

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA)

v.)

JACOB JOSEPH DIX,)
Defendant.)

Case No. CR23-145

MOTION FOR SUBPOENA DUCES TECUM

COMES NOW Defendant Jacob Joseph Dix, by undersigned counsel, who moves this Court pursuant to Virginia Sup. Ct. Rule 3A:12(a)(4) to issue a subpoena duces tecum to W. Lawton Tufts, Esq., requiring production of certain materials in his possession. In support of his motion, Defendant avers the following:

1. Defendant is charged herein with one count of burning an object with the intent to intimidate under Va. Code §18.2-423.01. The charge relates to Defendant’s alleged participation in a political demonstration on August 11, 2017. On that date, Defendant and others allegedly “burned” citronella torches on the grounds of the University of Virginia while expressing political speech protected under the First Amendment of the United States Constitution and under Article One, Section 12 of the Virginia Constitution.
2. Mr. W. Lawton Tufts, Esq., Assistant Commonwealth’s Attorney, is prosecuting this matter on behalf of the Commonwealth. In 2017, however, Mr. Tufts was a licensed attorney on staff at the University of Virginia School of Law. He was also, according to the so-called Heaphy Report, an “anti-racist activist” involved with local groups that counter-protested the demonstrations allegedly attended by Defendant on August 11 and

12, 2017.¹ In that capacity, Mr. Tufts served as a liaison between counter-protestors and local law enforcement in the weeks leading up to the events of August 11 and 12. As noted in the Heaphy Report:

Lawton Tufts...played a role in facilitating communications between members of [Black Lives Matter] and [Stand Up for Justice] and city officials...Tufts attempted to arrange a meeting between Reverend Edwards, [Black Lives Matter], Congregate Charlottesville, and [Charlottesville Police Department] ...

During the meeting...Tufts discussed the need for comprehensive community messaging, including sharing CPD's operational plan and using Tufts as an intermediary between CPD and BLM and SURJ...

Tufts shared with us that messaging he received in advance of August 12 suggested that law enforcement's focus was on restoring order after it broke down, not preserving order before conflict began. He noted that Lieutenant Brian O'Donnell told him before August 12 that CPD would be unable to prevent every act of violence, and that CPD officers would not enter a crowd unless and until the [Virginia State Police] mobile field force dispersed the crowd. Tufts took that to mean that CPD expected serious violence, and members of the community needed to be aware of the serious risk of injury. Tufts conveyed as much to BLM and SURJ, who continued to meet on a weekly basis until August 12...²

3. It is unclear if Mr. Tufts was one of the persons allegedly "intimidated" by Defendant on August 11. However, Mr. Tufts certainly attended the demonstrations on August 12 as a counter-protestor and may have interacted with Defendant in person at that demonstration.³

¹ Hunton & Williams, LLP, *FINAL REPORT, INDEPENDENT REVIEW OF THE 2017 PROTESTS IN CHARLOTTESVILLE, VIRGINIA*. P. 17 (Nov. 24, 2017). Cited pages of this report are attached hereto collectively as Exhibit A.

² *Id.* at Pp. 73-74.

³ See "August 11-12: How we Got Involved." *UVA Lawyer*, Fall 2017, p. 6. A description beneath Mr. Tufts's picture says the following: "Lawton Tufts, Director of Public Service and Alumni Advising, aimed to serve as an envoy between activists and the police on Aug. 12, but after police declared the protest an unlawful assembly, he followed supremacists who had dispersed through town to monitor if they stirred up violence and help vulnerable people in need." The article then quotes Mr. Tufts: "As disheartening as the day was, it was still powerful in showing how many allies there are against hate. Moving forward, I hope that our community will continue to remain equally involved in trying to bring about equality in Charlottesville and in Virginia and in the country, and not just feel like they took their stand on Aug. 12 and that their work is done. We need to harness the energy our community obviously has for fighting Nazis and use it to fight the injustices of everyday life and push towards equality for all." A copy of this page is attached hereto as Exhibit B.

4. Upon information and belief, Mr. Tufts possesses records and/or other evidence that is material to this matter. Specifically, it is believed that Mr. Tufts possesses records of communications among himself, law enforcement agencies, and counter-protestors from the time of the alleged offenses herein. Mr. Tufts also likely possesses records of communications among the counter-protestors themselves from the same time period. Further, Mr. Tufts likely possesses records of his own communications from 2017 and later—not to include any communications subsequent to his employment with the Albemarle County Commonwealth’s Attorney—to various other persons or entities that include statements indicating his personal involvement with the events forming the basis of these charges.

5. These records are material to Defendant as he prepares his defense in this matter because such records likely show that,

(a) counter-protestors intended to mount some sort of physical resistance to the planned demonstration on August 11, which tends to negate the Commonwealth’s potential claim that such persons were actually intimidated by the alleged actions of demonstrators like Defendant;

(b) law enforcement was aware of the planned demonstrations well in advance, both from communications via the demonstrators themselves and via counter-protestors, which may contradict expected testimony from certain law enforcement officers and also tends to negate the allegation that Defendant and other demonstrators intended to put others in fear of bodily harm;

(c) Mr. Tufts was a witness to the events of August 11 and 12, which precludes him from prosecuting this case under Va. Sup. Ct. Rule 3.7;

(d) Mr. Tufts attended at least one candlelight demonstration held on Albemarle County property during 2017, which renders his actions substantially similar—but for differences in the content of expression—to actions allegedly undertaken by Defendant, thereby suggesting evidence of improper selective prosecution by the Commonwealth’s Attorney; and/or

(e) Mr. Tufts has an improper personal bias against Defendant and similarly situated Defendants, thereby rendering this prosecution violative of Defendant’s Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Evidence gathered related to items (a) and (b) will be used by Defendant at trial.

Evidence gathered related to items (c), (d), and (e) will be used to support Defendant’s pretrial motions.

6. Defendant attempted to obtain these records through a Virginia Freedom of Information Act request directed to the University of Virginia, Mr. Tufts’ employer during the relevant period. The University stated in response that because Mr. Tufts is no longer an employee, it did not possess the requested materials.
7. It is possible this request could be made to Mr. Tufts in his personal capacity via a regular attorney-issued subpoena duces tecum. However, in 2017 Mr. Tufts was an attorney licensed in Virginia, and he may have had an attorney-client relationship with one or more of the individuals or organizations with whom he communicated during that time. As such, in an abundance of caution, Defendant brings this request under Virginia Sup. Ct. Rule 3A:12(a)(4).

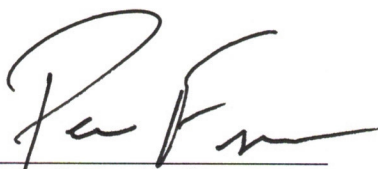
8. This request specifically excludes any records or communications made in Mr. Tufts' capacity as an employee of the Albemarle Commonwealth's Attorney.

WHEREFORE, Defendant requests that this Court issue a subpoena duces tecum requiring W. Lawton Tufts, Esq., to disclose and produce the following documents, records, representations, and/or any other materials, of any nature and in any form, evidencing or related his activities as an "anti-racist activist" in 2017 and later until the beginning of his employment with the Albemarle County Commonwealth's Attorney, to wit:

1. Any documents, records, representations, and/or any other materials evidencing Mr. Tufts' communications to or from law enforcement personnel of any kind in in the spring and summer of 2017, and any communications with such personnel after the summer of 2017 concerning the public demonstrations in Albemarle/Charlottesville in 2017;
2. Any documents, records, representations, and/or any other materials evidencing Mr. Tufts' communications to or from any individuals or organizations concerning the public demonstrations in Albemarle/Charlottesville in 2017;
3. Any documents, records, representations, and/or any other materials evidencing Mr. Tufts' communications to or from any person or entity, of any sort, related to Mr. Tufts' "anti-racist activism" activities from 2017 until the commencement of his employment with the Albemarle County Commonwealth Attorney's office.
4. Any documents, records, representations, and/or any other materials evidencing Mr. Tufts' activities on August 11 and 12, 2017, and/or evidencing his involvement in any candlelight demonstrations in 2017.

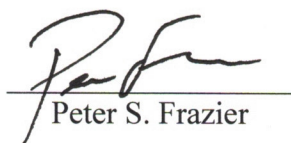
Defendant requests that response be made within thirty days from the date of this Court's subpoena.

RESPECTFULLY SUBMITTED
JACOB JOSEPH DIX
BY COUNSEL



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I certify that a true and accurate copy of this Notice was hand-delivered to the Commonwealth's Attorney for the County of Albemarle this 20th day of September 2023.



Peter S. Frazier

C. Organizational Responses

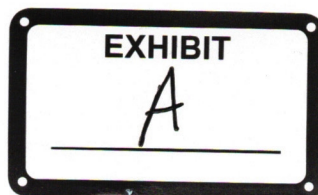
Over the course of our review, we attempted to obtain information from a wide array of organizations that were represented at the summer protest events. We had varying levels of success with these efforts.

Early in our review process, we contacted the individuals who obtained the permits on July 8 (Amanda Barker) and August 12 (Jason Kessler). We were able to interview each of them and incorporate their perspectives into this report. We were also able to interview a number of white nationalist leaders who attended the August 12 rally, including Chris Cantwell, Mike Enoch, and Trace Chiles. We also attempted to interview individuals associated with various groups who participated in the Unite The Right Rally, including Identity Evropa, the National Workers Front, the League of the South, the National Policy Institute, the Nationalist Front. We had discussions with Sam Dickson, an attorney who indicated that he represents many of these organizations. Mr. Dickson initially indicated that Richard Spencer, Nathan Damigo, Evan McLaren, Eli Mosley, and Michael Hill, were unwilling to speak with us. He cited the City's pending lawsuit filed against his clients and their affiliate organizations as reasons for their lack of cooperation with our review. Nevertheless, on November 20, 2017, we received a short letter from Mr. Spencer restating his position that police had failed to protect his group's First Amendment rights.⁸ We also received a longer narrative from Mr. Dickson describing his experience on August 12.⁹

We also attempted to speak with individuals who organized counter-protests or actively resisted the Klan and Unite The Right protest events. We interviewed a number of anti-racist activists, including Emily Gorcenski, Seth Wispelwey, Willis Jenkins, Ann Marie Smith, Rebekah Menning, Tanesha Hudson, and Lawton Tufts. We also reached out to representatives of Black Lives Matter, Solidarity Charlottesville, Standing Up for Racial Justice, and Congregate Charlottesville. As with the organizations above, we were unable to obtain fulsome cooperation from these groups. We also attempted to interview Walter Heinecke, who obtained permits for counter-demonstration events on August 12 at McGuffey and Justice Parks. Mr. Heinecke refused to speak with us, citing the "implications" of our review and his participation in litigation surrounding the protest events.¹⁰

In response to efforts to contact voices in the progressive community and gather their perspective on the protest events, we received an inquiry from the National Lawyers' Guild (NLG), a legal organization that claimed to have advised many members of anti-racist groups with respect to the protest events. NLG made a number of requests of our firm before agreeing to speak with us and advise others to do so. Specifically, NLG wanted us to keep information received during interviews with various individuals confidential from our client, the City of Charlottesville. NLG also asked us to modify our engagement with the City of Charlottesville to compel public release of all information gathered.¹¹ As explained in our response, we were unable to accommodate those requests due to our ethical obligations.¹² Accordingly, we have not been able to access information from NLG or others who they advised.

Much like the VSP resistance outlined above, the lack of cooperation from various organizations and individuals engaged in counter-protest activities mirrored their approach



100 people, and participants were repeatedly warned about the potential for significant violence on August 12. Members of Black Lives Matter and Standing Up for Racial Justice also attended the trainings.

Individuals who attended these trainings told us that their goal was to create “cognitive dissonance” and to delay and obstruct the hate speech that they expected. They wanted to be visible in the opposition to the right-wing groups and make it harder for them to have a platform to express racism. In service of that mission, they were willing to break the law and expected to be arrested. Although they had been warned about the potential for violence, few expected it.

Reverend Edwards and the Clergy Collective were not part of this nonviolent training effort or otherwise affiliated with Congregate Charlottesville. Wispelwey told us that his group came to view Edwards as “working for the City” given his close coordination with City leaders and law enforcement. Such coordination is unsurprising in light of Reverend Edwards’s past roles as School Board member, Mayor, and City Councilor in Charlottesville. In any event, many were frustrated by the lack of success produced by engaging with City leaders. Congregate’s formation thus marked a sharp conflict between the “old guard” clergy and a younger, more confrontational generation of faith leaders.

On July 31, Congregate held a press conference to announce that several national leaders would be coming to Charlottesville for the weekend of August 12, including Cornel West and Traci Blackmon. Reverend Edwards was not told about the press conference or invited. According to Wispelwey, “sides were chosen.”

The Congregate organizers planned to host an interfaith prayer service on the evening of August 11 at St. Paul’s Memorial Episcopal Church. Located on University Avenue, St. Paul’s sits just across the street from the University of Virginia, a stone’s throw away from the iconic Rotunda and the statue of Thomas Jefferson.

b. Local Activist Groups

Local chapters of Black Lives Matter and Standing Up for Racial Justice were tangentially, though not entirely, affiliated with the faith community in the weeks leading up to August 12. Some members of those groups participated in the nonviolent resistance training sponsored by Congregate Charlottesville. The distrust these groups felt towards City leadership created distance ahead of the event.

Lawton Tufts and Anne Coughlin played a role in facilitating communication between members of BLM and SURJ and City officials. Tufts is an employee of the UVA School of Law and a former public defender who serves as a member of the Police Citizen’s Advisory Panel. Coughlin is a professor of criminal law at UVA. Tufts attempted to arrange a meeting between Reverend Edwards, BLM, Congregate Charlottesville, and CPD. BLM refused to attend the meeting if Chief Thomas attended, so the City sent Assistant City Manager Mike Murphy.

During the meeting, Murphy shared the City’s prediction that the right-wing groups present at Unite The Right would be armed. This alarmed Coughlin, who told us that she thought

the City's laissez-faire approach was "crazy and terrifying." Tufts discussed the need for comprehensive community messaging, including sharing CPD's operational plan and using Tufts as an intermediary between CPD and BLM and SURJ. Murphy offered to give Tufts the contact information for Lieutenant Cheryl Sandridge. Tufts told us that his communications with Sandridge on August 12 amounted to a few unanswered text messages about a militia group. Unbeknownst to Tufts, Sandridge was not even stationed downtown on August 12 but was rather at the Emergency Operations Center at Zehmer Hall at UVA.

Tufts shared with us that the messaging he received in advance of August 12 suggested that law enforcement's focus was on restoring order after it broke down, not preserving order before conflict began. He noted that Lieutenant Brian O'Donnell told him before August 12 that CPD would be unable to prevent every act of violence, and that CPD officers would not enter a crowd unless and until the VSP mobile field force dispersed the crowd. Tufts took that to mean that CPD expected serious violence, and members of the community needed to be aware of the serious risk of injury. Tufts conveyed as much to BLM and SURJ, who continued to meet on a weekly basis until August 12. They were unsurprised. The groups resolved to avoid violence at all costs but record law enforcement conduct.

An organization called Solidarity Cville, "a community defense network of Charlottesville activists acting in solidarity with communities of color locally and globally to fight all forms of white supremacy," was also involved in organizing opposition to the Unite The Right rally.²³⁷ With membership that overlaps with BLM, SURJ, and Congregate, Solidarity Cville was described to us as an umbrella group that focuses on social media strategies. Initially, the Solidarity Cville web site contained a list of demands to City Council, including the revocation of Kessler's permit. Then, in the days leading up to the Unite The Right rally, the site hosted links to events and efforts put on by BLM, SURJ, and Congregate.

On August 5, a Solidarity Cville post titled "How to Prepare for August 12 (and action in general)" offered advice and tips for anyone intending to attend Unite The Right as a counter-protester. The post warned attendees to expect to see firearms and lots of law enforcement. The post also advised bringing water and first aid kits. Notably, the post explained that if an attendee ever needed aid, like in the event of tear gas or pepper spray, "simply shout 'medic!' if you are in need."²³⁸

c. Houses of Worship

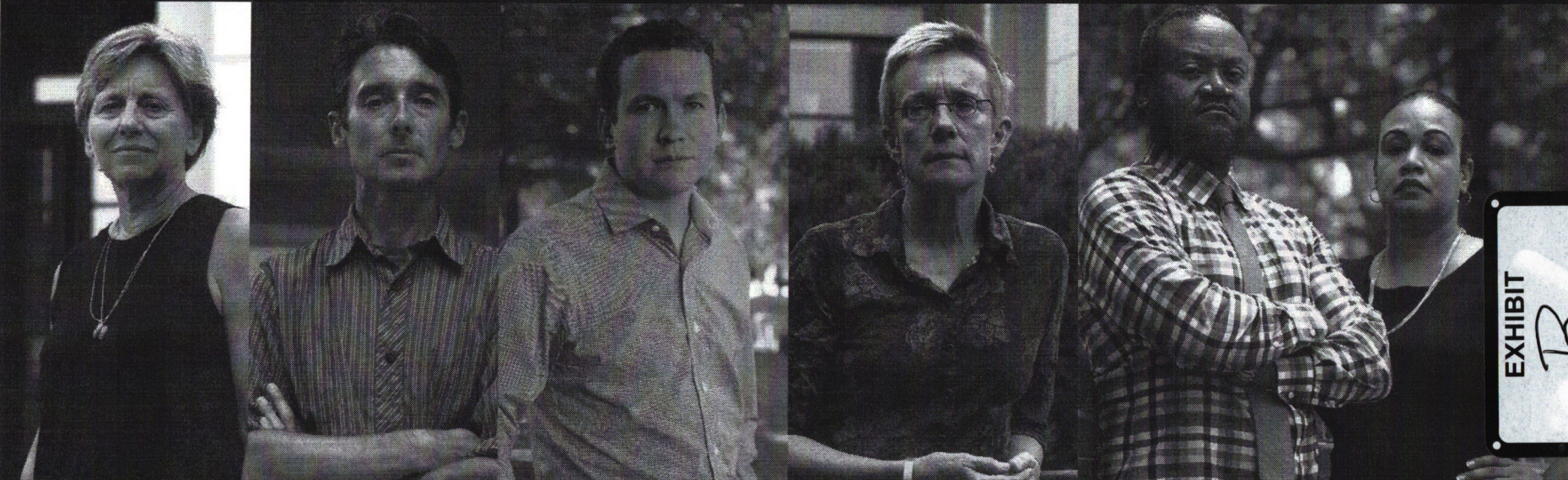
Separate from the interfaith groups, individual houses of worship located near Emancipation Park made preparations for August 12.

Paul Walker and Marilu Thomas, the Rector and Associate Rector at Christ Episcopal Church—located one block west of Emancipation Park—were concerned about the safety of their church on August 12. Walker contacted nearby Hill & Wood Funeral Home to inquire how they planned to secure their building on the day of the event. He learned that the funeral home had already reached out to Captain Mitchell and offered law enforcement the use of the Hill & Wood building during the demonstration. Walker called Captain Mitchell and described his concerns about security and property damage. Mitchell replied

AUG. 11-12, 2017: HOW WE GOT INVOLVED

AMONG THE MANY OTHERS INVOLVED IN COMMUNITY EFFORTS AUG. 11-12 WERE **KIM ROLLA '13**, who works at the LEGAL AID JUSTICE CENTER, served as a NATIONAL LAWYERS GUILD legal observer, and **DIRECTOR OF STUDENT AFFAIRS KATE DUVALL '06**, who volunteered through the NATIONAL LAWYERS GUILD to coordinate local, on-the-ground jail visits from attorneys for those who were arrested.

<p>PROFESSOR BARBARA ARMACOST '88 served as a legal observer for the National Lawyers Guild on Aug. 12,</p>	<p>alongside students AMANDA LINEBERRY '19 and ADELE STICHEL '19.</p>	<p>BEN BOHERTY, HEAD OF LIBRARY INSTRUCTION</p>	<p>AND RESEARCH LIBRARIAN, marched with activists.</p>	<p>LEWIS J. BURTS, DIRECTOR OF PUBLIC SERVICE AND ALUMNI ADVISING, aimed to serve as an envoy between activists and the police on Aug. 12, but after police declared</p>	<p>the protest an unlawful assembly, he followed supremacists who had dispersed through town to monitor if they stirred up violence and help vulnerable people in need.</p>	<p>PROFESSOR ANNE COUGHLIN and her husband,</p>	<p>Mark, drove street medics on Aug. 12.</p>	<p>ASSISTANT DEAN AND CHIEF ADMISSIONS OFFICER PAUL TAYLOR and former SENIOR DIRECTOR</p>	<p>OF LAW FIRM RECRUITING PARTNER DAVID R. HAYES, III and ASSOCIATE CHRISTOPHER J. WOOD hosted a dinner Aug. 13 for African-American</p>	<p>students who were in town, including 115 who had just moved to the area. The group of about 15 students</p>	<p>talked for hours about their concerns and ideas moving forward.</p>
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<p>"ONE OF THE MOST MOVING THINGS I SAW ON SATURDAY WAS THE FEW MOMENTS RIGHT AFTER THE WHITE SUPREMACISTS WERE MOVED OUT. The counter-protesters surged in and for just a few minutes they held the park. There were</p>	<p>shouts of a kind of surprised joy. There was a sense of, 'Oh my gosh, we just took over the park and drove them out.' And it was just a moment, of course, because the police cleared them out then too. But it was a wonderful moment."</p>	<p>"IT WAS A DAY FILLED WITH YERBORN. But I'm also taking away just a real sense of gratitude from all the people from</p>	<p>Charlottesville and from out of town all over the place who came downtown to defend the city."</p>	<p>"AS DISHEARTENING AS THE DAY WAS, IT WAS STILL POWERFUL IN SHOWING HOW MANY ALLIES THERE ARE AGAINST THAT HATE. Moving forward I hope that our community will continue to remain equally involved in trying to bring about equity in Charlottesville and in Virginia and in</p>	<p>the country, and not just feel like they took their stand on Aug. 12 and that their work is done. We need to harness the energy our community obviously has for fighting Nazis and use it to fight the injustices of everyday life and push towards equity for all."</p>	<p>"AT ONE POINT WE DROVE PAST ONE OF THE POLICE BARRIERS TO GET AS CLOSE AS WE COULD TO MARKET STREET—and this was right around the time of the homicide—and a police officer came running up and screamed at us for breaching the barrier. We apologized</p>	<p>and explained that we were dropping off medics and the officer immediately said, 'I'm sorry, that's fine.' And we then apologized to the officer and said, 'We're so sorry,' and thanked them for their work, and the officer started tearing up."</p>	<p>"THE CONCERNS [OF THE STUDENTS WE HAD DINNER WITH] WERE THE CONCERNS OF MANY STUDENTS. THEY WERE VERY MATURE. I was proud of them for the thought they had put into it and I was also proud that they felt strong enough to</p>	<p>ask some really difficult questions and ask that those questions be elevated even beyond the Law School. . . . I was happy to do the dinner because it made me personally feel less powerless in the face of what had happened."</p>	<p>"THERE WAS JUST SMOKE THAT THIS WAS HAPPENING IN THIS DAY AND HERE IN CHARLOTTESVILLE. It certainly hasn't been my</p>	<p>experience here—that's not to say that things are perfect—but it was a very disturbing scene to see people with such hate and animosity coming here."</p>
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IN A LETTER TO THE VIRGINIA LAW WEEKLY,

BLACK LAW STUDENTS ASSOCIATION VICE PRESIDENT KIMBERLY DELK '19 SAID THE EVENTS ON AUG. 11-12 VIOLATED

LEGAL STANDARDS FOR FREE SPEECH. "Some Americans interpreted these chants as hate speech or just the ignorant opinions of a small group of despicable," she wrote. "It is imperative to understand that Black and Brown Americans heard real, tangible, life-altering threats." "Unfortunately, the 'Unite the Right' rally

opened the door to the most heinous tool in racism's arsenal: fear. . . . Even though the rallies were extreme portrayals of racism, micro-aggressions and covert racism continue to plague our society when the cameras are off and the protesters are home. "With everything that happened that weekend, we still prepared for church on Sunday and work on Monday because fear is exactly what they wanted from us. We contained the fear within our friendships and families while portraying strength and confidence to our co-workers and classmates. We'll continue to assuage such strength because fear will

not bring about the prevention tactics, support and legislation necessary for change."

TIM HEAPHY '91 WILL LEAD CITY INVESTIGATION

FORMER U.S. ATTORNEY TIM HEAPHY '91, NOW A PARTNER AT HUNTON & WILLIAMS, HAS BEEN TAPPED TO PERFORM AN

INDEPENDENT REVIEW OF THE CITY OF CHARLOTTESVILLE'S RESPONSE TO THREE WHITE NATIONALIST RALLIES

THIS SUMMER. "The recent protests in Charlottesville presented a wide array of challenges to our community," Heaphy said in a press release. "It is crucial that we gather accurate information and attempt to learn from those difficult events. Our review will be thorough and objective, and will begin immediately. I look forward to presenting a comprehensive summary of what occurred in and around the protest events, and to formulating practical recommendations for improved future response."