’s history has seen abuses of constitutional rights in the name of protecting security. Sometimes, when the country has found itself in the midst of a crisis, it has erred on the side of public safety at the expense of constitutional values. During World War II, for example, Japanese internment camps were used to imprison U.S. citizens in the name of national security. The Supreme Court upheld this practice,³⁵ and it only recently acknowledged that its 1944 decision “was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — has no place in law under the Constitution.”³⁶

The FBI has an ugly history in its quest to protect the nation from perceived domestic threats. The civil rights movement and the Vietnam War protests during the 1960s were targets of government abuse. The Church Committee, named for Sen. Frank Church, conducted hearings in the 1970s regarding alleged intelligence collection abuses and found that, in the name of protecting national security, the FBI had harassed Dr. Martin Luther King, Jr., and engaged in illegal activities in running its Counterintelligence

24 *Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues*, Congressional Research Office, July 2, 2021, 54, <https://sgp.fas.org/crs/terror/R46829.pdf>.

25 Congressional Research Office, *Domestic Terrorism*, 55.

26 18 U.S.C. 2383; (Inciting Insurrection); 18 U.S.C. 875 (Communicating Threats); and 18 U.S.C. 371 (Conspiracy).

27 Congressional Research Office, *Domestic Terrorism*, 55.

28 See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), holding that freedom of speech permits advocating the use of force and the violation of the law unless the advocacy is directed to inciting imminent lawless action and is likely to incite such action.

29 *Brandenburg v. Ohio* at 58, citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

30 “Charlottesville: One Killed in Violence Over US Far-Right Rally,” *BBC*, Aug. 13, 2017, <https://www.bbc.com/news/world-us-canada-40912509>.

31 Congressional Research Office, *Domestic Terrorism*, 60.

32 Congressional Research Office, *Domestic Terrorism*, 61, citing *In re Directives Pursuant to 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008).

33 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

34 *Heller*, 626.

35 *Korematsu v. United States*, 323 U.S. 214 (1944).

36 *Trump v. Hawaii*, slip opinion at 38, (2018), https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf.

Program operation.³⁷ According to the Church Committee report, the program’s activities were originally directed toward the Communist Party during the Cold War.³⁸ The committee noted that the FBI “engaged in COINTELPRO [Counterintelligence Program] tactics to divide, confuse, weaken, in diverse ways, an organization.”³⁹ The program later expanded to target “racial matters,” “the New Left,” “student agitation,” and alleged foreign involvement in “the anti-war movement.”⁴⁰

As to its collection of intelligence relating to King, the Church Committee reported that “[t]he stated justification,” unsupported by any facts, was that King might “abandon his supposed ‘obedience’ to ‘white, liberal doctrine’ (nonviolence) and embrace black nationalism.”⁴¹ According to the report, FBI “[f]ield offices were instructed to exploit conflicts within and between groups; to use news media contacts to ridicule and otherwise discredit groups; to prevent ‘rabble rousers’ from spreading their ‘philosophy’ publicly; and to gather information on the ‘unsavory backgrounds’ of group leaders.”⁴² The report noted that FBI headquarters prodded field offices to “prepare leaflets using ‘the most obnoxious pictures’ of New Left leaders at various universities”; use the “snitch jacket technique” of creating the impression that leaders are informants for law enforcement agencies; send anonymous letters and articles from student or underground newspapers showing “depravity,” such as the use of narcotics and “free sex,” on the part of New Left leaders to university officials, donors, legislators, and parents; and “use ‘misinformation’ to ‘confuse and disrupt’ New Left activities, such as by notifying members that events had been cancelled.”⁴³

The committee’s findings contributed to the loss of public confidence in government intelligence collection and law enforcement. It led to reforms to check government overreach, including the Foreign Intelligence Surveillance Act, which required, for

the first time, court supervision over surveillance of agents of foreign powers. Four years earlier, the Supreme Court had held that surveillance of domestic threats to national security were subject to the Fourth Amendment warrant requirement and the judiciary’s general wiretap authority.⁴⁴ Until then, the executive branch had conducted national security surveillance without judicial oversight.

Concerns about FBI abuses also led to the creation of its internal Domestic Investigations Operations Guide,⁴⁵ which imposes on investigators “oversight and self-regulation to ensure that all investigations and intelligence collection activities are conducted within Constitutional and statutory parameters and that civil liberties and privacy are protected.”⁴⁶ Among the guide’s provisions is the prohibition that agents may “[c]onduct no investigation based solely on the exercise of First Amendment rights (i.e., the free exercise of speech, religion, assembly, press, or petition).”⁴⁷

Any contemporary strategy to counter domestic terrorism should acknowledge the risks of overreach and abuse by investigators, even if they are well intentioned. Even the appearance of government overreach is understandably subject to public criticism. And yet, the government can’t be so afraid of criticism that it fails in its mission to protect public safety. The country’s laws are designed to draw lines between competing societal values. When it comes to domestic terrorism, the government should balance values of public safety with those of free speech, free assembly, freedom from unreasonable searches and seizures, and the right to bear arms — but it cannot surrender its responsibilities.

37 *Final Report of the Select Committee To Study Governmental Operations with Respect to Intelligence Activities* (“Church Committee Report”), United States Senate, April 26, 1976, Book I, at 14, https://www.intelligence.senate.gov/sites/default/files/94755_I.pdf.

38 *Final Report of the Select Committee To Study Governmental Operations with Respect to Intelligence Activities*, April 26, 1976, Book II, 65, 66, https://www.intelligence.senate.gov/sites/default/files/94755_II.pdf

39 *Final Report of the Select Committee*, 66.

40 *Final Report of the Select Committee*, 70.

41 *Final Report of the Select Committee*, 71.

42 *Final Report of the Select Committee*, 87.

43 *Final Report of the Select Committee*, 89.

44 *United States v. U.S. District Court (Keith Case)*, 407 U.S. 297 (1972).

45 *FBI Domestic Investigations Operations Guide*, Federal Bureau of Investigation, Sept. 28, 2016, <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DI0G%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DI0G%29%202016%20Version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DI0G%29%202016%20Version%20Part%201%20of%2002/view>.

46 *FBI Domestic Investigations Operations Guide*, 1-1.

47 *FBI Domestic Investigations Operations Guide*, 3-3.



Proposed Additional Measures to Combat Domestic Terrorism

The Biden administration's *National Strategy on Countering Domestic Violence* makes some important recommendations, but it falls short of taking the necessary steps to address the problem with the urgency that it deserves. In order to prevent recruitment of domestic violent extremists, it is necessary to develop intervention strategies, regulate social media, and reduce access to deadly weapons. In order to disrupt and deter domestic terrorism activity, the government should make domestic terrorism a federal offense and criminalize paramilitary militia activities. Finally, in order to reduce the motivations that drive domestic violent extremism, the country needs to hold accountable political leaders who exploit divisions in society by normalizing violence and fueling disinformation for their political advantage.

Preventing Recruitment

The strategy discusses bolstering the resilience of would-be targets of domestic extremist recruiters, reducing online recruiting material, and preventing access to deadly weapons, all laudable goals. But again, the document is short on specifics. A meaningful strategy for preventing recruitment requires attention to mental health intervention and laws to regulate social media and reduce access to guns.

Mental Health Intervention

First, building the resilience of potential targets of domestic terrorist recruiters should be centered around mental health. Providing civics education and developing critical thinking skills are an important part of inoculating members of the public against the propaganda and conspiracy theories that recruiters use to radicalize followers, but it is also necessary to develop intervention strategies for those who are most susceptible to taking the bait or who have already started down that path.

According to the National Institute of Mental

Health, "Research shows that mental illnesses are common in the United States, affecting tens of millions of people each year," but the institute estimates that only about half of people with mental illnesses receive treatment.⁴⁸ One potential solution is to expand upon a current approach recommended for schools by the U.S. Secret Service's National Threat Assessment Center: the use of multidisciplinary threat assessment teams for students who display concerning behavior.⁴⁹ Teams may include mental health professionals, law enforcement officers, and educators.⁵⁰ These teams receive reports on incidents of troubling student behavior. Concerning conduct may not necessarily be indicative of violence, but it may nonetheless merit intervention.⁵¹ Withdrawal or isolation; sudden changes in behavior; and erratic, depressive, or other mental health symptoms might be the types of behaviors that trigger intervention.⁵²

The teams assess the conduct and the student's well-being by talking with other people with whom the student interacts; reviewing social media posts; and reviewing academic, disciplinary, law enforcement, and other available records about the student.⁵³ Teams are advised to consider whether the student has motives to harm others, unusual interests in attacks or weapons, access to weapons, emotional or mental health issues, plans to engage in violence, and the capacity to carry out an attack. They are then tasked with determining whether intervention is appropriate.⁵⁴ Intervention may take the form of counseling or mental health treatment.⁵⁵ The team may work to connect the student and his or her family with community resources.⁵⁶ If the team is concerned that the student is planning to engage in violence, then it is advised to report these concerns to law enforcement.⁵⁷ Programs similar to the school intervention model could be used in communities to intervene with individuals who demonstrate signs of radicalization toward violence or other concerning behaviors. While schools provide a structure that is admittedly lacking outside of that setting, community-based multidisciplinary teams could provide an offramp for individuals who are moving down a path from radicalization to action. Engaging with

48 "Statistics," National Institute of Mental Health, accessed Jan. 28, 2022, <https://www.nimh.nih.gov/health/statistics>.

49 *Enhancing School Safety Using a Threat Assessment Model*, National Threat Assessment Center, U.S. Secret Service, July 2018, 3, https://www.cisa.gov/sites/default/files/publications/18_0711_USSS_NTAC-Enhancing-School-Safety-Guide.pdf.

50 U.S. Secret Service, *Enhancing School Safety*.

51 U.S. Secret Service, *Enhancing School Safety*, 4.

52 U.S. Secret Service, *Enhancing School Safety*.

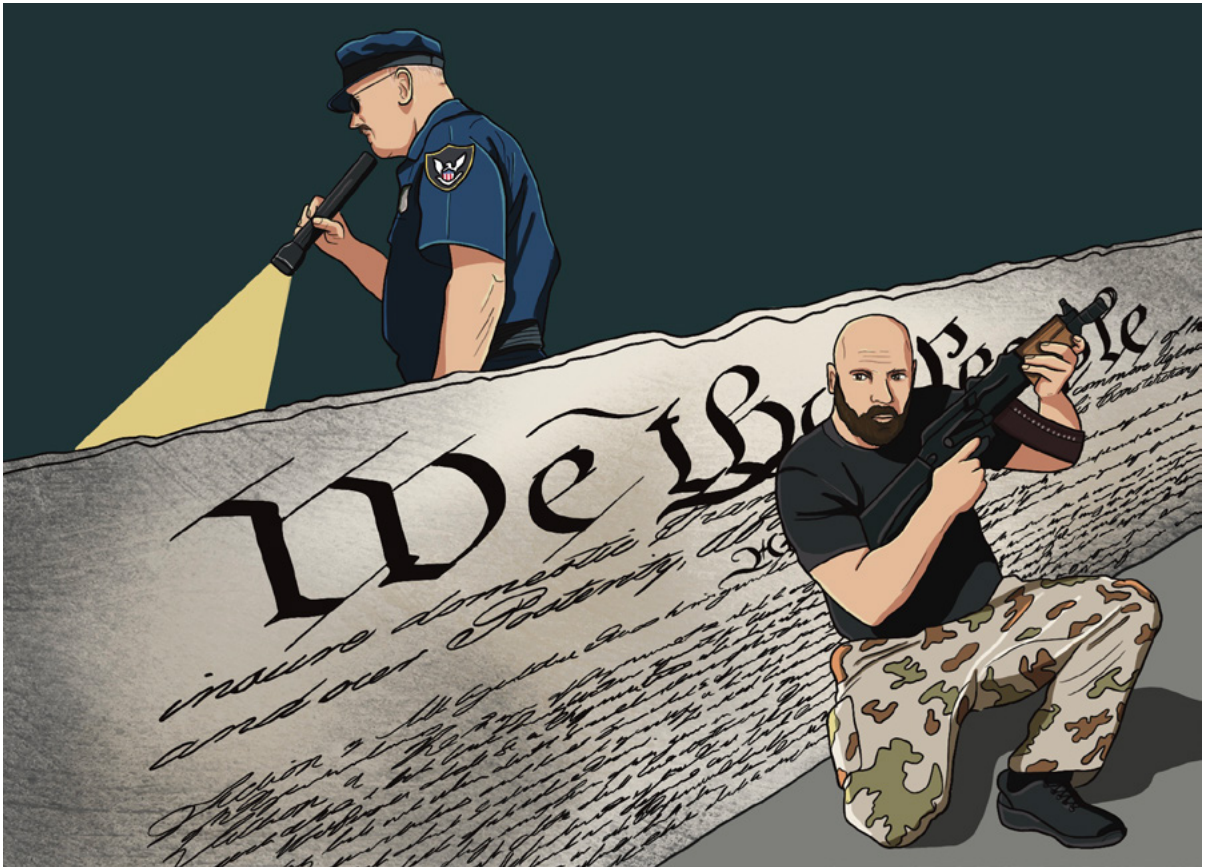
53 U.S. Secret Service, *Enhancing School Safety*, 7.

54 U.S. Secret Service, *Enhancing School Safety*, 9–15.

55 U.S. Secret Service, *Enhancing School Safety*, 17.

56 U.S. Secret Service, *Enhancing School Safety*.

57 U.S. Secret Service, *Enhancing School Safety*.



the faith-based community and non-governmental service providers to perform this work would give an intervention program important separation from law enforcement. If families know that there is an alternative for loved ones short of prosecution and incarceration, they may be more inclined to seek help. Government funding through grant programs would be important to enable such a program and would be a worthwhile investment in public safety.

Regulation of Social Media Platforms

Second, to reduce the supply of online recruitment material, it is necessary to address the disinformation that is used to promote conspiracy theories. Online propaganda causes “mass radicalization,” according to terrorism researchers, and it increases the risk of violent extremism.⁵⁸ Loss of trust in institutions has

created space for belief in conspiracy theories, such as those regarding election fraud and COVID-19. According to the Pew Research Center, 75 percent of adults in the United States believe that Americans’ trust in the federal government and each other has been shrinking.⁵⁹

The government can demand that social media companies do a better job of regulating their own spaces to provide warnings about unsupported factual claims online.⁶⁰ However, recent revelations from Facebook whistleblower Frances Haugen provide little room for optimism that tech giants can be trusted to serve the public good on their own.⁶¹ She has explained that it is not the content on social media that is nefarious, but the algorithms that are used to direct users to certain content or keep them on the platform longer. Haugen disclosed that Facebook’s reaction buttons were designed to promote “anger and hate”

58 Hannah Allam, “Right Wing Embrace of Conspiracy is ‘Mass Radicalization,’ Experts Warn,” *National Public Radio*, Dec. 15, 2020, <https://www.npr.org/2020/12/15/946381523/right-wing-embrace-of-conspiracy-is-mass-radicalization-experts-warn>.

59 Lee Rainie, and Andrew Perrin, “Key Findings About Americans’ Declining Trust in Government and Each Other,” Pew Research Center, July 22, 2019, <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>.

60 Brian Fishman, “Crossroads: Counter-terrorism and the Internet,” *Texas National Security Review* 2, no. 2 (February 2019), <https://tnsr.org/2019/02/crossroads-counter-terrorism-and-the-internet/>.

61 Loveday Morris, Elizabeth Dwoskin, and Hamza Shaban, “Whistleblower Testimony and Facebook Papers Trigger Lawmaker Calls for Regulation,” *Washington Post*, Oct. 25, 2021, <https://www.washingtonpost.com/technology/2021/10/25/facebook-papers-live-updates/>.

In light of the ease with which a gunman can fire multiple rounds within seconds with a semi-automatic weapon, restricting their use to military servicemembers and law enforcement professionals makes abundant sense in today's threat environment.

in order to keep people engaged and more likely to stay on the platform.⁶² She recently told British lawmakers that “[t]he current system is biased towards bad actors and people who push people to the extremes.”⁶³ Internal documents disclosed by Haugen reveal that Facebook knew that its algorithms fuel increased polarization, hateful speech, and misinformation.⁶⁴ In response to the Facebook revelations, some members of Congress have proposed laws to regulate social media companies,⁶⁵ a step that is long overdue. The good news about the distinction between content and algorithms is that, while regulating content would raise direct free speech implications, regulating algorithms may not. The government could prohibit social media companies from programming software to secretly steer users to certain content or could require the disclosure of algorithms that do so. This approach is also more concrete, and perhaps, therefore, more feasible.

Proposed legislation in the United Kingdom would mean that the government regulates internet companies in the same way that it regulates television and radio, and would create a “duty of care” to protect users from harm.⁶⁶ Breaches would be penalized with hefty fines.⁶⁷ In the United States, the government regulates broadcast media and utilities. Social media companies seem to be a blend of the two and equally deserving of government regulation. While regulating social media brings some concerns about infringing on First Amendment rights, narrowly tailored laws that advance compelling governmental interests would pass constitutional muster.

Regulating social media companies is no easy task, to be sure. But, at the very least, the government can demand that they refrain from taking steps designed to harm their users just to keep them on a platform for longer periods of time.

Party Like It's 1994

Another key component to any effective strategy on countering domestic terrorism in the United

States is controlling where guns may be carried and the types of guns that may be purchased. While the Supreme Court has held that the Second Amendment protects the right of individuals to keep and bear arms in their homes, it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁶⁸ Political forces make most gun regulations a non-starter, but if the government were to follow common sense instead of special interests, it would prohibit individuals from possessing firearms at public events and in government buildings and would ban high-powered assault weapons and high-capacity ammunition magazines as weapons of war that have no place in civilian society.

The Supreme Court’s interpretation of the Second Amendment permits states to prohibit civilians from carrying guns at public events and in public spaces. Even in so-called “open carry” states, where firearms may be carried in public places, states can and often do restrict possession of firearms at certain public events, such as sporting events, and certain sensitive spaces that are open to the public, such as schools, churches, parks, and government buildings. Perhaps one reason the Jan. 6 attack on the U.S. Capitol was not even more deadly than it was is the District of Columbia’s stringent gun laws.⁶⁹

Laws restricting access to guns at certain public events and spaces can reduce the potential for attacks by domestic terrorists. When civilians are permitted to carry weapons at events or in places that could be high-value targets, it is easier for terrorists to gain access to these sites without detection. In 2020, protestors armed with assault weapons demonstrated inside the State Capitol Building in Michigan.⁷⁰ In addition to intimidating lawmakers, armed protestors created other risks. A domestic extremist could have used the gun-carrying protestors as cover for a deadly attack. Following the attack on the U.S. Capitol on Jan. 6, Michigan’s Capitol Commission banned the open carry of firearms at the State Capitol, though the

62 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

63 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

64 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

65 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

66 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

67 Morris, Dwoskin, and Shaban, “Whistleblower Testimony.”

68 Heller, 626.

69 See *United States v. Rhodes*, et al., alleging that the 11 defendants, members of a group called the Oath Keepers, breached the Capitol on Jan. 6, 2021, unarmed, but had reinforcements known as “Quick Response Teams” positioned just outside city limits. The teams “were prepared to rapidly transport firearms and other weapons into Washington, D.C., in support of operations aimed at using force to stop the lawful transfer of presidential power.” See page 5, paragraph 10, <https://www.justice.gov/opa/press-release/file/1462481/download>.

70 Paul Egan, “Capitol Protestors Urge an End to Michigan’s State of Emergency,” *Detroit Free Press*, April 30, 2020, <https://www.freep.com/story/news/local/michigan/2020/04/30/capitol-protesters-urge-end-michigan-state-of-emergency/3055294001/>.



commission continues to permit individuals with licenses to carry concealed weapons there.⁷¹ Prohibiting firearms at sensitive events and in government buildings is a common-sense measure that should be taken in all 50 states. Those restrictions would not impair an individual's right to keep a gun in his or her home for protection or his or her use of firearms for sporting purposes.

Second, the government should restrict the sale of military weapons and ammunition. In 1994, before gun-rights advocates became such a powerful political force, Congress passed a ban on assault weapons.⁷² The law prohibited the manufacture, transfer, and possession of certain military-style assault weapons and high-capacity magazines capable of holding more than 10 rounds of ammunition.⁷³ The ban was allowed to expire in 2004, and so evidence of its effectiveness is incomplete, though research shows that high-fatality mass shootings, defined as six deaths or more, fell by 25 percent during the ban; deaths in such shootings fell by 40 percent; and fatalities involving both assault weapons and high-capacity magazines fell by 54 percent.⁷⁴

In light of the ease with which a gunman can fire multiple rounds within seconds with a semi-automatic weapon, restricting their use to military servicemembers and law enforcement professionals makes abundant sense in today's threat environment. Semi-automatic firearms were used in mass shootings at Marjory Stoneman Douglas High School in Parkland, Florida; the Pulse Nightclub in Orlando, Florida; the Las Vegas Music Festival; the Century 16 movie theater in Aurora, Colorado; Sandy Hook Elementary School in Newtown, Connecticut; the Waffle House restaurant in Nashville, Tennessee; the San Bernardino County office holiday party in California; and the Tree of Life Synagogue in Pittsburgh, Pennsylvania, among others.⁷⁵ While not all of these crimes were treated as acts

of terrorism, they demonstrate the deadly capabilities of assault weapons. Weapons of war designed to kill people swiftly and effectively should be kept out of the hands of civilians. Such a measure might not stop all terrorist attacks, but it can make terrorist attacks less deadly.

Disrupting and Deterring Domestic Terrorism Activity

The Biden administration's national strategy offers plans for helping law enforcement to disrupt and deter domestic terrorism activity by increasing resources for analysts, investigators, and prosecutors, and it states that the Department of Justice "is examining carefully what new authorities might be necessary and appropriate."⁷⁶ This cautious approach may very well reflect the political reality of dealing with a sometimes dysfunctional Congress. But a meaningful effort to disrupt domestic terrorism would require two other significant legislative changes, one at the federal level and one at the state level: making domestic terrorism a federal offense and outlawing paramilitary activities by private militias.

Make Domestic Terrorism a Federal Offense

While federal law provides a definition of domestic terrorism for investigative and sentencing purposes, it does not make domestic terrorism a crime.⁷⁷ Bills have been introduced in the House and Senate that would make domestic terrorism a federal offense.⁷⁸ The bills would create a new statute making it illegal to kill, kidnap, or assault another person or create a substantial risk of serious bodily injury by intentionally destroying or damaging property "with intent to intimidate or coerce a civilian population or to influence, affect, or retaliate against the policy

71 Rick Pluta, "After Violent Mobs in D.C., Michigan Bans Open Carry in State Capitol," *National Public Radio*, Jan. 11, 2021, <https://www.npr.org/2021/01/11/955792090/after-violent-mobs-in-d-c-michigan-bans-open-carry-in-state-capitol>.

72 Violent Crime and Law Enforcement Act of 1994, 103rd Congress, Sept. 13, 1994, Title XI, <https://www.congress.gov/103/statute/STATUTE-108/STATUTE-108-Pg1796.pdf>.

73 *Impacts of the 1994 Assault Weapons Ban: 1994-1996*, National Institute of Justice, U.S. Department of Justice, March 1999, <https://www.ojp.gov/pdffiles1/173405.pdf>.

74 Alex Yablon, "Diving Into the Data on Assault Weapons Bans," *The Trace*, Aug. 16, 2019, <https://www.thetrace.org/2019/08/what-the-data-says-assault-weapons-bans/>.

75 Bayliss Wagner, "Fact Check: AR-15 Style Rifles Used in 11 Mass Shootings Since 2012," *USA Today*, April 22, 2021, <https://www.usatoday.com/story/news/factcheck/2021/04/22/fact-check-post-missing-context-ar-15-rifles-and-mass-shootings/7039204002/>.

76 The White House, *National Strategy for Countering Domestic Terrorism*, 25.

77 18 U.S.C. Section 2331(5): "The term domestic terrorism means activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States."

78 S. ____, *To Penalize Acts of Terrorism*, 116th Congress, proposed Title 18 United States Code, Section 2339E, <https://s3.documentcloud.org/documents/6270558/OLL19714-1.pdf>.

or conduct of a government.”⁷⁹ The statute would also include attempt and conspiracy provisions so that law enforcement would not need to wait until an attack occurs before intervening.⁸⁰ Such a statute would parallel existing law that makes it a crime to commit international terrorism, defined as terrorism that transcends national boundaries.⁸¹

These bills would provide much-needed tools to federal agents and prosecutors, who sometimes find themselves without adequate means for investigating domestic terrorism. One of the goals of federal law enforcement agencies when investigating international terrorism plots is to disrupt plots “left of boom,” that is, prior to when a deadly attack occurs. A domestic terrorism law would similarly allow federal agents to disrupt domestic terrorism plots left of boom. To comply with the FBI’s *Domestic Investigations Operations Guide*, agents and prosecutors may open a criminal investigation only when it is predicated on the suspected violation of a federal statute. When investigators learn about a mass shooting plot, there is no federal offense on which to base an investigation. Instead, federal investigators are left to look for minor weapons offenses, sometimes to no avail. Similarly, the use of vehicles as weapons does not currently constitute any federal offense. With a domestic terrorism statute on the books, investigators could open an investigation of such crimes and use existing tools to disrupt plots and prosecute the perpetrators.

While state murder laws may be adequate to prosecute the commission of mass shootings or vehicular homicide, these crimes are usually prosecuted only *after* an attack has occurred. Even though state laws typically include attempt and conspiracy provisions, state law enforcement agencies generally lack the resources to conduct the type of long-term, proactive investigation that can detect and disrupt

terror plots before they occur. They are also limited by their geographic jurisdictions. The FBI, on the other hand, routinely engages in lengthy investigations and has agents in every state, a network of intelligence analysts, federal wiretap capabilities, and nationwide search and arrest authority.

Enforce Laws Against Paramilitary Activity by Private Militias

The intelligence community has assessed that the greatest threat of domestic terrorism directed against government personnel and facilities comes from “militia violent extremists.”⁸² The term “militia” correctly refers only to residents who may be called up by the government to defend the United States or an individual state.⁸³ To the contrary, private groups that gather and call themselves militias operate without any government authority. According to the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, “All 50 states prohibit private, unauthorized groups from engaging in activities reserved for the state militia, including law enforcement activities.”⁸⁴ Private paramilitary groups typically do not defend their country in the manner of a national guard, but instead act as vigilantes *against* government officials to achieve their favored political ends. According to the Anti-Defamation League, the militia movement grew in the United States following the election of President Barack Obama and the 2008 financial crisis.⁸⁵ One militia group known as “The Three Percenters” emerged in 2008 as self-proclaimed “patriots” who protect Americans from government tyranny.⁸⁶

Individuals affiliated with militias have been charged with crimes relating to the Jan. 6 attack on the U.S. Capitol.⁸⁷ In 2020, members of a private

79 To Penalize Acts of Terrorism.

80 The bill would also amend 18 U.S.C. Section 2339A, which makes it a crime to provide material support or resources “knowing or intending that they be used in preparation for, or in carrying out, a violation of” certain statutes. The new provision would add to that list of crimes the new domestic terrorism statute referenced above, 18 U.S.C. Section 2339E. Material support is defined as “any property or service,” including money, training, documents, weapons, and “personnel,” including oneself, except medicine or religious materials. Under the proposed law, prosecutors could charge someone with providing money, goods, weapons or services to others who plan to conduct a domestic terrorism attack.

81 18 U.S.C. Section 2332B.

82 The White House, *National Strategy for Countering Domestic Terrorism*, 10–11.

83 “Fact Sheet, Unlawful Militias in Michigan,” Institute for Constitutional Advocacy and Protection, Georgetown Law Center, accessed Jan. 28, 2022, citing 10 U.S.C. § 246, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/09/Michigan.pdf>.

84 “State Fact Sheets,” Institute for Constitutional Advocacy and Protection, Georgetown Law Center, accessed Jan. 28, 2022, <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/state-fact-sheets/>.

85 Rachael Levy, “What Are Militias and Are They Legal?” *Wall Street Journal*, Oct. 10, 2020, <https://www.wsj.com/articles/what-are-militias-and-are-they-legal-11602370719>.

86 Levy, “What Are Militias and Are They Legal?”

87 “Oath Keepers Member Arrested on Conspiracy Charges Related to Jan. 6 Capitol Breach,” U.S. Department of Justice, July 6, 2021, <https://www.justice.gov/usao-dc/pr/oath-keepers-member-arrested-conspiracy-charges-related-jan-6-capitol-breach> (describing the Oath Keepers as “a large but loosely organized collection of individuals, some of whom are affiliated with militias”); and “Self-Identified Proud Boy Arrested for Violent Entry and Obstruction of Justice During Jan. 6 Capitol Breach,” U.S. Department of Justice, June 8, 2021, <https://www.justice.gov/usao-dc/pr/self-identified-proud-boy-arrested-violent-entry-and-obstruction-justice-during-jan-6>.



militia group who call themselves the “Wolverine Watchmen” were charged with conspiring to kidnap and kill Michigan Gov. Gretchen Whitmer over her executive orders relating to COVID-19.⁸⁸ Heavily armed paramilitary groups contributed to the violence at the 2017 “Unite the Right” rally in Charlottesville and created confusion for law enforcement by making it difficult to know whether armed individuals wearing combat boots and tactical gear were sworn officers or protestors.⁸⁹

Although all 50 states prohibit private militia activity, 25 states make such activity a criminal offense. These states ban individuals from assembling to train or practice in using firearms or explosives because of the high likelihood that they may be used to cause civil disorder.⁹⁰ These laws are consistent with longstanding Supreme Court precedent holding that states may prohibit individuals from associating together “as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.”⁹¹ While the First Amendment right to free association permits like-minded individuals to gather to express ideas, states may ban paramilitary conduct.

Despite the growing threat posed by private militia groups, their illegal activity is rarely prosecuted.⁹² Private militias in some regions have become so commonplace that their paramilitary activity is accepted as normal. It has been suggested by one national security expert that one reason that these laws are not enforced is that prosecutors are unaware that they are on the books.⁹³

An effective strategy to counter domestic terrorism should include prosecuting paramilitary activity conducted by private militia groups. In states with existing laws that prohibit paramilitary training with firearms and explosives, police and prosecutors should enforce them. States without such laws should enact legislation that prohibits groups from assembling to engage in militia-style training and drilling. These so-called militias are not the well-regulated citizen-soldiers envisioned in the Second

Amendment. Vigorous enforcement would disrupt existing groups and deter other individuals from engaging in prohibited paramilitary activity.

One way to beef up enforcement of militia groups would be to have federal and state law enforcement authorities focus on the militia threat through the FBI’s existing Joint Terrorism Task Forces.⁹⁴ Approximately 200 task forces operate across the country, with at least one task force in each of the FBI’s 56 field offices.⁹⁵ These task forces combine federal, state, and local law enforcement to collect and share intelligence, gather evidence, respond to threats, and make arrests. In my experience, since the attacks of Sept. 11, 2001, Joint Terrorism Task Forces have dedicated the bulk of their resources to international terrorism threats. Federal resources, such as grand juries and wiretap authorities, could be used to investigate and disrupt militia groups left of boom in the absence of sufficient state resources. State and federal prosecutors could work together to consider charging options against militia activity and choose the one that best addresses the harm presented. In some instances, a state offense may be more appropriate in the absence of a federal offense.

Holding Divisive Political Leaders Accountable

Finally, American citizens should demand more of their leaders. Effective leaders bring calm to chaos. In recent years, many of the country’s leaders have done just the opposite, stoking divisions and exploiting differences for their own political gain. Congressional hearings are often filled with members asking questions that seem designed more to fuel public outrage than to inform legislation. Two members of Congress recently posed for holiday cards with their children and spouses brandishing assault weapons.⁹⁶ Their holiday greetings were made public shortly after a 15-year-old boy at a high school in Michigan allegedly used a semi-automatic

88 *United States v. Fox, et al.*, Superseding Indictment, April 28, 2021, <https://www.justice.gov/usao-dc/press-release/file/1390286/download>.

89 *Protests & Public Safety: A Guide for Cities & Citizens*, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center, 40, https://constitutionalprotestguide.org/ICAP-Protest_and_Public_Safety-Toolkit-2020.12.07.pdf.

90 Institute for Constitutional Advocacy and Protection, *Protests & Public Safety*, 41.

91 *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886).

92 Levy, “What Are Militias and Are They Legal?”

93 Levy, “What Are Militias and Are They Legal?”

94 “Joint Terrorism Task Forces,” FBI, accessed Jan. 28, 2022, <https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces>.

95 FBI, “Joint Terrorism Task Forces.”

96 Christina Wyman, “A Christmas Card with Guns? Lauren Boeert and Thomas Massie Start a New Culture War,” *NBC News*, Dec. 10, 2021, <https://www.nbcnews.com/think/opinion/christmas-card-guns-lauren-boeert-thomas-massie-start-new-culture-ncna1285709>.

handgun to kill four classmates and injure several others.⁹⁷ Their promotion of assault rifles is not just insensitive — they normalize deadly weapons.


Former President Donald Trump has glorified violence, referring to rioting white supremacists at the “Unite the Right” rally in Charlottesville as “very fine people.”⁹⁸ These rally participants had chanted, “You will not replace us,”⁹⁹ an anti-Semitic phrase associated with Nazism.¹⁰⁰ Trump has also pushed disinformation about the COVID-19 pandemic.¹⁰¹ His efforts to downplay the seriousness of the outbreak contributed to political resistance against public health orders for vaccines, masks, and social distancing, leaving the country more vulnerable to the spread of the virus. Trump has also aggressively promoted claims of fraud without evidence in the 2020 presidential election.¹⁰²

Trump’s inflammatory rhetoric has inspired acts of violent extremism. Some defendants in the Jan. 6 attack on the Capitol cited Trump’s call to action about election fraud as the reason for their conduct.¹⁰³ A Florida man who was sentenced to 20 years in prison for sending pipe bombs through the mail to prominent members of the media and Democratic Party said he was motivated by his fervent support for Trump.¹⁰⁴

Part of the strategy to combat domestic terrorism should be to demand more from America’s leaders. This is not a job for the government but rather is something that the American people should spearhead. Voters can hold leaders accountable by refusing to re-elect those who engage in divisive rhetoric or knowingly perpetuate false claims. Americans should call out those who stand with political party over country and allow political ends to justify horrifying means. Leaders who glorify violence and bigotry should be condemned. Ultimately, we get the leaders we deserve.

Conclusion

Americans have the knowledge and ability to do hard things — such as finding a vaccine for COVID-19 and routinely sending rockets into space. The only thing that prevents them from doing what they need to do is the lack of political will. America’s infatuation with guns and obsession with social media has had profound implications on its citizens’ physical safety and mental health. A sound strategy for countering domestic terrorism requires Americans to overcome their political differences and enact laws that regulate both of these dangers.

Absolutist views of the Bill of Rights make it impossible to balance the competing interests of society. The Supreme Court has consistently held that the rights to bear arms and free speech may be subject to reasonable restrictions to advance other goals, such as public health and safety. Unless America can reach a compromise to take these necessary steps, it may fulfill the prophecy of Justice Jackson. 

Barbara L. McQuade is a professor from practice at the University of Michigan Law School. She was the U.S. Attorney for the Eastern District of Michigan from 2010 to 2017; co-chair of the Domestic Terrorism Executive Committee from 2015 to 2017; and co-chair of the Terrorism and National Security Subcommittee for the Attorney General’s Advisory Committee from 2010 to 2017.

Image: Jonathan Thorne (CC BY-NC 2.0)¹⁰⁵

97 Wyman, “A Christmas Card with Guns?”

98 Jordyn Phelps, “Trump Defends 2017 ‘Very Fine People’ Comments, Calls Robert E. Lee ‘a Great General,’” *ABC News*, April 26, 2019, <https://abcnews.go.com/Politics/trump-defends-2017-fine-people-comments-calls-robert/story?id=62653478>.

99 “White US Nationalists Chant ‘You Will Not Replace Us,’” *BBC*, Aug. 12, 2017, <https://www.bbc.com/news/av/world-asia-40911744>.

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101 Juana Summers, “Timeline: How Trump Has Downplayed the Coronavirus Pandemic,” *National Public Radio*, Oct. 2, 2020, <https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919432383/how-trump-has-downplayed-the-coronavirus-pandemic>.

102 Olivia Beavers and Nicholas Wu, “1 Year Later, GOP Still Chained to Trump’s Baseless Election Fraud Claims,” *Politico*, Nov. 3, 2021, <https://www.politico.com/news/2021/11/03/gop-trump-baseless-election-fraud-claims-518603>.

103 Cheney Kyle and Josh Gerstein, “How Trump’s Renewed Election Rhetoric Is Complicating Rioters’ Legal Fight,” *Politico*, April 27, 2021, <https://www.politico.com/news/2021/04/27/trump-rhetoric-capitol-rioters-legal-fight-484787>.

104 Benjamin Weiser and Ali Watkins, “Cesar Sayoc, Who Mailed Pipe Bombs to Trump Critics, Is Sentenced to 20 Years,” *New York Times*, Aug. 5, 2019, <https://www.nytimes.com/2019/08/05/nyregion/cesar-sayoc-sentencing-pipe-bombing.html>.

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