

Written Testimony of

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Hearing: Examining the Role of the Department of Homeland Security's
Office of Intelligence and Analysis

Before the United States Senate
Committee on Homeland Security and Governmental Affairs
Tuesday, May 18, 2021

Chairman Peters, Ranking Member Portman, and members of the Committee, thank you for inviting me to testify regarding the role of the Office of Intelligence and Analysis (I&A) of the Department of Homeland Security (DHS).

As our country faces up to the persistent problem of white supremacist and far-right violence, as well as a range of other threats, I&A has the potential to play a constructive role in providing accurate and unbiased intelligence to help guide the response. At the same time, I&A must ensure that its intelligence collection efforts and the threat analyses it produces and disseminates do not infringe on civil rights and civil liberties. This is necessary both to protect our constitutional rights and to maintain the office's legitimacy. Given the serious concerns raised by I&A's past targeting of protestors and Muslim Americans, this requires, at a minimum, the revitalization of oversight mechanisms and clarity on how the office will separate First Amendment protected speech and activities from threats of violence.

Introduction

The Office of Intelligence and Analysis (I&A) supports the mission of the Department of Homeland Security (DHS) by gathering, receiving, analyzing, and sharing intelligence.¹ While I&A does not itself have enforcement functions, it provides terrorism-related analyses to federal, state, local, tribal, and territorial entities, many of which are law enforcement agencies who may act on it within their jurisdictions. The office also shares analyses with private sector and international partners and with other parts of DHS that carry out enforcement responsibilities.² Much of this sharing of information occurs through fusion centers, which were established to help prevent terrorist attacks by serving as a hub for federal agencies to share information and analysis with state and local authorities and the private sector, and to receive information from those entities.³ In other words, I&A sits at the center of a web of intelligence and law enforcement agencies spread throughout the country. Its intelligence products and the guidance it gives to its partners shape their perception of the threat environment we face and their response.

In light of the role that I&A plays, it is critically important that its output and advice meet the highest standards of respect for Americans' civil rights and civil liberties. This is especially true when it comes to the collection of domestic intelligence, which presents unique threats because of its obvious overlap with protected political speech and organizing.

As documented by the Church Committee, established by the U.S. Senate in 1975, unchecked surveillance authorities allowed the Federal Bureau of Investigation (FBI) to open over 500,000 files on Americans, including on the National Association for the Advancement of Colored People, the women's liberation movement, conservative Christian groups, and university and church groups opposed to the Vietnam War.⁴ The Central Intelligence Agency investigated at least 200,000 individuals inside the United States opposed to the war. These two agencies intercepted hundreds of thousands of

letters, including from the Federation of American Scientists and American peace groups such as the American Friends Service Committee. The Internal Revenue Service opened intelligence files on more than 11,000 Americans on the basis of political rather than tax criteria.

Many of the reforms instituted to curb the systemic abuses discovered by the Church Committee were rolled back in the wake of the attacks of 9/11. For the last two decades, we have seen renewed collection of domestic intelligence untethered from suspicion of criminal activity. This poses several overlapping types of risks: abuse of authority in order to pursue social and political movements; suppression of speech and association; invasion of privacy; discriminatory targeting of minority communities; and politicization.

Unfortunately, there is evidence that I&A has—at times—used its mandate as a cover for collecting information about minority communities, protest movements, and journalists. While the examples outlined below reflect only some of I&A’s activities, they are significant enough to require a serious discussion of whether internal controls and external oversight have been sufficient to ameliorate civil rights and civil liberties risks. As DHS in general—and I&A in particular—pivot to responding to domestic terrorism, there is an even more urgent need to develop more robust safeguards against these risks.⁵

I. I&A Authorities

The Homeland Security Act of 2002 gives DHS the responsibility for integrating law enforcement and intelligence information relating to “terrorist threats to the homeland,” and I&A is authorized to access, receive, and analyze information “in support of the mission responsibilities of the Department and the functions of the National Counterterrorism Center.”⁶

The Intelligence Oversight Guidelines (“guidelines”) that govern I&A’s collection, retention, and dissemination of information concerning U.S. persons define these missions broadly, breaking them down into national missions and departmental missions.⁷ DHS’s national missions include assisting the president and executive branch officials “in the development and conduct of foreign, defense, and economic policies or the protection of the United States national interests from foreign security threats.”⁸ Departmental missions include assisting DHS, other government agencies and authorities, and the private sector “in identifying protective and support measures regarding threats to homeland security.”⁹ Examples include the expected—for example, the threat of terrorism (both domestic and international), threats to critical infrastructure, and major disasters—but also the open-ended category of “[s]ignificant threats to the Nation’s economic security, public health, or public safety.”¹⁰ Supporting DHS leadership and other parts of the Department “in the execution of their lawful missions” provides a final catch-all basis for intelligence activities.¹¹

Generally, I&A personnel are only authorized to use “overt collection methods”¹² and to “collect information from publicly available sources.”¹³ The past decades have seen an explosion in the quantity and accessibility of publicly available information, and it is increasingly regarded as an important source of intelligence.¹⁴ While this information is often easily available, it raises First Amendment and privacy concerns. In the words of the Supreme Court, cyberspace—and social media in particular—is the most important place for the exchange of views,¹⁵ implicating core free speech concerns.¹⁶

I&A combines the information it collects with foreign intelligence from the Intelligence Community (IC), law enforcement information from federal, state, local, territorial and tribal sources, and private sector data about critical infrastructure and strategic resources, as well as information collected by DHS components as part of their operational activities.¹⁷ For example, I&A has access to data submitted by airlines on people flying to, from, or through the U.S.,¹⁸ Department of Motor Vehicle records, law enforcement and intelligence holdings, immigration records, and more.¹⁹ I&A also shares federal terrorism-related information to and from state and local law enforcement, often via state, local, and regional law enforcement intelligence fusion centers.²⁰ Private entities are another source of information, such as LookingGlass Cyber Solutions, a firm that produced a report on protests against family separation that was widely distributed by I&A.²¹

Based on publicly available information, I&A can access this smorgasbord of information so long as it reasonably believes that it supports one of the broad national or departmental missions described above.²² I&A’s guidelines allow information to be “permanently retained” as long as its officials believe it remains relevant.²³ Material in I&A’s repository can be shared easily with a range of federal, state, and local agencies as long as it would help the recipient carry out legally authorized public safety functions.²⁴ There is little accountability for what happens to this information. I&A can disseminate data that it collects on U.S. persons—without suspicion that they are engaged in criminal activity—but then has little control on how it is used or how long it is kept by the entity that receives it, or whether it might be misinterpreted without further context after it is shared. The office is required to establish internal procedures and audits to ensure compliance with the guidelines for the protection of U.S. person information, but the degree to which such measures have been implemented is not clear to the public.²⁵

In sum, I&A has broad authorities, and its access to information reaches well beyond what it collects from public sources. Unfortunately, there is limited publicly available information on when and how I&A uses this information and how it concretely accounts for civil rights and civil liberties concerns. As described below, however, there is reason to be concerned about the impact of its activities on Americans’ constitutionally protected rights.

II. Targeting Minority Communities and Protest Movements

As reflected in its guidelines, I&A is prohibited from collecting or disseminating information based solely on First Amendment protected activities, such as speech and assembly. It has not always respected this prohibition.

Muslim Americans have often been in its crosshairs for little apparent reason other than their religion. In 2007, for example, I&A undertook a study on the Nation of Islam, in which the office speculated about who would succeed Louis Farrakhan as the group's leader. The document was disseminated to hundreds of federal and local officials and members of Congress. It was quickly withdrawn, with a senior official conceding that "[t]he organization - despite its highly volatile and extreme rhetoric - has neither advocated violence nor engaged in violence."²⁶ The same year, I&A issued a report on refugees from Somalia. While the report itself is not publicly available, Senators Russ Feingold (D-WI) and John Rockefeller (R-WV) complained to the then head of I&A that it inappropriately sought information from a range of federal, state, and local agencies on "American organizations and American citizens, such as private attorneys, members of refugee organizations or even church groups" without any "indication of wrongdoing" by those groups.²⁷ And in May 2008, I&A issued yet another report about innocuous activities. Titled "TERRORISM WATCHLIST: Information Regarding a Flier Posted at a Mosque in Ohio Announcing an Upcoming Conference in Georgia," the report highlighted a flier announcing an upcoming conference and listing speakers.²⁸ While these documents were flagged by internal review procedures as potentially violating I&A guidelines, they demonstrate the Office's targeting of Muslim Americans for activity that is far removed from terrorism or violence.

In 2009, I&A published a report on "Rightwing Extremism,"²⁹ which was quickly quashed. In recent years, the suppression of the report has been cited as evidence of security agencies' refusal to take seriously the threat of far-right violence.³⁰ While the author of the report may have been prescient about a looming danger, the report itself ran afoul of the prohibition on intelligence based on First Amendment protected expressions of belief. It started by conceding that I&A had no specific information that "domestic rightwing terrorists were currently planning acts of violence," but warned that "rightwing extremists may be gaining new recruits by playing on their fears about several emergent issues," such as the economic recession, the impact of trade agreements on the availability of jobs, and the election of the first African American president.³¹ It focused on the beliefs of people, such as anti-tax, anti-abortion and pro-gun activists, rather than on any suspected or actual criminal activity. It is a forgotten fact that the report was issued over the objections of DHS's Civil Rights and Civil Liberties (CRCL) office and was criticized by both Republicans and Democrats in Congress, as well as the ACLU, for targeting nonviolent actors.³²

When I&A creates intelligence products about protest movements that involve some level of violence or criminal activity, it faces a delicate situation because its efforts

can easily slide into (or at least be perceived as) targeting political viewpoints. This has been the case over the previous year.

Last summer, as racial justice demonstrations triggered by the killing of George Floyd broke out across the country, I&A led the expansion of intelligence activities under the guise of protecting federal courthouses, apparently identifying protestors for agents to apprehend.³³ On June 26, 2020, President Trump issued an executive order which declared that “[i]t is the policy of the United States to prosecute to the fullest extent permitted under Federal law, and as appropriate, any person or any entity that destroys, damages, vandalizes, or desecrates a monument, memorial, or statue within the United States or otherwise vandalizes government property.”³⁴ Among other things, the order directed DHS to provide “personnel to assist with the protection of Federal monuments, memorials, statues, or property.”³⁵

An undated “job aid” published by the legal blog Lawfare shows that DHS operationalized this order to expand “intelligence activities necessary to mitigate the significant threat to homeland security.”³⁶ In addition to collecting information about threats that can reasonably be considered as relating to homeland security (e.g., threats to law enforcement personnel), analysts were directed to focus on “threats to damage or destroy any public monument, memorial, or statue.”³⁷ The information that could be collected was defined expansively and included “information that ... informs an overall assessment” of the threats to monuments.³⁸

During this operation, DHS engaged in extensive and intrusive surveillance of protestors: the Washington Post obtained an internal DHS document showing that I&A had access to protestors’ communications on the electronic (supposedly encrypted) messaging app Telegram, and that these conversations were written up in an “intelligence report” that was disseminated to federal, state, and local law enforcement agencies.³⁹ Under its governing statute and guidelines, I&A is not authorized to conduct electronic surveillance but must obtain the assistance of another federal agency (such as the FBI) in order to obtain private messages. It is not clear how the office obtained access to these messages.⁴⁰ While the messages have not been made public, according to the Washington Post, they did not “show the protestors planning to harass or target police or damage property,” but instead were focused on “how to avoid encounters with police, particularly federal officers, who they knew had detained protestors.”⁴¹

Journalists too were scrutinized by I&A during this time. The Office compiled and disseminated three intelligence reports summarizing tweets written by the editor in chief of Lawfare and a reporter for the New York Times, highlighting their publication of leaked, unclassified documents about DHS operations in Portland.⁴²

Reacting to reports in the press, the Chair of the House Intelligence Committee, Rep. Adam Schiff (D-CA), wrote to the Acting Secretary of DHS, Chad Wolf, and the Acting Undersecretary of I&A, Brian Murphy, seeking information about the intelligence activities in response to protests.⁴³ If the reports were true, Schiff said, DHS was

distorting its authorities by treating “threats of graffiti, vandalism, or other minor damage to monuments, memorials, statutes [sic], and federal buildings ... in the same fashion as it would seek to counter acknowledged threats to U.S. homeland security, such as terrorism, significant cyber intrusions, or attacks against federal facilities or personnel.”

Rep. Schiff’s characterization was shared by local officials, who generally opposed the Department’s intervention.⁴⁴ While I&A’s guidelines identify “[s]ignificant threats to the Nation’s economic security, public health, or public safety” as a basis for intelligence operations, it is surely a reach for an entity set up to combat terrorism to turn its attention to the types of public safety matters that are typically handled by police forces and local officials.

Shortly afterwards, I&A withdrew the job aid. While asserting there was more than one legitimate view of its authority, it stated it was choosing to take a “narrower interpretation to better align with the threats of concern to I&A.”⁴⁵

In contrast to its aggressive posture in Portland and vis-a-vis racial justice protests in general,⁴⁶ I&A did not issue any specific warnings ahead of Congress’s certification of electoral college votes or trigger any special intelligence effort. In testimony submitted to this committee for a hearing on March 3, 2021, I&A’s Acting Under Secretary, Melissa Smislova, noted that the office had issued Office by pointing to its issuance “strategic warnings,” both public and non-public, about election-related violence, but conceded that “concerning information was gathered and evaluated in the weeks prior to the attack on the U.S. Capitol” and “more should have been done to understand the correlation between that information and the threat of violence.”⁴⁷

The disparate treatment meted out by I&A in the two instances highlighted above—the racial justice protests in summer 2020 vs. the lead-up to the January 6 insurrection—naturally raises questions about bias and politicization of intelligence and shows the very real consequences that result. For I&A to be regarded as a reliable and neutral source of intelligence focused on the very real threats our country faces, guardrails must be established to prevent a recurrence.

III. Confronting the Domestic Terrorism Threat

It is particularly critical that I&A get its house in order as DHS pivots to confront the threat of domestic terrorism.⁴⁸ Recent actions by the Department underscore this shift in focus:

- On January 27, 2021, the Department’s Acting Secretary issued an National Terrorism Advisory System (NTAS) Bulletin warning that “some ideologically-motivated violent extremists with objections to the exercise of governmental authority and the presidential transition, as well as other perceived grievances fueled by false narratives, could continue to mobilize to incite or commit violence.”⁴⁹ The Bulletin identified specific issues motivating domestic violent

extremists, “including anger over COVID-19 restrictions, the 2020 election results, and police use of force.” An updated version was issued on May 14, 2021.⁵⁰

- In February, Secretary Mayorkas designated domestic violent extremism (DVE) a “National Priority Area,” which requires state and local grant recipients to dedicate a portion of the funds received from DHS to combatting DVE.⁵¹
- On May 12, 2021, the Secretary informed the Senate Appropriations Committee that he had established a dedicated team within I&A to ensure the development of the “expertise necessary to combat this threat using sound, timely intelligence,” and explained that DHS plans to leverage the fusion center network, increase information-sharing, and evaluate how online activities are linked to real-world violence.⁵²

DVE (or domestic terrorism) is frequently equated with far-right violence, but the category actually covers a range of political violence. DHS, like the FBI, specifies five broad types of DVE threats:

- Racially motivated violent extremism (which melds together in one category white supremacists and Black separatists, among others);
- Anti-government or anti-authority violent extremists (which includes militias, sovereign citizens, and anarchists);
- Animal rights and environmental activists;
- Abortion-related extremists; and
- All other domestic terrorism threats.⁵³

By listing this range of threats, DHS can claim that its response to DVE is ideology-neutral, an important framing given concerns about freedom of speech and association that arise in addressing political violence.

Regardless of whether the Department’s programs, including the tasking of I&A, are neutral as *between* ideologies, they are clearly organized to focus on ideologies. The five threat categories, for example, are defined based on perceived similarities between ideologies while obscuring or entirely omitting the types of connections that would make sense from an operational point of view. For example, while both sovereign citizens and anarchists may be anti-government, they are hardly known for working together. On the other hand, some militias do have connections to white supremacist groups and a history of working together.⁵⁴ This framing elevates the role of what people think over their actions.

In March 2021, NBC News reported that DHS officials had indicated that the Department wants to identify online “narratives” that are likely to incite violence and flag people who may be susceptible to them based on their social media behavior.⁵⁵ John

Cohen, the Assistant Secretary for Counterterrorism and Threat Prevention, testified before Congress that the goal is to “identify emerging narratives as early as possible and assess whether those narratives are likely to influence acts of violence and how fast they’re spreading across multiple platforms.”⁵⁶ This was confirmed by Secretary Mayorkas, who said that the Department plans to “review how extremists exploit and leverage social media and other online platforms, and how online activities are linked to real-world violence.”⁵⁷

In operational terms, the focus on ideologies means that DHS—and particularly I&A—will be monitoring social media in search of threats. This is likely to be both ineffective and invasive, while sweeping in reams of information, including about constitutionally protected activities.

Outside of overt planning for violence of the type that was evident in the days leading up to the January 6 attack on the Capitol, targeting what people say online is unlikely to be an effective means of addressing the DVE threat.⁵⁸ The reason for this is simple: large numbers of people believe the types of narratives that DHS identified as drivers of violence in its January 27 NTAS Bulletin. Anti-immigrant sentiment has a long history in the U.S.; many people believe that the measures taken to control COVID-19 infringe on their freedoms; millions of Americans, including 65 percent of Republicans, dispute the results of the 2020 elections;⁵⁹ and police use of force against African Americans triggered demonstrations across the country last summer. These narratives can be found on social media platforms of all stripes, as well as on popular cable TV shows. They are hardly a way of distinguishing potentially violent actors from those who simply hold these views.

In fact, DHS’s previous attempts to identify pre-terrorism indicators for international terrorism (i.e., violence connected to or inspired by groups like Al Qaeda and ISIS) show that such an endeavor is likely futile. The Department has given millions of dollars in funding to researchers to identify the precursors to extremist violence. While these researchers can make lists of factors that—when viewed retrospectively—seem to have contributed to an individual’s decision to turn to violence, they uniformly caveat their work by noting that there are no indicators or hallmarks of someone who is about to become violent. As noted in a major DHS-commissioned study of terrorism prevention efforts conducted by the RAND Corporation: “Because there are no unambiguous early indicators of future violent behavior, the performance of risk assessment tools and methods to distinguish individuals who appear to be threats from those who actually do pose a threat is limited[.]”⁶⁰

Moreover, there are severe limitations on the use of social media as a source for understanding the DVE threat. As the Acting Undersecretary of I&A recently acknowledged, “actual intent to carry out violence can be difficult to discern from the angry, hyperbolic – and constitutionally protected – speech and information commonly found on social media and other online platforms.”⁶¹ Social media poses multiple

challenges when it comes to accurately interpreting a speaker's intent, from the absence of "traditional context clues" that signal meaning to the different conventions that govern discourse on social media to variable uses of the technology depending upon the participant's age and background.⁶² These barriers to interpretation are particularly acute when the reader lacks a shared context with the speaker.

DHS's previous attempts to use social media to identify threats amply demonstrate these limitations. In 2016, the Department piloted several programs that attempted to use social media to vet visa applicants. A February 2017 DHS Inspector General audit of these programs found that DHS had not measured their effectiveness, rendering them an inadequate basis on which to build broader initiatives.⁶³ USCIS evaluations of three out of the four programs used to vet refugees reported that information from social media "did not yield clear, articulable links to national security concerns," even when an applicant was flagged as a potential threat through other channels.⁶⁴ Officials pointed out that they were unable to reliably match social media accounts to the individual being vetted, and even where the correct accounts were found, it was hard to determine "with any level of certainty" the context and reliability of what they were reviewing.⁶⁵

Another DHS effort to collect social media information also recently ran into trouble. In September 2019, the Department proposed a new rule authorizing it to collect social media identifiers from roughly 33 million people annually on its travel and immigration forms. In April, the White House's Office of Information and Regulatory Affairs (OIRA), the White House office that reviews federal regulations, rejected the proposal on the grounds that DHS had not "adequately demonstrated the practical utility of collecting this information."⁶⁶ OIRA told the Department that if it submitted a similar proposal in the future, it must demonstrate the utility of such collection and show that "such utility outweighs the costs - both monetary and social - of doing so."

IV. Recommendations

To address the concerns raised by the record outlined above, it is critical to strengthen I&A's civil rights and civil liberties safeguards and oversight over its functions.

First, the clearance authority of the oversight offices (CRCL, Privacy, the Office of the General Counsel, and I&A's Intelligence Oversight Section) should be restored and potentially written into law. Starting in 2009, DHS put in place an "interim clearance process" that ensured these offices reviewed all unclassified intelligence analysis before it was issued.⁶⁷ Disagreements were elevated to the Deputy Secretary for decision.⁶⁸ This process was formalized in 2013 and further elaborated in 2016.⁶⁹ But these internal rules were discarded in May 2020, with I&A's Undersecretary given "final decision authority for disseminating intelligence products."⁷⁰ In July, the oversight offices' influence was further diminished; I&A was given the authority to set time limits on their review and even publish intelligence products without review in "exigent circumstances."⁷¹ DHS

leadership should (if it has not already) revive the role of the oversight offices and Congress should consider mechanisms for ensuring that these critical functions cannot be so easily side-lined.

Second, regular audits by an appropriate oversight office should be implemented. Under the current guidelines, I&A's Intelligence Oversight Officer is tasked with "periodic reviews" that include "unannounced reviews (i.e., 'spot checks'), reviews of audit logs, records reviews, and employee and contractor interviews."⁷² If these reviews reveal any intelligence collection that is "unlawful or contrary to executive or presidential directive," the Associate General Counsel for Intelligence reports the conduct to the Intelligence Oversight Board (a standing component of the President's Intelligence Advisory Board) and the Office of the Director of National Intelligence.⁷³ Audits by an office like CRCL, however, would provide an opportunity for a holistic review of civil rights and civil liberties with the potential to identify program deficiencies or areas for improvement and training not evident during the more limited reviews currently required.

Third, in light of the fact that social media is a principal forum for political discussion and the limitations on identifying actual threats through this medium, I&A should reconsider its plans to monitor these platforms for "narratives" and "grievances." At a minimum, it should provide transparency about how it intends to cabin such monitoring to ensure that it is focused on identifying violent actors rather than simply keeping tabs on what Americans say on the Internet.

In addition, according to press reports, I&A currently uses human reviewers to review social media.⁷⁴ The office should clarify if this is the case or if it is using automated tools (either directly or via third-party vendors). While these tools are often hyped by the private companies that sell them, data scientists agree that algorithms that claim to be able to judge the meaning of text struggle to make even simple determinations, such as whether a social media post is positive, negative, or neutral.⁷⁵

Finally, former Department officials have said that the privacy and due process concerns arising from DHS operations, including the retention of "huge amounts of data on individuals," dwarf those arising out of the National Security Agency's (NSA) more publicly scrutinized information collection.⁷⁶ The Privacy and Civil Liberties Oversight Board (PCLOB) should review I&A's access these data systems to assess the sufficiency of privacy and civil liberties safeguards.⁷⁷

¹ Homeland Security Act of 2002, 6 U.S.C. § 101 (2002). I&A is also charged with providing input on the priorities of the intelligence community and with carrying out vulnerability assessments for key resources and critical infrastructure. HSA 6 U.S.C. § 121(d)(1)-(3).

² See Department of Homeland Security, “Resources for Fusion Centers,” accessed May 14, 2021, <https://www.dhs.gov/resources-fusion-centers>.

³ The number of fusion centers has grown dramatically in the years since 9/11, from nine in 2003 to eighty today. Jason Barnosky, “Fusion Centers: What’s Working and What Isn’t,” Brookings Institution, March 17, 2015, <https://www.brookings.edu/blog/fixgov/2015/03/17/fusion-centers-whats-working-and-what-isnt/>. Despite the growth in numbers, the terrorism threat has not been large enough to occupy most fusion centers. Most have thus shifted to an “all hazards” approach, working to prevent ordinary crime and mitigate natural disasters. Blake Harris, “Fusion Centers May Strengthen Emergency Management,” GovTech, June 9, 2009. In a 2012 survey of fusion center employees, only 28 percent said counterterrorism was their most important activity. Michael Price, *National Security and Local Police*, Brennan Center for Justice, 2013, 20 (citing Frank J. Cilluffo, Joseph R. Clark, Michael P. Downing and Keith D. Squires, *Counterterrorism Intelligence: Fusion Center Perspectives*, George Washington University Homeland Security Policy Institute, June 2012, 27, <https://justiceacademy.org/iShare/Library-DHS/Fusion/HSPI%20Counterterrorism%20Intelligence%20-%20Fusion%20Center%20Perspectives%206-26-12.pdf>).

⁴ S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755 (1976).

⁵ *Domestic Violent Extremism in America, Hearing Before the S. Comm. on Appropriations*, 117th Cong. (2021) (oral testimony of Alejandro N. Mayorkas, Secretary of Homeland Security).

⁶ HSA 6 U.S.C. § 121(d)(1).

⁷ As a member of the Intelligence Community, I&A is required to issue guidelines for its collection, retention, and dissemination of information about U.S. persons, which must be approved by the Attorney General in consultation with the Director of National Intelligence. Exec. Order No. 12333, 46 FR 59941 (December 4, 1981). U.S. persons are defined by federal law as any corporation, partnership, or other organization organized under the laws of the United States. 22 U.S. Code § 6010 (1992).

⁸ I&A, *Intelligence Oversight Guidelines*, 1.1.1. The mission of the National Counterterrorism Center is to “lead and integrate the national counterterrorism (CT) effort by fusing foreign and domestic CT information, providing terrorism analysis, sharing information with partners across the CT enterprise, and driving whole-of-government action to secure our national CT objectives.” National Counterterrorism Center, “Who We Are,” accessed May 15, 2021, <https://www.dni.gov/index.php/nctc-who-we-are/mission-vision>.

⁹ I&A, *Intelligence Oversight Guidelines*, 1.1.2.

¹⁰ I&A, *Intelligence Oversight Guidelines*, 1.1.2.(c).

¹¹ I&A, *Intelligence Oversight Guidelines*, 1.1.2.

¹² I&A has defined overt collection broadly, to include, “[t]he acquisition of intelligence information from public media, observation, government-to-government dialogue, elicitation, and from the sharing of data openly acquired; the process may be classified or unclassified; the target and host governments as well as the sources involved normally are aware of the general collection activity, although the specific acquisition, sites, and processes may be successfully concealed.” S. Homeland Security Comm., Subcomm. on Investigations, *Federal Support for and Involvement in Fusion Centers*, October 3, 2012, <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>; see also I&A, *Intelligence Oversight Guidelines*, Glossary.

¹³ I&A, *Intelligence Oversight Guidelines*, 2.1.1. The guidelines also provide specific rules for counterintelligence activities involving the physical surveillance of I&A staff (current and former) and applicants, mail covers, and the use of monitoring devices. I&A, *Intelligence Oversight Guidelines*, 2.1.2.3.

¹⁴ Congress has called for a study by the ODNI on the intelligence community’s open source intelligence mission. Intelligence Authorization Act for Fiscal Year 2021, H.R.7856, 116th Cong. (2020); Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (2020).

¹⁵ *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997).

¹⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1731 (2017) (observing that social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought) (quotation marks and citation omitted).

¹⁷ Department of Homeland Security, “Office of Intelligence and Analysis Enterprise Records System,” 73 FR 28128 (June 16, 2008), <https://www.federalregister.gov/documents/2008/05/15/E8-10888/privacy-act-office-of-intelligence->

[and-analysis-enterprise-records-system](#); Congressional Research Service, *Selected Homeland Security Issues in the 116th Congress*, November 26, 2019, 3, <https://fas.org/sgp/crs/homesec/R45701.pdf>.

¹⁸ U.S. Customs and Border Protection, *Passenger Name Record Privacy Policy*, September 13, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2020-May/PNR-Privacy-Policy-%28508-Compliant%29.pdf>. See CBP, *PNR Privacy Policy*, 3-4. Passenger Name Records contain everything from the payment a person used to buy their ticket, their contact information, travel itinerary, who they are traveling with, and more.

¹⁹ See Department of Homeland Security, *Privacy Impact Assessment for the Automated Targeting System*, DHS/CBP/PIA-006(e), January 13, 2017, last updated May 5, 2021, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp006-ats-may2021.pdf>; Department of Homeland Security, *Privacy Impact Assessment Update for the Analytical Framework for Intelligence (AFI)*, DHS/CBP/PIA-010(a), September 1, 2016, last updated August 2020, https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-afi-august2020_0.pdf.

²⁰ Permanent Subcommittee on Investigations, “Investigative Report Criticizes Counterterrorism Reporting, Waste at State & Local Intelligence Fusion Centers,” Senate Committee on Homeland Security and Government Affairs, October 3, 2012, <http://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers>; Faiza Patel and Michael Price, “Fusion Centers Need More Rules, Oversight,” Brennan Center for Justice, October 18, 2012, <https://www.brennancenter.org/our-work/research-reports/fusion-centers-need-more-rules-oversight>. Fusion centers have been criticized for wasting security resources and for producing and disseminating inappropriate and unreliable intelligence reports about protest groups—often with little relationship to public safety. Permanent Subcommittee on Investigations, “Investigative Report Criticizes Counterterrorism Reporting.” For example, the Maine Information and Analysis Center (MIAC) reportedly distributed reportedly intelligence on potential violence at anti-police-brutality protests based on far-right activists’ social media posts. In May 2020, former state trooper George Loder filed an employment discrimination case against the center, claiming that he was demoted after he told his bosses that the center was collecting and maintaining data illegally, including information about people who had applied to buy guns from firearms dealers, those who legally protested, and those who worked at a Maine international camp for Israeli and Arab teens. See Mara Hvistendahl and Alleen Brown, “Law Enforcement Scoured Protester Communications and Exaggerated Threats to Minneapolis Cops, Leaked Documents Show,” Intercept, June 26, 2020, <https://theintercept.com/2020/06/26/blueleaks-minneapolis-police-protest-fears/>; Nathan Bernard, “Maine Spy Agency Spread Far-Right Rumors of BLM Protest Violence,” Mainer, July 7, 2020, <https://mainernews.com/maine-spy-agency-spread-far-right-rumors-of-blm-protest-violence/>; Judy Harrison, “Maine State Police Illegally Collecting Data on Residents, Lawsuit Claims,” Bangor Daily News, May 14, 2020, <https://bangordailynews.com/2020/05/14/news/state/state-agency-illegally-collecting-data-on-mainers-claims-trooper-in-whistleblower-suit/>. Fusion centers are also a primary conduit for collecting and sharing “see something, say something” leads from the public that are packaged as “suspicious activity reports” (SARs) and disseminated through the ODNI’s Intelligence Sharing Environment (ISE) and the FBI’s eGuardian system. A survey of fusion center personnel criticized SARs as “white noise” that harmed intelligence analysis, and SARs obtained by the ACLU revealed bias driving much of the reporting. Julia Harumi Mass and Michael German, “The Government Is Spying on You: ACLU Releases New Evidence of Overly Broad Surveillance of Everyday Activities,” American Civil Liberties Union, September 19, 2013, <https://www.aclu.org/blog/national-security/privacy-and-surveillance/government-spying-you-aclu-releases-new-evidence>.

²¹ Ryan Devereaux, “Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests,” Intercept, April 29, 2019, <https://theintercept.com/2019/04/29/family-separation-protests-surveillance/>.

²² I&A, *Intelligence Oversight Guidelines*, 2.1.3.1 (referencing 1.1, 2.2.3). I&A can only collect, retain, or disseminate information on U.S. persons if it fits within an information category defined in the guidelines. Moreover, I&A’s use of shared databases must comply both with the guidelines and any more restrictive rules a given database’s host may have. I&A, *Intelligence Oversight Guidelines*, 4.4; I&A, *Intelligence Oversight Guidelines*, Glossary-5 (“Shared Repository: A database, environment, or other repository maintained for the use of more than one entity. A database, environment, or other repository that a contractor or other entity maintains solely for the use of I&A, or those acting on its behalf, is not a shared repository.”). There are also specific rules for “bulk data” likely to contain non-public U.S. person information, including the receipt of information that is responsive to demographic traits like a person’s age or gender rather than “specific identifiers” like their name, date of birth or social security number. I&A, *Intelligence Oversight Guidelines*, 3; I&A, *Intelligence Oversight Guidelines*, Glossary-1 (“Bulk data transfer does not include the transfer of records responsive to specific identifiers (e.g., name, date of birth, social security number, etc.) but it does include the transfer of records identified through the application of search terms where the transfer would include a

significant number of records that, while responsive to the applied search terms, is not reasonably likely to have any ultimate intelligence or operational value to the recipient (e.g., records responsive to demographic profiles such as age, citizenship, or gender).”). Rules governing bulk data transfer, collection, retention, and dissemination generally incorporate additional safeguards—for example, the Under Secretary for Intelligence & Analysis must determine in writing that a bulk data collection is “the only practicable means of identifying or using the information in the collection that will support an authorized I&A mission[.]” I&A, *Intelligence Oversight Guidelines*, 3.1. One limit on I&A’s collection, retention, and dissemination of information gleaned from shared databases is that any rules governing a shared database that are more restrictive than I&A’s guidelines, such as restrictions on copying, storing or sharing information taken from the database, must be followed. I&A, *Intelligence Oversight Guidelines*, 4.4. However, some databases, like CBP’s Automated Targeting System, recognize the risk that shared intelligence will be stored longer than the ATS retention period (15 years). DHS, *ATS PIA*, 14.

²³ I&A, *Intelligence Oversight Guidelines*, 2.2.2.

²⁴ I&A, *Intelligence Oversight Guidelines*, 2.3.1; Department of Homeland Security, I&A “Enterprise Records System.” Under most circumstances, only data that qualifies for permanent retention may be disseminated, but even information that has not yet qualified for permanent retention may be disseminated to other elements of the IC. I&A, *Intelligence Oversight Guidelines*, 2.3.2.

²⁵ I&A, *Intelligence Oversight Guidelines*, 1.2.

²⁶ “Intelligence Oversight Inquiry into the Production and Dissemination of Office of Intelligence and Analysis Intelligence Note,” Memorandum from Charles E. Allen, Under Secretary for Intelligence and Analysis, to Gus Coldebella, DHS Acting General Counsel, March 28, 2008, <https://www.eff.org/files/nationofislam.pdf>; Richard B. Muhammad, Ashahed M. Muhammad and Askia Muhammad, “Nation of Islam Targeted by Homeland Security,” *Final Call News*, December 24, 2009, https://www.finalcall.com/artman/publish/National_News_2/article_6682.shtml.

²⁷ Russell D. Feingold and John D. Rockefeller IV, Letter from Senators Russell D. Feingold and John D. Rockefeller IV to Michael Chertoff, Secretary of Homeland Security, July 31, 2008, https://www.eff.org/files/filenode/intel_oversight/dhs_release_feb_1_2010.pdf

²⁸ Feingold and Rockefeller, Letter to Michael Chertoff.

²⁹ Department of Homeland Security Office of Intelligence and Analysis, *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment*, April 7, 2009, <https://fas.org/irp/eprint/rightwing.pdf>.

³⁰ Spencer Ackerman, “DHS Crushed This Analyst for Warning about Far-Right Terror,” *Wired*, August 7, 2012, <https://www.wired.com/2012/08/dhs/>. Following the controversy surrounding the report, DHS also disbanded the small unit that studied “non-Islamic extremism.” Daryl Johnson, “I Warned of Right-Wing Violence in 2009. Republicans Objected. I Was Right,” *Washington Post*, August 21, 2017, <https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/i-warned-of-right-wing-violence-in-2009-it-caused-an-uproar-i-was-right/>.

³¹ DHS I&A, *Rightwing Extremism*, 2, 5.

³² Tom Brune, “Homeland Security Admits Error with Extremism Report,” *Newsday*, April 17, 2009, <https://www.newsday.com/long-island/politics/homeland-security-admits-error-with-extremism-report-1.1219261?firstfree=yes>; Teddy Davis and Ferdous Al-Faruque, “Napolitano Facing Republican Calls for Her Ouster,” *ABC News*, April 23, 2009, <https://abcnews.go.com/Politics/story?id=7412992&page=1>; Brett Murphy, Will Carless, Marisa Kwiatkowski and Tricia L. Nadolny, “A 2009 Warning about Right-Wing Extremism Was Engulfed by Politics. There Are Signs It’s Happening Again,” *USA Today*, January 27, 2021, <https://www.usatoday.com/story/news/investigations/2021/01/25/twelve-years-before-capitol-riot-warning-right-wing-extremism-buried/6658284002/>; Michael German, “Soon, We’ll All Be Radicals,” *American Civil Liberties Union*, April 16, 2009, <https://www.aclu.org/blog/national-security/privacy-and-surveillance/soon-well-all-be-radicals?redirect=2009/04/16/soon-well-all-be-radicals>.

³³ Steve Vladeck and Benjamin Wittes, “DHS Authorizes Domestic Surveillance to Protect Statues and Monuments,” *Lawfare*, July 20, 2020 <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>.

³⁴ “Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence,” Exec. Order No. 13933, 85 FR 40081 (2020).

³⁵ EO 13933, Sec. 5.

³⁶ Vladeck and Wittes, “DHS Authorizes Domestic Surveillance.”

³⁷ Vladeck and Wittes, “DHS Authorizes Domestic Surveillance.”

³⁸ The memo makes clear that “[p]ersons merely engaging in non-violent protest activities near MMS [monument, memorial or statue], or making hyperbolic statements about MMS likely do not constitute a threat to MMS” (emphasis added). Vladeck and Wittes, “DHS Authorizes Domestic Surveillance.” See also Shane Harris, “DHS Authorizes Personnel to Collect Information on Protesters It Says Threaten Monuments,” *Washington Post*, July 20, 2020, https://www.washingtonpost.com/national-security/dhs-authorizes-personnel-to-collect-information-on-protesters-it-says-threaten-monuments/2020/07/20/6f58867c-cace-11ea-b0e3-d55bda07d66a_story.html.

³⁹ Shane Harris, “DHS Analyzed Protester Communications, Raising Questions about Previous Statements by Senior Department Official,” *Washington Post*, July 31, 2020, https://www.washingtonpost.com/national-security/dhs-analyzed-protester-communications-raising-questions-about-previous-statements-by-senior-department-official/2020/07/31/313163c6-d359-11ea-9038-af089b63ac21_story.html; Zolan Kanno-Youngs, “Homeland Security Considered Snooping on Portland Protesters’ Cellphones,” *New York Times*, October 2, 2020, <https://www.nytimes.com/2020/10/02/us/politics/homeland-security-portland-protesters.html>.

⁴⁰ If they obtained them by infiltrating the protest group rather than through electronic surveillance, that would still appear to violate the guidelines governing actions taken by I&A agents on behalf of the office; it is not clear whether the use of informants would run afoul of the office’s guidelines. See I&A, *Intelligence Oversight Guidelines*, 4.1, Participation in Organizations Within the United States (setting out the parameters for participation in U.S. organizations). It has also been reported that an elite FBI counterterrorism team was flown to Portland to “exploit” the phones of people who had been arrested, with the arrestees’ (supposed) consent. Mattathias Schwartz, “The FBI Team Sent to ‘Exploit’ Protesters’ Phones in Portland,” *New York Review of Books*, October 8, 2020, <https://www.nybooks.com/daily/2020/10/08/the-fbi-team-sent-to-exploit-protesters-phones-in-portland/>.

⁴¹ Harris, “DHS Analyzed Protester Communications.”

⁴² Shane Harris, “DHS Compiled ‘Intelligence Reports’ on Journalists Who Published Leaked Documents,” *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. The Department of Homeland Security acknowledged that this was inappropriate and said it would “discontinue” collecting information on members of the press.

⁴³ Adam B. Schiff, Letter from Rep. Adam B. Schiff to Chad F. Wolf, Acting Secretary of Homeland Security, and Brian Murphy, Acting Under Secretary for Intelligence and Analysis, July 22, 2020, https://intelligence.house.gov/uploadedfiles/20200722hpsci_chm_letter_to_dhs.pdf. Wolf acknowledged that the collection of intelligence about journalists’ tweet was unwarranted and demoted the Acting Head of I&A, Brian Murphy. Shane Harris, “DHS Compiled ‘Intelligence Reports’”; Zolan Kanno-Youngs and Adam Goldman, “Homeland Security Reassigns Official Whose Office Compiled Intelligence on Journalists,” *New York Times*, August 1, 2020, <https://www.nytimes.com/2020/08/01/us/politics/brian-murphy-homeland-security-protesters.html>. Murphy in turn filed a whistleblower complaint, claiming that the office was not allowed to report on white supremacist threats and was told to emphasize “the prominence of violent ‘left-wing’ groups.” Brian Murphy, Whistleblower Reprisal Complaint, Department of Homeland Security, September 8, 2020, <https://int.nyt.com/data/documenttools/homeland-security-whistleblower/0819ec9ee29306a5/full.pdf>.

⁴⁴ Sergio Olmos, Mike Baker and Zolan Kanno-Youngs, “Federal Agents Unleash Militarized Crackdown on Portland,” *New York Times*, September 1, 2020, <https://www.nytimes.com/2020/07/17/us/portland-protests.html>.

⁴⁵ Benjamin Wittes (@benjaminwittes), image of DHS memo attached to Tweet: “DHS I&A rescinds “job aid” about which @steve_vladeck and I wrote on @lawfareblog a few weeks back. Here is the memo:” Twitter, August 19, 2020, 10:56 a.m., <https://twitter.com/benjaminwittes/status/1296144054770642947>. This prompted a response from Schiff that expressed disappointment with I&A’s position and its “inability to fully repudiate such overreach,” and promised to explore legislative options to clarify I&A’s authorities and mission and institute necessary guardrails. Adam B. Schiff, Letter from Rep. Adam B. Schiff to Joseph B. Maher, Principal Deputy General Counsel and Senior Official Performing the Duties of the Under Secretary for Intelligence and Analysis, August 19, 2020, <https://intelligence.house.gov/uploadedfiles/20200819hpscichmfollowuplettertodhsia.pdf>.

⁴⁶ Yael Halon, “DOJ ‘Targeting and Investigating’ Leaders, Funders of Far-Left Groups and Rioters, Wolf Tells Tucker,” Fox News, August 31, 2020, <https://www.foxnews.com/politics/chad-wolf-doj-investigating-far-left-rioters> (citing interview in which Wolf says, ““This [arresting and charging leaders of “antifa” and the Black Lives Matter movement] is something that I have talked to the AG personally about[.]”).

⁴⁷ *Examining the January 6 Attack on the U.S. Capitol, Hearing Before the S. Comm. on Homeland Sec. and Gov’t Affairs and S. Comm. on Rules and Admin.*, 117th Cong. (2021) (testimony of Melissa Smislova, Acting Under Secretary for the Office of Intelligence and Analysis).

⁴⁸ The U.S. uses separate frameworks for international and domestic terrorism, and in the two decades since the 9/11 attacks has focused much of its intelligence gathering and law enforcement prowess on the former. Terrorism is categorized as international if the perpetrator has a connection – operational or ideological – with a foreign terrorist group. It is treated as domestic if the perpetrator’s operational or ideological affiliation is with a U.S.-based group. Over the last few years, U.S. security agencies have been paying increasing attention to far-right violence as high-profile attacks, which often target minority communities, have ramped up. *Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats, Hearing Before the S. Judiciary Comm.*, 117th Cong. (2021) (statement of Christopher Wray, Director of the Federal Bureau of Investigation) (“As has been stated multiple times in the past, preventing terrorist attacks, in all forms, remains the FBI’s top priority... The top threat we face from DVEs continues to be those we identify as racially or ethnically motivated violent extremists (RMVEs), specifically those who advocate for the superiority of the white race, and who were the primary source of ideologically motivated lethal incidents of violence in 2018 and 2019.”); Department of Homeland Security, *Homeland Threat Assessment*, October 2020, 18, https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf (“2019 was the most lethal year for domestic violent extremism in the United States since the Oklahoma City bombing in 1995... Among DVE actors, WSEs conducted half of all lethal attacks (8 of 16), resulting in the majority of deaths (39 of 48).”). The 1/6 attack on the Capitol, which was marked by the significant presence of groups such as the Proud Boys, as well as individuals bearing or wearing white supremacist insignia, catapulted this threat to the top of the Biden administration’s agenda. Washington Post Staff, “Identifying Far-Right Symbols That Appeared at the U.S. Capitol Riot,” *Washington Post*, January 15, 2021, <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/>; Zolan Kanno-Youngs and Nicole Hong, “Biden Steps up Federal Efforts to Combat Domestic Extremism,” *New York Times*, April 4, 2021, <https://www.nytimes.com/2021/04/04/us/politics/domestic-terrorism-biden.html>.

⁴⁹ Department of Homeland Security, “National Terrorism Advisory System Bulletin.”

⁵⁰ Department of Homeland Security, update of the “National Terrorism Advisory System Bulletin,” May 14, 2021, <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-may-14-2021>.

⁵¹ Department of Homeland Security, “DHS Announces Funding Opportunity for \$1.87 Billion in Preparedness Grants,” February 25, 2021, <https://www.dhs.gov/news/2021/02/25/dhs-announces-funding-opportunity-187-billion-preparedness-grants>.

⁵² Mayorkas, *Domestic Violent Extremism in America*.

⁵³ FBI and DHS, *Intelligence Assessment on Domestic Terrorism*, 5.

⁵⁴ *The Rise of Domestic Terrorism in America, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Sec.*, 117th Cong. (2021) (testimony of Michael German, fellow at the Brennan Center for Justice) <https://docs.house.gov/meetings/JU/JU08/20210224/111227/HHRG-117-JU08-Wstate-GermanM-20210224.pdf>.

⁵⁵ Ken Dilanian, “DHS Launches Warning System to Find Domestic Terrorism Threats on Public Social Media,” NBC News, March 10, 2021, <https://www.nbcnews.com/politics/national-security/dhs-launches-warning-system-find-domestic-terrorism-threats-public-social-n1266707>.

⁵⁶ *Racially and Ethnically Motivated Violent Extremism: The Transnational Threat, Hearing Before the H. Comm. on Homeland Sec. Subcomm. on Intelligence and Counterterrorism*, 117th Cong. (2021) (oral testimony of Cohen, Assistant Secretary of Homeland Security for Counterterrorism and Threat Prevention).

⁵⁷ Mayorkas, *Domestic Violent Extremism in America*.

⁵⁸ Devlin Barrett and Matt Zapposky, “FBI Report Warned of ‘War’ at Capitol, Contradicting Claims There Was No Indication of Looming Violence,” *Washington Post*, January 12, 2021, https://www.washingtonpost.com/national-security/capitol-riot-fbi-intelligence/2021/01/12/30d12748-546b-11eb-a817-e5e7f8a406d6_story.html; Carol D. Leonnig, “Capitol Police Intelligence Report Warned Three Days before Attack That ‘Congress Itself’ Could Be Targeted,” *Washington Post*, January 15, 2021, https://www.washingtonpost.com/politics/capitol-police-intelligence-warning/2021/01/15/c8b50744-5742-11eb-a08b-f1381ef3d207_story.html; Dina Temple-Raston, “Why Didn’t the FBI and DHS Produce a Threat Report Ahead of the Capitol Insurrection?,” NPR, January 13, 2021, <https://www.npr.org/2021/01/13/956359496/why-didnt-the-fbi-and-dhs-produce-a-threat-report-ahead-of-the-capitol-insurrect>.

⁵⁹ Carrie Dan, “Meet the Press Blog: Latest News, Analysis and Data Driving the Political Discussion,” NBC News, May 13, 2021, <https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussion-n988541/ncrd1261306#blogHeader> (“The survey, conducted February 25 – March 1, found that 65 percent of Republicans believe that Biden’s win was solely the result of voter fraud.”).

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- ⁶⁰ Brian A. Jackson, Ashley L. Rhoades, Jordan R. Reimer, Natasha Lander, Katherine Costello and Sina Beaghley, *Practical Terrorism Prevention: Reexamining U.S. National Approaches to Addressing the Threat of Ideologically Motivated Violence*, RAND Corporation, 2019, https://www.rand.org/pubs/research_reports/RR2647.html.
- ⁶¹ Smislova, *Examining the January 6 Attack*, 3.
- ⁶² Lyrisa Barnett Lidsky and Linda Riedemann Norbut, “#1️⃣U: Considering the Context of Online Threats,” *California Law Review* 106 (2018): 1891.
- ⁶³ Department of Homeland Security Office of Inspector General, *DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success (Redacted)*, February 27, 2017, <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.
- ⁶⁴ U.S. Citizenship and Immigration Services, “Social Media,” in *U.S. Citizenship and Immigration Services Briefing Book*, 181, <https://www.dhs.gov/sites/default/files/publications/USCIS%20Presidential%20Transition%20Records.pdf>.
- ⁶⁵ USCIS, *Briefing Book*, 183.
- ⁶⁶ Office of Information and Regulatory Affairs, “Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms,” No. 202007-1601-001, April 2, 2021, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202007-1601-001; Harsha Panduranga, “White House Office Rejects DHS Proposal to Collect Social Media Data on Travel and Immigration Forms,” Brennan Center for Justice, April 27, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/white-house-office-rejects-dhs-proposal-collect-social-media-data-travel>.
- ⁶⁷ *Fiscal Year 2010 Budget for the Office of Intelligence and Analysis of the Department of Homeland Security, Hearing Before the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. (2009) (testimony of Bart R. Johnson, Acting Under Secretary for the Office of Intelligence and Analysis) (“To strengthen our existing processes, an interim clearance process was put in place shortly after the release of the April 7, 2009 assessment. That process established mandatory review and concurrence by four offices - Civil Rights and Civil Liberties, the Privacy Office, Office of the General Counsel, and I&A’s Intelligence Oversight Section. Any non-concurrence that could not be resolved was elevated to the Deputy Secretary for review, ensuring a much more coordinated review of I&A’s products than had previously been in place.”).
- ⁶⁸ Bart Johnson testimony, *Fiscal Year 2010 Budget for the Office of Intelligence and Analysis*.
- ⁶⁹ Tia Sewell and Benjamin Wittes, “The Evolution of DHS Intelligence Review Policy,” *Lawfare*, August 14, 2020, <https://www.lawfareblog.com/evolution-dhs-intelligence-review-policy>.
- ⁷⁰ Benjamin Wittes, “How the DHS Intelligence Unit Sidelined the Watchdogs,” *Lawfare*, August 6, 2020, <https://www.lawfareblog.com/how-dhs-intelligence-unit-sidelined-watchdogs>.
- ⁷¹ Wittes, “DHS Intelligence Unit Sidelined the Watchdogs.”
- ⁷² I&A, *Intelligence Oversight Guidelines*, Appendix A.
- ⁷³ I&A, *Intelligence Oversight Guidelines*, Appendix A. Previously, under Executive Order 12863, Inspectors General and General Counsel of IC member agencies, including I&A, were required to report to the Intelligence Oversight Board on a quarterly basis any “concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.” President’s Foreign Intelligence Advisory Board, Exec. Order 12863 (September 13, 1993). The Board also had the authority to “review the practices and procedures of the Inspectors General and General Counsel” for identifying and investigating potential violations. Congress should give thought to whether these authorities should be restored.
- ⁷⁴ Ken Dilanian, “DHS Launches Warning System to Find Domestic Terrorism Threats,” (“So far, DHS is using human beings, not computer algorithms, to make sense of the data, the officials said”).
- ⁷⁵ Coalition Letter to DHS Opposing the Extreme Vetting Initiative, letter from civil society organizations to Elaine C. Duke, Acting Secretary of Homeland Security, November 16, 2017, 2n12-13, <https://www.brennancenter.org/sites/default/files/Coalition%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%202011.15.17.pdf> (referencing Ahmed Abbasi, Ammar Hassan and Milan Dhar, “Benchmarking Twitter Sentiment Analysis Tools,” Proceedings of the Ninth International Conference on Language Resources and Evaluation, Reykjavik, Iceland, May 2014; Julia Hirschberg & Christopher D. Manning, “Advances in Natural Language Processing,” *Science* 349 (2015): 6245; Su Lin Blodgett & Brendan O’Connor, “Racial Disparity in Natural Language Processing: A Case Study of Social Media African-American English,” Proceedings of the 2017 Fairness, Accountability, and Transparency in Machine Learning Conference, Halifax, Canada, 2017 (showing failure to perform on English text as used by a specific demographic community)).
- ⁷⁶ Chappell Lawson and Alan Bersin, “The Future of Homeland Security,” in *Beyond 9/11: Homeland Security for the Twenty-First Century*, ed. Chappell Lawson, Alan Bersin and Juliette N. Kayyem (Cambridge, Mass: MIT Press, 2020), 303.

⁷⁷ The PCLOB is a bipartisan body which was established by the 9/11 Commission Act of 2007 to ensure that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266 (2007). It has reviewed some of the most sensitive intelligence programs of the U.S. government, providing much-needed transparency about their scope.