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CITY BAR

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The Honorable Joseph Lieberman
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, DC 20510

Senator Susan Collins
Ranking Minority Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, DC 20510

Re: S. 1959, Violent Radicalization and Homegrown Terrorism Prevention Act
of 2007

Dear Senator Lieberman and Senator Collins:

I write on behalf of the Association of the Bar of the City of New York (“the Association”) to express the Association’s opposition to S. 1959, the Violent Radicalization and Homegrown Terrorism Prevention Act of 2007 (“the Bill”). Founded in 1870, the Association is a professional organization of more than 23,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights and the democratic process.

At the outset, I would like to emphasize that the Association firmly supports the goal of preventing violent terrorist acts. Indeed, working in New York City as our members do means that many of us experienced all too personally the impact of the events of September 11, 2001, and makes us particularly sensitive to the impact of violent terrorism on our city and country and determined to prevent future violent terrorist acts in the United States. The Association nevertheless writes in opposition to the Bill because we are concerned that the Bill’s vague language and weak civil liberties protections unacceptably threaten free speech rights and association rights without providing concomitant protection against future violent terrorist acts.

Briefly summarizing the Bill's provisions, S. 1959 defines "violent radicalization," "homegrown terrorism," and "ideologically based violence" (§ 899A) and makes certain findings regarding violent radicalization, homegrown terrorism, and ideologically based violence in the United States (§ 899B). The Bill would establish a National Commission on the Prevention of Violent Radicalization and Ideologically Based Violence (§ 899C), and it directs the Secretary of Homeland Security to establish or designate a university-based Center of Excellence for the Study of Violent Radicalization and Homegrown Terrorism in the United States (§ 899D). The Bill also directs the Secretary of Homeland Security to work with the State Department, the Attorney General, and other Federal Government entities to conduct a survey of methods used by other nations and to use the results of that survey to develop a national policy on addressing "radicalization and homegrown terrorism," requiring the Secretary to submit a report to Congress on that topic (§ 899E). The Bill also requires that the efforts by the Department of Homeland Security that are described in the Bill not violate the constitutional or civil rights of U.S. citizens or permanent residents (§ 899F).

Our primary concern about S. 1959 is that it defines terms so broadly that they could readily be interpreted as encompassing legitimate activities protected by the First Amendment to the Constitution. The basis for our concern is illustrated by the Supreme Court's landmark decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the Supreme Court struck down the Ohio Criminal Syndicalism statute, which penalized "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 . . ." (Id. at 444-45.) As the Court explained, its prior decisions "fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (Id. at 447.) Quoting its earlier ruling in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), the Court reaffirmed that "the mere abstract 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." (395 U.S. at 448.) Thus, the Court made clear that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." (Id.)

The proposed Bill likewise "sweeps within its condemnation speech which our Constitution has immunized from governmental control." For example, although in normal speech "violence" requires actual action, the Bill defines "ideologically based violence" as including mere planning: "The term 'ideologically based violence' means the use, planned use, or threatened use of force or violence by a group or individual to promote the group or individual's political, religious, or social beliefs." (§ 899A(4).) This conflation of speech and violence is not only confusing and disingenuous, but it also ignores the teaching of *Brandenburg*, which protects the "advocacy of the use of force" unless the advocacy is directed to and likely to incite "imminent lawless action." The Bill incorporates its overly-broad definition of "ideologically based violence" into the term "violent radicalization," which it defines as "the process of adopting or promoting an extremist belief system for the purpose of facilitating ideologically based violence to advance political, religious, or social change."

(§ 899A(2).) In other words, the Bill condemns thought, not action. Indeed, although it condemns the “process of adopting or promoting an extremist belief system,” it does not even define what is required to constitute an “extremist belief system.” The Bill similarly condemns thought rather than action in its definition of “homegrown terrorism” as including the “planned use, or threatened use, of force or violence . . . in furtherance of political or social objectives.” (§ 899A(3).)

Thus, under the Bill, “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence,” to quote *Brandenburg*, would be condemned by the Bill as “ideologically based violence,” “violent radicalization,” and “homegrown terrorism.” We cannot help but think of examples from our history, such as the fight for women’s suffrage, and conclude that under the Bill those protests, or even the planning of them, could be condemned as “homegrown terrorism.”

Also disturbing are some of the Bill’s findings, and in particular its condemnation of the Internet as “facilitating violent radicalization, ideologically based violence, and the homegrown terrorism process in the United States by providing access to broad and constant streams of terrorist-related propaganda to United States citizens.” (§ 899B(3).) This finding obviously ignores the “broad and constant streams” of other information and the vibrant political discussion that the Internet promotes. The finding also tips dangerously toward condemning the very free speech that is at the heart of our democracy. The Association believes that only by promoting the discourse of ideas – even those with which we disagree – can our country remain truly free.

The fact that the Bill does not impose criminal penalties, but instead creates a Commission and a university-based Center to study “violent radicalization” and “homegrown terrorism,” does not alleviate our concerns or make the Bill an appropriate piece of legislation. Giving a Commission the power to hold hearings, take testimony under oath, and make legislative recommendations creates a chilling effect on permissible speech, as does creating a Center to continue that study long-term. Further, the Bill directs the Commission to make legislative recommendations for “immediate and long-term countermeasures to violent radicalization, homegrown terrorism, and ideologically based violence,” thereby encouraging the perpetuation of its misguided approach to dealing with terrorism.

Similarly, the Bill’s admonition in § 899F that efforts by the Department of Homeland Security to prevent ideologically based violence and homegrown terrorism “as described herein” should not violate the constitutional or civil rights of U.S. citizens or permanent residents is inadequate. To begin with, the impact of the Bill, with the creation of the Commission and the academic Center, is not limited to the Department of Homeland Security. Moreover, if Congress truly does not want to condone or encourage the violation of constitutional rights, then it should not pass this Bill in the first place.

The cost of implementing this legislation, which the Congressional Budget Office estimates at \$22 million over the 2008-2012 time period, is yet another reason to defeat the Bill. It is at best a waste of taxpayers’ money to create a Commission and a Center whose charges violate constitutional principles. As stated on the website of the Department of Homeland Security, “one primary reason for the establishment of the Department of Homeland Security was to provide the unifying core for the vast national network of organizations and

institutions involved in efforts to secure our nation.” This Bill would instead splinter that effort, diverting funding from the Department that is charged with protecting the country from terrorist attacks.

Accordingly, we ask that Senators on both sides of the aisle join to defeat S. 1959.

Sincerely,

A handwritten signature in cursive script that reads "Barry Kamins".

Barry Kamins