

Re: Docket No. PCLOB-2022-0001

To the Members of the Privacy and Civil Liberties Oversight Board:

Thank you for the opportunity to participate in the PCLOB’s recent public forum on privacy and civil liberties issues concerning the United States government’s efforts to counter domestic terrorism. We appreciated the discussion of biases in the government’s enforcement of the terrorism regime and overreliance on ideology. Yet no discussion of the government’s approach to domestic violent extremism—and its impact on civil rights—is complete without considering the impact this framework has on Americans who may be regarded as having an ostensible foreign connection, based on their place of birth or that of their parents, for example, or even whether the faith they practice is considered “foreign.”

1. The PCLOB should reject the baseless disparate treatment imposed by the government’s current counterterrorism regime.

Counterterrorism agencies have typically relied on a framework that divides the world of ideological violence into two different categories: domestic terrorism and international terrorism. In both situations, U.S. laws generally define terrorism to mean activities that involve criminal violent acts committed with the apparent intent to intimidate or coerce a civilian population or the government.¹ Departing from statute, agencies typically deploy the euphemism “violent extremist” to refer to people in the United States. The government further refers to persons it claims are involved with international terrorism due to an alleged foreign connection as “homegrown violent extremists,” while calling those perceived to be lacking such a connection “domestic violent extremists.”

The existing framework subjects Americans allegedly influenced by certain “foreign” ideologies to aggressive international terrorism investigations and prosecutions, using tools originally designed for use against hostile foreign agents, even if the actor operates solely in the United States.² At the same time, the government’s approach ignores the transnational character of many forms of far-right violence, treating them as “domestic terrorism,” even when people perpetrating such violence appear to coordinate directly with foreign persons. Three cases, among many others, illustrate how this distinction is biased and politicized.

“International” Terrorism. Take, for instance, Harlem Suarez, a “homegrown violent extremist” convicted of attempting to use a weapon of mass destruction and providing material support to

¹ The U.S. Department of Justice uses two definitions in statute, one for international terrorism and the other for domestic terrorism. 18 U.S.C. § 2331(1) (international terrorism); (5) (domestic terrorism). Note that international terrorism includes “violent acts or acts dangerous to human life,” whereas domestic terrorism includes only “acts dangerous to human life.” The Department of Homeland Security relies on one definition for terrorism generally, which is tied to acts “dangerous to human life or potentially destructive of critical infrastructure or key resources.” 6 U.S.C. § 101(18). The DHS definition is further delineated in DHS policy. See, e.g. Office of Intelligence and Analysis (hereinafter I&A), *Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines*, DHS, January 19, 2017, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.

² We will discuss this framework in greater detail in part 2 below.

ISIS.³ In 2015, Suarez, who was 23 years old at the time, knew little about ISIS until an FBI informant taught him the name of ISIS's leader, introduced him to the group's handbook, procured camera gear, and encouraged Suarez to participate in a recruitment video for ISIS.⁴ An FBI undercover agent then talked Suarez through a plan of attack, pointing him to a domestic target. By all accounts Suarez had struggled up to that point in his life, suffering "lifelong social and intellectual challenges" that may have made him especially susceptible to this direction and the flattery lavished upon him by his would-be coconspirators.⁵

During the investigation, based on a review of court records, the FBI acquired technical and location information from Facebook, AT&T, and textPlus, a messaging service.⁶ The parties filed pre-trial motions related to the Classified Information Procedures Act (CIPA), including documents referring to classified national security information governed by the Foreign Intelligence Surveillance Act. These filings suggest the government relied on more aggressive terrorism investigative methods that are available when it asserts a foreign connection. We discuss these methods—and their iniquitable use—in greater detail below.

In his search for ISIS members, Suarez found only the FBI, never making contact with anyone actually connected with ISIS.⁷ After months of being pursued doggedly, Suarez agreed to set off a bomb. The bomb turned out to be fake—given to him by another federal agent—but Suarez was nonetheless arrested exiting the vehicle where he picked up the package. At trial Suarez complained of being threatened by the demands of the various people working for the FBI.⁸

Regardless, because of the availability of the homegrown violent extremism regime and international terrorism charges, Suarez was convicted and sentenced to life in prison.

"Domestic" Terrorism. In contrast, the government did not use its international terrorism tools against participants in a transnational white supremacist conspiracy, involving a Canadian and two Americans, and travel from Canada to Virginia to engage in violence to spark a "race war."

The Base is a North American white supremacist organization. Patrik Mathews, a 29-year-old Canadian national, plotted with a fellow member of the Base "to use a pro-gun rights rally in Richmond, Virginia, to engage in mass murder and attacks on critical infrastructure."⁹ He crossed

³ Department of Justice (hereinafter DOJ), "Florida Man Convicted at Trial of Attempting to Use a Weapon of Mass Destruction and Providing Material Support to ISIL," January 31, 2017, <https://www.justice.gov/opa/pr/florida-man-convicted-trial-attempting-use-weapon-mass-destruction-and-attempting-provide>.

⁴ Lisa Rose, "The Massive FBI Sting to Bring Down an ISIS-Supporting Weightlifter in Key West," CNN, January 24, 2017, <https://www.cnn.com/2018/01/24/politics/harlem-suarez-isis/index.html>.

⁵ Trever Aaronson, "The Unlikely Jihadi: the FBI Pressured a Lonely Young Man Into a Bomb Plot. He Tried to Back Out. Now He's Serving Life in Prison," *Intercept*, September 3, 2017, <https://theintercept.com/2017/09/03/the-fbi-pressured-a-lonely-young-man-into-a-bomb-plot-he-tried-to-back-out-now-hes-serving-life-in-prison/>.

⁶ Complaint at 3, 6, *U.S. v. Suarez*, No. 14-10009 (S.D. Fl. July 28, 2015), available at

<https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Suarez%20Criminal%20Complaint.pdf>.

⁷ Aaronson, "The Unlikely Jihadi."

⁸ Id.

⁹ Alexander Mallin, "FBI Tapes Show White Supremacists Plot Mass Murder to Start Race War," ABC, November 5, 2021, <https://abc30.com/white-supremacist-terror-plot-supremacists-the-base-group-patrik-jordan-mathews/11201252/>.

the border into the United States and was subsequently arrested along with two Americans who helped conceal his presence in the country.

In contrast with its pursuit of Suarez, the government does not appear to have relied upon classified or national security information, as the court docket does not reveal any use of CIPA in its prosecution of Base members. The government instead relied on ordinary criminal investigative tools, including a Title III wiretap and search and tracking warrants.

Throughout this proceeding, prosecutors described the case as one involving domestic terrorism for the purpose of increasing the defendants' sentences. Yet the defendants were ultimately convicted on federal weapons and related charges, not federal terrorism charges. And Mathews, who obtained and possessed illegal weapons and engaged in a conspiracy with fellow white supremacists—not undercover agents—was sentenced to nine years in prison as against Suarez's life sentence.¹⁰ His two co-conspirators received sentences of nine and five years.¹¹

Non-Terrorism. When global politics come into play, U.S. counterterrorism policy can take an unexpected turn. Such is the case with the Azov Battalion, a Ukrainian paramilitary force currently fighting the Russian military.¹² While allied in this conflict with U.S. government goals, the battalion is also a far-right, nationalist, and often white supremacist militia. In 2018 it carried out attacks against Roma and LGBTQ Ukrainians, constituting serious ideological violence. Its members are known to identify with Nazis and represent themselves as “national socialists.”¹³ At times, American lawmakers have lobbied the government to designate Azov as a foreign terrorist organization.¹⁴

Azov makes up a significant part of the Ukrainian insurgency challenging the Russian military. Volunteers from around the world have signed up with Azov to support Ukraine. Even when Americans specifically seek to travel to Ukraine to join Azov, the U.S. government has not appeared to prohibit anyone from joining the fight alongside these Ukrainian white supremacists, though U.S. Customs and Border Protection officers have questioned Americans at ports of entry.¹⁵

Government agencies have numerous reasons they may wish to speak to Americans transiting U.S. borders, but they appear not to have considered ideological actors traveling to join the Azov Battalion—currently seen as aligned with the West—as potential terrorists, let alone

¹⁰ Dan Morse, “Two Men Accused of Plotting ‘Race War’ Plead Guilty to Immigration-Related Gun Charges,” *Washington Post*, June 10, 2021, https://www.washingtonpost.com/local/public-safety/base-guilty-plea-terrorism/2021/06/10/e10c29d0-c97a-11eb-81b1-34796c7393af_story.html.

¹¹ DOJ, “Florida Man Convicted at Trial.”

¹² Sudarsan Raghavan, et al, “Right-wing Azov Battalion Emerges as a Controversial Defender of Ukraine,” *Washington Post*, April 6, 2022, <https://www.washingtonpost.com/world/2022/04/06/ukraine-military-right-wing-militias/>.

¹³ Shaun Walker, “Azov Fighters Are Ukraine’s Greatest Weapon and May Be Its Greatest Threat,” *Guardian*, September 14, 2014, <https://www.theguardian.com/world/2014/sep/10/azov-far-right-fighters-ukraine-neo-nazis>.

¹⁴ Al Jazeera, “Profile: Who Are Ukraine’s Far-right Azov Regiment?,” March 1, 2022, <https://www.aljazeera.com/news/2022/3/1/who-are-the-azov-regiment>.

¹⁵ Betsy Woodruff and Christopher Miller, “Customs and Border Protection Bulletin: American Fighters Headed to Ukraine Questioned at U.S. Airports,” *Politico*, May 24, 2022, <https://www.politico.com/news/2022/05/24/american-fighters-ukraine-white-supremacists-00034860>.

homegrown violent extremists. The disparity between treatment of these Americans and Americans like Harlem Suarez is stark.

2. The divide between domestic and homegrown violent extremists is artificial and harms civil rights.

The government acknowledges the transnational nature of much “domestic” white supremacist violence, yet typically reserves the international terrorism label for American Muslims and Americans the government perceives as associating with Islamic terrorist groups. This is true even when those individuals are greatly attenuated from any behavior that transcends national borders, such as in the case of Harlem Suarez and many similarly situated investigative subjects.

Justifications for this divide carry forward the belief that so-called “domestic violent extremists” enjoy First Amendment rights that “homegrown violent extremists” do not. Government officials testify that domestic terrorism investigations and prosecutions are complicated by the fact that the First Amendment protects such actors’ ability to speak on and influence American political issues, and practice their chosen religion and beliefs freely.¹⁶ But these officials typically do not see these barriers when talking about American Muslims or individuals in the U.S. aligned with Muslim groups, even when their actions are limited to communicating with a federal

¹⁶ Then-Acting Director of the DOJ’s Counterterrorism Division Michael McGarrity stated the following in 2019 testimony to Congress: “In line with our mission to protect the American people and uphold the Constitution of the United States, no FBI investigation can be opened solely on the basis of First Amendment-protected activity. Thus, the FBI does not investigate mere association with groups or movements.” *Confronting the Rise of Domestic Terrorism in the Homeland, Hearing Before the H. Comm. on Homeland Security*, 116th Cong. (2019), <https://www.congress.gov/event/116th-congress/house-event/LC64275/text?s=1&t=3>. Similarly, Mary McCord, a former senior DOJ official, began 2020 testimony on the divide by stating: “There are marked differences in the tools available to investigate the financing of domestic and international terrorism. This is because the First Amendment protects the freedom of speech and peaceful assembly of individuals and organizations in the United States, while providing no such protections for foreign individuals and organizations. . . . Because of the rights protected by the First Amendment, there is no comparable designation scheme for domestic extremist organizations.” *A Persistent and Evolving Threat: An Examination of the Financing of Domestic Terrorism and Extremism, Hearing Before the Subcomm. on National Security of the H. Comm. on Financial Services*, 116th Cong. (2020) (testimony of Mary McCord, Legal Director, Institute for Constitutional Advocacy and Protection), 1, <https://www.congress.gov/116/meeting/house/110369/witnesses/HHRG-116-BA10-Wstate-McCordM-20200115.pdf>. The same concerns, apparently, do not extend to so-called homegrown violent extremists.

agent posing as a terrorist,¹⁷ consuming publicly available online media,¹⁸ sending money abroad,¹⁹ or offering non-violent training.²⁰

These justifications have, as a matter of policy, the effect of stigmatizing as foreign American Muslims and members of other communities perceived similarly by the government. Under the government's logic, some Americans possess narrower rights to association, political belief, religious practice, and receipt of foreign speech than do others, based predominantly on their religion, nationality, and national origin.

American Muslims, bearing the burden of the “homegrown violent extremism” label, experience not only stigma but also very real, invasive investigative and prosecutorial techniques reserved for people with meaningful connections to a controlling foreign power: lower standards for electronic surveillance, more extensive records inquiries, the wider availability of material support charges, and aggressive sentencing enhancements during prosecution. The disparity in treatment has been well-catalogued²¹ and we will summarize only two key investigative aspects of the international terrorism regime.

Electronic Surveillance Standards. If a federal agent suspects an investigative subject of a crime related to domestic terrorism and seeks to conduct wiretap surveillance, the agent must go through

¹⁷ Suarez is not the only example of a would-be “extremist” who interacted only with federal agents. See, e.g., Rozina Ali, “The ‘Herald Square Bomber’ Who Wasn’t,” *New York Times*, April 23, 2021, <https://www.nytimes.com/2021/04/15/magazine/fbi-international-terrorism-informants.html> (describing the story of Shahawar Matin Siraj, who was talked into a plot by an FBI informant); and Paul Harris, “Newburgh Four: Poor, Black, and Jailed Under FBI ‘Entrapment’ Tactics,” *Guardian*, December 12, 2011, <https://www.theguardian.com/world/2011/dec/12/newburgh-four-fbi-entrapment-terror> (describing the Newburgh Four).

¹⁸ For instance, the FBI labeled a July 2015 terrorist attack as “motivated by foreign terrorist organization propaganda,” despite a dearth of evidence to substantiate the assertion. Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Center for Justice, October 31, 2018, 4, https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf. The scientifically baseless theory that there exists a clear “pathway to violence” or radicalization long perpetuated by counterterrorism agencies identifies behaviors including consuming or creating videos—and other non-violent, constitutionally-protected activity—as two of the many behaviors law enforcement should surveil. See National Counterterrorism Center, FBI, and DHS, *US Violent Extremist Mobilization Indicators: 2021 Edition*, January 27, 2022, 18, https://www.dni.gov/files/NCTC/documents/news_documents/Mobilization_Indicators_Booklet_2021.pdf.

¹⁹ Take the case of Nicholas Young, a Washington, D.C., police officer and American Muslim. The FBI engaged in a five-year sting operation and used several informants to befriend Young. After a two-year period, one informant pretended to join ISIS and Syria. The informant pleaded for money and Young sent him a \$245 gift card. In response, the government charged Young with material support to ISIS and he was sentenced to 15 years in prison. German and Robinson, *Wrong Priorities*, 5.

²⁰ The best-known case demonstrating the breadth of the material support statute is *Holder v. Humanitarian Law Project*, in which the Supreme Court held that an organization providing training on peaceful dispute resolution and political advocacy to foreign terrorists constituted material support to a foreign terrorist organization and was not protected by the First Amendment to the U.S. Constitution. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2009).

²¹ Shirin Sinnar, “Separate and Unequal: The Law of ‘Domestic’ and ‘International’ Terrorism,” *Michigan Law Review* 117 (2019): 1344-63 (discussing differences in investigation and prosecution, and summarizing commentary and authorities).

the ordinary process of convincing a judge there exists probable cause that a crime has been or will be committed.²² But if that same agent investigates someone—including an American—for international terrorism, then under the Foreign Intelligence Surveillance Act (FISA), the agent may seek approval from a secret court, showing only probable cause that the surveillance target is an “agent of a foreign power,” not that any crime has been or will be committed.²³ And the standard for proving that an individual is an agent is quite broad, with the term understood to include those who knowingly engage in, aid, or abet international terrorism or preparatory activities “for or on behalf of” foreign powers,²⁴ including persons who had no direct contact with a foreign terrorist organization. Indeed, FISA allows the government to label two people engaged in terrorism as a foreign power,²⁵ meaning the requirement for participation is quite low.

Moreover, while judges may authorize ordinary wiretap surveillance for up to 30 days,²⁶ FISA surveillance, once authorized, is good for 90 days against U.S. citizens and lawful permanent residents and 120 days against others.²⁷ And while the government notifies targets following termination of conventional surveillance, it need not do so after FISA surveillance except where it seeks to use the evidence in a proceeding.²⁸ Finally, FISA applications and ex parte proceedings are so secretive that defendants have no right to see the government’s application for a warrant and are thus greatly inhibited from challenging the surveillance.²⁹

Although FISA surveillance authorities would not apply to Americans supporting groups engaged only in domestic activities, the statutory scheme does reach Americans who themselves act only domestically with some tenuous connection to a foreign power. The electronic surveillance regime thus provides two sets of rules, one for Americans engaging in “domestic” political violence and a more aggressive one for Americans supposedly engaged internationally.

Additional Investigative Methods. The FISA electronic surveillance authority represents a significant disparity between domestic and homegrown violent extremism investigations, but other provisions have applied the same problematic construct. Section 215 of the PATRIOT Act—which was in effect for nearly twenty years before it lapsed in late 2020³⁰—permitted federal agents to access various tangible records to “protect against international terrorism” where the agent could show reasonable grounds to believe the records were relevant to an authorized investigation.³¹ These records included business records, phone records, and tax returns, the sorts of records that allow a

²² 18 U.S.C. § 2516-2518.

²³ 50 U.S.C. § 1805(a)(2).

²⁴ Id. § 1801(b)(2)(C), (E). See also Sinnar, “Separate and Unequal,” 1344 (discussing differences between FISA and conventional wiretap surveillance).

²⁵ 50 U.S.C. § 1801(a)(4); for additional discussion see Sinnar, “Separate and Unequal,” 1348.

²⁶ 18 U.S.C. § 2518(5).

²⁷ 50 U.S.C. § 1805(d)(1).

²⁸ Sinnar, “Separate and Unequal,” 1345 n.66 (citing *In re Sealed Case*) (discussing differences between the two regimes).

²⁹ *United States v. Daoud*, 755 F.3d 479, 490 (7th Cir. 2014) (Rovner, J., concurring) (observing that FISA defendants “face an obvious and virtually insurmountable obstacle” to challenge a warrant because they cannot access the underlying affidavit, which they would need to show “deliberate or reckless material falsehoods” to overcome the warrant).

³⁰ India McKinney, “Section 215 Expired: Year in Review 2020,” Electronic Frontier Foundation, December 29, 2020, <https://www EFF.org/deeplinks/2020/12/section-215-expired-year-review-2020>.

³¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 288.

government agency to develop a deep understanding of a subject and its social network. Network analysis is no more or less useful in domestic terrorism investigations, yet these tools are not available to scrutinize those activities.

Section 215 requests required the government to apply to the FISA Court for approval, but other intrusive tools authorized for international investigations lack even this minimal oversight. National Security Letters, for instance, allow the FBI to acquire records from electronic communications providers and financial institutions based solely on a certification that the records support a national security investigation. Notably, those investigations include only international terrorism, and so would be permissible in inquiries into homegrown violent extremists but not domestic violent extremists.

3. Much of the legitimacy of “homegrown violent extremism” turns on the notion that Americans influenced from abroad should be treated as international actors. Yet the nature of today’s internet, which breaks down national barriers, renders this distinction meaningless.

Ideas, including ones that have been used to inspire or justify violence, flow quickly across internet fora and national boundaries. Although powerful political ideas have always transcended national lines—from the American and French revolutions to twentieth century authoritarian regimes across Europe—the ease and speed of today’s communication is unparalleled. Anonymity and pseudonymity compound this effect: It is often impossible for a reader, lacking access to technical details, to understand where a speaker originates.³² And speakers can use this environment to create a persona that may appear to be from another country.

This online breakdown in national borders is true not only of Anwar Al-Awlaki’s video lectures or ISIS propaganda videos, materials the government considers drivers of international terrorism and homegrown violent extremism.³³ It is also the case for white supremacist views, endemic not only to America but also Europe. Indeed, white supremacist speech originating in Europe, Russia, South Africa, Australia, or New Zealand is passed around just as freely, and events in these countries inspire acts in the United States.³⁴ Yet, demonstrating its total commitment to this

³² One such example is the use of national flags on the Politically Incorrect channel on 4chan, the internet’s anonymous image board infamous for its use by violent white supremacist actors and reactionary trolls alike. Stephane J. Baele, Lewys Brace and Travis G. Coan, “Variations on a Theme? Comparing 4chan, 8kun, and Other chans’ Far-Right “/pol” Boards,” *Perspectives on Terrorism* 15 (2021): 65-80 <https://www.jstor.org/stable/26984798?seq=1>. The channel paints a mosaic of international participants by assigning users a flag corresponding with their country of origin, based upon their IP address. Knowledgeable users can manipulate their IP address, however, and thus their ostensible country of origin.

³³ Journalists have covered the once wide availability of Al-Awlaki’s lectures, which the government has used as a hub around which to build various material support indictments. Alex Hern, “‘YouTube Islamist’ Anwar al-Awlaki Videos Removed in Extremism Clampdown,” *Guardian*, November 13, 2017, <https://www.theguardian.com/technology/2017/nov/13/youtube-islamist-anwar-al-awlaki-videos-removed-google-extremism-clampdown>. See also Patrick Kingsley, “Who Is Behind Isis’s Terrifying Online Propaganda Operation,” *Guardian*, June 23, 2014, <https://www.theguardian.com/world/2014/jun/23/who-behind-isis-propaganda-operation-iraq>.

³⁴ For example, violent white supremacists occasionally post their plots on 4chan and similar message boards such as 8chan, where the Christchurch, New Zealand, attacker Brenton Tarrant livestreamed his massacre.

absurd framing of the issue, the FBI has described the white supremacist attacks in Christchurch, New Zealand, as “domestic terrorism threats overseas.”³⁵

Given the lack of distinction based on national origin of speech and the broad accessibility of such information around the world, we cannot draw meaningful lines between domestic and international terrorism when it comes to the location from which the influence originates. Continuing to do so is untenable.

4. Notably, both the HVE and DVE frameworks define terrorism too broadly, departing from statute and capturing activity protected by the First Amendment.

Federal law defines domestic terrorism roughly as criminal acts dangerous to human life, occurring within the United States, that appear intended to target the public or influence government policy through intimidation or coercion.³⁶ But counterterrorism agencies depart from this definition, using the euphemisms “domestic” or “homegrown” violent extremism, as we have discussed. As the federal government itself recognizes, it does not define DVE consistently,³⁷ and this framework, as we pointed out in our prior comment, opens the door to targeting Americans based on their views, because it is explicitly oriented around ideology rather than violent action that satisfies the legal definition of terrorism.

Moreover, these agencies already have plenty to do, even without playing fast and loose with their authorities. With white supremacists engaging in significant violence and criminal activity, counterterrorism agencies need only “to start paying greater attention to the violent crimes these

Talia Lavin, “How 8chan Became the Go-To Platform for Mass Shooters,” *GQ Magazine*, August 7, 2019, <https://www.gq.com/story/8chan-mass-shooters>. In the United States, violent white supremacists have also used 8chan to convey their message prior to attacking. Tim Elfrink, “‘A Cesspool of Hate’: U.S. Web Firm Drops 8chan After El Paso Shooting,” *Washington Post*, August 5, 2019, <https://www.washingtonpost.com/nation/2019/08/05/chan-dropped-cloudflare-el-paso-shooting-manifesto/>. And a prison letter of Tarrant’s later ended up on 4chan. Siobhán O’Grady, “New Zealand Vowed to Silence the Alleged Christchurch Killer’s Hateful Speech. But a Letter He Wrote Was Posted to 4chan,” *Washington Post*, August 14, 2019, <https://www.washingtonpost.com/world/2019/08/14/new-zealand-vowed-silence-alleged-christchurch-killers-hateful-speech-letter-he-wrote-was-posted-4chan/>.

³⁵ *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform*, 116th Cong. (2019), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg36828/html/CHRG-116hhrg36828.htm> (FBI Assistant Direct for Counterterrorism Michael McGarrity in response to congressional questioning).

³⁶ 18 U.S.C. § 2331(5). The Department of Homeland Security relies on a definition of “terrorism” that has a similar threshold of harm, including also acts “potentially destructive of critical infrastructure or key resources.” 6 U.S.C. § 101(18).

³⁷ As a recent Department of Homeland Security document noted in recommending the adoption of a consistent definition of DVE: “Multiple definitions of domestic violent extremism and violent extremist activity are currently being used by the Federal Government, including by the Federal Bureau of Investigation (FBI), ODNI [Office of the Director of National Intelligence], and DOD [Department of Defense].” DHS Office of the Chief Security Officer, *Report to the Secretary of Homeland Security Domestic Violent Extremism Internal Review: Observations, Findings, and Recommendations*, March 11, 2022, 8, <https://www.dhs.gov/sites/default/files/2022-03/Report%20to%20the%20Secretary%20of%20Homeland%20Security%20Domestic%20Violent%20Extremism%20Internal%20Review%20Observations%2C%20Findings%2C%20and%20Recommendations.pdf>.

groups are actually committing on a regular basis.”³⁸ The government does not need to fixate on religion, ethnicity, or ideology, or scour social media to find provocateurs, but should instead focus on the significant white supremacist criminal activity evading scrutiny today.

5. The PCLOB should issue two main recommendations.

It is long past time to eliminate the government’s reliance on “homegrown violent extremism,” a category of actor no more international than the many actors the government considers “domestic.” This false distinction ignores the reality of modern communication and influence, invites government agencies to target persons based on ideology, and disproportionately harms the civil rights of American Muslims.

Accordingly, as it reviews the government’s approach to these issues, the PCLOB should issue two main recommendations. First, the government should eliminate the DVE and HVE labels entirely, and investigate and prosecute Americans within the limits of existing terrorism or criminal laws, which do not reference particular ideologies.

Second, the government should reject distinctions—across its law enforcement, intelligence, and counterterrorism activities—between American actors based on the location of the persons or organizations who may have influenced their behavior. No person in the United States should be subjected to the enhanced investigative and surveillance techniques we describe above due to a supposed ideological link, sympathy, or viewpoint. Instead, the government should categorize subjects of terrorism investigations and prosecutions based on where their actions occur, consistent with the title 18 definitions.

6. Conclusion

We appreciate the opportunity to provide these additional comments as the PCLOB continues its efforts to protect the rights and liberties of Americans impacted by the government’s counterterrorism work. Please do not hesitate to contact us if we can provide any further information. We may be reached at patelf@brennan.law.nyu.edu (Faiza Patel), levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman), and reynoldss@brennan.law.nyu.edu (Spencer Reynolds).

Respectfully submitted,

Brennan Center for Justice

³⁸ Mike German, “Learning from Our Mistakes: How Not to Confront White Supremacist Violence,” *Journal of National Security Law & Policy*, 12 (2021): 177. There are numerous recent examples of white supremacists engaged in significant violent crime, including: the 2019 mass shooting in El Paso, a 2018 mass shooting at a Pittsburgh synagogue, and finally the insurrection at the U.S. Capitol on January 6, 2021. See Mike German and Harsha Panduranga, “How to Combat White Supremacist Violence? Avoid Flawed Post-9/11 Counterterrorism Tactics,” Brennan Center for Justice, September 1, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/how-combat-white-supremacist-violence-avoid-flawed-post-911>.