

**Subcommittee on the Constitution Hearing on
“The Right of the People Peaceably to Assemble: Protecting Speech by Stopping
Anarchist Violence”
Questions for the
Record August 4,
2020**

QUESTIONS FROM SENATOR FEINSTEIN

Questions for Mr. German, Fellow, Brennan Center for Justice at New York University

1. In your written testimony, you stated that “white supremacists and far-right militants regularly kill far more people, including police officers,” than “anarchists and Black activists.”
 - a. **Do you believe that the threat posed by antifa, anarchists, and similar groups and movements pose a threat to law enforcement and public safety equivalent or nearly equivalent to the threat posed by white supremacist, white nationalist, and militia groups and movements? Why or why not?**

No, I do not believe there is evidence that “antifa,” anarchists, or similar groups pose as significant a threat to law enforcement and public safety as white supremacists and far-right militant groups pose. White supremacists and far-right militant groups have a long history of engaging in deadly violence that has killed hundreds of people over the last twenty-five years, including dozens of police officers.¹ No homicides have been reported from anti-fascist actions or anarchist violence over the same period.

In its highly-criticized 2017 intelligence assessment of so-called “Black Identity Extremists,” the FBI identified two individuals involved in fatal attacks on police. But these individuals were not part of a larger group, organization, or movement, and were not related to one another in any way beyond their race.² The FBI’s attempt to manufacture a Black Identity Extremism movement out of these and a handful of other unrelated cases unfairly cast aspersions on the multitudes of Black activists protesting police violence and racism who pose no threat to law enforcement.³ Tellingly, the two examples of deadly violence against police officers since the murder of George Floyd have come from far-right Boogaloo adherents, not anti-fascists or anarchists.

- b. **Do you think an effective federal response to counter violent extremism should prioritize the use of its resources against the specific threat posed by violent white supremacist, white nationalist, right-wing, and militia groups and movements? Why or why not?**

No, I do not think countering violent extremism (CVE) programs are effective, and expanding them to target white supremacists or other far-right militant groups would not be helpful. CVE programs focus on beliefs rather than violent acts, under the

disproven theory that extreme beliefs are indicators of or precursors to violent acts. In fact, the vast majority of people holding extreme beliefs do not engage in violence, and many people who commit acts of terrorism do not have strong attachments to ideology. There is no evidence CVE programs have been successful in reducing extremist violence, and the Brennan Center joined with more than 50 other civil and human rights groups to oppose expanding them to other groups.⁴ Expanding CVE programs would only perpetuate the harmful impacts to the American Muslim communities and communities of color that they disproportionately target.⁵

Instead, law enforcement should focus its efforts and resources to address the violent acts committed by white supremacists and far-right militants. Today, the FBI does not even know how many people are killed by white supremacist violence each year because they do not prioritize investigations into these incidents. As a matter of policy, the U.S. Justice Department defers the investigation and prosecution of hate crimes to state and local law enforcement agencies despite the fact that several states do not have hate crimes laws, and that less than 13 percent of police agencies report hate crimes occurring within their jurisdictions. This policy blinds the federal government to the nature and scope of white supremacist violence in the U.S., making it impossible to develop an effective national strategy to address it. The Brennan Center published two reports regarding these problematic policy responses to violence from white supremacists and far-right militant groups, as well as recommendations to improve them.⁶

2. You testified at the hearing that you've seen a politicization of intelligence with respect to reporting on the events in Portland.
 - a. **What leads you to conclude that intelligence reporting on these events has been politicized? Do you believe it is specific to one department or agency? Please include salient examples as part of your answer.**

Terrorism is distinguished from other violent crimes by its political motives. By its nature, then, counterterrorism can also be a highly political undertaking. The 1975 Church Committee investigation resulted in structural reforms designed to inhibit this natural inclination, but they were weakened or removed after al Qaeda's 9/11 attacks. This weakening of protections was primarily accomplished by reducing or removing the criminal predicates necessary to initiate FBI investigations and surveillance operations. With lower evidentiary requirements for investigations, FBI agents could target groups based on bias rather than objective evidence of wrongdoing. As an FBI agent, I noticed that law enforcement domestic terrorism training after 9/11 began to emphasize left-wing protest violence from anarchists, despite the relatively minor injuries and property damage resulting from this activity, while de-emphasizing the far more deadly white supremacist and far-right violence. By 2005, the FBI publicly declared that eco-terrorism was the number one domestic terrorism threat, even though these environmental activists hadn't committed a single homicide.

This politicized counterterrorism emphasis on left-wing activism became deeply engrained in law enforcement. Law enforcement as a profession tends to view its

mission as protecting the existing social order, so it tends to view anti-establishment activism as a greater threat than violence intended to reinforce the social order. This is particularly true when groups protest police policies and practices. This bias became most visible during the violent police reactions to the relatively peaceful Occupy movement, the Black Lives Matter protests in Ferguson, Missouri, and the Standing Rock protests in North Dakota. These images contrasted sharply with the restrained law enforcement reaction to a series of violent white supremacist and far-right militia protests across the country beginning in 2016, in which anti-racist protesters were stabbed, shot, and killed.

Portland saw a number of protests led by armed far-right militants and opposed by anti-racists beginning in 2016 and continuing right up to the present. The Portland Police Bureau (PPB) appeared to treat violent members of these far-right groups, many from out of state, with a light touch while conducting mass arrests and indiscriminately deploying so-called “less lethal” munitions like rubber bullets, flash bangs, pepper spray, and tear gas against local anti-fascist counter-protesters who came out to oppose them.⁷ Department of Homeland Security (DHS) officers clad in riot gear also policed these protests and were captured on video recruiting members of far-right militia groups to assist them in arresting anti-fascist protesters.⁸

A draft report of a Independent Police Review investigation of the PPB response to the June 2017 rallies appeared to substantiate these concerns. It quoted a police lieutenant who “felt the right-wing protesters were ‘much more mainstream’ than the left-wing protesters.”⁹ Allegations of PPB bias surfaced again when *Willamette Week* published friendly text messages between a PPB lieutenant and the out-of-state leader of a far-right group whose members had engaged in violence at the 2017 rallies. The texts included advice on how one member with an active warrant could avoid arrest, and details about the movements of opposing groups.¹⁰ The PPB later claimed the texts were intended to gather intelligence and cooperation from the far-right group to prevent violence at the rallies.¹¹ Though several of the violent actors traveled interstate in order to engage in the rallies, the U.S. Department of Justice brought no federal charges.

This dynamic was repeated in recent protests, in which armed far-right militants have reportedly thrown pipe bombs and shot firearms at Black Lives Matter protesters.¹² Last week, far-right militants were captured on video using bear mace, shooting paint ball guns, brandishing firearms, and attacking anti-fascist counter-protesters. The PPB issued a statement claiming a lack of resources prevented it from responding to this violence.¹³

A 2016 white supremacist rally in Sacramento, California, left several anti-racist counter-protesters with stab wounds. Documents show state police officials later worked with members of the neo-Nazi groups to identify and charge the anti-racism counter-protesters, even as they acknowledged the neo-Nazis had been armed with knives during the rally.¹⁴ The FBI likewise treated the white supremacists as victims in opening an investigation into one of the anti-racist counter-protest groups. It misidentified the neo-Nazi group at the protest as the Ku Klux Klan, which it

described as a group that “some believed to be supportive of a white supremacist agenda.” When the Charlottesville police later asked the FBI what it knew about one of the white supremacist groups that participated in the Sacramento rally violence, an agent reportedly replied that the white supremacist group would not be a problem but groups coming out in opposition might be.¹⁵

The Trump administration seized on this apparent bias after the police killing of George Floyd, alleging that the Black Lives Matter protests around the country were being led by “antifa.” The rhetoric fell on fertile soil, as law enforcement intelligence reports produced by the FBI, DHS, and state and local fusion centers included sensationalized allegations, sometimes originating from right-wing internet outlets, exaggerating the threat posed by anti-fascists, anarchists, and “black racially motivated violent extremist” groups.¹⁶ Hundreds of police intelligence reports from the FBI, DHS, and state and local fusion centers that leaked to the media in July 2020 document evidence of this bias. *The Intercept* compared intelligence reports discussing exaggerated threats about “antifa,” which were poorly sourced, sensationalistic, and speculative, to reports about far-right groups that were much more sober and incident-focused.¹⁷

DHS also compiled intelligence reports regarding journalists who were writing about federal agents policing the Portland protests.¹⁸ While DHS leadership condemned this collection effort once it was exposed, it mirrored an earlier scandal in which DHS collected and disseminated information on American journalists, activists, and lawyers working on immigration issues at the Mexican border.¹⁹

b. What can federal departments and agencies do to better ensure that intelligence on domestic terrorist and violent extremist threats aren’t politicized? What can Congress do?

I believe sunlight is the best disinfectant. Investigative journalists, activists, and whistleblowers have exposed biased and inappropriate intelligence products produced by the FBI, DHS, and state and local intelligence fusion centers for many years since increased information sharing was proposed as a solution to the intelligence breakdowns exposed by the 9/11 attacks. Intelligence analysts and agencies are evaluated based on the number of reports produced, rather than the quality. But sharing information that is false, biased, irrelevant, or untimely harms security efforts. The lack of peer review, internal quality control, and external oversight increases the opportunity for error and abuse to proliferate in the closed system of law enforcement intelligence analysis.

The Senate Homeland Security Committee investigated fusion centers in 2012, and found the intelligence reports they produced were of “uneven quality – oftentimes shoddy, rarely timely, sometimes endangering citizens’ civil liberties and Privacy Act protections, occasionally taken from already-published public sources, and more often than not unrelated to terrorism.”²⁰ Yet Congress took no further action to reform these entities that continue to receive federal funds and the support of the U.S. Justice Department, FBI, and DHS.

After a scandal involving a 2009 intelligence report, DHS adopted a practice of having attorneys in the department's Office of Civil Rights and Civil Liberties review intelligence products before releasing them to other agencies. The Senior Official Performing the Duties of the Deputy Secretary of Homeland Security, Ken Cuccinelli, modified this practice in 2020 to allow DHS Intelligence and Analysis to publish reports without this review.²¹

Congress must increase its oversight of FBI, DHS, and fusion centers to examine intelligence reports and establish a more effective mechanism for greater internal and external oversight. Congress should also strengthen whistleblower protections so that employees at the Justice Department, FBI, DHS, and fusion centers that receive federal funds can report waste, fraud, abuse, and misconduct in the production of intelligence. Congress should provide whistleblowers protections from retaliation through effective redress procedures, including access to federal courts to vindicate their rights.

3. On a separate panel of witnesses appearing for the same hearing, Ken Cuccinelli, the Senior Official Performing the Duties of the Deputy Secretary of Homeland Security, disputed the notion that the situation in Portland has become peaceful since federal forces withdrew from the Mark O. Hatfield Courthouse in downtown Portland.
 - a. **Do you agree with Mr. Cuccinelli's assessment of the situation? Why or why not?**

There was a period of a few days after federal forces withdrew from Portland that the protests were peaceful and resulted in few arrests.²² But the Portland Police and Oregon State Police resumed using the escalating force model of protest policing shortly thereafter, including indiscriminate use of pepper spray, tear gas, and batons. The most potentially deadly incidents involved far-right militants, however, including one allegedly throwing pipe bombs at protesters on August 8, 2020, and others shooting bear mace, paint balls, and firing two pistol shots into a crowd on August 16, 2020.²³ Law enforcement's lackluster response to these incidents raises the likelihood that violence will increase, as far-right extremists will believe they can act with impunity and community members will come to believe they must rely on collective self-defense for protection, rather than law enforcement.

 - b. **Generally, do you believe state and local law enforcement officials are better or worse situated than federal law enforcement officials to perform crowd and riot control functions in their cities? Why or why not?**

Generally, it is preferable for state and local law enforcement to take responsibility for protest policing because they are more accountable to the local communities where the protests take place. Federal law enforcement should only intervene at the request of state and local officials or when necessary to protect the civil rights of protected classes. We have seen all levels of law enforcement engaging in unnecessary and abusive violence toward protesters, journalists, and legal observers

during the protests following the murder of George Floyd, however, so comprehensive reform of protest policing tactics and training is required.

c. What kind of training, and how much of it, would any law enforcement officer, whether federal, state, or local, need to handle crowd or riot control situations involving members of the general public without escalating the situation?

Unfortunately, much of the modern police training teaches a “warrior” ethos that drives the use of excessive force in protest situations and all other interactions with the public. There has to be wholesale reform of the entirety of law enforcement training to restore a guardian ethic in law enforcement culture that emphasizes communication, de-escalation of force, problem solving, and crisis management. Use of force training should emphasize using force only when necessary to protect against death or severe bodily harm, and then only the force necessary to achieve compliance. Training for policing protests should utilize the negotiated management models that emphasize community engagement, communication, and facilitation.²⁴ Police should also be trained that less-lethal weapons are still potentially lethal, and should only be deployed when lethal force is authorized, and only against individuals who pose an immediate threat of serious bodily harm. Less-lethal weapons shouldn’t be tools of collective punishment.

Finally, law enforcement should receive stress management training. While law enforcement remains a relatively dangerous profession, it is much safer than just a few decades ago. Yet police officers are trained to believe otherwise. Studies suggest that police officers who are trained to manage stress perform better in making use of force decisions in critical incidents.²⁵

4. In your written testimony, you indicated that the *Justice in Policing Act of 2020* (H.R. 7120), is a “positive first step toward equal justice for all” and that the Brennan Center for Justice, which you represent, “hope[s] it can be strengthened by limiting police use of intrusive surveillance technologies and military equipment.”

a. How would the *Justice in Policing Act* help to ensure that events like the escalation of violence in Portland do not happen again?

The Justice in Policing Act is an important first step to reduce police misconduct. It would ban chokeholds and increase use of force standards, and leverage federal funding to ensure state and local law enforcement followed suit. It would prohibit racial profiling in federal law enforcement and require state and local police agencies adopt policies to eliminate profiling. The bill would limit the transfer of military weaponry, including less-lethal munitions, to state and local law enforcement. It would also create a national police misconduct registry, to make it easier to identify problem officers to ensure they do not get hired by other agencies.

b. What other steps would you recommend that Congress take to limit police use of intrusive surveillance technologies and military equipment, and why

are those steps necessary?

History has shown that intrusive police surveillance can suppress political organizing and mobilization. Surveillance is often a precursor to more aggressive police actions and enables the selective prosecution of political dissidents. In recent decades, federal, state, and local law enforcement agencies have enthusiastically adopted and implemented many new and untested surveillance technologies, some of them developed on military battlefields. Often, police departments obtain these technologies and tools and put them into use without adequate public notice or deliberations by elected officials responsible for police oversight. Transparency and accountability over the adoption and use of these technologies are key components to reform. In some cases, such as facial recognition, the intrusiveness of the technology and its demonstrated racial bias requires at least a moratorium. Congress can act to directly limit the use of these tools at the federal level and regulate their use through funding programs for state and local law enforcement. Congress should end the transfer of military equipment to police departments through the 1033 program. Congress should also ban racial profiling in law enforcement intelligence activities, and restore reasonable criminal predicates to prevent surveillance, investigations, and intelligence collection against individuals not reasonably suspected of wrongdoing. Most privacy protections in federal law are outdated, written before technology has empowered both the government's and the private sector's vast collection and retention of intimate details of Americans' lives. Updating these laws to better protect individual privacy is long overdue.

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² "Black Identity Extremists Likely Motivated to Target Police Officers," *Federal Bureau of Investigation*, August 3, 2017, <https://privacysos.org/wp-content/uploads/2017/10/FBI-BlackIdentityExtremists.pdf>.

³ Kate Irby, "White and Far-Right Extremists Kill More Cops, But FBI Tracks Black Extremists More Closely, Many Worry," *McClatchy*, January 24, 2018, <https://www.mcclatchydc.com/news/nation-world/national/article196423174.html>.

⁴ Citing Civil Liberties Concerns, the Brennan Center and Over 50 Groups Oppose Expanding Countering Violent Extremism Programs to White Supremacists, *Brennan Center for Justice*, September 7, 2017, <https://www.brennancenter.org/our-work/research-reports/citing-civil-liberties-concerns-brennan-center-and-over-50-groups-oppose>.

⁵ See, Letter from Faiza Patel and Meghan Koushik, "Countering Violent Extremism," *Brennan Center for Justice*, (2017), <https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report.pdf>.

⁶ Michael German and Sara Robinson, "Wrong Priorities on Fighting Terrorism," *Brennan Center for Justice*, (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf; Michael German and Emmanuel Mauleón, "Fighting Far-Right Violence and Hate Crimes," *Brennan Center for Justice*, (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf.

⁷ Maxine Bernstein, 'Kettling' of Counterprotesters Last June Not Legally Justified, *Review Says*, The Oregonian, May 31, 2018, updated Jan. 30, 2019, https://www.oregonlive.com/portland/2018/05/portland_police_oversight_repo.html; and Jason Wilson, *Portland Far-Right Rally: Police Charge Counterprotesters With Batons Drawn*, THE GUARDIAN, Aug. 5 2018, <https://www.theguardian.com/us-news/2018/aug/04/patriot-prayer-to-carry-guns-at-portland-rally-as-fears-of-violence-rise>; and Christopher Mathias and Andy Campbell, *Violent Proto-Fascists Came to Portland. The Police Went After the Antifascists*, HUFFINGTON POST, Aug. 5, 2018, <https://www.huffpost.com/entry/portland-patriot>

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⁸ Arun Gupta, *Playing Cops: Militia Member Aids Police in Arresting Protester at Alt-Right Rally*, THE INTERCEPT, Jun. 8, 2017, <https://theintercept.com/2017/06/08/portland-alt-right-militia-police-dhs-arrest-protester/>.

⁹ Katie Shepherd, *Portland Police Saw Right-Wing Protesters as ‘Much More Mainstream’ Than Leftist Ones*, WILLAMETTE WEEK, Jun. 27, 2018, <https://www.wweek.com/news/courts/2018/06/27/portland-police-saw-right-wing-protesters-as-much-more-mainstream-than-leftist-ones/>.

¹⁰ Katie Shepherd, *Texts Between Portland Police and Patriot Prayer Ringleader Joey Gibson Show Warm Exchange*, WILLAMETTE WEEK, Feb. 14, 2019, <https://www.wweek.com/news/courts/2019/02/14/texts-between-portland-police-and-patriot-prayer-ringleader-joey-gibson-show-warm-exchange/>.

¹¹ Maxine Bernstein, *Portland Cop’s Chatty Texts to Patriot Prayer Spur Outrage but are Standard Police Strategy, Experts Say*, THE OREGONIAN, Feb. 16, 2019, <https://www.oregonlive.com/crime/2019/02/police-experts-weigh-in-on-portland-lieutenants-controversial-text-messages-with-patriot-prayer-leader.html>

¹² Laura Jedeed, “A Far-Right Protester Fired Two Gunshots at Black Lives Matter Demonstrators Last Weekend,” *Willamette Week*, August 17, 2020, <https://www.wweek.com/news/2020/08/17/far-right-protester-fired-two-gunshots-at-black-lives-matter-demonstrators-last-weekend/>.

¹³ Andy Campbell, “Portland Police Are Giving Up on Policing the Far-Right,” *Huffington Post*, August 25, 2020, https://www.huffpost.com/entry/portland-police-far-right-proud-boys_n_5f4417f6c5b6c00d03b29826.

¹⁴ Sam Levin, “California Police Worked With Neo-Nazis to Pursue Anti-Racist Activists, Documents Show,” *The Guardian*, February 9, 2018, <https://www.theguardian.com/world/2018/feb/09/california-police-white-supremacists-counter-protest>; Sam Levin, “Revealed: FBI Investigated Civil Rights Group as ‘Terrorism’ Threat and Viewed KKK as Victims, *The Guardian*, February 1, 2019, <https://www.theguardian.com/us-news/2019/feb/01/sacramento-rally-fbi-kkk-domestic-terrorism-california>.

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¹⁶ See for example, Curtis Waltman, “Homeland Security Reports Show Overwhelming Focus on Violence from the Left, While Downplaying Threat from the Right,” *Muckrock.com*, January 8, 2018, <https://www.muckrock.com/news/archives/2018/jan/08/fusion-centers-antifa/>; Jason Wilson, “Intelligence Report Seemed to Endorse View Leftwing Protesters Were ‘Terrorists’,” *The Guardian*, April 1, 2019, <https://www.theguardian.com/world/2019/apr/01/intelligence-law-enforcement-report-leftwing-terrorists-charlottesville>; Mara Hvistendahl and Alleen Brown, “Law Enforcement Scoured Protester Communications and Exaggerated Threats to Minneapolis Cops, Leaked Documents Show,” *The Intercept*, June 26, 2020, <https://theintercept.com/2020/06/26/blueLeaks-minneapolis-police-protest-fears/>; Nathan Bernard and Caleb Horton, “Maine Spy Agency Spread Far-Right Rumors of BLM Protest Violence,” *Mainer News*, July 7, 2020, <https://mainernews.com/maine-spy-agency-spread-far-right-rumors-of-blm-protest-violence/>.

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¹⁸ Shane Harris, “DHS Compiled Intelligence Reports on Journalists Who Published Leaked Documents,” *The Washington Post*, July 30, 2020, https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html?tid=a_breakingnews&hpid=hp_no-name_hp-breaking-news%3Apage%2Fbreaking-news-bar.

¹⁹ Tom Jones, Mari Payton, and Bill Feather, “Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Activist Through a Secret Database,” *NBC7 San Diego*, March 6, 2019, <https://www.nbcstandiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438/>.

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Questions for the Record
for Michael German, Fellow, Liberty and National Security Program, Brennan Center for Justice, Washington, DC
Submitted August 5, 2020

1. *In your written testimony, you noted that “aggressive riot control tactics against protesters incite greater violence in response, undermine police-community relations, and often result in costly civil suits as a result of the injuries they inflict.”*
 - a. *How would an appropriate law enforcement response at a protest differ from an appropriate response to a prison riot or border incident?*

The primary difference between policing a protest and a prison riot is that protesting is First Amendment-protected activity that law enforcement has an obligation to safeguard, not suppress. Protest policing should follow the negotiated management model developed after studies of violent civil disturbances in the 1960s and 1970s discredited the escalating violence model police used at the time. The negotiated management model emphasizes communication with protesters to facilitate the goals of the protests in a manner that protects the public. Under this model, police should intervene in disruptive activity within the protest only when necessary to protect against serious bodily injury. These interventions should be narrowly targeted on the individuals committing the harm, and use only the amount of force necessary to interdict the threat.

Border incidents could involve everything from First Amendment-protected protests that require safeguarding or incursions from foreign hostile nations, so it is more difficult to generalize a proper response. Where the incident involves the exercise of protected rights, whether speech and assembly or requests for asylum, the government must accommodate them. Even in situations where constitutional or human rights issues are not predominant, however, police training should focus on solutions that reduce the likelihood of violence. Studies suggest that police escalation of force results in more violent crowd responses. As in all law enforcement responses, force should only be used when necessary to preserve human life, and should be properly focused on genuine threats.

- b. *What kind of training should law enforcement officers receive in order to respond to protests appropriately?*

Unfortunately, much of the modern police training teaches a “warrior” ethos that drives the use of excessive force in protest situations and all other interactions with the public. There has to be wholesale reform of the entirety of law enforcement training to restore a guardian ethic in law enforcement culture that emphasizes communication, de-escalation

of force, problem solving, and crisis management. Use of force training should emphasize using force only when necessary to protect against death or severe bodily harm, and then only the force necessary to achieve compliance. Training for policing protests should utilize the negotiated management models that emphasize community engagement, communication, and facilitation.¹ Police should also be trained that less-lethal weapons are still potentially lethal, and should only be deployed when lethal force is authorized, and only against individuals who pose an immediate threat of serious bodily harm. Less-lethal weapons shouldn't be tools of collective punishment.

Finally, law enforcement should receive stress management training. While law enforcement remains a relatively dangerous profession, it is much safer than just a few decades ago. Yet police officers are trained to believe otherwise. Studies suggest that police officers who are trained to manage stress perform better in making use of force decisions in critical incidents.²

2. *There are multiple first-hand accounts and videos of federal agents in unmarked vehicles arresting protesters in Portland over the course of several nights.*
 - a. *Based on your training and experience as a former FBI agent, when is it appropriate for law enforcement officers to use unmarked vehicles?*

The FBI is primarily an investigative agency, so its agents often use unmarked cars and dress in soft clothes rather than uniforms. Still, when interacting with the public while conducting law enforcement functions, FBI agents are required to identify themselves with a display of credentials. The exception is when FBI agents are acting in a covert capacity while conducting surveillance or working undercover. Few federal law enforcement agencies have the need to patrol U.S. streets as part of their core responsibilities, including the U.S. Park Police, Forest Service, and Border Patrol. These agencies typically use marked vehicles to conduct these activities, which protects both the officers and the public.

- b. *How common is it for law enforcement to use unmarked vehicles during protests?*

It is quite rare and inappropriate for law enforcement agencies, and particularly federal law enforcement agencies, to use unmarked vehicles to patrol streets and conduct “jump out” arrests during protests, as a mix of federal agents have been doing in Portland and elsewhere. These agents are reportedly acting under the delegated authority of the Federal Protective Service, which is mandated to protect federal property—not to patrol streets far from federal properties.

- c. *Why is the use of unmarked vehicles by federal agents in Portland concerning?*

Federal law enforcement agencies using unmarked vehicles to patrol streets and conduct arrests is extremely dangerous for both the public and the officers involved. In the current

context there are multiple law enforcement agencies from federal, state, and local agencies working the protests. When a law enforcement agency uses unmarked vehicles it makes it harder for other law enforcement agencies to quickly identify them as law enforcement, which could lead to blue-on-blue shootings. More worrisome, since many far-right militants have adopted the militarized costumes police often wear, it is easy for them to infiltrate police lines, as a man with a Nazi SS tattoo did at a Las Vegas protest in May.³ For the public, the use of unmarked cars raises concern the officers are not actually law enforcement, which increases the incentive to resist. It also makes it more difficult to hold the agency accountable in cases of error and abuse. This problem is increased when the law enforcement officers don't wear clearly marked clothing designating their agency and unique identifier.

3. *At the hearing, Mr. Cuccinelli stated that DHS agents in Portland were identified by a patch on their arm indicating what agency they worked for, but had removed unique personal identifiers from their uniforms.*

- a. *Based on your training and experience as a former FBI agent, when is it appropriate for law enforcement officers to remove unique personal identifiers from their uniforms?*

When officers are in uniform and engaged in a law enforcement function, they should never remove unique agency and personal identifiers. This tactic is a means of escaping individual responsibility for misconduct, increasing the likelihood of the law enforcement officers engaging in unnecessary violence against protesters who pose no threat. The riot control uniforms police often wear already have a dehumanizing effect that has been shown in studies reduce feelings of individual responsibility among officers and agitate crowds, increasing the likelihood of defiance to police orders.⁴ Further removing agency and individual identifiers makes it easier for crowds to not view the officers as people, putting them at greater risk of violent resistance.

- b. *Why is it important that law enforcement officers have unique personal identifiers visible when they are in uniform?*

It is always important for law enforcement officers to wear unique personal identifiers for individual and agency accountability, and to improve officer and public safety, as explained above.

4. *When a white supremacist drove his car into a protestor in Charlottesville, President Trump told reporters, "You had very fine people, on both sides."⁵ In response to nationwide protests against police brutality, President Trump has threatened protestors with violence,⁶ and shared videos of an armed couple in St. Louis threatening protestors⁷ and of one of his supporters shouting "white power."⁸*

a. What effect does the President’s rhetoric have on white supremacists and far-right militants?

President Trump’s rhetoric legitimizes the activities of white supremacist and far-right militant groups, which make it easier for them to organize and recruit. It also sends a signal to law enforcement that the president sees police and far-right militants as part of the same team and therefore less deserving of police attention when they engage in violence against anti-racist and anti-fascist protesters.

b. What effect would designating antifa a terrorist group have on white supremacists and far-right militants?

Antifa is not an organization and has not engaged in deadly violence that would meet the statutory definition of terrorism so designating it a terrorist organization would serve no purpose except to label anti-racism protesters as enemies of the Trump administration. Designating antifa a terrorist organization would encourage white supremacist and far-right militants to target anyone opposed to their actions or racist ideologies with violence. It would also encourage police violence against any protesters the police identify as “antifa.”

c. How does the President’s rhetoric escalate conflict at protests?

President Trump’s rhetoric blaming protest violence on antifa escalates protest violence in a number of ways. It is common for law enforcement and other government officials to blame public unrest on “outside agitators,” as a means of discrediting a popular uprising.⁹ It removes agency from the protest group and implies that the protesters’ message isn’t genuine. This tactic also increases the chances that police will use unwarranted violence against protesters. It is hard for police agencies to justify taking violent actions against the community they are sworn to serve and protect. Labelling protesters as outside agitators, or worse a terrorist group, makes it much easier for the police to justify using violence and even brutality to suppress the threat these supposed outsiders pose to the community.

5. In your testimony, you noted that the Trump administration has de-prioritized the investigation and prosecution of right-wing violence. What should the federal government do to adequately respond to this menace?

The Brennan Center published two reports on the government’s problematic policy responses to white supremacist violence in 2018 and 2019, and a third is forthcoming.¹⁰ Today, the FBI does not even know how many people are killed by white supremacist violence each year because they do not prioritize investigations into these incidents. As a matter of policy, the U.S. Justice Department defers the investigation and prosecution of

hate crimes to state and local law enforcement agencies despite the fact that several states do not have hate crimes laws, and that less than 13 percent of police agencies report hate crimes occurring within their jurisdictions. This policy blinds the federal government to the nature and scope of white supremacist violence in the U.S., making it impossible to develop an effective national strategy to address it. Modifying this policy to require FBI field agents to assess hate crimes to determine if there is a connection to a white supremacist or far-right militant group, and to evaluate whether federal prosecution is warranted, would empower law enforcement with a stronger intelligence base to develop a more effective national strategy.

The FBI also de-prioritizes its investigation of white supremacist violence. Though this violence can be designated as domestic terrorism, which is the FBI's number one priority, it often categorizes these attacks as a civil rights violations, its fifth priority. In most cases, the FBI addresses white supremacist crimes through its violent crimes program, which is its sixth priority. By pushing white supremacist violence into these other categories, the FBI systematically reduces the resources and attention brought to these cases.

The Brennan Center's reports demonstrate that the Justice Department and FBI have all the legal authorities they need to proactively and effectively address the threat from violent white supremacists and far-right militants, as do the undercover investigations I worked on as an FBI agent. They just need to properly prioritize these investigations, and properly distribute their domestic terrorism resources to the most violent threats. Even within the domestic terrorism program, the FBI has not prioritized the investigation of white supremacist and far-right militant violence. For years the FBI labelled "eco-terrorism" as the number one domestic threat, though there isn't a single U.S. homicide related to violent environmental activism. It later prioritized investigations of so-called "Black Identity Extremists." Earlier this year, Director Chris Wray testified that the FBI had elevated its prioritization of white supremacist violence to make it equal to ISIS investigations, but no data has been produced to demonstrate whether this is true. Congress recently passed legislation requiring the FBI to produce data regarding how it uses its domestic terrorism resources, but this information has not yet been published. Congress should follow up to ensure the Justice Department publishes this data and is properly prioritizing and resourcing the investigation of white supremacist and far-right violence.

¹ See, Edward R. Maguire, "New Directions in Protest Policing," *St. Louis University Public Law Review*, December 1, 2015, <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1028&context=plr>.

² Judith P. Andersen and Harri Gustafsson, *A Training Method to Improve Use of Force Decision Making: A Randomized Control Trial*, SAGE Open, April 7, 2016, <https://journals.sagepub.com/doi/full/10.1177/2158244016638708>.

³ David Ferrarra, *Armed Man at Black Lives Matter Protest Charged With Impersonating Officer*, Las Vegas Review Journal, June 12, 2020, <https://www.reviewjournal.com/crime/army-man-at-black-lives-matter-protest-charged-with-impersonating-officer-2051755/>.

⁴ Star Editorial Board, *Police Riot Gear: Too Often a Self-Fulfilling Prophecy*, The Star, June 14, 2020, <https://www.thestar.com/opinion/editorials/2020/06/14/police-riot-gear-too-often-a-self-fulfilling-prophecy.html>.

⁵ Glenn Kessler, *The ‘very fine people’ at Charlottesville: Who were they?*, Wash. Post, May 8, 2020, <https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/>.

⁶ Kevin Breuninger, *Trump threatens ‘protestors, anarchists, agitators, looters or lowlifes’ the day before his Tulsa rally*, CNBC, June 19, 2020, <https://www.cnbc.com/2020/06/19/trump-threatens-protesters-the-day-before-his-tulsa-rally.html>.

⁷ Annie Karni, *Trump Shares Video of Armed White Couple Confronting Protestors*, N.Y. Times, June 29, 2020, <https://www.nytimes.com/2020/06/29/us/politics/trump-white-couple-protesters.html>.

⁸ *Id.*

⁹ Li Zhou, “The Trope of ‘Outside Agitators’ at Protests, Explained,” *Vox*, June 3, 2020, <https://www.vox.com/2020/6/3/21275720/george-floyd-protests-outside-agitators-ferguson-civil-rights-movement>.

¹⁰ Michael German and Sara Robinson, “Wrong Priorities on Fighting Terrorism,” *Brennan Center for Justice*, (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf; Michael German and Emmanuel Mauleón, “Fighting Far-Right Violence and Hate Crimes,” *Brennan Center for Justice*, (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf.