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June 16, 2023

Via Email (president@virginia.edu)

President James E. Ryan
Office of the President
University of Virginia
Post Office Box 400224
Charlottesville, VA 22904-4224

Re: Ideological Profiling of Students, Faculty

Dear President Ryan:

For the past 40-plus years, The Rutherford Institute has sounded the alarm whenever the government exceeded its authority and defended the rights of the citizenry in the face of governmental abuses.¹ As such, I can personally attest to the fact that nothing is ever as simple as the government claims it is. Thus, even a casually floated suggestion of a system to track the religious and political affiliations/ideologies of students and faculty at the University of Virginia raises significant constitutional concerns.²

Any attempt by a government agency to establish a system by which the populace can be targeted, tracked and singled out based upon their ideological viewpoints and affiliations must be met with extreme caution.

Certainly, in an age when the government has significant technological resources at its disposal to not only carry out warrantless surveillance on American citizens but also to harvest and mine that data for its own dubious purposes, whether it be crime-mapping or profiling based on whatever criteria the government wants to use to target and segregate the populace—including race, religion or politics—the potential for abuse is grave.

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals' constitutional rights and educate the public about threats to their freedoms.

² Sydney Shuler, "UVa Board of Visitors floats tracking student, faculty political ideology," *The Daily Progress* (Jun. 3, 2023), https://dailyprogress.com/news/uva-board-of-visitors-floats-tracking-student-faculty-political-ideology/article_aff72f24-01a5-11ee-83e0-4f8c6e129ddb.html.

Ideological profiling can lead to penalizing individuals for thought crimes

Such a system, even when justified in the name of ensuring diversity, can quickly lead to a slippery slope in which anyone espousing views that run counter to the official government narrative might be found guilty of thought crimes.

As far-fetched as this scenario may sound, it is not so far removed from the realm of possibility. As has been widely reported, the FBI, CIA, NSA and other government agencies have increasingly invested in corporate surveillance technologies that can mine constitutionally protected speech on social media platforms such as Facebook, Twitter and Instagram in order to identify potential extremists and predict who might engage in future acts of anti-government behavior.³

Indeed, for years now, the government has used all of the weapons in its vast arsenal—surveillance, threat assessments, fusion centers, pre-crime programs, hate crime laws, militarized police, lockdowns, martial law, etc.—to target *potential* enemies of the state based on their ideologies, behaviors, affiliations and other characteristics that might be deemed suspicious or dangerous. For instance, if you believe in and exercise your rights under the Constitution (namely, your right to speak freely, worship freely, associate with like-minded individuals who share your political views, criticize the government, own a weapon, demand a warrant before being questioned or searched, or any other activity viewed as potentially anti-government, racist, bigoted, anarchic or sovereign), you could be at the top of the government’s terrorism watch list.⁴

Moreover, as a *New York Times* editorial warns, you may be an anti-government extremist (a.k.a. domestic terrorist) in the eyes of the police if you are afraid that the government is plotting to confiscate your firearms, if you believe the economy is about to collapse and the government will soon declare martial law, or if you display an unusual number of political and/or ideological bumper stickers on your car.⁵ According to one FBI report, you might also be classified as a domestic terrorism threat if you espouse conspiracy theories, especially if you “attempt to explain events or circumstances as the result of a group of actors working in secret to benefit themselves at the expense of others” and are “usually at odds with official or prevailing explanations of events.”⁶

In other words, if you dare to subscribe to any views that are contrary to the government’s, you may well be suspected of being a domestic terrorist and treated accordingly.

³ Lee Fang, “The CIA is investing in firms that mine your Tweets and Instagram photos,” *The Intercept* (Apr. 14, 2016), <https://theintercept.com/2016/04/14/in-undisclosed-cia-investments-social-media-mining-looms-large/>.

⁴ “Summary of Terrorism Threat to the U.S. Homeland,” National Terrorism Advisory System Bulletin, Dept. of Homeland Security (February 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-february-07-2022>.

⁵ Charles Kurzman and David Schanzer, “The Growing Right-Wing Terror Threat,” *The New York Times* (June 16, 2015), <http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html>.

⁶ Jana Winter, “FBI document warns conspiracy theories are a new domestic terrorism threat,” *Yahoo News* (Aug. 1, 2019), <https://news.yahoo.com/fbi-documents-conspiracy-theories-terrorism-160000507.html>.

Likewise, more recently, those who share “false or misleading narratives and conspiracy theories, and other forms of mis- dis- and mal-information” in order to criticize the government—whether that criticism manifests itself in word, deed or thought—have been likened those to terrorists.⁷

In recent years, the government has used the phrase “domestic terrorist” interchangeably with “anti-government,” “extremist” and “terrorist” to describe anyone who might fall somewhere on a very broad spectrum of viewpoints that could be considered “dangerous.”⁸ The ramifications are so far-reaching as to render almost every American an extremist in word, deed, thought or by association.

Yet what the First Amendment protects—and a healthy constitutional republic requires—are citizens who routinely exercise their right to speak truth to power.

In order for that right to be fully protected—especially in light of the government’s massively expanding characterization of what constitutes “extremism” and indications of “domestic terrorism”—citizens must be allowed to associate anonymously without the government compelling them to disclose their political or religious beliefs.

The U.S. Supreme Court has recognized that “freedom of association . . . has long been held to be implicit in the freedoms of speech, assembly, and petition.”⁹ The Court has explained the broad scope of this protection in stating that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny” even when abridgement of such rights is “unintended[but] may inevitably follow from varied forms of governmental action.”¹⁰

One’s political and religious associations are often connected with their speech, and a person’s “decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”¹¹ Indeed, the “historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the ‘freedom of the press.’”¹²

⁷ “Summary of Terrorism Threat to the U.S. Homeland,” National Terrorism Advisory System Bulletin, Dept. of Homeland Security (February 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-february-07-2022>.

⁸ “Leftwing Extremists Likely to Increase Use of Cyber Attacks over the Coming Decade,” US Dept. of Homeland Security (Jan. 26, 2009), <http://fas.org/irp/eprint/leftwing.pdf>.

⁹ *Healy v. James*, 408 U.S. 169, 181 (1972).

¹⁰ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (protecting the right of group “members to pursue their lawful private interests privately and to associate freely with others” by denying compelled disclosure of membership lists).

¹¹ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

¹² *Id.* at 361 (Thomas, J., concurring).

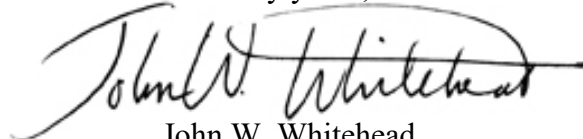
This is an important protection because “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all,” and thus “[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes.”¹³ But “identification and fear of reprisal might deter perfectly peaceful discussions of matters of public importance.”¹⁴

Thus, “compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association,” and the Supreme “Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”¹⁵ For example, in protecting the right of anonymous association, in *Shelton v. Tucker*, the Court invalidated a state requirement for teachers to file an annual affidavit listing every organization to which the teacher belonged or contributed during the past five years, including to which political party and church they belong or have given financial support.¹⁶ The Court stated that “to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”¹⁷

While not going to the extreme extent of the required disclosure in *Shelton*, just compelling someone to disclose even their general political or religious beliefs could reveal which groups that person might be associated with and thus still violate constitutional protections of their privacy and speech. It could also create a chilling effect on their First Amendment activities and raise questions about bias or discrimination behind any adverse action of the University toward them.

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” and “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust.”¹⁸ Therefore it is our hope that the University of Virginia will remain committed to the First Amendment principles that were valued so highly by its founder, Thomas Jefferson, among these the right to speak, think and associate freely, the right to religious freedom, and the right to criticize the government.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President

¹³ *Talley v. California*, 362 U.S. 60, 64-65 (1960).

¹⁴ *Id.* at 65.

¹⁵ *NAACP*, 357 U.S. at 462.

¹⁶ *Shelton v. Tucker*, 364 U.S. 479, 480, 488, 490 (1960).

¹⁷ *Id.* at 485-86.

¹⁸ *Id.* at 487.