University of Miami Race & Social Justice Law Review

Volume 12 | Issue 1 Article 6

January 2022

Revengence Taken: Russian Active Measures and our Entrenched Racial Divide

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Our racial divide has always been a national security threat. An early observer of our American project, Alexis de Tocqueville, wrote about this threat to our future union in "Democracy in America," learned by merely travelling the young nation thirty years before our Civil War.[1] Despite generations of societal and legal evolution, our nation has not overcome the wounds and disabilities that our racial divide left behind — now ripe for modern security threats. In 2019, the United States Senate Select Committee on Intelligence released Volume II of their years long investigation into Russian Active Measures of interference with our elections and democracy, referring to the effort as an "information warfare campaign" designed to stoke "societal division in the United States."[2] Our racial divide was the fault line under attack in the Russian Active Measures campaign.

The Senate's "integrated" recommendations avoided the critical issue of proven vulnerability through our racial fault lines and mainly offered that social media companies, citizens, and the

* I would like to thank Professor Donald M. Jones for his guidance and inspiration, and Professor Irwin P. Stotzky for giving me an exceptional framework to understand law.

Most importantly, I would like to thank my husband, Miguel Vias. His love and support is otherworldly.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Bantam Classics, Random House 2004).

2 S. COMM. ON INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOLUME 2: RUSSIA'S USE OF SOCIAL MEDIA WITH ADDITIONAL VIEWS, at 78 [hereinafter Sen. Intel. Rep.].

> *Executive Branch should simply self-regulate in face of this national security threat. More critically, the Senate recommendations mandated that any "approach" to guard against this threat "must be rooted in protecting democratic values, including the freedom of speech."*[3]
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> *The weak Senate recommendations, coupled with the unprecedented siege on the Capitol on January 6, 2021, require an urgent review of the ways that our laws have disabled us from properly analyzing the impact of race as a legal matter. Three landmark cases, Brandenburg v. Ohio, Washington v. Davis, and McCleskey v. Kemp, are all post-Civil Rights Movement cases that opened America up to assaultive speech, attempting to usher in race-neutrality and a "law and economics" framework. These cases made our racial lines a bit deeper, leaving us with scar tissue exposed to the world, rather than sound and protective case law.*
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> *Indeed, the landmark Brandenburg opinion supports this argument.*[4] *Clarence Brandenburg, who spoke his works a few days after the Civil Rights Bill of 1964 was passed in the Senate, threatened to march the Klan to Mississippi and St. Augustine, Florida. There was nothing random about those locations. Brandenburg spoke a few days after three young Civil Rights workers were murdered by the Ku Klux Klan in the infamous Mississippi Burning case, their bodies were still missing when he spoke. Then-President Lyndon B. Johnson sent the F.B.I. and troops to Mississippi as a response — the murders gripped the nation and our government. Clarence Brandenburg also spoke while widespread violence engulfed St. Augustine, Florida as Dr. Martin Luther King, Jr. was spending the month in St. Augustine to desegregate the city — violence was ongoing and rampant. Yet this context was sanitized in a hastily written per curium opinion originally authored by Abe Fortas as he was forced to resign over financial improprieties. Adding to this uniquely odd circumstance, no opinions were released on Brandenburg in the state courts below. This acontextual, ahistorical opinion, stripped of the power of judicial speech, is ironically our landmark Free Speech*

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3 *Id.*

4 Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

decision. The Davis and McCleskey opinions warrant review as the Senate was not short on data, facts, or intent in the Russian Active Measures campaign report, yet somehow the data on race was not acted upon nor appeared in the recommendations. These cases frame why when our racial division is at the forefront of an issue factually, it is disabled as a legal matter.

Demanding attention to where the law has failed us on matters of race is fiercely important now as the relevant matters of national security uncovered by the Senate remained unanswered legally. Indeed, the January 6, 2021 "Save America" rally is eerily reminiscent of Clarence Brandenburg's exhortation to "Save America" in his Klan speech in 1964. The studied blindness of racism and racial harms in law has not solved our problems, rather, it has left us more vulnerable than ever.

TABLE OF CONTENTS

INTRODUCTION

Part I of this paper identifies the premium national security held in the formation of the United States of America and reveals how racial imbalance was factored into the union to bolster national security and unity at our founding. Silence was often a strategy to limit critique, leaving us with deep divisions rampant today. Part II brings this threat to today, discussing key revelations by the Senate Intelligence Committee on the exploitation of the American legacy of racial division in the Russian Active Measures Campaign. The facts presented by the Senate contrast with the glaring void in the coordinating recommendations to mitigate the stoking of racial divisions through divisive, racially-based speech. This issue of race was also missing as an actionable legal matter in Robert Muller's indictment of the Russian defendants. This reveals our legal disability — racism even when at the forefront factually remains enfeebled legally. Further, that Bob Mueller was one of the two named defendants in *Ashcroft v. Iqbal*, a case that ostensibly made race an almost fatal, implausible matter legally, questions whether he was the best person to analyze and indict persons involved in attacking our democracy through our racial fault lines. Part III examines the validity of modern First Amendment protections as our Senate positioned that no recommendations to protect our democracy from the current "warfare" can collide with current First Amendment protections. This paper analyzes the unusual shift in early First Amendment doctrine which focused on Communist party participation within the United States to a stark shift post-Civil Rights movement in the landmark *Brandenburg* decision. The sanitizing of Clarence Brandenburg's unmistakably particularized speech as Klan violence peaked during the Freedom Summer of 1964, coupled with the analogizing *Brandenburg* to cases on Communist Party activity should have pointed to distinguishing legal features, not relevant, applicable case law. Further, the unusual circumstances in the ouster of Justice Abe Fortas as he rushed to author the opinion —submitting it the day before his official resignation— and the lack of any written opinions through the lower courts warrant reassessment of the *Brandenburg* test. Part IV claims that our disability to soundly analyze racial issues as a matter of law goes far beyond *Brandenburg*. An analysis of two landmark cases on race, *Washington v. Davis* and *McCleskey v. Kemp,* urge additional reckoning as those cases broadly support the narrative of race as a legally irrelevant matter through the use of shockingly obsolete, discriminatory, and callous inputs, and a refusal to accept sophisticated and reliable empirical data on race by the Court. Both issues are relevant to understand how, faced with so much expert testimony, details, and facts on race-baiting, the Senate glossed over the issues. In conclusion, Part V

addresses the relevance now, urging a reimagining of the proper place of race in our laws as a necessary response to the United States Senate's Select Committee on Intelligence investigation and report on Russia Active Measures in the 2016 Election.

I: THE UNITED STATES, NATIONAL SECURITY, & RACE

Our nation has always been complicated. After gaining independence in the 1770s, the United States was not initially well suited to defend itself from foreign influence, and skirmishes between individual states. These threats required action to unify the people and states to guarantee the fledgling nation's future.[5] National defense was therefore the lead argument in the Federalist Papers — less romantic notions of democracy heralded today, but more "arguments about defense . . . and geography at its borders."[6] National defense as a unifier was not a new concept as England was openly envied for enjoying a unique "insular situation," a geostrategic benefit serving as a natural guard against foreign invasion.[7] This energy towards national security as the backbone of the Union was the central theme in George Washington's farewell address to the nation at the end of his second presidential term in 1796. Washington, perhaps more than any, was able to identify geographic concerns on foreign invasion, yet he chose to warn against discreet foreign influence.[8]

Washington warned against "the insidious wiles of foreign influence [requiring] a free people [] to be constantly awake . . . [as] foreign influence is one of the most baneful foes of republican government."[9] He imparted that "every part of our country [has an] interest in union" specifically because of the "greater security from external danger [and] a less frequent interruption [of our] peace by foreign nations."[10] Washington was fearful enough to counsel that even commerce managed with anything

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5 AKHIL REED AMAR, AMERICA'S CONSTITUTION A BIOGRAPHY, 46-47 (Random House 2005).

6 *Id.* at 46 (discussing that the Federalist Papers 1-6 and 8-9, chiefly focused on national security and the new United States were reprinted more than any of the other essays, speaking to unity to provide national defense as the core logic politically, and of the voting population for ratification of the new United States Constitution).

7 *Id.* at 47 (addressing an argument advanced by William Blackstone in his Commentaries on the Laws of England, incorporated into Federalist Papers No.'s 8, 41).

8 George Washington*, September 17, 1796, Farewell Address*, UNITED STATES SENATE HISTORICAL OFFICE.

9 *Id.*

10 *Id.* (imparting this specially as the advice of "an old and affectionate friend" counseling that this is central logic for a strong nation, and continually warning of the various methods that "mischiefs of foreign intrigue" could do to the security of the United States).

less than an absolute "equal and impartial hand" could invite an appearance of favoritism that would be "[paid] with a portion of [our] independence."[11] The word "foreign" appears fifteen times in this speech, "secure" and "security" nine, which together, is significantly higher than the six references to the Constitution[12] thus supporting the claim that national security was the driver of our national project, and communicated to citizens at large.

Washington also addressed slavery, but as in the Constitution, without naming or defining it. Washington's reminded the nation that the "*North,* in an unrestrained intercourse with the *South,* protected by the equal laws of a common government, finds in the production of the latter great additional resources . . . and precious materials of manufacturing industry . . . [as] the *South* . . . sees its agriculture grow and its commerce expand."[13] The clear implication is that the slave-based industry of the South created a useful and critical economic bond with the North that the young Nation needed to thrive. The regions decided to bind themselves legally in this symbiotic relationship. This bond-benefit dichotomy received a parallel but more frank analysis by Thurgood Marshall, who wrote of the same "clear understanding" and reliance as "[t]he economic interests of the regions coalesced."[14] Marshall commented that despite the "clear understanding of the role slavery would play in the new republic, use of the words 'slaves' and 'slavery' was carefully avoided."[15] He gave color to George Washington's sanitized North-South mutual relationship discussion noting that "New Englanders engaged in the 'carrying trade' would profit from transporting slaves from Africa as well as goods produced in America by slave labor."[16] The economic and national security advantages that racial inequities gave this country led to a particular narrative on race — silence on the harms while advocating the fruitfulness of national bonds.

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11 *Id.*

12 *Id.* (referencing the Constitution six times).

13 *Id.* Beyond the North-South economic bond that relied upon slavery and laws permitting slavery Washington also spoke about trade between the East, which provided "indispensable outlets" for the production of the West created "an indissoluble community of interest as one nation." As territories to the West become more prevalent, the question of free states versus slave states would embroil the nation. *Id.*

14 Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 26 VAL. U.L. REV. 21, 22 (1991) (stating in more open but wholly parallel terms, that "[t]he economic interests of the regions coalesced). And as the words foreign, secure, and security, pepper Washington's farewell address without mention to slaves or race. *See also* Amar, supra note 5, at 20 ("many of the Constitutions clauses specially accommodated or actually strengthened slavery, although the word itself appeared nowhere in the document").

15 Marshall, *supra* note 14.

16 *Id.*

Washington warned that ever-present "*geographical discriminations*" undergirding factions and party alliances are highly divisive and are "inseparable from our nature [with] root[s] in the strongest passions of the human mind."[17] That is poetic, but the rest of the world was not so blind to our passionate factions. Alexis de Tocqueville, a French aristocrat with a judicial post in Versailles, traveled America from 1831-1832 to study the then-new concept of a democratic government.[18] De Tocqueville identified that the diversity of people did not lend itself to an easy American union, particularly given the unique issue of race in America. Ventilating the blind spots in Washington's farewell address, de Tocqueville wrote:

[w]hatever faith I may have in the perfectibility of man, until human nature is altered . . . a government [cannot] hold together forty different peoples, disseminated over a territory equal to one-half of Europe . . . avoid all rivalry, ambition, and struggles between them and direct their independent activity to the accomplishment of the same design."[19]

Even assuming *"no hostile interests*" and that all people could be "*equally interested in the maintenance of the Union,"* de Tocqueville wrote "I am still of the opinion that where there are 100,000,000 of men, and forty distinct nations [states and territories] the continuance of the Federal Government can only be a fortunate accident."[20] The United States entered the Civil War thirty years later.

Seeing the inevitable end of slavery, de Tocqueville argued that "[w]hatever efforts of the Americans of the south to maintain slavery, they will not always succeed; slavery . . . which is now contrasted with democratic liberties and the information of our age, cannot survive" and yet "great calamities may be expected to ensue" upon any method used to alter the entrenched racial dynamics.[21] Agreeing with Thurgood Marshall and George Washington on coalesced interests, de Tocqueville went further. Slavery did not:

render the interests of one part of the Union contrary to those of another part . . . it has modified the character and changed the habits of the natives of the South . . . .[the] men who inhabit the vast territory of the United States are almost all the issue of a common stock; but the effects of the climate, and more especially of slavery, have gradually introduced very striking differences."[22]

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17 Washington, *supra* note 8.

18 DE TOCQUEVILLE, *supra* note 1, at 17.

19 *Id.* at 461. The title of this chapter, was, in part, "DANGERS OF THE UNION RESULTING FROM THE DIFFERENT CHARACTERS AND PASSIONS OF ITS CITIZENS." *Id.*

20 *Id.*

21 *Id.* at 441.

22 *Id.* at 457.

Moreover, it was not only the effects of our racial problems on Black people, de Tocqueville discussed the effects on white Americans at length. It was not the mere, general "diversity of interests or of opinions" creating "[t]he dangers which threaten the American Union . . . but [] the various characters and passions of the Americans" created by participating and relying upon the slave trade and relying upon racial inequity to sustain the nation.[23] These observations are key in examinaning the scope and depth of our racial divisions as a threat to modern national security, particularly as they are written from the vantage point of a diligent outside observer, who was interested in understanding the fault lines at play.

II. 2019 SENATE INTELLIGENCE COMMITTEE REPORT: FREE SPEECH OVER NATIONAL SECURITY

The threats de Tocqueville mentioned almost two hundred years ago was the foundation of the Russian Interference Campaign that dominated the political landscape at the change of administrations in 2017. On August 18, 2020, the U.S. Senate Select Committee on Intelligence released its fifth and final volume on its three-year bipartisan investigation into the claims of Russian interference with the 2016 election, and the "American political system" generally.[24] This paper focuses on Volume 2: Russia's Use of Social Media released on October 8, 2019[25] as it identifies the risks associated with First Amendment freedom of speech and our well-known racial divisions.

The Senate Intelligence Committee claimed that their findings revealed more than "active measures" but rather an "information warfare campaign [that] was broad in scope and entailed objectives beyond the

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[23] *Id.* at 457-459. De Tocqueville would claim the following, which can relate to the intractable nature of racial divisions specifically at moments where advances in Civil Rights were emerging: "The citizen of the Southern States of the Union is invested with a sort of domestic dictatorship, from his earliest years; the first notion he acquires in life is that he is born to command, and the first habit which he contracts is that of being obeyed without resistance." *Id.* This speaks to the incredible violence discussed in Section III in *Brandenburg* during the Civil Rights "Freedom Summer" and the recalcitrance of race and its effects today.

[24] Press Release, Senate Intelligence Committee, Senate Intel Releases Volume 5 of Bipartisan Russia Report (August 18, 2020), (adding that "[t]he Committee's investigation totaled more than three years of investigative activity, more than 200 witness interviews, and more than a million pages of reviewed documents. All five volumes total more than 1300 pages") (*Volume I: Russian Efforts Against Election Infrastructure*; *Volume II: Russia's Use of Social Media*; *Volume III: U.S. Government Response to Russian Activities*; *Volume IV: Review of the Intelligence Community Assessment* (followed by *Additional declassifications of Volume IV*); and *Volume 5: Counterintelligence Threats and Vulnerabilities*).

[25] *See* Sen. Intel. Rep., *supra* note 2.

result of the 2016 presidential election."[26] The efforts did not constrain themselves merely to "harm Hillary Clinton's chances of success and supporting Donald Trump at the direction of the Kremlin" but that the Kremlin "'after election day . . . *stepped on the gas* . . . [and] became *more active* . . . confirming again that the assault on our democratic process is much bigger than the attack on a single election."[27] The Senate Intelligence Committee took pains to cite a broad, sophisticated, and ongoing "warfare campaign . . . vastly more complex and strategic . . . than was initially understood."[28]

While racial division was not the only target, it was dominant. The findings confirmed that the "preponderance of the operational focus, reflected repeatedly . . . was on socially divisive issues, such as race, immigration, and Second Amendment rights—in an attempt to pit Americans against one another and against their government."[29] The Intelligence Report was not shy to claim racial divisions were a controlling issue: "[b]y far, race and related issues were the preferred target of the information [] campaign" and "[the] overwhelming operational emphasis on race" combined with geographical targeting was central to the methodology.[30]

Striking as that may be, how to approach this "warfare" given our current laws is another matter. Divisions were not created by an adversary; they were exploited. Thomas Rid, then Professor of Securities Studies at Kings College, London, was one expert called to testify before the Senate, and advised that "[t]he tried and tested way of active measures is to use an adversary's existing weaknesses against himself, to drive wedges into pre-existing cracks: the more polarized a society, the more vulnerable it is—America in 2016 was highly polarized."[31] Exploitation however needs breath. It is the "institutions and norms that define western liberal democracies . . . vibrant press freedoms, freedom of speech, and diverse

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26 *Id.* at 4.

27 *Id.* at 4, 8.

28 *Id.* at 5 (emphasis added).

29 *Id.* at 6. The Senate Select Committee did not link divisions stoked over immigration to race, but the commentary used on immigration at events that the Senate claimed Russia had a hand in organizing, were infused with racial invective, and should be considered as a focus on race in this Report. *Id.*

30 *Id*. at 5-6. Proportionality was confirmed as the mainstream social media companies shared their data as evidence for the Senate; Facebook revealed that over 66 percent of the advertising content "contained a term related to race and targeting [] principally aimed at African-Americans in key metropolitan areas"; also stating that Instagram and Twitter are "heavily focused on hot-button issues with racial undertones", and that "96 percent of the IRA's YouTube content was targeted at racial issues and police brutality." *Id.* at 38-39.

31 *Disinformation: A Primer in Russian Active Measures and Influence Campaigns: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 6 (2017) (statement of Thomas Rid, Professor Department of War Studies) [hereinafter Disinformation Hearing].

societies" that are also conducive to exploitation.[32] Rid, as many who testified, explained that the 2016 election was a fungible target. The Report confirmed that the focus would not end with the 2016 election, "[i]t's much more than that. It's interference in our society, in our culture, in our political conversation."[33]

New Legal Terrain

While the Senate revealed the campaign intended to interfere "in our society, in our culture, in our political conversation,"[34] how to combat this is issue is an unknown, and unchartered legal terrain. There were no armed attacks, no "destruction of infrastructure," nor a cyber-attack so severe to fall under the use of force according to the United Nations.[35] Russian interference as claimed by the Senate Report therefore sits in a new legal space between traditional information collection, but falls well under traditional, physical attacks, thereby "push[ing] the boundaries of international law."[36]

Despite the severity and complexity of the active measures claims, and no international law to provide guidance, the Senate's recommendations were vague and rudderless in what could be addressed — race baiting speech. The concluding "Recommendations" section led with an overarching precatory command that any remedy "must be rooted in protecting democratic values, including freedom of speech" while "defending against foreign influence."[37] Remarkably, the Senate then stated that the Federal Government, civil society, and the private sector "each have an important role to play in deterring and defending against

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[32] Sen. Intel. Rep., *supra* note 2, at 22; *see* Disinformation Hearing, *supra* note 41, at 6 ("Sometimes I am amazed how easy it is to play these games," said the KGB's grandmaster of "dezinformatsiya", General Ivan Agayants, during an inspection of the particularly aggressive active measures shop in Prague in 1965, "if they did not have press freedom, we would have to invent it for them").

[33] *Id.* at 37-38. Locational targeting had an additional efficiency — our geographically based electoral system. Roughly one-third of locational targeting was directed at swing states. *Id.*

[34] *Id.*

[35] Darin E. W. Johnson, *Russian Election Interference and Race-Baiting*, 9 COLUM. J. RACE & L. 191, 241 (2019)(citing the OFFICE OF GEN. COUNSEL, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 997 (2015)).

[36] *Id.*

[37] Sen. Intel. Rep., *supra* note 2, at 78. It is noteworthy that the Sen. Intel. Comm. Report commences its recommendations in this manner given the hearings of Thomas Rid, who shared a quote from a leading disinformation agent back in 1965 that "if they [Western nations] did not have press freedom, we would have to invent it for them" regarding feasibility of this method. The message seems to have had no effect. Disinformation Hearing, *supra* note 41

foreign influence operations that target the United States."[38] That the public at large and the private sector should spontaneously guard the nation against this sophisticated attack is illogical. The key conclusions of the Senate report were that our society is at risk because of these attacks, society has been duly affected, yet our society should spontaneously self-correct after being exposed to these intentionally hateful, divisive messages.

The recommendations were weak.[39] The Senate advised the social media industry to simply self-regulate and share information to defend against this sophisticated, broad, "warfare campaign" against the United States.[40] Sharing of "indicators" that were admittedly "ad-hoc" was offered as a good starting point based on trials among certain companies; basic notifications to users to warn that the content viewed may have a malicious nature were proffered.[41] The Committee suggested that Congress should "consider ways to facilitate productive coordination" between the social media industry and the pertinent government agencies and departments" regarding foreign influence operations against Americans.[42] While the latter is more promising as Congress may pass laws, there was no timeline, no assigning this awesome task to an administrative agency, it was a simple suggestion.

The Executive Branch recommendations were particularly stunning: "The Committee recommends . . . [that] in the run up to the 2020 election, [the Executive Branch should] reinforce with the public the danger of attempted foreign influence in the 2020 election."[43] This recommendation came a few months after then-President Donald Trump sat for a highly publicized interview with George Stephanopoulos in the Oval Office, claiming that if offered, he might accept "dirt" on a rival from a foreign government, stating: "It's not interference. They have information. I think I'd take it."[44] The Stephanopoulos interview pressed upon the June 2016

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38 Sen. Intel. Rep., *supra* note 2, at 78.

39 *Id.* at 78-85 (beginning the recommendations with industry-related guidance, then Congressional measures, followed by recommendations to the Executive Branch, ending with "Other Measures" and other "additional views" submitted independently by Senator Wyden (D-OR)).

40 The Committee recommends that social media companies work to facilitate greater information sharing between the public and private sector, and among . . . themselves about malicious activity . . . Formalized mechanisms . . . to defend against foreign disinformation, as occurred with violent extremis content online, should be fostered." Sen. Intel. Rep., *supra* note 2, at 78.

41 *Id.* at 79.

42 *Id.* at 80.

43 *Id.* at 81.

44 Jessica Taylor, *Trump: If Offered Dirt By Foreign Government On 2020 Rival, 'I Think I'd Take It'*, NPR (June 12, 2019).

meetings between Russians and the Trump team, one of the very reasons the Senate commenced this investigation.

Another ineffective recommendation was to "build media literacy from an early age [to] help build long-term resilience to foreign manipulation of our democracy."[45] This recommendation both admits that this threat will remain for years to come, and that not only do we lack requisite defenses today, but that we may lack defenses intergenerationally. The final "Other Measures" recommended were not any more reassuring, suggesting that "public figures engaged in political discourse . . . be judicious in scrutinizing the information that they choose to share or promote online."[46] Despite this report being developed by the Senate Intelligence Committee, the concluding recommendation seemed to reject duty of that intelligence role, encouraging that "all Americans . . . [take] responsibility . . . to not give greater reach to those who seek to do our country harm."[47]

The Senate appeared to have punted on our national security "warfare" vulnerability. Certainly, Americans cannot spontaneously, and without leadership or coordination, successfully combat a broad attack. The American Bar Association's International Law division 2018 Year in Review lead issue were that "[t]ensions between the United States and Russia" were high and included "frequent and tumultuous changes in 2018."[48] Nestled between a recap of the Treasury Department's "Blocked Persons" list, including "oligarchs . . . senior Russian Government officials, and a state-owned Russian weapons trading company" and U.S. Government's "actions against Russia for its alleged involvement in the nerve-agent attack" in the United Kingdom is an update to the indictments of the Department of Justice for those involved in the Russian interference in the 2016 presidential election."[49] The actors and the intent behind the threat were known to be significant, requiring more than American citizens to self-regulate.

The severity of this issue, combined with the challenging limits of international law, should force an analysis of our domestic legal structures and case law to develop a framework, determine solutions, and understand what could provide better long-term protections for our "democratic values, including the freedom of speech."[50]

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45 Sen. Intel. Rep., *supra* note 2, at 81.
46 *Id.* at 82.
47 *Id.*
48 Geoffrey M. Goodale , et al., *National Security Law*, 53 INT'l LAW 439, 439 (2019).
49 *Id.* at 440.
50 Sen. Intel. Rep., *supra* note 2, at 78.

Race: The Missing Claim in the 2018 Indictment of Russian Agents and the IRA

Robert Mueller III, acting as the Special Counsel for the Department of Justice, submitted an indictment against the IRA (Internet Research Organization – the group claimed to be the machine behind social media meddling) and twelve other named defendants in 2018.[51] There were eight official counts:

Count 1 "conspiracy to defraud the United States", Count 2 and Counts 3-8 "aggravated identity theft".[52] Charges including conspiracy "to defraud the United States by impairing, and defeating the lawful functions of the government," use of stolen ID's[53], a "strategic goal to sow discord in the U.S. political system, including the 2016 U.S. presidential election, obstruction via "fraud and deceit" by campaign expenditures without "proper regulatory disclosure" and lack of registration as foreign agents[54], general organization of the group[55] and conspiracy to commit wire and bank fraud.[56]

Mueller's claims generally point to traditional issues of foreign influence, physical breaches, conspiracy to defraud, and identity theft. The "Object of the conspiracy" charge was mechanical — opening of bank accounts to support social media posts, and activities requiring financing.[57] But the content and purpose of that conspiracy — divisive racial speech — was touched on for context but had no legal effect. The indictment rested upon the illegality of the fraudulent bank account activity and identity theft as the method of attacking the United States on race — not on the inflaming of racial divisions itself.

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51 Indictment, United States v. Internet Research Agency, LLC, No. 1:18-cr-00032-DFL, 2018 WL 91477 (D.D.C. Feb 16, 2018) [hereinafter "Indictment"].

52 *Id.*

53 *Id.* at 16 (claiming that "Defendants and their co-conspirators also used, possessed, and transferred, without lawful authority, the social security numbers and dates of birth of real U.S. persons . . . opened accounts at PayPal, a digital payment service provider; created false means of identification, including fake driver's licenses . . . [and] obtained, and attempted to obtain, false identification documents to use as proof of identity in connection with maintaining accounts and purchasing advertisements on social media sites.").

54 *Id.* (stating that the charges included abuse by the named defendants of "FARA" the Foreign Registration Act which a kind of honor system for foreign agents of all stripes which "establishes a registration, reporting, and disclosure regime for agents of foreign principals (which includes foreign non-government individuals and entities) so that the U.S. government and the people of the United States are informed of the source of information and the identity of persons attempting to influence U.S. public opinion, policy, and law.").

55 *Id.*

56 *Id.* at 30.

57 *Id.* at 31.

The words "race" and "racial" are not present in the indictment. Yet, the implications exist and are striking. Black people and Muslim people are referenced 19 times in the inditement and targeted with specificity — such as encouraging Black people to not vote[58] and using a two-pronged approach for Muslim Americans, hiring persons to hold polarizing signs at multiple rallies "depicting Clinton and a quote attributed to her stating 'I think Sharia Law will be a powerful new direction of freedom.'"[59] Then online, promoting a second message of voter suppression aimed at Muslim-Americans: "American Muslims [are] boycotting elections today, most of the American Muslim voters refuse to vote for Hillary Clinton because she wants to continue the war on Muslims in the middle east and voted yes for invading Iraq."[60]

Conversely, white-Americans are not referenced directly in the Indictment (nor in the Senate Intelligence Report) but swept under the ambit of "geographic regions" with groups called "South United" and "Heart of Texas."[61] The geographic targeting claims focused on creating live rallies in Florida under a series of rallies called "Florida goes Trump"[62] and in Pennsylvania in a series of rallies called "Miners for Trump."[63] At these rallies, while economic sympathy specific to local concerns was expressed (ie. miners in Pennsylvania), race was a loud and unmistakable undercurrent in both the Pennsylvania[64] and Florida[65] series

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58 *Id.* Cites to political ads stating, "Hillary Clinton Doesn't Deserve the Black Vote," posts under the account "Woke Blacks" reading "[A] particular hype and hatred for Trump is misleading the people and forcing Blacks to vote Killary. We cannot resort to the lesser of two devils. Then we'd surely be better off without voting AT ALL," or attempting to point the Black vote to Jill Stein. *Id.* at 18, 20.

59 *Id.* at 21, 25.

60 *Id.* at 18.

61 *Id.* at 14.

62 *Id.* at 26 (one defendant having written "So we're gonna organize a flash mob across Florida to support Mr. Trump").

63 *Id.* at 30.

64 *See* Donald Trump, Presidential Candidate, Campaign Speech in Manheim, Pennsylvania (Oct. 1, 2016), https://www.c-span.org/video/?416260-1/donald-trump-campaigns-manheim-pennsylvania (addressing Mexico at 01:36, "We are going to start benfitting our country. Right now it is a one-way road to trouble. Our jobs leave us. Our money leaves us. With Mexico, we get the drugs. They get the cash. That simple. [Cheers]. And we will build the wall.") (addressing Islam at 45:42, "We are going to keep radical Islamic terrorists out of our Country. Hillary wants to let them come [here] again, we cannot do that . . . We are going to end illegal immigration [applause]").

65 *See* Donald Trump, Presidential Candidate, Campaign Rally in Melbourne, Florida (Sep. 27, 2016), https://www.c-span.org/video/?415934-1/donald-trump-campaigns-melbourne-florida (addressing Islam at 17:39 and 58:04, "Radical Islamic terrorism (sic) is spreading everywhere . . . We have a president who won't even issue the term. We have a former secretary of state who doesn't want to mention the term. They're allowing people to come into our country by the thousands and thousands and thousands and we don't even

of rallies. While disparaging and enflamed speech about racial or religious minorities may be distasteful and dangerous, it is unfortunately not illegal. Mueller could only indict defendants for illegal funds that supported these attacks.

Conversely, Mueller's indictment cites to a panoply of laws such as 18 U.S.C. § 371, Conspiracy to Defraud the United States, which according to the Department of Justice is broad and not only "reaches financial or property loss through use of a scheme or artifice . . . but [] is designed and intended to protect the integrity of the United States and its agencies, programs and policies" with substantial case law upholding the protections for the government.[66] Mueller issued charges of aggravated identify theft, codified under 18 U.S.C. § 1028A(c) for indictment purposes.[67] Remedies available to the government for a broad range of fraudulent securities claims were also included as part of the indictment.[68] Additionally, the Indictment referenced various administrative agencies whose rules were violated as per the indictment. For example, the FEC (Federal Election Commission) rules on foreign contributions to election communications, FARA (Foreign Registration Act) managed by the DOJ (Department of Justice) requiring foreign agents to register and advise the United States government of activities, and finally the U.S. Department of State as to requirements of truthful statements to obtain a visa.[69]

The awesome weight and protection of these Federal laws and agencies is in stark contrast to the absence of protections against racially divisive speech. Indeed, it was not that the defendants prodded at our racial fault lines that was a legal issue, it was only how they did it. That the Special Counsel could only indict on technicalities like bank fraud and identity theft, rather than indict directly on the attack on our racial divisions as a proxy attack our society at large, requires an examination of

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know who the hell they are [crowd boos]" . . . "We're going to keep radical Islamic terrorists the hell out of our country, OK? [crowd jeers]") (addressing Mexico at 24:24, "It's a one-way highway right into Mexico, with our jobs and our money. I always say we get the drugs they get the money") (addressing immigration at 57:54, "We're going to end illegal and very dangerous immigration [large applause]"); *see also* Donald Trump, Presidential Candidate, Campaign Rally in Tampa, Florida (Nov. 5, 2016), (addressing immigration at 38:51, "Very quickly. We will stop illegal immigration, deport every last criminal alien, and dismantle every criminal gang and cartel threatening our great citizens [crowd roars]").

66 18 U.S.C. § 371

67 Indictment, *supra* note 51, at 34-35.

68 *Id.* at 35-36 (noting 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) provide that upon conviction, the defendants "shall forfeit to the United States any property, real or personal . . . derived from proceeds traceable to the offense(s) of the conviction." And if any of that traceable property has been lost, damaged, placed beyond jurisdiction, etc., the United States intended to "seek forfeiture of any other property of said defendant.").

69 *Id.* at 11-12.

the laws that created this disability that we will address in sections III and IV.

Robert Mueller, Ashcroft v. Iqbal, and Obviating Race in Modern Law

It is interesting to note that Robert Mueller himself has had a role in obviating race as a legal matter. Mueller, as former head of the F.B.I., was one of two named defendants in *Ashcroft v. Iqbal*, a case brought by a former Pakistani immigrant-detainee for the malicious, harsh, and discriminatory detainment he endured after 9/11.[70] Iqbal's complaint alleged that Mueller was "'instrumental' in adopting and executing . . . 'a policy [of abusive confinement] solely on account of [] religion, race, and/or national origin."[71] Iqbal's claims were not rejected by the Court "on the ground that they [were] unrealistic or nonsensical" nor had an "extravagantly fanciful nature, [which would] disentitle them to the presumption of the truth."[72] In writing for the majority, Justice Kennedy asserted that there was an "obvious alternative explanation"[73] to claims of racial animus — sometimes these incidents are an understood incident of your race.. Kennedy wrote the "September 11 attacks were perpetrated by 19 Arab Muslim hijackers [led and composed of] Arab Muslim[s]. . . . [thus] [i]t should come as no surprise that a legitimate policy . . . would produce a disparate, incidental impact."[74] Kennedy's explanation is silent on the abuse alleged during confinement, a core issue in the complaint, and instead held that one's race cannot be used to state a legal claim, but certain harms may fall upon a group or persons within a group, and the disparate harm is a valid explanation that could defeat a claim.

Iqbal is filled with context. Shirin Sinnar of Stanford Law School, challenged the Court's "narrative that rendered Iqbal . . . nearly invisible, [and] minimized the harm" he endured.[75] Sinnar intended to "bring to life the individual beyond the bare facts that the Justices found legally relevant." Parts III and IV of this paper accept that argument and add the Court does more than merely reduce questions of race, it *imposes* it's own context.

Sinnar also identifies that the *Iqbal* Court conflated racial definitions critical to their holding, specifically that "[m]ost Muslims are not Arab, and most Arab-Americans are not Muslim" yet the terms were almost

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70 556 U.S. 662, 669 (2009).
71 *Id.* at 680-681.
72 *Id.* at 681.
73 *Id.* at 682.
74 *Id.*
75 Shirin Sinnar, *The Lost Story of Iqbal*, 105 Geo. L.J. 379, 384 (2017).

interchangeable in the *Iqbal* opinion.[76] This error undermines the Court's logic and questions whether the Court is able to make sound judgements when race is involved, and the level of commitment the Justices have to understanding the basics of race, generally.

Mueller himself represents this problem — Mueller was a beneficiary in *Iqbal*, this landmark Supreme Court case which further neutralized race as a legal matter. Was he then the best person to analyze the evidence unveiled by the Senate on Russian Interference where racial matters were at the forefront? Should there have been a special entity assigned to him and his team to instill an appreciate the issues that race necessarily involves? We may not know the answers, but given these facts, the inquiry seems valid.

III: UNIQUELY AMERICAN. PROTECTION FOR ASSAULTIVE RACIAL HATE SPEECH POST-CIVIL RIGHTS MOVEMENT.

The fact that our Senate prioritized modern conceptions of First Amendment rights over national security interests might have been unthinkable to George Washington, considering his farewell address.[77] Two early British doctrinaires who were influential in conceptions of free speech were John Milton and Blackstone. Neither defended speech that could undermine national unity. Quite the opposite. Milton's *Areopagitica*, a speech addressed to the Parliament of England in 1644, contains "several passages . . . ritualistically quoted to the exclusion of all else [and] carry implications of majestic breadth" to support an absolutist free speech sentiment.[78] However, reading the document in full, his work was narrow and advocated for severe punishment for damaging speech; for example, he argued against the abuse of free speech and press in shocking terms "*if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectuall remedy, that mans prevention can use*."[79] Hardly an absolutist approach to speech.

Blackstone, the influential British jurist was not an advocate for modern, absolutist free speech either. Rather, Blackstone seems to invoke a balancing test fit for American courts today:

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[76] *Id.* at 414.

[77] *See* Washington, *supra* note 8.

[78] Leonard W. Levy, *Freedom of Speech in Seventeenth-Century Thought*, 57 THE ANTIOCH REVIEW 165, 171 (1999).

[79] *Areopagitica: A Speech of Mr. John Milton For the Liberty of Unlicensed Printing, To the Parlament of England*, THE JOHN MILTON READING ROOM, (noting the distinction in Milton's arguments between licensing and censorship, speech alone could be punishable).

> "The liberty of the press is indeed essential to the nature of a free state . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . .but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[80]

As George Washington promoted the "indissoluble community of interest as one nation"[81] encouraging the economic bond between North and South under the aegis of silence on slavery, Blackstone explicitly argued that societal cohesion was not to be attacked by speech or the press, and indeed could be criminal:

> [T]o punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.[82]

Nor does our first iteration of the First Amendment, found in the Articles of Confederation later transplanted into Article I, § 6 Cl. 1 of the United States Constitution, provide for broad protections for speech to the public. Before the Bill of Rights, protections for speech was very limited. Our Constitution only provided that:

> Senators and Representatives shall . . . .be privileged from Arrest during their Attendance at the Sessions of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[83]

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80 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOLUME 4: A FACSIMILE OF THE FIRST EDITION OF 1765-1769.

81 *See infra* p. 5.

82 BLACKSTONE, *supra* note 80.

83 U.S. CONST. art. I, § 6, cl. 1; *see* ARTICLES OF CONFEDERATION of 1781, art. V, para. 5 (providing "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace").

The Preservation of Peace and Good Order

This historical theme in free speech —governance, freedom of thought, within bounds that preserve good order— was carried into 20th Century American jurisprudence and provide a stark contrast to the recommendations of the Senate advocating that free speech principles must lead considerations even while combatting national security risks. Indeed, in *Schenck v. United States*, Justice Oliver Wendell Holmes' argued that the conspiracy charges for printing and distributing leaflets against military participation in World War I were legitimate; the defendants had no First Amendment protection that could overcome the Espionage Act, nor the needs of the government and national security in those circumstances.[84] While the main legal test derived from Schenck is "*whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent*" using the short-hand "*clear and present danger test*" removes all context from the analysis.[85] Beyond prioritizing national security as a legal matter, Holmes argued for a contextual review of speech as "*the character of every act depends upon the circumstances in which it is done.*"[86] The intent of the speaker was also simplified — the mere distribution of the leaflet in *Schenck* was sufficient to find intent; the defendants offered no dispute in the record.[87] Engaging in the act was sufficient to prove intent.

Over time, the "clear and present danger" test lost ground, and the Justices would vie for doctrinal dominance. Less powerful parties, i.e. the political dissidents, would be exposed to asymmetrical harms.[88] But the role of context would end with *Brandenburg's* acontextual, ahistorical approach.

Race and the First Amendment Line of Cases

While most First Amendment cases argued the rights of political speech and affiliation supportive of communism or socialism, one case gives insight into the Court's approach on race as a topic.

Terminiello v. City of Chicago was not a case adjudicating over a group of political activists speaking against the United States

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84 249 U.S. 47 (1919).

85 *Id.* at 52.

86 *Id.*

87 *Id.* at 51 ("Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point").

88 *See id.* at 52.

government.[89] Rather, Terminiello was found guilty in lower courts of disturbing the peace when he "vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[90] The litigation leading to the Supreme Court focused on the constitutionally protected status of his "derisive, fighting words."[91] Yet the Court "[would] not reach that question" and instead focused on a small procedural question — the manner in which a charge was passed to the jury for review in the court below.[92] Justice Douglas, writing for the majority, admitted that this was a question that "the parties did not dispute . . . [but made its] adjudication no less ripe for our review."[93]

Douglas gently put distance between the power of Congress to protect the nation and citizens, stating that "freedom of speech, though not absolute . . . [is] protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[94] Douglas, writing that "the right to speak freely and promote diversity of ideas . . . is [] one of the chief distinctions that sets us apart from totalitarian regimes"[95] upheld the "clear and present danger" test, but warned that "[t]here was no room under our Constitution for a more restrictive view [f]or the alternate would lead to standardization of ideas."[96]

The majority avoided confronting assaultive racial and religious speech, prompting vigorous dissents by fellow Justices Vinson, Frankfurter, and Jackson. Jackson attacked Douglas by claiming the Court now "fixe[d] its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order."[97] Jackson argued that the contextual, fuller "clear and present" danger test was valid, and that the impermissible nature of Terminiello's hateful speech, laced with racist invective proved "beyond dispute" that Chicago was "justified in punishing Terminiello"[98] — an argument aligned with both Milton and Blackstone. Ending his dissent ominously, Jackson wrote "if the Court

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89 Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).
90 *Id.* at 1.
91 *Id.*
92 *Id.*
93 *Id.* at 6.
94 *Id.* at 4.
95 *Id.* at 1.
96 *Id.* at 3.
97 *Id.* at 14.
98 *Id.* at 26.

does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[99]

The Silent Sea Change in Brandenburg

Brandenburg as our leading case on First Amendment rights today should be reviewed using the facts of the case, including context of that era. This section is critical of *Brandenburg* as the Senate's determination that we were subject to information warfare from an international adversary through the weaponization our First Amendment rights reveals a weakness: we are constrained by the same First Amendment rights that we are being attacked through, yet the solutions that we may consider are also constrained by those same First Amendment rights. This is a stunning position to be in, warranting an analysis of the leading case law that binds us in this paradox. This section begins with the facts of the *Brandenburg*, which must be rebuilt as there was never a written opinion by one judge — the state courts below offered no opinions, and the Supreme Court decision was per curium. The section starts with a chronology of when Clarence Brandenburg spoke, and the coordinating Klan violence that was inescapable national news at the time — the summer of 1964 when the Civil Rights Act was passed. Next is a look at the federal response the Klan murders in Mississippi that Brandenburg referenced in his speech, as well as the documented violence in St. Augustine, Florida at the same time.

Clarence Brandenburg was advocating for more Klan violence in these two specific places that were national news at the time due to severe violence and murders belies the notion that harm was not imminent. Next, a look at the structure of the *Brandenburg* per curium opinion, the rushed nature of the opinion, and an analysis of the dearth of appropriate case law analogized to by the Court in reaching its conclusion (all case law used in the analysis relates to Socialist or Communist party members speech and associations against relevant statutes — not a sound comparison for Klansmen advocating more violence at the peak of Klan violence). Finally, a look at the reality of the politics and the players of the era. A heavyweight on the Court, Justice Hugo Black, had a noted Klan past and fiercely fought against anti-lynching bills as a United States Senator. Considering the threats to our nation today, an honest analysis of *Brandenburg* is warranted.

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[99] *Id.* at 37. The other dissenters on the Court were equally concerned and offended by the majority's undermining of the "clear and present danger" test by allowing this otherwise impermissible hate speech to be granted constitutional cover when the majority by focused on "one sentence . . . that was no part of the case until this Court's independent research ferreted it out [of the record]." *Id.* at 7.

Facts of Brandenburg

Twenty years after *Terminiello*, *Brandenburg* was born out of America's head-on fight against racism and oppression during passing of the Civil Rights Act of 1964. The speech in question was a particularized and nationally broadcast threat by the Ku Klux Klan, during the height of the violence during the Freedom Rides of June 1964. The violent Klan speech was considered "mere advocacy" during a time of great violence.[100] The opinion offered a sanitized version of the facts, and ignored the actual, relentless violence this nation wrestled with during the Civil Rights Movement. Without any context, the speech the Court narrowly focused on is as follows:

> We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken . . . .We are marching on Congress July the Fourth, four hundred thousand strong . . . From there . . . one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.[101]

Identifying Mississippi generally, and St. Augustine, Florida is unusual. Why this one state, and why this one city, out of the thousands of small cities in the United States?

While the opinion was released in 1969, Clarence's Brandenburg's speech was given on June 28, 1964.[102] June 1964 was a pivotal and volatile month that gripped the nation: On June 19, 1964, the Senate passed H.R. 7152, the Civil Rights Act of 1964, after 60 straight days of debate in the Senate, with Senate chambers "filled beyond capacity" and "hundreds more gathered" "outside of the Capitol building along with news cameras.[103] By June 24, 1964, the F.B.I and the National Guard were deployed to Mississippi to locate three murdered civil rights workers in a case that gripped the nation, and remains notable for its violence a half-century later.[104] On June 24, 1964, law enforcement in St. Augustine,

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100 Brandenburg v. Ohio, 395 U.S. 444 (1969).

101 *Id.* at 446.

102 Brief for Appellant at 4, Brandenburg v. Ohio, No. 492 (1964).

103 *Civil Rights Act of 1964*, UNITED STATES SENATE.

104 *See infra* pp. 23-26; *see also* Jason Daley, *After 52 Years, the "Mississippi Burning" Case Closes*, SMITHSONIAN MAGAZINE, (noting that in 2016, Mississippi Attorney General Jim Hood finally closed the case as officials concluded no new convictions were likely despite the decades of work. At trial in 1967, the all-white jury and judge acquitted twelve of the defendants, and the seven others received jail time ranging between tree and nine years. Only 41 years later was "Edgar Ray Killen, the Klan leader who orchestrated the

Florida advised that they no longer could control the violence there as hundreds of segregationists were attacking non-violent protestors led by Dr. Martin Luther King, Jr. who was based in St. Augustine for the month of June.[105] On July 2, 1964, President Johnson signed the Civil Rights Act of 1964 in a televised event.[106] To distinguish Brandenburg's speech as not inciteful and not likely to create imminent lawless action is questionable.

Mississippi Burning: Klan Violence in Mississippi & the Federal Response in June 1964

June 1964 was the "Freedom Summer," "a massive three-month initiative to register southern Black people to vote in a direct response to the Klan'scampaign of fear and terror."[107] This initiative enraged the local Mississippi Klan who targeted one social worker, Michael Schwerner, in particular for revenge — young, Jewish, and from New York, Schwerner had been particularly active and successful in boycotts and voter registration.[108] On June 16, 1964 aiming to find Schwerner, the KKK — according to the FBI— "descended on a local church meeting looking for him" but not finding their target, the Klan simply "torched the church and beat the churchgoers" instead.[109] Returning on June 21st, the Klan "firebombed the church, reducing it to charred rubble."[110]

Later that evening, Schwerner, along with two other field workers involved in helping register Black voters —James Chaney and Andrew Goodman— were arrested for speeding, and for burning the church.[111] It was of course a rouse. That evening, the three voting registration workers were released, but in a "preordained plan, KKK members followed" out

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attack, found guilty of three counts of manslaughter. This national tragedy, represented the violence at large on people of color and those who tried to aid them. President Barack Obama in 2014 "posthumously awarded Chaney, Goodman and Schwerner the Medal of Freedom, the highest civilian honor in the United States.").

105 Equal Justice Initiative, *White Community Members Protest Integration of St. Augustine Beaches; Engage in Violence Over Several Days*, https://calendar.eji.org/racial-injustice/jun/24.

106 Library of Congress, *The Civil Rights Act of 1964: A Long Struggle for Freedom, Television Coverage of President's Johnson's Remarks upon Signing the Civil Rights Act of 1964*.

107 *Mississippi Burning*, FBI FAMOUS CASES & CRIMINALS.

108 *Chaney, Goodman, & Schwerner*, CORE CONGRESS OF RACIAL EQUALITY, Schwerner was a CORE field worker and came to Mississippi with his wife. He organized boycotts of stores who sold to Blacks but would not hire Blacks with success, received hate mail and threats, including "police harassment." *Id.*

109 *See Mississippi Burning*, *supra* note 107.

110 *Ku Klux Klan, A History of Racism and Violence*, Staff of the Klanwatch Project of the Southern Poverty Law Center (6th Ed.), at 30.

111 *Id.* at 31.

of the courthouse in "two carloads" — the Klansmen shot the three civil rights workers point blank shortly thereafter, and buried the three young men.[112] On June 22, 1964, the Department of Justice was notified of their "disappearance" and then-Attorney General Robert Kennedy got the FBI involved; June 23rd the FBI found the charred car, and on June 24th, 1964, the FBI and the National Guard "launched a massive search" for the Civil Rights activists' bodies.[113] President Lyndon Johnson had the FBI open a new office in Jackson, Mississippi to constrain the Klan.[114] It is after all of these events, that on June 28, 1964, Clarence Brandenburg threatened to march the Klan to Mississippi before the victims' bodies were even found.

'Mississippi Burning' was major national and news. On June 27, 1964 alone, The New York Times devoted several articles to the mens' disappearance, including the following lengthy front-page headline: "*DULLES REQUESTS MORE F.B.I. AGENTS FOR MISSISSIPPI; Urges President to Expand Force in State to Control 'Terroristic Activities'; GRAVE DANGER IS CITED; U.S. Officials Arrest 3 White Men on Charge of Threat to Civil Rights Workers.*"[115] Allen W. Dulles was the former Director of Central Intelligence and served as President Johnson's special representative for this case; Dulles recommended that any organization aiding voter registration and other Civil Rights projects in Mississippi should alert their teams "that '*very, very grave danger*' awaited them in that state."[116] Additionally, President Johnson sent 200 Naval officers to Mississippi to help find the bodies, along with Naval helicopters.[117] Many in Mississippi were upset. Mississippi House Representative denounced federal involvement, claiming President Johnson had "'surrendered' to the demands of 'every left-wing agitator' in the country."[118]

KKK violence against the Freedom Riders was universally understood as imminent and likely. The *New York Times* wrote that this "explosive situation —[was] the first of what may be many in the summer ahead" and

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112 *See Mississippi Burning*, *supra* note 107.

113 *Id.*

114 *Id.* (stating that the mens' remains would not be found until August 4, 1964).

115 Marjorie Hunter, *DULLES REQUESTS MORE F.B.I. AGENTS FOR MISSISSIPPI; Urges President to Expand Force in State to Control 'Terroristic Activities'; 'GRAVE DANGER' IS CITED; U.S. Officials Arrest 3 White Men on Charge of Threat to Civil Rights Workers."* NY. TIMES, June 26, 1964.

116 *Id.*

117 Tom Wicker, *PRESIDENT SENDS 200 SAILORS TO AID IN MISSISSIPPI HUNT*, NY TIMES, June 25, 1964 (emphasis added).

118 *Id.*

understandably a high priority for the Justice Department, and the President personally.[119]

J. Edgar Hoover gave the following instructions to the high-ranking officers selected to work in the new Mississippi office "'You will do whatever it takes to defeat the Klan, and you will do whatever it takes to bring law and order back to Mississippi.'"[120] The violence was so severe and so pervasive that F.B.I. agents themselves were recipients of threats, being forced to "look underneath [our] cars to make sure we did not have any dynamite strapped underneath."[121]

Klan violence in Mississippi as a response to the federal push towards Civil Rights was not new, again pointing to the predictability and entrenchment of violence there. Medgar Evers, Mississippi's first NAACP field secretary, was shot in front of his home a few hours after President Kennedy addressed the nation on television and radio about Civil Rights.[122] Evers died soon after.[123] The assassin, Byron de la Beckwith was tried twice in 1964 in Mississippi courts; both trials ending in jury deadlock.[124] The trails were a sham. Beckwith rose to the level of "folk hero" in Mississippi and the sitting Mississippi Governor, Ross Barnett, attended the trial as a "well-wisher" in support of the assassin.[125]

It is remarkable that the Supreme Court held language by a Klan member who in a national broadcast promised that the Klan would seek "revengeance" within days of Klan murders as "mere abstract teaching", protecting it via footnote as "peaceable assembly."[126] It simply defies

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119 *Id.*

120 *KKK Series*, FBI FAMOUS CASES & CRIMINALS, https://www.fbi.gov/history/famous-cases/kkk-series.

121 *Id.* Retired agents participated in an oral history of certain work of the F.B.I., here, those agents assigned to infiltrate the Klan. It is unmistakable in the mandates of the Federal government, accounts of the severity of their work, and the pride in feeling that their sacrifices and dedication allowed the F.B.I. to "[break] the back of the Klan in Mississippi." This questions why the First Amendment was read by the Supreme Court to allow continued advocacy of violence, in the height of a particularly violent moment in history. *Id.*

122 John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963)/ (advising the nation that the National Guard of Alabama was deployed to protect two Black students, and to advance Kennedy's and thus the Federal Government's stance on the urgent need for Civil Rights).

123 Medgar Evers, FBI CASES & CRIMINALS.

124 Ron Harrist, *URGENT White Supremacist Byron De La Beckwith Convicted Of Medgar Evers' Murder*, ASSOCIATED PRESS (Feb. 5, 1994). After the two failed and biased trails in 1964, Evers' widow attempted again to pursue the case. In 1991, on the third trial, new witnesses and evidence of de la Beckwith's guilt, finally receiving a life sentence for the murder in 1994 — thirty years after Evers' assassination. *Id.*

125 *Id.*

126 Brandenburg v. Ohio, 395 U.S. 444, 449, n. 4 (1969) (citing to De Jonge v. Oregon, 229 U.S. 353, 364 (1937)) ("Statutes affecting the right of assembly . . . must observe the

reason to refer to these several weeks in American history, in these particularized locations, while our federal government was actively engaged in tampering extreme violence as "times of peace" and questions the decision-making process in *Brandenburg*.

Klan Violence in St. Augustine, Florida: the "worst in years" in June 1964 as Dr. Martin Luther King, Jr. Visited to Desegregate the City

On the same frontpage cover of the N.Y. Times on June 26, 1964 addressing violence in Mississippi, was another article directly relevant to *Brandenburg*: "*St. Augustine Aides Say They Cannot Keep Peace*" with an image of the Florida Governor, Farris Bryant, touring the Old Slave Market in St. Augustine "where racial disturbances occurred."[127] St. Augustine law enforcement advised a Federal judge in Jacksonville, Florida "that they were unable to stop white mobs from assaulting civil rights demonstrators."[128] This admission in court followed "a night of terror in which white mobs routed the police [and assaults] including women and children."[129] More victims received emergency hospital care in the "worst outbreak of racial violence since [civil rights demonstrations had begun]" a year prior.[130] The Times implicating the local Sheriff as having close affiliations with Klan leaders in St. Augustine, through "social organization[s] . . . regarded here as nearly synonymous with the Klan."[131] The "racial situation in St. Augustine was "'very dangerous and explosive'" leading the Florida Governor to send in 80 additional State Troops.[132]

The N.Y. Times frontpage article focused on the 200 or so people who attacked the civil rights marchers. Also on June 25, 1964, about 100 Black people were attacked for attempting to enter the waters of a beach.[133] The violence on St. Augustine was relentless. In another N.Y. Times headline, "*Dr. King Describes St. Augustine As Most Lawless City He's Seen*" reporting on multiple death threats against Dr. King's life and gunshots into the car of a man driving home with his young son from a meeting

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established distinctions between mere advocacy and incitement to imminent lawless action, . . . 'The right of *peaceable* assembly [like free speech] . . . is equally fundamental").

127 Homer Bigart, *St. Augustine Aides Say They Cannot Keep Peace*, N.Y. TIMES, June 26,1964.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

where Dr. King addressed a crowd of Black people on civil rights activities.[134] Dr. King held news conferences and advised that the White House gave him assurances that Federal and state authorities would [protect] his demonstrators.[135] Federal protection was needed as the "County Sheriff . . . had recruited special deputies to handle racial trouble from the ranks of the Ku Klux Klan."[136] Indeed, six days later, the Times continued their reporting on Klan violence in St. Augustine claiming that by night, St. Augustine "is the scene of an outpouring of racial hatred and violence."[137] With weapons found along the path of demonstrators including "sulfuric [sic] acid, chains, and clubs."[138]

These known events in Mississippi and St. Augustine call into question the formation of the *Brandenburg* test, that a State is not allowed to limit or punish "advocacy of the use of force or of law *except* where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[139] Certainly, the specificity of calling the Klan to these two focal points of ongoing Klan violence qualifies as incitement and the intent to produce "imminent lawless action."[140] Further, the *Brandenburg* test does not require success or completion of an act. Imminent means "impending" "hanging over one's head" and "close at hand."[141] The test is therefore a bit odd temporally to Mississippi and St. Augustine — violence was perpetual, it had occurred, was occurring, and certainly threatened to continue to occur. As troops were sent to both locations, encouraging more Klansmen to march in defiance absolutely threatens more violence. If the test fails because one does not *believe* in the imminence of the violence or the likeliness of violence at that time, that lack of belief is not credible.

Mississippi and St. Augustine were the frontlines for entrenched Klan violence. Further, in both locations, the Klan was entrenched in law enforcement, making the "revengeance" that Brandenburg advocated more likely: violence in those locations was sanctioned and given cover.[142] The erasure of the violence of the summer of 1964 also questions the validity of the concurrences in Brandenburg Court. Justice Douglas,

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134 Homer Bigart, *supra* note 127.
135 *Id.*
136 *Id.*
137 John Herbers, *Martin Luther King and 17 Others Jailed Trying to Integrate St. Augustine Restaurant*, N.Y. TIMES,
138 *Id.*
139 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
140 *See id.*
141 *Imminent, Oxford English Dictionary*.
142 *See Mississippi Burning*, *supra* note 107 (noting that both the Deputy and Sheriff were indicted and arrested in the murders); *see also* Homer Bigart, *supra* note 127 (noting that the sheriff was involved with an organization synonymous with the Klan).

concurring, argued that "the 'clear and present' danger test [might be] congenial to the First amendment in time of a declared war . . . [but] not reconcilable with the First Amendment in days of peace."[143] Claiming that this moment in American history —abductions, murder, bombings, arson, beatings, etc.— were "days of peace" casts doubt on the logic of that concurrence. Further, the rest of the nation knew of the violence, and was getting play-by-play news on the violence. That Douglas made such a claim casts a shadow on his words.

On June 25, 1964, Walter Cronkite dedicated one full hour of national news coverage to the Mississippi Burning case.[144] For comparison, Cronkite only dedicated fourteen minutes to the Watergate scandal in 1972.[145] Cronkite opened his one-hour special to the nation, "*The Search in Mississippi*" stating that the three men were "the focus of a whole country's concern" with footage of a Black civil rights leader warning the civil rights workers from the North that "people should expect to get beaten . . . you might even get killed" when trying to warn them of the dangers of this work.[146] These statements were within the first minute of the broadcast.

The white Mississippians interviewed commented that that "the real crux of our problem . . . under the Civil Rights Bill is an attempt to revolutionize society by force."[147] This fear was expressed by Clarence Brandenburg in his speech "Give us our state rights."[148] The fact that the Civil Rights Bill was brought to the Senate Floor by subverting the normal procedure that would have required Mississippi Senator's involvement,[149] may have added to the local conception that Congress' authority was not valid. Further, while many Americans of all backgrounds were moved by the "substantive evils" prevalent in the violence and oppression of Black people, the intense maneuvering to get the Bill passed and the lack of support by almost one-third of the Senate may have sustained a narrative that there were no "substantive evils," and that Congress did not have the proper authority to pass the Civil Rights bill.

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143 *Brandenburg*, 395 U.S. at 452 (Douglas, J., concurring).

144 *From the Archives: "The Search in Mississippi" featuring Walter Cronkite*, CBS NEWSHOUR (July 17, 2014), (broadcasting originally on June 25, 1964).

145 Douglas Martin, *Waler Cronkite, 92, Dies; Trusted Voice of TV News*, N.Y.TIMES (July 17, 2009), .

146 CBS NEWSHOUR, *supra* note 144, at :10 and 14:06.

147 *Id.* at 47:46.

148 *Brandenburg*, 395 U.S. at 457, n. 1.

149 *See id,* see also *Landmark Legislation: The Civil Rights Act of 1964 Senate Chamber Desk*, United States Senate. (stating that Senator Mansfield placed the Civil Right Bill on the Senate calendar directly, rather than "refer it to the Judiciary Committee, chaired by civil rights opponent James Eastland of Mississippi" as Eastland would subvert civil rights legislation.)

Improper Analogies in Brandenburg: Socialism and Racial Violence as Incoherent Analogies

Brandenburg is unique as much of the prior twentieth-century First Amendment case law used for analogies involved bias against socialists and fear of overthrow of the United States government, espionage, and involvement with various Communist Parties. While *Terminiello* included racially motivated hate speech, that opinion never addressed the content of the speech, rather focused upon one hidden procedural issue below.[150] *Brandenburg* citied to no case that addressed hate speech or racial violence.[151] Instead, the thrust of *Brandenburg's* legal reasoning was based on eight cases, generally dealing with socialist groups and speech, striking down statutes on overbreadth and vagueness, that "failed to draw distinctions" between the "mere abstract teaching and moral necessity [for] force and violence" in speech versus "actually preparing a group for violent action and steeling it to such action."[152] The Court was seeking to demark the kind of speech that "the Constitution has immunized from governmental control."[153]

Of those eight cases, three highlight the general lack of applicability of the group. In *Aptheker v. Secretary of State*, the Court in 1964 found that legislation under the Subversive Activities Control Act was

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150 *See* Terminiello v. City of Chicago, 337 U.S. 1 (1949).

151 *See Brandenburg*, 395 U.S.

152 *Id.* (citing Yates v. United States, 354 U.S. 298 (1957) (on advocacy of governmental overthrow by members of the Communist party in California by joining the party, recruiting, and writing and publishing "The Daily Worker"; De Jonge v. Oregon, 299 U.S. 353 (1937) (defendants arrested during a speech on July 24, 1934, open to the public, given by the Communist Party, protesting conditions of the country jail, and actions of the police as to a workers' strike); Stromberg v. California, 283 U.S. 359 (1931) (overturning a CA statute that made any display of a red flag (banner, badge, or device) an "invitation or stimulus to anarchistic action . . . of a seditious character guilty of a felony."); United States v. Robel, 389 U.S. 258 (1967) (when Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated; holding unconstitutional § 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 64 Stat. holding that "it shall be unlawful for any member of the [Communist] organization 'to engage in any employment in any defense facility.'; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (finding state plans to terminate or prevent appointment of "subversive" employees unconstitutional by members of faculty for a university); Elfbrandt v. Russell, 384 U.S. 11 (1966) (finding it a violation of the First Amendment to force a loyalty oath on an Arizona school teacher); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (finding the clause of the Subversive Activities Control Act making it a felony for a member of a Communist organization "to apply for, use or attempt to use a passport" as "unconstitutional on its face"); Baggett v. Bullitt, 377 U.S. 360 (1964) (holding that the Washington statutes requiring teachers and state employees, as condition of employment, to take loyalty oaths are unconstitutionally vague)).

153 *Brandenburg*, 395 U.S. at 448.

"unconstitutional on its face" and could not impose a felony charge for members of the Communist party who "apply for, use or attempt to use a passport."[154] The *Aptheker* Court held that this statute "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the *Fifth* Amendment."[155] The Court chose to extend the argument to the First amendment guarantee of freedom of association as "the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."[156] *Brandenburg* contained no Fifth Amendment legal claim. Further, arguing that a state cannot punish Brandenburg's violent speech to "bury" a victimized racial minority group while filming themselves for broadcast, bearing arms, burning a cross, and promising that "we intend to do our part" after national outrage of that exact violence is not properly analogized against a question of whether a state can prevent members of a Communist group from obtaining and using passports.

In *Baggett v. Bullitt*, the Court held that state statutes requiring "loyalty oaths" as a condition of employment for teachers and state employees were unconstitutional.[157] Concerns on the "vagueness" the teachers could suffer included hypotheticals that criticism of "the design or color scheme of the state flag or unfavorable comparison [] with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath."[158] The vagueness and overbreadth in *Baggett* would force the oath-taker to "'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'"[159] The appellants concern was that they could not understand at what point speech would be proscribed by the oath, nor "define the range of activities" that would convert a permissible act into an impermissible act.[160] Here also, there is vast legal space between the concerns in *Brandenburg* and *Baggett*. The Court in *Baggett* analyzed hypotheticals on what meaning could be proscribed to preferences on the color scheme of flags to demonstrate overbreadth; the statute in question in *Brandenburg* punished speech that advocated "crime, violence, or

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154 *Aptheker*, 378 U.S. at 500.
155 *Id.* at 504.
156 *Id.* at 507.
157 377 U.S. 360 (1964).
158 *Id.* at 371.
159 *Id.* at 372.
160 *Id.* at 378 (noting also that the state of Washington statute in question had never been interpreted by the state courts. The Supreme Court argued that abstention, returning this case to Washington to decide, would only give rise to "extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty").

unlawful methods of terrorism."[161] Those dangers had and were continuing to occur in the specific places referenced by the speaker, such that it became the personal focus of the President of the United States to reign in that violence. *Brandenburg* could not rely on claims of vagueness or uncertainty as to what type of speech was permissible as the Court did in *Baggett* —cross burning and naming groups to assault as they were being assaulted are specific and obvious. The Court went beyond the required inciting or producing imminent lawless action that is likely to incite or produce such action, to also require "preparing a group for violent action and steeling it to such action."[162]

Here, the Court anchored the *Brandenburg* reasoning to *Noto v. United States*.[163] *Noto* is yet another case dealing with restraints on Communist Party affiliations via statutory restrictions, and again, with no discernible connection to the risks of racially assaultive speech.[164] *Noto* was an inappropriate analogy and was overgeneralized and misapplied in *Brandenburg*. In *Noto,* the Court constrained their holding to Communist party activity, as "the mere abstract teaching of *Communist* theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[165] *Brandenburg* altered the *Noto* holding by simple ellipses without any explanation or substance, holding that "'the mere abstract teaching * * * * of the moral propriety . . . '" collapsing the teaching of Communist theory with advocating and encouraging Klan violence, creating a generality not logically related to *Noto*.[166]

Further, even if *Noto* was apposite, the *Brandenburg* Court then should have employed the use of context and reasonable levels of evidence as offered in the *Noto* holding — *Noto* was rich in substantive analysis that *Brandenburg* refused to engage in:

There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and

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161 *See id.*, *see also* Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (the full citing in the case to the Ohio Criminal Syndicalism Statute was "for advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.").

162 *Brandenburg*, 395 U.S. at 448.

163 Noto v. U.S. 367 U.S. 290 (1961).

164 *Id*.

165 *Id.* at 297-298. Additionally, Noto references this not as a new holding, but as a rule through stare decisis "'We held in Yates, and we reiterate now . . . ," a stark difference to the bold altering of prior caselaw in *Brandenburg*.

166 *Brandenburg*, 395 U.S. at 448.

sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole[167]

Brandenburg refused to properly acknowledge the real violence that gripped the nation in June 1964 in Mississippi and St. Augustine, Florida in contravention to *Noto*. Instead, the Court surgically pulled from recent doctrinal evolutions on the First Amendment that had never been used for the specific power paradigm at issue — the stronger group advocating for additional racial violence against a weaker group. The power paradigm in *Brandenburg* conflicted with the prior case law it cited, In *Noto*, *Baggett*, and *Aptheker*, the Court protected the weaker party (socialist and communist party affiliates, and teachers and state employees wishing to avoid a loyalty oath) against the more powerful party, the government. *Noto*, *Baggett*, and *Aptheker* do not relate to the underlying facts in *Brandenbur*g with well known, well documented violence that left many terrorized, injured, or dead.

Brandenburg's Per Curium Status, Justice Abe Fortas' Forced Resignation, and a Bare-Bones, Rushed, and Edited Opinion

Brandenburg is not only questionable in its logic that "days of peace" can include the Klan murders of Mississippi Burning, or President Johnson's personal oversight of the FBI and Armed Forces involvement to quell violence. *Brandenburg* is a per curium opinion, sterilely written, which is in sharp contrast to lengthy, impassioned, and intellectual arguments in both prior First Amendment opinions and dissents. Since *Schenck* in 1918, Justices had vied for doctrinal supremacy in this space.[168] The silence in *Brandenburg* cannot be missed.

The early procedural path of *Brandenburg* is unique in that no written opinion accompanied the case to the Supreme Court.[169] The lack of statements, testimony, and analysis of fact are unusual, and would logically lead to the desire for a "robust and open" analysis in the opinion, particularly given the path of First Amendment cases in the Court during the prior fifty years. The Supreme Court did not fill that void.

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167 *Noto*, 367 U.S. at 298.

168 *See* Schenck v. United States, 249 U.S. 47 (1919). The opinions and dissents in First Amendment cases are notable in part for the intellectual arguments advanced, and the ability to see the judges align doctrinally and attempt to advance their conception of the First Amendment protections is beyond the scope of this paper, but a few of the cases on the path to *Brandenburg* discussed demonstrate this point.

169 *Brandenburg*, 395 U.S. at 445; *see also* Brief for Appellant at 1, Brandenburg v. Ohio, No. 492 (1964) ("There are no written opinions, either reported or unreported, in this case. The Judge assigned to write the opinion for the Ohio Court of Appeals died before completing it, and the Ohio Supreme Court issued no opinion.").

Martha A. Field, currently a Langdell Professor of Law at Harvard Law School, clerked for Justice Abe Fortas in the 1968-69 Supreme Court term and worked directly with him on writing the *Brandenburg* opinion.[170] Her account is pivotal to understanding the abnormal and harried gestation of this landmark case despite the tectonic shift into the expansive First Amendment protections *Brandenburg* gave rise to. Field's account is that Justice Fortas knew while writing *Brandenburg* that the opinion would be released as a per curium decision as he expected to submit his resignation before release.[171] *Brandenburg* was written "on a rushed schedule."[172] The "opinion went to the conference on a Friday, [then was quickly] assigned to Justice Fortas.[173] *Brandenburg* was written just in time for submission — Fortas resigned the day after the Court voted to adopt his opinion.[174] All Field knew was "that Justice Fortas needed to have the opinion right away."[175]

We may never know what damage the adverse conditions *Brandenburg* was written in caused. But a germ of doubt appears in Field's writing about the end result:

I've often thought since *Brandenburg* that we should have focused more . . . on both the type and the gravity of the danger. The danger, if there was any in *Brandenburg*, was grave: an assault on American values, an appeal to white supremacy and anti-Semitism."[176]

While Field sees the "grave danger" in *Brandenburg*, she does not go as far as offering *Brandenburg's* speech was connected to violence; she does acknowledge that *Brandenburg* is "wholly unlike" prior landmark First Amendment cases given the unique dangers presented.[177] Field notes that "[u]ntil Brandenburg, "the clear and present cases focused on either overthrow of the government or interference with a U.S. war" situations not equal to documented Klan violence against a discrete minority group.[178] Nor does it address the immediate shift in the power-paradigm

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[170] Martha A. Field, *Brandenburg v. Ohio Its Relationship to Masses Publishing Co. v. Patten*, 50 Ariz. St. L.J. 791 (2018). Field wrote that she had declined speaking about this topic for fifty years out of deference to Court etiquette imposed by then Chief Justice Earl Warren. Her decision to speak in 2018 was aided by the change in direction on speaking about Court decisions.

[171] *Id.* at 800.

[172] *Id.* at 791.

[173] *Id.*

[174] *Id.* at 801. Further accounts claim that Fortas missed the editing process altogether given this unfortunate, rushed pace.

[175] *Id.*

[176] *Id.* at 798.

[177] *Id.*

[178] *Id*. (citing to Brandenburg v. Ohio, 395 U.S. 444, 450–53 (1969) (Douglas, J., concurring) (summarizing the prominent cases involving the clear and present danger test)).

between parties in First Amendment cases. In the Espionage-Communist line of First Amendment cases, it was the powerful government who sought protection against defendants often seen as weak.[179] Justice Douglas dissenting in *Dennis* hinted at the value he placed on the power-paradigm by arguing that a parties' "abhorrent" speech was not enough to nudge that speech into constitutionally unprotected territory, rather it was an analysis of the power of the persons, and the extent of their reach into societal power dynamics that did.[180]

Field also casts doubt on the legal result in *Brandenburg.* According to Field, "Fortas viewed *Brandenburg* as a resuscitation and clarification of the clear and present danger test."[181] In the opinion, "Fortas wanted to say that a clear substantial imminent danger is what is required" to lose First Amendment protections.[182] Further support exists that Fortas merely intended to place *Brandenburg* as "just one in a long line of cases seeking to apply the clear and present danger test", and in no way intended *Brandenburg* to be a landmark decision that broke with precedent.[183]

Changes were made to the opinion upon Fortas' departure, before release to the public; Justice Brennan's edits removed positive reference to the clear and present danger test, and inserted language constraining the Government from allowing substantive review of speech.[184] It was Brennan who added that the advocacy in question must be "'likely to incite' imminent lawless action."[185] This seemingly small change altered the course of our laws. Fortas' version of the clear and present danger test required an inquiry into whether "the social conditions existed for lawless action, while Brennan's formulation asked if the advocacy itself would

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179 *See* Abrams et al. v. United States, 250 U.S. 616, 629 (1919) (advocating that the party with less power should not be punished, commenting that the defendants were "poor and puny anonymities" from whom not enough could be "squeezed from" to make a material difference"); *see also* Dennis v. United States, 341 U.S. 494, (1951) (J. Douglas, dissenting) (claiming that defendants in the Communist party were "miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful . . . political impotence . . . does not . . . dispose of the problem. Their numbers; their position in industry and government; the extent to which they have infiltrated the police . . . and other critical places all bear on the likelihood that their advocacy will endanger the Republic").

180 *Dennis*, 341 U.S. at 589 ("[t]heir numbers; their positions in industry and government; the extent to which they have infiltrated the police, the armed forces . . . all bear on the likelihood that their advocacy . . . will endanger the Republic").

181 Field, *supra* note 171, at 792.

182 *Id.*

183 Susan M. Gilles, *Brandenburg v. State of Ohio: An Accidental, Too Easy, and Incomplete Landmark Case*, 38 CAP. U. L. REV. 517, 526 (2010).

184 *Id.*

185 *Id.*

produce" the lawless action regardless of the social conditions.[186] Wholly different tests. Under Fortas' clear and present danger test, context and a substantive review were part of the submitted *Brandenburg* test. Under the edited per curium opinion, the test became narrow, stripped the role of context, and forced a review of utterances divorced from context.

Martha Field studied and confirmed the difference in the two opinions, and supports the argument that Fortas submitted his opinion with the "clear and present danger" test, but that language was edited out by Brennan.[187] Further, Field reminds us that Justice Black's concurrence spoke out strongly against the clear and present danger test, that it "should have no place in the interpretation of the First Amendment."[188] Justice Douglas claimed that the clear and present danger test was "not reconcilable with the First Amendment in days of peace."[189] In light of the power *Brandenburg* has today, and the effect seen in the Senate Intelligence Report on Russian Active Measures, the harried, per curium backdrop, and the either perversion or erasure of context certainly questions the roots of that decision. Moreover, the actual context in *Brandenburg* is simple and does not require deep reflection. Days of peace are not days the President sends in troops and dispatches the F.B.I. to quell violence and murder, nor when law enforcement in St. Augustine advised their federal courts and state Governor that they could not control the outsized violence in their state fomented by the Klan. *Brandenburg* is problematic for these many substantial reasons.

Lastly, the sea change *Brandenburg* brought to free speech is worthy of review for no other reason than the sharp change in law. *Brandenburg* pointedly "undermined the logic of several other early cases."[190] Leading legal scholars today posit that "[w]e might even wonder about the correctness of . . . *Brandenburg* to the extent that th[is] landmark cases broke with prior case law."[191] This stark change in First Amendment

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[186] *Id.* at 527. This explains also the awkward and redundant language in the holding "advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

[187] Field, *supra* note 171, at 801.

[188] *Id.* (commenting that as the late edits to *Brandenburg* are silent on the clear and present test, the insistence that Justice Black put on negating it's importance points to the fact that the original opinion was indeed base on the clear and present danger test) ; *see also* Brandenburg v. Ohio, 395 U.S. 444, 450 (1969).

[189] *Brandenburg*, 395 U.S. at 449-50.

[190] Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even before the First Amendment*, 38 CAP. U. L. REV. 503, 505 (2010).

[191] *Id*. at 505. Akhil Reed Amar found the renegade nature of *Brandenburg,* and "other constitutional modalities" outside of case law and doctrine are "strong additional support for a robust constitutional right of political expression." This then requires the reader to accept *Brandenburg's* threats as political expression, and a manner of self-governance. Amar used *Brandenburg* while showing the path to today's "rock-solid" "free expression

jurisprudence on its own suggest that *Brandenburg* is ripe for reexamination. That the extensive findings of the Senate's Select Committee on Intelligence confirm race is a unique topic within speech, is a tool to efficiently and effectively divide our nation and interfere with American "citizens and democratic institutions" through our "existing weaknesses" provides just the opportunity for urgent review now.[192] However, it is the "existing weaknesses" that require a legal analysis that appreciates racially charged threats, and does not treat these threats as a mere intellectual exercise.[193] Much analysis of *Brandenburg* includes scholars dismissing the legitimate fear and harm of Klan threats, looking only to "the record [which] revealed almost no evidence of likely effect."[194] Further, that the Klan threat was "silly" . . . "[a]lthough some of the group had guns . . . nobody can suppose that a silly, hateful speech by an unknown man would present any immediate danger to the President, Congress, or the Supreme Court."[195]

As reviewed earlier, this paper identifies the exact Klan violence and threats. Moreover, the threat was not just to Congress, it was to the innocent people of Mississippi and St. Augustine, Florida who were victims — they deserved consideration. Today, we have entered an era where violent speech has materialized into real violence and threats to members of Congress and the Vice President. Dismissing the harms in *Brandenburg* was unwarranted and has not served us well.

Klan Terror & The Law. Justice Black's Klan Past & His Senate Anti-Lynching Filibuster

Justice Black was a prominent advocate of absolutist First Amendment protections. In his famous speech at NYU in 1960, Black discussed the historical demands for the Bill of Rights but focused on "[t]he First Amendment [as] truly the heart of the Bill of Rights."[196] Black recounted draconian punishments in England, citing to examples of William Prynne a lawyer who was mutilated for nothing more than "writing books and pamphlets."[197] However this concern for corporal

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of political opinions." However if one does not agree that the klan threats were political expression, we can note that to some extent, *Brandenburg* is an outlier, supporting its re-examination.

192 Sen. Intel. Rep., *supra* note 2, at 5, 21.

193 *See id.* at 21.

194 Gilles*, supra* note 184, at 519.

195 *Id*. (paraphrasing Justice Oliver Wendell Holmes, which is an example of treating such a threat as an intellectual exercise).

196 Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 881 (1960).

197 *Id.* at 870. The account is quite gruesome: Black told the students that Pyrnne's ears were cut off by court order, then then "subsequently, by another court order, had his

safety was absent in his *Brandenburg* concurrence. Black insisted that the "'clear and present danger' doctrine should have no place in the interpretation of the First Amendment."[198] Black did not explain why threats of bodily harm are acceptable, while sustaining that the harm, once committed, is an evil. Nor would Black question Douglas' claims that these were times of peace, nor question the depositions in the Brief for Appellant from Klan officials on the "fraternal nature of the Klan and its organizational prohibition against violence."[199]

The Appellant's Brief to the Court included supporting statements via deposition from the President (Imperial Wizard) of the Klan, James K. Venable, who professed to a zero-tolerance rule within the Klan against violence, and that Venable continually advised all national Klan branches to refrain from violence in their effort to "accomplish this race war as you might call it."[200] This statement fails for many reasons — first the notion of a peaceful "race war" is either a stunning euphemism or admission of a violent goal, and further, why would the leader of a peaceful organization need to continually remind the Klan at large to refrain from violence unless violence was a recurring issue? Further, this professed Klan advocate of peace did not seek the humanity in non-violent, peaceful assembly for any reason other than reluctantly as a means and an end, not because violence is bad, it just "gets us all in trouble."[201] Finally, as Brandenburg's speech was made during the height of Klan violence, the Wizard was notably silent on any commentary about the violence from his organization. These questions are absent in the opinion.

A second key Klan deposition was that of William Morris, noted as "a long time Klansman" who simply wrote about the Klan.[202] Morris' deposition attempted to position the act of burning crosses as elevated, spiritual conduct, commenting that burning crosses is pure, and merely has

> a spiritual meaning to all Klan members, in the language of the ritualism, symbolism . . . remindin[ing] that the cross upon which our Savior died, [] is the criterion of character of every Klansman . . . .Now, the fiery cross has a tremendous spiritual significance to us, also, because we are reminded that Jesus Christ said, 'I am the light of the World' . . . that God guarded the entrance to the Garden of Eden with a flaming

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remaining ear stumps gouged out while he was on a pillory." Surely accounts like that are intended to gain support for broad protections of speech. However, Black should be equally concerned then about violence against the recipient of that speech. It is an odd bargain that an innocent person should be forced to suffer violence so that the speaker is absolved from violence.

198 *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969).

199 Brief for Appellant at 4, Brandenburg v. Ohio, No. 492 (1964).

200 *Id.*

201 *Id.* at 7.

202 *Id.* at 5, n. 1.

sword . . . and guided the Children of Israel on their journey to the Promised Land by pillar of fiery night . . . .So, when we add fire to the cross, we simply are proclaiming to the world our fiery zeal. Fire is the greatest purifier yet known to man. So we symbolically stand before the world in that manner.[203]

Morris was of course much more than a member who only wrote about the Klan — he was the Wizard in Alabama.[204] In fact, Morris was one of two men responsible for the resurgence of the Klan in Alabama, filing the incorporation papers for the Klan with the State of Alabama in 1946, stating, "'[a]ll we want to do is keep the colored man in his place.'"[205] And so the terror began. By 1949, Morris' Alabama chapter of the Klan swelled in numbers and violence. At a Klan Rally outside of the city courthouse, Morris advised listeners that the Klan was "ready to 'ride'" leading to the burning of eighty-nine crosses and violence against twenty people within two weeks.[206] This violence led Morris to jail when he refused to cooperate with Alabama courts and deliver information the courts required to prosecute local "hooded violence" several years before this Brief was submitted.[207] If the National Wizard made it a point to preach peace to the local chapters, that seems to have been lost in the face of actual violence. Further, the violence in Alabama was so widespread and severe under Morris' Klan that it was national news — it would have been hard for the Justices or their clerks to not have known.[208]

One would hope that today, such depositions would not be left unchallenged. But the times in 1969 were different. Justice Black himself had been a member of the Alabama Klan as a young lawyer, leading to his election to the U.S. Senate.[209] Like the sanitization of Klan violence in *Brandenburg*, Black's membership in the Klan is generally excused even today. The United States Senate website comments that Black had no choice but to join the Klan, as he equated "membership with courtroom success" given the breadth of Alabama lawyers and jurors who were part of the Klan.[210] Our Senate today still maintains the incompatible realities on this matter, that Black soon resigned from the Alabama Klan and "spent the rest of his life regretting" having joined the Klan, yet somehow balanced regret with personal gain as Black "enlisted help from Klan

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203 *Id.*

204 *Klan Leader Sent Back to Jail*, N.Y. TIMES, August 3, 1949, at 24.

205 Glen Feldman, *Soft Opposition: Elite Acquiescence and Klan-Sponsored Terrorism in Alabama, 1946 – 1950*, 40 The Historical Journal 753, 759 (1997).

206 *Id.* at 764.

207 *See Klan Leader Sent Back to Jail*, *supra* note 205.

208 *See* Glen Feldman, *supra* note 206, at 770.

209 Hugo Black Lobby Investigation, UNITED STATES SENATE.

210 *Id.*

leaders in his successful race for the U.S. Senate" after his resignation form the Klan.[211]

But what did Hugo Black reject by leaving the Klan? In 1935, the Costigan-Warner anti-lynching bill was up for vote in the Senate. Southern Senators crafted a filibuster that blocked all other Senate business, including debate on passage of the new Social Security Bill.[212] The Wagner-Costigan bill died in 1935 due to the Southern Senators filibuster, in large part, due to Hugo Black as one of two Southern Senators who led the filibuster.[213] When the filibuster was finally successful, thus killing the bill to curb lynching, the architects of the filibuster, "Tom Connally of Texas and Hugo Black of Alabama — grinned at each other and shook hands."[214] Two years later, when Black had already ascended to the Supreme Court unburdened by his role in these dark alliances, the new 1937 anti-lynching bill was under filibuster attack in the Senate. His former partner, Tom Connally used Black's prior 1935 filibuster speech in absentia, proudly boasting "I know at least one justice who will never vote to sustain this anti-lynching law when it comes before the Supreme Court. That Justice is Mr. Justice Black."[215]

Claims that Hugo Black was a First Amendment absolutist are assailable. The same term as *Brandenburg*, Justice Black wrote a vehement dissent in *Tinker v. Des Moines*, another landmark case protecting the First Amendment rights, this time of school children silently wearing two-inch black armbands to express disapproval of the Vietnam war.[216] *Tinker*, also authored by Abe Fortas, was argued and decided three months before *Brandenburg*. In *Tinker*, Black argued that "[i]t is a myth . . . that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases."[217] Black noting that "one defying pupil was [] 8 years old" still related this second-grade student wearing a pro-peace armband to is concern that "some of the country's greatest problems are crimes committed by the youth" and relating the *Tinker* children to "the loudest-mouthed, but maybe no the brightest, students" who forced their "whims and caprices" on others.[218] Whether Black was subtly digging at both the anti-war protests on campus, or perhaps the

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211 *Id.*

212 Paul M. Sparrow, *Eleanor Roosevelt's Battle to End Lynching*, THE NATIONAL ARCHIVES (Feb. 12, 2016).

213 *Anti-Lynching Act Shelved by Filibuster*, PHILADELPHIA POST-GAZETTE, May 2, 1935, at 2.

214 *Id.*

215 Turner Catledgespecial, *LYNCH BILL FOUGHT; Connally Halts Action by Reading a Filibuster Speech by Black*, N.Y. TIMES, Nov. 17, 1937, at 1.

216 399 U.S. 503 (1969).

217 *See id.* at 517, 522.

218 *Id.* at 524-25.

students who were in the 1960's protesting for racial equality is not clear. But what is clear in Black's writings is his disdain and refusal to allow for First Amendment protections for the *Tinker* children, while wholly advocating for First Amendment protections for Klan members, brandishing guns, stating their intent to march on Congress, and "bury" meaning kill Black and Jewish people at the exact moment that Black people and Jewish people were being killed by the Klan.[219]

Given the incredible silence of *Brandenburg* on the Klan and Justice Black's well-known Klan membership, Black's role defeating anti-lynching legislation, and the vacillation he showed in First Amendment jurisprudence at the time of *Brandenburg*, can we really rely on this interpretation of fact on racial violence and the Klan, this opinion, or his general advocacy away from balancing tests? Today, the expansive freedom in *Brandenburg* binds us. The United States Senate's conclusions that we are under attack by an adversary exploiting our societal divisions through broad protections of first amendment privileges, while those same, expansive privileges also prevent us from protecting ourselves seems an incalculable error. *Brandenburg* is at the center of those modern privileges, warranting a critical look at the painful facts of the case, at the errant procedure, and the incredible indifference to race and the law we have struggled with throughout the history of this country.

There is an alternative First Amendment doctrine that can be applied allowing both flexibility but protective. Revisiting the *Dennis v. United States* framework allows action on issues of national security as they develop and does not require the courts to "wait until the putsch is about to be executed" and maintain First Amendment protections along dangerous paths.[220] *Brandenburg's* "imminent and likely" standard means the exact act must in fact be in the process of occurring, exactly what *Dennis* intended to prevent. The danger in affording speech protection through the point that illegal and harmful actions are already emergent means that victims will always face danger under *Brandenburg*, In *Dennis*, Chief Justice Vinson adopted the Learned Hand test which held that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is

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[219] In *Tinker* is helpful to note that Fortas' majority opinion did weigh the importance and relative harm connected to the speech for First Amendment analysis. Fortas' opinion found that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure free speech' which we have repeatedly held is entitled to comprehensive protection under the First Amendment." *Id*. at 505-06. That the speech in *Brandenburg* was attempting to attach itself to the national violence in June 1964 is at odds with the logic of *Tinker* decided at almost the same time.

[220] 341 U.S. 494, 509 (1951).

necessary to avoid the danger."[221] Vinson and that majority welcomed the efficiency of the test, "it is as succinct and inclusive as any other [test] we might devise" and appreciated the contextual space allotted "[i]t takes into consideration those factors which we deem relevant, and relates their significances."[222] Today as we face the reality that racial divisions are a national security threat, from the Senate Intelligence Report, and now reckoning with the January 6, 2021 attack on the Capitol, applying the *Dennis* test and abandoning *Brandenburg* could be necessary to protect our national interests.[223]

IV: RACIAL BLINDSPOTS FORGED DEEP INTO OUR LAWS

Brandenburg is unfortunately not an island of miscalculations by the Court on race. Other landmark Supreme Court cases add to the disabilities in properly addressing any analysis concerning race legally. The legacy of these additional cases likely constrained how the Senate reacted to the findings on racial divisions and the Russian Active Measures campaign.

First, this section reveals the use of the burgeoning Law and Economics theories in the 1970s case *Washington v. Davis*, which asserted through fuzzy opinions that discrimination was a good. Here, empirical data was not the foundation, rather observations by those the Court felt comfortable relying upon as authorities. Next, this section identifies the rejection of empirical data in *McCleskey v. Kemp,* and the Court's blunt statement that race is an "irrelevant" legal factor even when confronted with sophisticated studies that the Court accepted as factually accurate.[224]

Washington v. Davis & the "Irrelevance" of Race in Law

In *Washington v. Davis*, Black applicants for the Washington D.C. Police Force brought suit against the Police Chief in Washington D.C. and Commissioners within the United States Civil Service claiming discrimination on the basis of race given in part, on reliance upon a written test, "Test 21" which Black applicants disproportionately scored lower on, thus precluding them from joining the police force.[225]

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221 *Id*. at 510.

222 *Id.*

223 *See* Zolan Kanno-Youngs, *Homeland Security Dept. Affirms Threat of White Supremacy After Years of Prodding*, N.Y. TIMES (Oct. 1, 2019), ("'I would like to take this opportunity to be direct and unambiguous in addressing a major issue of our time. In our modern age, the continuation of racially based violent extremism, particularly violent white supremacy, is an abhorrent affront to the nation,' Mr. McAleenan said . . . describing white nationalism as one of the most dangerous threats to the United States."); *see also* Katie Benner, Charlie Savage, *Garland, at Confirmation Hearing, Vows to Fight Domestic Extremism*, N.Y. TIMES (Feb. 22, 2021).

224 481 U.S. 279 (1987).

225 426 U.S. 229, 233 (1976).

Justice White made it clear that the law would not move even if a "disproportionate impact" exposed as a harm to Black Americans was proven in Court, as was the case here.[226] Admitting that an "invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact [if true] that the law bears more heavily on one race than another"[227] the Court maintained indifference. Justice White insisted upon an implausible new dichotomy: "discriminatory impact . . . may [] demonstrate unconstitutionality because [] discrimination is very difficult to explain on nonracial grounds" yet a law can still be found "neutral on its face" satisfying the Equal Protection clause by use of the new "sole purpose" test advanced in *Washington v. Davis*[228]. In short, it is only when an action has no other purpose than to be intentionally and solely discriminatory that the Court will accept racial matters as a valid legal issue. If the 1960s was the zenith of advancing racial equality, how could the Court have made such a turn that affects us to this day?

Questionable Context: Washington v. Davis' Footnote Fourteen

The sole purpose test had teeth. On the fortieth anniversary of *Washington v. Davis*, Professor Osagie K. Obasogie commented that *Davis* is "a pivotal case on race and equality whose legacy has profoundly shaped American race relations . . . and most people have never heard of it."[229]

In fact, the *Davis* opinion bursts with overt bias, concluding with a decision by the Court to favor imbalance. The *Davis* Court was concerned about more than the score of Black candidates on Test 21, the focus was on societal balance generally, and what if anything considering race-based harm would mean to those who *benefitted* from imbalances. Noting that Title VII standards would have allowed for review of disparate impact, the plaintiffs were victims of bad timing; the complaint was filed just before Title VII protections were extended to Government employees.[230] The remaining constitutional claims would not protect these plaintiffs. Rather than adopt the "more probing judicial review", White attacked the ability to analyze disparate impact — the stated concern was to not upset the *disparate benefit* to others, stating that:

to hold a statute invalid [if it] benefits or burdens one race more than another would be far-reaching and would raise serious questions about,

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226 *Id.* at 238.
227 *Id.*
228 *Id.* at 242-43.
229 Osagie K. Obasogie, *The Supreme Court is Afraid of Racial Justice*, N.Y. TIMES (June 7, 2016).
230 *Davis*, 426 U.S. at 238, n. 10.

and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and average black than to the more affluent white.[231]

It seems that the sole purpose of White's opinion was intentional discrimination, thus oddly satisfying his own "sole purpose" test and warranting reexamination of *Washington v. Davis*.

Justice White had to offer supporting proof for something so damning. Here, the Court relied on the burgeoning field of Law and Economics, offering three articles presented as authority tucked into footnote 14. One authority cited to was Harold Demsetz, "one of the greatest economists of the Chicago School [of economic theory]", and "one of the most creative and deep microeconomists of the 20th century."[232] Demsetz' article was written one year after the passing of the Civil Rights Act, and the violence broached in *Brandenburg*.[233] Demsetz' opening argument was that law is incapable of changing the nature of discrimination as anti-discriminatory legal constraints imposed on the market actually "penalize those in our society who are discriminated against."[234] His elliptical claim that laws against discrimination only hurt those who are discriminated against was undone as Demsetz assured his readers that his use of the word "discrimination" was not "be interpreted as a general condemnation" and provided the following "proof" of the "useful role that can be played by discrimination"

Because they are discriminated against, women who are plain and overweight use the techniques of cosmetics, styling, diets, and exercise to beautify themselves, and uneducated persons desirous of associating with the educated find it advantageous to acquire more education. Only if we are not ready to admit that beauty and education are characteristics to which encouragement should be given can we claim that discrimination serves no useful purposes. Indeed, although mistakes are often made as to what are the 'appropriate' or 'useful criteria upon which to discriminate, there can be no doubt that discrimination is one of the strongest forces for change in a free society. [235]

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231 *Id.* at 248.

232 *See* Richard A. Epstein, *The Greatness of Harold Demsetz*, THE HOOVER INSTITUTION, (Jan 14, 2019); *see also Ben Klein on Harold Demsetz*, UCLA ECONOMICS (Jan 9, 2019).

233 Epstein, *supra* note 233.

234 Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271 (1965) (claiming that discriminated against groups can generally expect to fare worse in the polling place than in the free market," Demsetz thus argues that voting is a useless endeavor for minorities).

235 Demsetz goes far further in a hypothetical that surely would raise alarm today. In arguing against "legal modifications of the operation of the free market" ie the right to discriminate, the author claims that these laws force the burden of influencing market behavior onto "personal characteristic compensation" with a stunning hypothetical: "It is

Demsetz only cited to his own opinion in this assertion, offering no empirical data.[236] The Court also relied on Demsetz' argument regarding the futility of equal-pay laws, if there is no discrimination by the employer and wages are flattened, the "non-preferred" employees would be "forced to seek less desirable employment" and suffer.[237] Demsetz emphasized that these non-preferred people include "plain women or physically deformed persons as well as Jews or Negroes."[238] These brazen, biased opinions were ushered into our current laws under the academic vogue for law and economics, and gave reign to normative arguments advocating the notion that discrimination is good, that harms simply befall certain groups in *Davis* and beyond, and the futility and impracticability of doing anything about discrimination and disparate impact.

Another article cited to in footnote 14 was authored by Frank I. Goodman, a decorated lawyer serving as Director of Research for the Administrative Conference of the United States (ACUS) during a distinctly conservative turn — Richard Nixon was President, and Antonin Scalia the newly named Chairman of ACUS.[239] This conservative turn is evident in that the enabling act for ACUS was signed into law by President Lyndon B. Johnson one month after the passage of the Civil Rights Act of 1964.[240] Johnson's pick for the first chair of ACUS was Jerre S. Williams, who as a professor of law at the University of Texas, volunteered to teach Marion Sweatt, of *Sweatt v. Painter,* one of the famous school desegregation cases leading to *Brown v. Board of Education*.[241] All other

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one thing for a beautiful, young, white, Protestant woman, as an aid to buying a better cut of steak, to display her personal characteristics to a discriminating white, Protestant butcher. It is quite another for a plain, old, Jewish, Negro woman to try the same tactic with the same butcher." Then claiming the lack of utility, arguing that such "plain, old" persons should avoid that path and discover some other natural talent to proffer. *Id.* at 275

[236] *Id.* at 272, n. 1.

[237] *Id.* at 278.

[238] *Id.* at 277. The author then offers that companies who do not discriminate may be more profitable as "non-preferred workers" would work at "wages below the value of their input." However, employers "who earn smaller nominal returns because they discriminate will earn nonmonetary returns in their increased consumption of preferable association." Essentially arguing, employers can still win, emerging as more elite, if they discriminate . . . realizing nonmonetary returns in their increased consumption of preferable [white, protestant] association

[239] *Historical Timeline*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, https://www.acus.gov/50/timeline (last visited Nov. 7, 2021) (stating that on September 29, 1972, Antonin Scalia became the third chairman of the Administrative Conference).

[240] *Id.* (stating that on August 30, 1964, President Lyndon B. Johnson signed the Administrative Conference Act (Public Law 88-499) and established the Administrative Conference of the United States on a permanent basis).

[241] Kathleen Teltsch, *Judge Jerre Williams, 77, Expert On Constitutional and Labor Laws,* p. 17 Obituary Section, N.Y. TIMES, August 31, 1933.; *see also* 339 U.S. 629 (1950); 347 U.S. 483 (1954).

law professors refused to teach Sweatt, despite the Supreme Court's decision to integrate the law school. Only Jerre Williams followed the Supreme Court order.

Under Nixon, ACUS was different. Goodman's paper advocates that although de facto and de jure issues may have the same impact on groups, and therefore do the same things, they are wholly different as legal matters.[242] It is Goodman's work, and thus the work of the Federal Government at the time, that permitted Justice White's notion that correcting de facto discriminatory impact was unnecessary.[243] Goodman, and the Court in citing this work, turned this into a moral position, the objection to [a disproportionate impact rule] is not solely one of practicality, *but also one of principle*."[244] The articulated principle was legal callousness to Black people — "a man's blackness does not exempt him from neutral laws . . . [w]hy then should he be exempt solely because [disadvantaged by the law happen disproportionately to be black?"[245] Goodman then offered the legal justification that "mere disproportionate impact" is a form of "permitted de facto racial discrimination . . . familiar in our constitutional jurisprudence."[246] Goodman's argument that "natural" imbalances do not invite judicial (or legislative) intervention was based upon the goal of his paper, a debate on *Brown v. Board* and de facto school segregation. Goodman concluded that the theory used in *Brown* that "racial and socioeconomic imbalance [is] harmful" is based on a "highly disputed empirical premise."[247]

Goodman did not extend this logic to the professional realm, noting "the baffling complexity [of] professional competence [was] "an area where knowledge is still accumulating, values still in flux, and yesterday's wisdom very often today's folly."[248] The Court went ahead and adopted ACUS' work to professional competence anyway, even after noting that Congress had already extended Title VII protections to government employees, which would have provided a different outcome in *Davis*. Justice White forced a procedural opening to be more discriminatory than

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242 Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972).

243 *Id*. ("State action that is neutral on its face and serves legitimate non-racial ends does not violate the equal protection clause merely because those it burdens often happen to be black . . . .many laws, such as neutral tests and qualifications for voting, draft deferment, public employment . . . .[s]ales taxes, bail schedules, and other state-imposed charges are more burdensome to the poor than the rich, and hence more so to the average black than to the average white.").

244 *Id.* (emphasis added).

245 *Id.* at 301.

246 *Id.* at 300.

247 *Id.* at 436.

248 *Id.* at 436-37.

the ACUS authority in Footnote 14 advocated for, and gave space for regression in racial discrimination despite Congress' legislative move in extending Title VII.

Further, *Davis* evoked *emotions* on race. Suspicion that Black people are inherently flawed, and not the exam, were prevalent.[249] Anger was too: "American democracy . . . as we have known it" cannot withstand "increasingly vociferous" demands for quotas; "wide-spread quota imposition, not the overall American system, [will be] abandoned; poorly educated [Blacks] are likely to be thrown back into the misery and want from which they emerged, more bitter and volatile than before."[250] This reads as pure animus, and is perhaps why Charles Lawrence III commented that the economic nature of the *Davis* analysis, and White's reliance on "efficiency" — to move beyond a narrative of strictly racial terms.[251] By considering the "in-group and out-group in economic rather than racial terms" provides a veneer that "unconscious racial attitudes about race [did not] influence [] the governmental decision maker."[252]

Lawrence's comments on the unconscious operating in *Davis* is clear. Almost no discussion is devoted to what the actual questions were in Test 21, and what if any logical connection there was to verbal skills, or police skills. Upon review of the questions, was it possible that Black applicants could have been disadvantaged at the time? A review of the questions on Test 21 could have resolved much of the angry debate. Examples on the test include the following two questions from Test 21:

"Laws restricting hunting to certain regions and to a specific time of the year were passed chiefly:"

A) to prevent people from endangering their lives by hunting

B) keep our forests more beautiful

C) raise funds from the sale of hunting licenses

D) prevent complete destruction of certain kinds of animals

E) preserve certain game for eating purposes

"Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair and often structurally unsound." The quotation best supports the statement that all buildings in ghetto areas are:

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249 *See* Barbara Lerner, *Washington v. Davis: Quantity, Quality, and Equality in Employment Testing*, 1976 S. CT. REV. 263.

250 *Id.* at 314.

251 Charles R. Lawrence III, *The Id, The Ego, And Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317, 365 (1987).

252 *See id*. at 365, 387 (concluding that the "workings of the unconscious make th[e] dissonance between efforts to achieve full civil rights for Blacks and the self-interest of those who are most able to effect change even more difficult to overcome"). Lawrence's analysis might explain commentary like Justice White's, but the academic articles cited to in Footnote 14 are more overt, on the offensive, and may go past the unconscious threshold.

A) overcrowded
B) undesirable as living quarters
C) well-constructed
D) about to be torn down
E) seldom inspected[253]

The applicability of hunting to urban D.C. in the 1970s is slight if it existed at all, and the disparaging question about "all" housing in "the ghetto" being "drab" and "unsanitary" is offensive and degrading.[254] Rather than presuming neutrality, the Court could have questioned the validity of Test 21 along the lines of a simple rational review test, to decide whether the questions bore a rational relationship to the role of a police officer in Washington D.C. the 1970s, really did test the "verbal ability, vocabulary, and reading and comprehension" targets for federal service generally, and whether Test 21 questions established a "'job relatedness'" standard not just in line with the Civil Service Act of 1883 as offered in support of the test, but applicable to life in 1976 when *Davis* was in front of the Court.[255]

Those academic authorities supporting the *Davis* "sole purpose' test are outdated, lack empirical data, an insist on holding onto prejudicial narratives that have no place in legal doctrine today. As related to key findings by the Senate's Intelligence Report in 2016 "no single group of Americans was targeted by [Russian] information operatives more than African-Americans."[256] *Davis* made that significant fact legally irrelevant, and likely created the instinct in the Senate and in the Select Committee on Intelligence to receive that information as not actionable; we see no corresponding security recommendations in the Senate Recommendations to combat the disparate impact, nor any corresponding charge in Mueller's Indictment. The "sole purpose" test in *Davis* has harmed Black people long enough and has metastasized to and now harms us broadly in matters of national security today.

McCleskey v. Kemp: Risks, Race, and Devolving Doctrine

While *Davis* solidified the notion that America would and should function just fine using disparate impact to explain away discrimination, factual integrity was also at issue. *Davis* relied upon dubious theories loosely pulled from new field of Law and Economics and the vogue for laissez-faire economics in the 1970's that even at the time was challenged

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253 Obasogie, *supra* note 230.
254 *See id.*
255 Washington v. Davis, 426 U.S. 229, 236, n.4 (1976).
256 Sen. Intel. Rep., *supra* note 2, at 6.

for being "insufficiently scientific."[257] This section focuses on the interplay of fact, empirical data, and race in law as critical to understanding how the extensive findings and data in the Senate Intelligence Committee confirming that racial division was at the forefront of the attacks and is a glaring vulnerability were reduced to irrelevance legally.[258]

McCleskey v. Kemp finds a Black defendant disputing the disproportionate punishment he faced in criminal sentencing.[259] McCleskey went to the Court with highly regarded, new empirical data demonstrating that he, as a Black defendant who shot and murdered a white person was subject to far more severe punishment given the nexus of those two racial data points.[260] This case forced the Court, in their own words, to consider "the most sophisticated [] analysis ever performed [which] revealed that race more likely than not infects [judicial] decisions."[261] The empirical data performed by a group of professors, referred to as the "Baldus study"[262] was considered very "sophisticated" by the Court and analyzed 2,000 murder cases from Georgia during the 1970s, utilized 230 variables, and empirically revealed stark variances in punishments when considering race of the victim and the defendant.[263]

Writing for the majority, Justice Powell opened the opinion by accepting that this "complex statistical study [] indicates a risk that racial considerations" affects capital punishments.[264] The question was whether this proved that McCleskey's punishment was unconstitutional.[265] The Court also accepted that "Baldus [referring to the study] indicates that Black defendants, such as McCleskey . . . have the greatest likelihood of

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257 The Associated Press*, Friedman Given A Nobel Award; 2 Share a Prize*, N.Y. TIMES, p. A1, Oct. 14, 1976 (noting that Dr. Milton Friedman, widely viewed as the leader of the Chicago School of Economics (of which Demsetz belonged) was *not* universally accepted as an appropriate Nobel Prize Winner by the Royal Academy in Stockholm; rather, "the award to Dr. Friedman followed an extraordinary and sometimes heated debate, centered primarily over his political activity as adviser to conservative politicians . . . Some academy members also reportedly felt his economic judgments were insufficiently scientific.").

258 *See generally* Sen. Intel. Rep., *supra* note 2.

259 481 U.S. 279, 308 (1987).

260 *Id.*

261 *Id.* at 337.

262 The Baldus study was considered very "sophisticated" by the Court at that time and covered 2,000 murder cases from Georgia during the 1970s, utilized 230 variables, revealing a range of permutations as to consequences and punishment variances by racial group of the defendant and the victim. Baldus' group, Black defendant, white victim, had the "greatest likelihood of receiving the death penalty." *Id.* at 288.

263 *Id*. (Baldus' group, Black defendant, white victim, had the "greatest likelihood of receiving the death penalty").

264 *Id.* at 283.

265 *Id.*

receiving the death penalty."[266] However, the Court still fell back into an ahistorical approach by the end of the opinion — that the claims surrounding the data "rest[ed] on the *irrelevant* factor of race [that] easily could be extended to apply to claims based on unexplained discrepancies."[267] This conclusion is incoherent — nothing can be irrelevant if impact is proven empirically.

Powell went further to obviate race as a legal matter. He warned that if race would be considered, there would be no limiting factor. All other minorities would require consideration, as would gender, the "race or sex of other actors in the criminal justice system, such as defense attorneys, or judges" or "any *arbitrary* variable" like a "defendant's facial characteristics, or . . . physical attractiveness."[268] With race out of the way, Powell argued that the Constitution did not warrant action as race was merely equal to any other "potentially irrelevant factor," and therefore the Constitution does not require action for the resulting "*demonstrable* disparities."[269] How racial impact was irrelevant despite "demonstrable disparities" was not reckoned.

McCleskey therefore secured the perpetuation of racial disparities even when the State had proof and an "awareness of consequences."[270] This disability haunts us today in the stunning void in the Senate Intelligence Committee's recommendations in the Russian Interference Campaign. The overwhelming supporting facts that an international adversary used racial provocations to upend our 2016 election and attack our democracy broadly fell to the *Davis* and *McCleskey* logic.

The Race-Fact Disability at the Court

McCleskey presents three strong dissents by Justices Brennan, Blackmun, and Stevens, admonishing the majority for repudiating "the elaborate studies which the Court properly assumes to be valid."[271]

The dissents all argue that the evidence was more than sufficient to act. Justice Brennan's dissent reinserted context and attacked the claim that eye color or other features were equally "irrelevant" to legal matters as it was not possible to contend that America "has on the basis of hair color inflicted upon persons [the] deprivation comparable to that imposed on the basis of race."[272] Further, history and context are not just narratives — they matter for a proper analysis of statistical evidence. Ahistorical and

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266 *Id.* at 287.
267 *Id.* at 316.
268 *Id.* at 316-18.
269 *Id.* at 319.
270 *Id.*
271 *Id.* at 366-67.
272 *Id.* at 341.

acontextual claims "would require evidence of statistical correlation *even more* powerful than that presented by the Baldus study."[273] To Brennan, the Baldus study was unassailable, a fact he claimed the Court was not equipped to challenge. The evidence of racial disparity was "uniquely sophisticated" and by "far and away the most refined data ever assembled" in that area of law.[274] Brennan surmised that the Court simply "fail[ed] to take account of the unprecedented refinement and strength of the Baldus study" and reverted to bias and the willful ignorance in refusing to accept legal considerations for racial disparity.

Justice Blackmun also admonished the Court for failing to consider "evidence that establish[ed] a constitutionally intolerable level of racially based discrimination."[275] Blackmun pointed to the majority's inexplicably shifting evidentiary standards. Use of the Baldus study was logical under *Batson v. Kentucky* which had just lowered the burden of proof for a defendant to meet for a prima facie case of "purposeful discrimination" only one year prior.[276] The Baldus study therefore presented "exhaustive evidence" "that would have satisfied the [even] more burdensome standard" the Court just struck down.[277] There was simply no reason to refuse the empirical data pointing to racial discrimination.

The Court vacillated on standards to apply to race-based questions, evidence, and burden of proof requirements with dizzying speed. The results of these slippery norms was laid bare in the Senate Intelligence Report — the deep evidence of disparate impact offered with exacting empirical data did not attach legally as the harms.

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[273] *Id.* at 342. Simply put, the erroneous argument by the majority that discriminating based on hair color is so outlandish and incomprehensible that the statistical correlation to render that a valid argument would need to be far higher.

[274] *Id.* at 342. Brennan's point on the sufficiency of evidence was also elaborate. This "evidence depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated. Acceptance of petitioner's evidence would therefore establish a remarkably stringent standard of statistical evidence unlikely to be satisfied with any frequency." *Id.*

[275] *Id.* at 345.

[276] 476 U.S. 79 (1986); *see* Swain v. Alabama, 380 U.S. 202, 227 (1965) The prior standard under Swain v. Alabama was more burdensome and required the defendant meet the burden of proof to demonstrate purposeful discrimination by systemic use of race impermissibly over a period of time.

[277] McCleskey, 481 U.S. at 364; *see* Turner v. Murray 476 U.S. 28, 48 n. 5 (Powell, J., dissenting) (noting that race is irrelevant).

V: CONCLUSION

Coming to Terms with Race and the Law — The Fierce Urgency of Now

This paper was conceived before the January 6th, 2021, siege on the Capitol. The facts presented in the Senate's Intelligence Report that inspired this paper should have spurred a review of *Brandenburg* given its odd procedural posture, and the incredible conundrum that our nation was simultaneously targeted through our broad, free speech protections and impaired from acting due to the same free speech protections. Simply noting how extensively race was used against our society and the absence of any correlating recommendations or place in Mueller's indictment should have alerted to the imbalance our laws have created. Our nation may be unrecognizable today to the founders for many reasons, but certainly, our ambivalent treatment of a documented issue of national security at the hands of a foreign entity fails the original purpose of our union.

But the disability these cases imposed on our society are not insurmountable. *Brandenburg*, *Davis*, and *McCleskey* laid beside their corresponding history or authorities supporting those decision are outmoded, based on questionable facts, such that further usage and applicability can be questioned.

Finally, we cannot spend our way out of this threat. Russia's annual budget for these "Active Measures" was roughly fifteen million (USD) versus the United States' $582.7 billion (USD) military budget for 2017, a mere 0.003% of our annual spending at the time.[278] We have moved into a new legal frontier that calls for a corresponding paradigm shift to ensure basic elements of our national security are protected. We must finally confront our weaknesses head on.

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[278] Sen. Intel. Rep., supra note 2, at 7 ("the operational costs of the IRA were approximately $1.25 million dollars a month"); *see Department of Defense (DoD) Releases Fiscal Year 2017 President's Budget Proposal*, U.S. DEPT. OF DEFENSE (Feb. 9, 2016), *but see* Joe Gould, *Pentagon Finally Gets its 2020 Budget from Congress*, DEFENSE NEWS (Dec. 19, 2019), (reporting that the 2020 Defense bill was approved by Congress at $738 Billion dollars, and increase of 27%).