



Memorandum

January 13, 2011

To: Members of Congress

From: The Washington Legislative Office of the ACLU

RE: Guidance for Members of Congress and Staff on
Free Speech and Related Public Safety Concerns in the
Aftermath of the Arizona Shootings

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Introduction

The American Civil Liberties Union was deeply saddened about the loss and injury caused by the horrendous shootings in Arizona last weekend and we express our sympathy to all of those affected by it. There is no place for such violence in our democracy.

Though the facts have not yet been established, some have speculated that the heated political rhetoric during the recent congressional campaigns may have influenced the accused shooter. While we encourage a meaningful conversation on the possible repercussions of provocative political speech or speech that calls for violence in the wake of this tragic event, we must be mindful that the Constitution protects speech that many of us find offensive. We are concerned that some members of Congress might seek to pass legislation that could diminish fundamental First Amendment rights by seeking to criminalize constitutionally-protected speech. While these efforts are likely well-intentioned, they are unnecessary and could infringe on protected liberties.

The ACLU, while adamant about protecting the individual rights of all, is also concerned about the well being of all members of Congress and their staff (a branch of government charged with the defense of the Constitution and the Bill of Rights) - as well as the safety and well being of protesters. The First Amendment to the Constitution is not a barrier to effective law enforcement action against persons reasonably believed to be engaged in unlawful activity. There are already numerous federal, state and local criminal statutes prohibiting threatening communications and violent behavior (See Appendix).ⁱ And our government has what we consider an

impermissibly broad authority to investigate individuals based on the mere speculation that they might someday engage in illegal behavior.ⁱⁱ

Protecting Speech and Protecting Against Violence

The First Amendment to the Constitution allows individuals and groups to engage in free speech, to peaceably assemble and petition the government for redress of grievances. The ACLU is a membership organization in its 90th year that is committed to defending the First Amendment rights of all – regardless of political affiliation, citizenship or ideology. In our zealous defense of rights we are not insensitive to the concerns raised by members of Congress and the public that some speech and assembly can raise legitimate security challenges. Thus, we have prepared this memorandum as a way to start a conversation about how to approach First Amendment rights and public safety in a manner that neither abridges the robust exercising of rights nor surrenders safety.

Whether because of views on abortion, health care reform, taxes, war, the right to bear arms or because of race, religion, sexual orientation or other issues, at various points in history Members of Congress have felt singled out for violent behavior. It is important to know the facts about what laws protect Members of Congress and their staff so that violent confrontations can be avoided without engaging in overly repressive measures that impede public engagement and do harm to our cherished liberties.

Congress should seek information from law enforcement agencies that exist to protect members of Congress and their constituents. For example, it is entirely appropriate for Congress to ask about federal law enforcement threat response protocols and to have appropriate contact information for state and local law enforcement in their home districts.

It is also important for members of Congress to hold the relevant law enforcement agencies accountable for exercising their duties in an effective manner that does not show bias toward any particular viewpoint – that of the member of Congress and his or her staff -- or that of the speakers and protestors. Fair and equal treatment, prohibitions on the use of excessive force and unjustified data collection are important components of good policing practices. All sides of this discussion should be properly resourced and informed so that free expression of ideas flourish and public safety is maintained.

The ACLU hopes that these questions and answers offer a good starting point for future discussions.

1) Does the incident in Arizona justify a thorough review of law enforcement practices and procedures for responding to potential threats?

Certainly, after any major event that has raised law enforcement, free expression or security concerns, oversight can be beneficial. Law enforcement officers at all levels of government are given significant authority to act - even to use deadly force - when they reasonably believe an

individual or group poses an imminent threat of serious bodily harm. Therefore, it is critical that we hold them to high standards to ensure they are using their power legally, effectively and responsibly.

Since the Oklahoma City bombing in 1995, acts of violence linked with political dissent have come to be known as "domestic terrorism." Congress has given law enforcement expansive new tools to fight domestic terrorism in the Antiterrorism and Effective Death Penalty Act of 1996 and in the USA Patriot Act of 2001. The ACLU believes that many of the expanded law enforcement powers in these statutes are overbroad and lack appropriate checks and balances.ⁱⁱⁱ

Terrorism, or more correctly the fear of terrorism, creates an environment that breeds overzealous police activity. Moreover, because law enforcement often distinguishes terrorism from "regular" crime by the political or social motive behind violent acts, it is easy for law enforcement to mistakenly assume that non-violent individuals or groups supporting similar political or social goals also support the terrorism. As a result, abusive law enforcement operations targeting First Amendment-protected activity have been commonplace in history, and have become commonplace again.

The ACLU has documented law enforcement obstruction or surveillance of non-violent political activity in 31 states and the District of Columbia since the 9/11 terrorist attacks, violating the victims' constitutional rights and diverting law enforcement resources from real threats. Indeed, a 2010 report by the Department of Justice Inspector General regarding FBI investigations of domestic advocacy groups exposed through ACLU Freedom of Information Act requests showed the FBI opened investigations against non-violent advocates based on the mere possibility they might violate federal law in the future.^{iv} The IG identified several cases in which the FBI characterized non-violent civil disobedience as terrorism.^v Investigating non-violent individuals and groups doesn't make anyone safer and only wastes resources and undermines public support for law enforcement goals.

History shows that loosening traditional law enforcement standards makes it more likely that police will target people for investigation not because they have engaged in any misconduct but because of racial profiling or because they hold unpopular political or religious views. Unfortunately, rather than learn from that history, we have been repeating it.

2) What is the current threat?

The ACLU encourages members of Congress to consult with the relevant law enforcement agencies for threat assessment briefings to assure that accurate and timely information is being conveyed and that appropriate data on threats are being collected. News coverage is not always complete and accurate and some events are sensationalized by the media. The perception of a potential threat can sometimes be at odds with reality. For instance, there were several press reports suggesting the number of threats against President Obama far exceeded those against previous presidents, but when Secret Service Director Mark Sullivan

testified before the House Homeland Security Committee in December 2009, he said the number threats was not higher than the number against President Bush and President Clinton.^{vi} However, the numbers may not tell the whole story. For example, the public does not know if the threats against President Obama were more plausible than threats against his predecessors.

No matter what the incidence of threats is, knowledge is power. The keys to properly responding to a perceived increase in threats are first, to attempt to understand the true nature of the threat environment; second, to understand that hostile behaviors may fall within or outside of the bounds of free speech; third, to make sure that Members of Congress and staff have the means and the information to contact law enforcement, if needed; and fourth, to hold relevant law enforcement agencies accountable for their action or inaction.

Members should keep in mind that law enforcement officials have been known to misjudge the relative danger posed by different groups based on the groups' political beliefs. For example, the Washington, D.C. Metropolitan Police Department's handling of anti-globalization demonstrations from 2000 to 2003 were characterized by unnecessary police violence against peaceful protesters and hundreds of pre-emptive arrests of innocent persons. The overzealousness of the police led the D.C. City Council to enact legislation to protect demonstrators' First Amendment rights

In 2005, the FBI domestic terrorism chief identified eco-terrorists as the FBI's number one threat priority, despite the fact that no deaths were attributed to their acts of political violence. That same year the Department of Justice Bureau of Justice Statistics published a survey of crime victims which revealed the FBI severely undercounted hate crimes in their annual reports required by Congress.^{vii} Proper oversight is necessary to ensure law enforcement is utilizing its resources based on facts rather than rhetoric.

3) What agencies should Members of Congress and their staff look to for law enforcement support?

Members of Congress and their staff can request briefings from the Capitol Police, the Federal Bureau of Investigation, the Federal Protective Service and state and local police, as appropriate. Each may have a role in both assuring that demonstrations and other forms of speech are protected, and in responding to or investigating suspected activity that may violate local or federal civil or criminal statutes. Law enforcement agencies will be able to provide protocols and procedures for reporting and responding to potential violations of law.

4) At what point does hostility become a legitimate threat?

The distinction between political hyperbole and a true threat is not always clear and whether a caller or visitor is threatening can be a subjective matter. If any Member of Congress, staff member or constituent feels immediately threatened she or he should call 911 without hesitation. Thoroughly documenting and reporting reasonably suspected violations of law is a

prudent course of action even where there is some doubt whether an actual crime occurred. Not every report will justify an investigation and not every investigation will result in a prosecution, but the police may have information that is not available to the staffer or Member of Congress, regarding a particular caller or recent crime patterns. Again, when one feels truly threatened, he or she should not hesitate calling the appropriate law enforcement agencies.

5) What can Members of Congress do to stop threats from occurring in the first place?

While there is no need for First Amendment analysis when a staffer perceives an existing threat, the question becomes harder to answer when the discussion turns to strategies for discouraging threats from occurring in the first place. In general, the best way to combat hateful speech is through countervailing speech, public education efforts to expose bigotry and other sources of hate, and the encouragement of diverse viewpoints and free expression. However, this obviously might not prevent all threats from occurring.

Prior restraints on speech based on viewpoint or content - even the most repugnant speech - run counter not only to the First Amendment but also to the long-term interests of the most frequent victims of hate - racial, ethnic, religious, political minorities and members of the LGBT communities. Restrictions on the content of speech give government the power to decide what can and can't be said - and government should not be in the role of deciding what opinions are hateful and deserving of censorship, and history shows that government is more likely to use that power to limit minority viewpoints and groups than to empower them.

So the key lies in identifying a true threat, reporting it promptly, and allowing law enforcement agencies to do the work needed to protect those subject to an actual threat and, if appropriate, investigate for possible prosecution. Even if the speech in question legitimately falls within that category of speech labeled 'political protest,' if a law is broken in the course of such protest, the one who has broken the law must answer to the judicial system for that transgression. Beyond civil disobedience, acts of violence, harassment or intimidation, and invasions of privacy are also open to sanction and it is up to law enforcement to bring the perpetrators of such acts to justice when appropriate based on reliable and admissible evidence. In those cases, the best thing that members of Congress or their staff can do is to provide reliable and accurate information to law enforcement and to agree to participate in the appropriate legal proceedings when warranted. It is our hope that such proceedings will not be a proxy for chilling and restricting legitimate First Amendment rights.

6) How does a Member of Congress hold a hearing, host a town hall or community meeting, or conduct business in a congressional office without disruptions?

Avoiding disruptions by protesters is not always possible, nor can it be in a free society that encourages and relies on open debate. The ACLU vigorously defends the right of individuals to protest the adoption of laws or policies they oppose. However, we see a distinction between peaceful attempts to focus attention on perceived injustice and other forms of protest that involve violence, which by definition go beyond the mere expression of ideas. Those who

disobey valid laws (those that do not abridge the First Amendment or any other civil liberty) in the course of engaging in even the most altruistic and peaceful forms of civil disobedience must still answer to the rule of law.

Having said that, mere political speech, even if unwelcome, should always be protected and differentiated from conduct that breaks local and federal laws. Law enforcement officers should not be involved in obstructing, censoring or chilling lawful political speech at an office or event, even when that speech creates inconveniences for the member of Congress. Democracy is not always tidy. But an occasional "boo" is different from shouting down a speaker, and law enforcement has a proper role to play when protesters prevent an office from functioning or an event from going forward. At the same time, Representatives and Senators should expect and demand that law enforcement officers responding to a request for assistance act in an appropriate, respectful, professional and lawful manner at all times, and when police have probable cause to make an arrest that they use only the force necessary to safely make those arrests.

At times, protestors will conduct sit-ins that can disrupt the normal activities of a congressional office. How much of such conduct a congressional office chooses to tolerate is often a judgment call that each office must determine for itself. There are laws prohibiting loitering, trespassing, unlawful assembly, and disorderly conduct (some of which we consider invalid), but members of Congress, in considering how to proceed, may wish to recognize that certain groups might have as their political objective the goal of provoking confrontations with police or causing negative publicity for the member.

When speaking outside the Capitol, it is important to check out the rules and regulations of the locality and the venue to know what is and is not permitted. Public facilities often have different rules than private facilities. Invitation-only events are different from open-to-the-public forums. Federal, state and local police, and private security guards hired for an event may each have different authorities and operating procedures. Both the hosts of forums and those planning to protest should consult with local law enforcement or security officials at the venue so they know the rules in advance.

7) Why does broad protection for speech serve us all well?

Freedom of speech, of the press, of association, of assembly and petition -- this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression. Supreme Court Justice Benjamin Cardozo wrote that this freedom is "the matrix, the indispensable condition of nearly every other form of freedom."^{viii} Without it, other fundamental rights like the right to vote would wither and die. There would be a significant loss to society if the law chilled speech that comes close to the line separating true threats from protected speech, but does not cross it. A great virtue of the First Amendment is that it "does not protect only the articulate, the well known, and the popular."^{ix} That virtue vanishes if anyone who speaks rudely, coarsely, or offensively risks arrest and prosecution. Dramatic language that may make some people nervous can have a communicative impact that cannot

be equaled using tamer language. If emotional, visceral, or even offensive statements of animosity get swept up in an overly broad definition of criminally punishable threats, the ability to express a range of legitimate messages will be lost.

The First Amendment to the Constitution is not a barrier to effective law enforcement action against persons reasonably believed to be engaged in misconduct. Strict standards and effective oversight of law enforcement activities will protect our values and our safety.

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ⁱ For example the Supreme Court has held that, "fighting words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Brandenburg v. Ohio*, 295 U.S. 444, 447 (1969), the Court held the government cannot punish inflammatory speech unless there is an intent and likelihood of producing imminent illegal action. Court rulings have also upheld limitations on defamatory speech, even against public figures, and on obscenity. See, *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Miller v. California*, 413 U.S. 15 (1973).

ⁱⁱ See, Dept. of Justice, Office of Inspector General, A Review of the FBI's Investigations of Certain Domestic Advocacy Groups, (Sept. 2010), at: <http://www.justice.gov/oig/special/s1009r.pdf>

ⁱⁱⁱ *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214, (1996); and *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272, (2001). See also, Mike German And Michelle Richardson, "Reclaiming Patriotism: A Call To Reconsider The Patriot Act," American Civil Liberties Union (Mar. 2009), available at:

http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf.

^{iv} Dept. of Justice, Office of Inspector General, A Review of the FBI's Investigations of Certain Domestic Advocacy Groups, (Sept. 2010), at: <http://www.justice.gov/oig/special/s1009r.pdf>

^v *Id.*, at 190.

^{vi} Rachel Slajda, "Secret Service Director: Threats Against Obama Not Up," Talking Points Memo, (Dec. 3, 2009), at: <http://tpmlivewire.talkingpointsmemo.com/2009/12/secret-service-director-threats-against-obama-not-up.php>

^{vii} See, Southern Poverty Law Center, "Report: FBI Hate Crime Statistics Vastly Understate Problem," (Winter 2005), at: <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hate-crime>

^{viii} *Palko v. Connecticut*, 302 U.S. 319, 327, (1937).

^{ix} *Kleindiesnt v. Mandel*, 408 U.S. 753, 768 (1972).

APPENDIX

Federal Statutes and Regulations:

41 C.F.R. §§ 101-20.305 and 101-20.315, prohibiting any loitering, disorderly conduct, or other conduct on property which creates loud or unusual noise or a nuisance; which unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; which otherwise impedes or disrupts the performance of official duties by Government employees; or which prevents the general public from obtaining the administrative services provided on the property in a timely manner.

Title 18 U.S.C. §13, under the Assimilative Crimes Act, state crimes occurring on federal property, such as in federal buildings, can be prosecuted in federal court, so that a trespass taking place in a congressional district office can be prosecuted under this statute.

Title 47 U.S.C. § 223, prohibiting obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications;

Title 18 U.S.C. §113, prohibiting assaults within special maritime and territorial jurisdiction of the United States (on the sea, in an airplane or on federal property, including federal buildings).

Title 18 U.S.C. §114, prohibiting maiming within maritime and territorial jurisdiction;

Title 18 U.S.C. §115, prohibiting influencing, impeding or retaliating against a federal official or their families;

Title 18 U.S.C. §119, prohibiting the release of personal information about employees of the U.S. government with the intent to threaten, intimidate, or incite the commission of a crime of violence;

Title 18 U.S.C. §930, prohibiting the possession of firearms and dangerous weapons in federal facilities;

Title 18 U.S.C. §1111, prohibiting murder within maritime and territorial jurisdiction;

Title 18 U.S.C. §1114, prohibiting killing or attempting to kill employees of the U.S. Government in the performance of their official duties;

Title 18 U.S.C. §351, prohibiting killing, kidnapping or assaulting Member of Congress;

Title 18 U.S.C. §875, prohibiting threatening communication in interstate or foreign commerce;

Title 18 U.S.C. §876, prohibiting threatening communications through the U.S. mail;

Title 18 U.S.C. § 842, prohibiting the importation, manufacture, distribution and storage of explosive materials;

Title 18 U.S.C. § 1001, prohibiting false statements to federal officials (false bomb threats);

Title 18 U.S.C. § 2332a, prohibiting use or threatened use of a weapon of mass destruction;

Title 18 U.S.C. § 2332(f), prohibiting bombing places of public use, government facilities, public transportation systems or an infrastructure facility;

Title 18 U.S.C. § 2339A, prohibiting material support for terrorism.

District of Columbia Criminal Code:

DC Code § 22-1121, prohibiting disorderly conduct;

DC Code § 22-3102, prohibiting trespassing;

DC Code § 22-1307, prohibiting unlawful assembly, profane and indecent language;

DC Muni. Reg. §§ 18-2000.2 & 2000.10, prohibiting failure to obey a police officer (failure to disperse);

DC Code § 22-402, prohibiting assault with a dangerous weapon;

DC Code § 22-404, prohibiting assault or threatened assault in a menacing manner;