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COMBATING DOMESTIC TERRORISM: CONSTITUTIONAL ISSUES AND PRACTICAL SOLUTIONS

Captain Melissa Ken

ABSTRACT

Recent events in the United States have fueled the ongoing conversation regarding the domestic terrorist threat within our nation. Multiple studies indicate that the greatest terrorist threat to the United States no longer emanates from a foreign source but comes from within. In response, many lawmakers have proposed various legislative solutions, including the creation of a domestic terrorist organization designation similar to the existing foreign terrorist organization designation. This Article analyzes constitutional issues in creating a domestic terrorist organization designation and concludes that such a designation is not constitutionally feasible. It proposes several practical alternatives to provide law enforcement and prosecutors with the necessary resources and tools to combat this growing threat within the United States while preserving its most cherished liberties, such as freedom of association and free speech.

I. INTRODUCTION

On January 6, 2021, during the "Rally to Save America," protestors gathered in Washington, D.C. to contest the results of the November election. Impassioned speakers, including then-President Trump, claimed that marching on the Capitol was the last chance to "stop the steal" and save their country. Thousands of protestors marched down Pennsylvania Avenue from the White House toward the Capitol Building. The protestors came from all over the nation with various motivations, goals, and objectives. Once at the Capitol, the protest turned into a riotous assault on the building. A few hundred rioters overwhelmed the Capitol security, overran the barricades, and stormed the building causing lawmakers, who were in process of certifying the election results, to temporarily abandon the certification.[1] Five people died as a result of the attack.[2] Then president-elect Biden described the assault on the U.S. Capitol building as "one of the darkest days in the history of our nation" and an act of domestic terrorism.[3]

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[1] *See* Dan Barry, Mike McIntire & Matthew Rosenberg, *'Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html.

[2] Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html.

[3] Ken Thomas & Sabrina Siddiqui, *Biden Says Rioters Who Stormed the Capitol Were Domestic Terrorists*, WALL ST. J.: POLITICS (Jan. 7, 2021, 8:40

Since the attack, several of the rioters have been arrested and charged with various federal offenses, such as unlawfully entering a restricted building, impeding government business, and disorderly conduct.[4] None of those charges include the word "terrorism." This is, at least in part, because the United States does not have a federal criminal domestic terrorism statute or a domestic terrorist organization ("DTO") designation. Congress is considering several bills regarding the criminalization of domestic terrorism at the federal level; however, the conversation regarding the designation of DTOs is less prominent.[5] This is due to the constitutional issues inherent in such a designation.[6]

A DTO designation, particularly as applied to the attack on the U.S. Capitol, raises serious questions regarding the definition of a DTO. There were hundreds of people present at the Capitol on January 6th who did not enter the building or engage in violent acts; should their mere association with the gathering justify designating those individuals as terrorists? As discussed throughout the paper, the key element of terrorism is the utilization of violence or the threat of violence to intimidate civilians or influence government policy.[7] It is also critical to ensure any DTO definition does not infringe on constitutionally protected rights, particularly the First Amendment rights of free speech and freedom of association.[8]

PM), https://www.wsj.com/articles/biden-says-mob-that-stormed-capitol-were-domestic-terrorists-11610046962.

[4] Press Release, Off. Pub. Affs., U.S. Dep't of Just., Thirteen Charged in Fed. Ct. Following Riot at the U.S. Capitol (Jan. 8, 2021), https://www.justice.gov/opa/pr/thirteen-charged-federal-court-following-riot-united-states-capitol.

[5] In 2019, multiple bills proposing the criminalization of domestic terrorism were "drafted in the Senate and in the House of Representatives . . . but none have become law to this date." Francesca Laguardia, *Considering a Domestic Terrorism Statute and its Alternatives*, 114 NW. U. L. REV. ONLINE 212, 215 (2020). In the same year, only one Senate bill and one House bill called for the designation of domestic terrorist organizations. *See* S. Res. 279, 116th Cong. (2019-2020); *see also* H.R. Res. 525, 116th Cong. (2019-2020).

[6] JEROME P. BJELOPERA, CONG. RSCH. SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS 9, 62 (2012).

[7] 18 U.S.C. § 2331(5).

[8] *See* Brian Michael Jenkins, *Five Reasons to Be Wary of a New Domestic Terrorism Law*, THE RAND BLOG (Feb. 24, 2021), https://www.rand.org/blog/2021/02/five-reasons-to-be-wary-of-a-new-

Despite issues with designating DTOs, it is essential that law enforcement and prosecutors have the tools necessary to combat this growing threat to our nation. Studies evaluating global terrorism have concluded that the most serious threat facing the United States comes from domestic white supremacist and paramilitary groups.[9] A DTO designation would result in additional resources and funding to law enforcement as well as dedicated research regarding the issue. Without understanding the threat our nation faces, it will be extremely difficult, if not impossible, to effectively combat it.

Domestic terrorist lethality and danger is currently outpacing the threat from foreign and jihadist terrorist groups.[10] Some of the greatest advantages in designating a foreign terrorist organization ("FTO") come from the "legal clarity" and "lucidity in the often complicated [sic] interagency process of coordinating the actions of Executive agencies, by giving them a center focal point upon which the efforts converge."[11] However, as explained below, the FTO designation does not raise the same constitutional concerns as an analogous DTO designation.[12]

While a DTO designation raises serious the constitutional concerns and is likely prohibited, there are other solutions that will enable counter-domestic terrorist efforts to receive the attention and funding needed to combat this rapidly evolving threat. Those solutions include increased utilization of the existing FTO designation process; repurposing federal criminal statutes; creating a DTO process analogous

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domestic-terrorism.html. ("But in the domestic environment, these activities will inevitably raise legal challenge under the First Amendment.").

[9] Right-wing terrorism comprises the majority of terrorist attacks in the United States. Right-wing terrorists are predominantly white supremacists, anti-government extremists, and involuntary celibate (incels). *See* SETH G. JONES, CATRINA DOXSEE & NICHOLAS HARRINGTON, CTR. FOR STRATEGIC & INT'L STUD. BRIEFS, THE ESCALATING TERRORISM PROBLEM IN THE UNITED STATES 1, 7 (2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200612_Jones_DomesticTerrorism_v6.pdf.

[10] Neil MacFarquhar, *As Domestic Terrorists Outpace Jihadists, New U.S. Law is Debated*, N.Y. TIMES (Feb. 25, 2020), https://nyti.ms/37RZDys.

[11] AUDREY K. CRONIN, CONG. RSCH. SERV., RL32120, THE "FTO" LIST AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 6-7 (2003).

[12] *See* Holder v. Humanitarian L. Project, 561 U.S. 1 (2010); *see also* Justin S. Daniel, *Blacklisting Foreign Terrorist Organizations: Classified Information, National Security, and Due Process*, 166 U. PA. L. REV. 213 (2017).

to the FBI's gang designation process; and prosecuting paramilitary groups under existing state laws.

This paper will begin by describing the current framework the federal government uses to designate FTOs as well as Specially Designated Global Terrorists ("SDGT") and elucidate the domestic authority for these types of foreign designations. The next section will explore the current federal definition of domestic terrorism while defining the domestic limitations of the authority used to designate FTOs. Finally, this paper will address the practical application of constitutional issues to a DTO designation and propose other viable solutions to combat domestic terrorism.

II. FRAMEWORK FOR DESIGNATING FTOs AND SDGTs

The Bureau of Counterterrorism in the State Department is responsible for identifying and designating entities as FTOs.[13] In making its assessment, the Bureau of Counterterrorism looks at actual or suspected attacks and acts of terror committed by the organization as well as the group's capability and intent to carry out attacks in the future.[14] This broad assessment illustrates the federal government's intention to not only impose accountability upon those who have already taken action against the interests of the United States, but also to prevent future attacks. As illustrated below, there are specific criteria which must be met in order for an organization to be designated as an FTO or SDGT.[15] Additionally, the executive branch is given wide discretion in designating FTOs largely due to the President's foreign relations power under Article II of the Constitution.[16]

A. Procedural Framework and Consequences of FTO Designation

In making an FTO designation, the Bureau of Counterterrorism determines whether the organization engages in "terrorist activity" under the Immigration and Nationality Act (INA)[17] or "terrorism" as

[13] JOHN W. ROLLINS, CONG. RSCH. SERV., IF10613, FOREIGN TERRORIST ORGANIZATION (FTO) (2019).
[14] *Id.*
[15] 8 U.S.C. § 1182(a)(3)(B); 22 U.S.C. § 2656f(d)(2); *see also* 8 U.S.C. § 1189(a)(1), *amended by* Pub. L. No. 104-132 (1996).
[16] *See generally* U.S. CONST. art. II, §§ 2-3.
[17] 8 U.S.C. § 1182(a)(3)(B).

defined by the Foreign Relations Authorization Act (FRAA).[18] The INA requires an unlawful act of violence or support effort that involves one of six different types of violence.[19] On the other hand, the FRAA specifically requires that the act of violence be politically motivated and perpetrated against civilian targets.[20] The primary difference in these two definitions is the requisite motivation behind the violent act.[21]

The INA also requires that the Secretary of State determine whether the organization has met three criteria in order to justify FTO designation.[22] Those three criteria are that the suspected terrorist group must: 1) be a foreign organization; 2) engage in or retain the capability and intent to engage in terrorism; and 3) threaten the security of U.S. nationals or the national defense, foreign relations, or economic interests of the United States.[23] After the Secretary of State makes a determination in consultation with the Secretary of the Treasury and the Attorney General, Congress must be notified of the intended designation and is given seven days to object.[24] After the seven-day waiting period, the designation is published and takes effect.[25]

If an organization is designated as an FTO, there are severe consequences, including the prohibition of material support or resources to that organization from any person subject to U.S. jurisdiction.[26] Material support is defined very broadly and includes financial support, the provision of property or services, as well as providing training.[27] In addition to a prohibition on material support, foreign national members of FTOs are not permitted to enter the United States.[28] Finally, the Secretary of the Treasury may block all transactions involving domestic financial institutions and FTO assets.[29]

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[18] 22 U.S.C. § 2656f(d)(2).
[19] 8 U.S.C. § 1882(a)(3)(B)(iii).
[20] 22 U.S.C. § 2656f(d)(2).
[21] *See generally* Faiza W. Sayed, *Terrorism and the Inherent Right to Self-Defense in Immigration Law*, 109 CAL. L. REV. 615 (2021) (the lack of motivation in the IRA definition has caused individuals acting in self-defense to be barred from admission to the United States).
[22] 8 U.S.C. § 1189(a)(1), *amended by* Pub. L. No. 104-132 (1996).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] 18 U.S.C. § 2339B(a)(1).
[27] For full definition, see 18 U.S.C. § 2339A(b)(1)-(3).
[28] 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)-(V), 1227 (a)(1)(A).
[29] 18 U.S.C. § 2339B(a)(2).

Outside of the domestic statutory penalties imposed by FTO designation, there are also several international consequences.[30] The United States is a global leader in the war on terrorism and the United States' determination in this arena carries weight with the global community.[31] Designation as an FTO under American law heightens public awareness and knowledge of terrorist organizations and activities.[32] It also creates a stigma against that organization and helps to isolate it.[33] These collateral consequences of the FTO designation help to cut off support for that organization, not only from the United States but from around the world.[34]

B. Procedural Framework and Consequences of SDGT Designation

The SDGT designation is a product of the September 11th terrorist attacks on the World Trade Centers in New York City.[35] Pursuant to his authority to declare a national emergency,[36] then-President Bush issued Executive Order 13,224 which created the SDGT designation and imposed financial sanctions on organizations and individuals deemed to be a threat to American citizens and national security interests.[37] The Secretaries of State and Treasury have the ability to designate SDGTs in consultation with each other as well as the Attorney General and Secretary of Homeland Security.[38]

In order to designate an SDGT, the Executive Order requires that the group or individual meet one of what essentially boil down to four criteria: 1) pose significant risk of committing acts of terrorism; 2)

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[30] *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE: BUREAU OF COUNTERTERRORISM, https://www.state.gov/foreign-terrorist-organizations/ (last visited Oct. 22, 2021).
[31] *See generally* AUDREY KURTH CRONIN ET AL., CONG. RSCH. SERV., RL 32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS (2003).
[32] *Foreign Terrorist Organizations*, *supra* note 30.
[33] *Id.*
[34] CRONIN ET AL., *supra* note 31.
[35] *Id.*
[36] 50 U.S.C. § 1701; 50 U.S.C. § 1621(a).
[37] Exec. Order No. 13,224, 3 C.F.R. § 13224 (2001), *amended in part by* Exec. Order No. 13,886, 3 C.F.R. § 13886 (2019).
[38] *See* Exec. Order No. 13,886, 3 C.F.R. § 13886(1)(a); Exec. Order No. 13,224, 66 Fed. Reg. 48041 (Sept. 12, 2019); 31 C.F.R. § 594.201 note 2 to ¶ (a) (2021).

participate in training to commit acts of terrorism; 3) be a leader of a designated entity; or 4) own or materially support, or attempt or conspire to own or support, a designated group or individual.[39] This definition is much broader than the FTO designation criteria listed above and can result in the designation of American organizations as SDGTs.[40]

Pursuant to SDGT designation or initiation of investigation regarding an SDGT designation, all of the organization's or individual's assets are blocked.[41] Unlike FTO designation, there are no immigration consequences and lesser criminal penalties.[42] The SDGT's assets remain blocked until the organization has been de-listed.[43] As with the FTO designation, an SDGT organization draws global attention and stigma for its ties to terrorist activity.

C. Executive Authority to Regulate Foreign Affairs

The robust statutory authority for designating FTOs relies entirely on the President's Article II powers to conduct foreign affairs on behalf of the United States and the broad discretion given to the executive branch by the courts. Article II invests the President with several enumerated foreign policy powers.[44] These Article II powers have been interpreted broadly by the judiciary in cases such as *Curtiss-Wright*[45] and *Holder*.[46]

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[39] Exec. Order No. 13,224, *supra* note 22.

[40] An Ohio-based, Muslim charity was provisionally designated as an SDGT based on allegations that the charity donated funds to Hamas and that their president was a foreign national. The charity's assets were frozen which essentially shut down the charity. Without assessing the merits of the designation, the district court judge found Fourth Amendment and due process violations. *See* KindHearts v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

[41] Exec. Order No. 13,224, 3 C.F.R. § 13224.

[42] Criminal and civil penalties may apply for violations. *See* 50 U.S.C. § 1705 (2021).

[43] Media Note, Off. of the Spokesperson, U.S. Dep't of State, Terrorism Designations FAQs (Feb. 27, 2018), https://2017-2021.state.gov/terrorism-designations-faqs/index.html.

[44] These powers include the power to make treaties and appoint ambassadors (with the advice and consent of the Senate) and the authority to receive ambassadors (which has been interpreted to give the President exclusive power to recognize foreign nations). *See* Zivotofsky v. Kerry, 576 U.S. 1059 (2015); *see also* U.S. CONST. art. II, §§ 2-3.

[45] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[46] Holder v. Humanitarian L. Project, 561 U.S. 1, 61 (2010).

In the *Curtiss-Wright* case, the Supreme Court upheld criminal charges for violating a Presidential order.[47] The Court stated that the President is "the sole organ of the federal government in the field of international relations."[48] The expansive holding in *Curtiss-Wright* has since been limited by the *Youngstown* case which made it clear that a President's power may be checked if he acts against the expressly stated will of Congress.[49] However, the discretion accorded to the executive branch in the area of foreign affairs remains very strong.[50]

More recently, the Supreme Court showed great deference to the executive in designating FTOs and drew an interesting line in regards to freedom of association issues under the First Amendment (which will be explored in the next section).[51] The plaintiffs in *Holder* sought an injunction preventing the federal government from enforcing two FTO designations.[52] The plaintiffs claimed that the designations violated their constitutional rights to support the lawful objectives of the organizations.[53] The Court gave deference to the executive's determination that these organizations presented a threat to the United States and merited FTO designation.[54] Thus, the Court was willing to take the executive's assertion essentially at face value in regards to national security and issues of foreign affairs.[55]

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[47] *See Curtiss-Wright*, 299 U.S. at 331-32.
[48] *Id.* at 320.
[49] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952).
[50] *Id.* at 640.
[51] *Holder*, 561 U.S. at 61.
[52] *Id.* at 7.
[53] The designated organizations had both lawful and unlawful objectives (including supporting terrorists), but the Court held that there was no requirement to prove intent to further an organization's illicit activities. The statute requires knowledge of the organization's connection to terrorism, not specific intent to further terrorist activities. *See Holder*, 561 U.S. at 10-12.
[54] *Id.* at 10.
[55] *Constitutional Law*, 124 HARV. L. REV. 179, 259 (2010) ("Central to this decision was the Court's broad deference to the national security judgments of Congress and the executive branch as to what constituted a likely threat of furthering terrorism. Yet, the Court's uncritical reliance on these judgments stood in fundamental tension with the heightened scrutiny that it purported to apply.").

III. CONSTITUTIONAL ISSUES WITH APPLYING FTO FRAMEWORK TO DOMESTIC ORGANIZATIONS

As seen above, the executive branch has a great amount of authority and discretion in regards to judicial proceedings centered on foreign affairs and national security interests. Current legislation also supports the FTO designation process.[56] With such strong support from all three branches of government on the subject of FTOs, it seems a simple matter to translate the three FTO criteria into an analogous DTO test. Congress has already defined domestic terrorism in 18 U.S.C. § 2331(5) as follows: "acts dangerous to human life in violation of criminal laws of the United States or any State" intended to intimidate civilians or a government which occurs inside the United States.[57] This existing definition and the framework for FTO designation makes for a seemingly simple DTO test: a domestic organization engaging in domestic terrorism pursuant to 18 U.S.C. § 2331(5) which threatens the security of U.S. nationals or the national defense of the United States.

However, those authorities and support for FTO designation evaporate as soon as the lens of "terrorism" falls on American soil.[58] The Court in *Holder* specifically stated that it was doubtful the same prohibition on material support would survive application to domestic organizations.[59] This is likely due to increased constitutional protections which shield American organizations on U.S. soil, as described below.[60] In order to survive scrutiny, any DTO designation must not violate constitutional civil liberties.[61] This Article will

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[56] 8 U.S.C. § 1189.

[57] 18 U.S.C. § 2331(5) (2021).

[58] Even FTO designations are coming under increased scrutiny from the public sector as studies reveal that the existing framework and policies regarding terrorists are used to unfairly subject Muslim- and Arab-Americans to increased scrutiny. MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., WRONG PRIORITIES ON FIGHTING TERRORISM 4 (2018), https://www.brennancenter.org/sites/default/files/201908/Report_Wrong_Priorities_Terrorism.pdf.

[59] *Holder*, 561 U.S. at 39 (2010).

[60] *See id.* at 30 (citing Zemel v. Rusk, 381 U.S. 1, 17) ("Congress . . . must of necessity paint with a brush broader than it customarily wields in domestic areas.").

[61] Marbury v. Madison, 5 U.S. 137, 180 (1803) ("a law repugnant to the Constitution is void"); *see also The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx ("The complex role

specifically address the concerns regarding DTO designation in the context of First Amendment rights violations, namely freedom of speech and freedom of association.[62]

A. Freedom of Speech

Freedom of speech is guaranteed under the First Amendment.[63] This freedom is a hallmark of Western society; however, the United States likely has the strictest adherence to and broadest interpretation of the idea of free exchange of speech and ideas.[64] Despite calls from Western nations to do otherwise, the U.S. has continued to protect ideas and speech that are considered extremely offensive by other groups and individuals.[65] This strict adherence to cherished civil liberties is part of the American identity. While protections of First Amendment freedom of speech are robust, they are not absolute. There are instances where speech can be, and is, criminal under United States law.

As explained below, essentially when speech crosses the line into intentionally placing people in fear of bodily harm or death, that speech is not protected by the First Amendment. There are some other

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of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court's considered judgment, conflict with the Constitution.").

[62] There are other Constitutional rights at issue with these designations, such as due process and Fourth Amendment protections against unreasonable search and seizure, including surveillance. However, those topics are beyond the scope of this paper.

[63] "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

[64] *The U.S. Supreme Court and Freedom of Expression*, 84 INDIANA L. J. 885, 916 (2009) ("in the United States, the freedom of expression is a negative liberty. In contrast, the freedom of expression in Europe is a positive liberty. Thus, the freedom of expression in the United States imposes prohibitions on the State, but rarely imposes duties.") (citing Isaiah Berlin, An Inaugural Lecture Delivered Before the University of Oxford: Two Concepts of Liberty (Oct. 31, 1958), http://ilj.law.indiana.edu/articles/84/84_3_Zoller2.pdf.

[65] Tony Romm & Drew Harwell, *White House Declines to Back Christchurch Call to Stamp Out Online Extremism Amid Free Speech Concerns*, WASH. POST (May 15, 2019), https://www.washingtonpost.com/technology/2019/05/15/white-house-will-not-sign-christchurch-pact-stamp-out-online-extremism-amid-free-speech-concerns/.

recognized categories of speech that are also unprotected;[66] however, content-based speech that falls outside of those categories is considered protected speech.[67] Laws curtailing such speech must typically pass muster under the strict scrutiny test to survive constitutional challenge.[68] Strict scrutiny requires that the government use the most narrowly tailored means to protect a compelling interest.[69] Sex offender registration is an example of a regulation involving First Amendment rights which survives strict scrutiny.[70] However, this is a very limited, specifically carved out exception to the broad protections generally enjoyed by American citizens under the First Amendment.

1. True Threat Standard

Speech can be criminalized if it constitutes a threat.[71] The word "threat" has a very subjective connotation to it – what one person meant as a joke, another person can perceive as a threat.[72] One way to impose criminal liability on speech is if the threat constitutes a "true threat."[73] The Supreme Court laid out the initial criteria for this standard in the *Watts* case.[74] In order to be a true threat, a court must consider the

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[66] Other unprotected categories include, but are not limited to, obscenity (*see* Miller v. California, 413 U.S. 15 (1973)) and child pornography (*see* New York v. Ferber, 458 U.S. 747 (1982)).

[67] *See* Elonis v. United States, 575 U.S. 723 (2015); *see also* Watts v. United States, 394 U.S. 705 (1969).

[68] "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) (internal citation omitted).

[69] Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359-60 (2006).

[70] *See* United States v. Fox, 286 F. Supp. 3d 1219, 1244 (D. Kan. 2018) (district court found federal Sex Offender Registration and Notification Act served the compelling government interest of protecting the public from sex offenders and was narrowly tailored by tracking only essential information).

[71] 18 U.S.C. § 875(c) (criminalizes the transmission in interstate or foreign commerce of communications containing "any threat to kidnap any person or any threat to injure the person of another").

[72] *See generally* Elonis v. United States, 575 U.S. 723, 731 (2015) (considered criminal liability when speaker did not intend to convey a threat, but his words were perceived as a threat).

[73] Watts v. United States, 394 U.S. 705, 707 (1969).

[74] *Id.* at 708.

context, conditional nature, and reaction of the listener.[75] Recently, the Supreme Court added to this test in the *Elonis* case. In *Elonis*, the Court determined that the speaker must have intended the speech to be considered a threat (adopting a subjective intent requirement) while the recipient's understanding of the speech is not dispositive (rejecting an objective intent requirement).[76]

Additionally, the Supreme Court held that there is no First Amendment protection for speech or symbolic conduct (such as cross burning) meant to communicate a serious expression of an intent to commit violence or to intimidate others.[77] The Court stated that the true threat standard consists of "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[78] In a pre-cursor to *Elonis*, the Court in *Black* held that a true threat is where the speaker has the "intent of placing the victim in fear of bodily harm or death."[79]

2. Incitement Standard

As opposed to the true threat standard where provoking fear or intimidation can be sufficient to criminalize speech, the criminal incitement standard requires that speech be at least likely to result in unlawful action.[80] The current incitement standard is known as the *Brandenburg* test.[81] For speech to be criminalized, the test requires that the speech in question produce imminent lawless action or be likely to produce such action.[82] The Court in *Brandenburg* found that these criteria were not met and overturned the conviction of a Ku Klux Klan leader who called for vengeance against the U.S. government, African Americans, and Jewish individuals during a rally which was locally televised.[83] The limits of this incitement standard were very recently

[75] *See generally* Virginia v. Black, 538 U.S. 343 (2003).
[76] *Elonis*, 575 U.S. at 737-38 (2015).
[77] *Black*, 538 U.S. at 360, 362-63 (2003).
[78] *Id.* at 359.
[79] *Id.* at 360.
[80] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[81] *Id.* at 448-49.
[82] *Id.* at 447.
[83] *Id.* at 447.

tested and analyzed by two separate federal courts in recent years resulting in different opinions on the federal Anti-Riot Act.[84]

The Anti-Riot Act criminalizes traveling in interstate or foreign commerce to incite, organize, or aid and abet a riot.[85] This Act was passed "[a]fter several years of increasing unrest in cities and as a result of demonstrations against the Vietnam War and for civil rights."[86] The Act reflected Congress's focus on targeting "the speech and conduct of so-called 'outside agitators,' specifically, Black political leaders and Communists, who were supposedly able to evade existing state anti-riot statutes."[87] Although the Act has not been used much in the past few decades, it has made a resurgence in the modern era.[88]

The first case, decided by the Central District of California in 2019, charged four defendants with conspiracy to riot and using a facility of interstate commerce with the intent to riot in violation of the Anti-Riot Act.[89] The defendants were allegedly members of the Rise Above Movement (RAM), a white supremacist organization, and traveled to three political rallies in California during the charged time period.[90] At two of the rallies, the defendants allegedly assaulted counter-protestors.[91] The defendants challenged the constitutionality of the Anti-Riot Act.[92] The Court agreed with the defendants and dismissed all charges against them. In dismissing the charges, the Court found that the Act criminalized speech and actions "taken long before any crowd gathers . . . so long as the individual acts with the required purpose" and that the Act did not contain an imminence requirement which "eviscerates *Brandenburg*'s protections of speech."[93] As such, the Act "substantially infringe[d] on the rights to free speech and

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[84] 18 U.S.C. § 2101; *See* United States v. Rundo, 497 F. Supp. 3d 872, 874-75, 876 (C.D. Cal. 2019), *rev'd and remanded*, 990 F.3d 709 (9th Cir. 2021); *see also* United States v. Miselis, 972 F.3d 518, 525 (4th Cir. 2020).
[85] 18 U.S.C. § 2101(a)(1)-(4).
[86] Dennis Melamed, *Really Reading the Riot Act*, HISTORY.NET (Feb. 2018), https://www.historynet.com/really-reading-riot-act.htm.
[87] *United States v. Miselis: Fourth Circuit Finds the Anti-Riot Act Partially Unconstitutional*, 134 HARV. L. REV. 2614, 2617 (2021).
[88] *Id.* at 2614.
[89] United States v. Rundo, 497 F. Supp. 3d 872, 874-75, 876 (C.D. Cal. 2019), *rev'd and remanded*, 990 F.3d 709 (9th Cir. 2021).
[90] *Id.* at 875, *rev'd and remanded*, 990 F.3d 709.
[91] *Id.* at 876, *rev'd and remanded*, 990 F. 3d 709.
[92] *Id.* at 875-76, *rev'd and remanded*, 990 F.3d 709.
[93] *Id.* at 877, *rev'd and remanded*, 990 F.3d 709.

freedom of assembly" resulting in its being unconstitutionally overbroad.[94] However, the Ninth Circuit recently held that "the district court erred in finding the Anti-Riot Act facially overbroad" and reversed the decision.[95] The Ninth Circuit's opinion largely tracks with the next case, decided by the Fourth Circuit Court of Appeals.[96]

The Fourth Circuit Court of Appeals also analyzed the incitement statement in a case involving two defendants who entered conditional guilty pleas to conspiracy to violate the Anti-Riot Act.[97] Again, the defendants were allegedly members of RAM who travelled to the "Unite the Right" rally in Charlottesville, Virginia, and allegedly assaulted counter-protestors.[98] Again, the defendants challenged the constitutionality of the Anti-Riot Act as being "facially overbroad." However, in this case, the Court held that the Act was only unconstitutional in part and that the portions of the statute which held up under constitutional scrutiny supported the conviction.[99] The Court specifically found unconstitutional the portions of the Act which criminalized speech tending to "encourage" or "promote" a riot as well as the criminalization of speech "urging others to riot."[100] The Court reasoned that by removing the portions of the statute which created unconstitutional broadness, the remainder of the statute is severable and left intact.[101] Pursuant to the remaining provisions of the statute, it is a violation of the Anti-Riot Act to commit violence in furtherance of a riot to which the defendants admitted in their provisional guilty plea.[102]

While these cases were decided in different circuits at different levels, they address similar questions regarding the incitement standard and its constitutionality. The District Court, albeit overturned, invalidated the entirety of the Anti-Riot Act while the Fourth Circuit eliminated only the provisions pertaining to speech with no imminency

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[94] *Id.* at 879, *rev'd and remanded*, 990 F.3d 709.
[95] *See* U.S. v. Rundo, 990 F.3d 709 (9th Cir. 2021).
[96] The Ninth Circuit invalidated the provisions prohibiting "speech tending to 'organize,' 'promote,' or 'encourage' a riot and expands that prohibition to 'urging' a riot and to mere advocacy. To that extent, we agree with the Fourth Circuit that the Act criminalizes a substantial amount of protected speech." U.S. v. Rundo, 990 F.3d 709, 720 (9th Cir. 2021).
[97] United States v. Miselis, 972 F.3d 518, 525 (4th Cir. 2020).
[98] *Id.* at 529.
[99] *Id.* at 530.
[100] *Id.* at 540, 546-47.
[101] *Id.* at 530.
[102] *Id.* at 547.

to violent, unlawful actions.[103] Both of these cases illustrate the difficult of balancing First Amendment rights against deterring and punishing criminal activity. They also demonstrate the importance of the imminency standard in ensuring pure speech is not criminalized.

B. Freedom of Association

Freedom of association is not explicitly enumerated in the Constitution. Rather it is an implied, but powerful, right derived from the Constitutional right of freedom of speech.[104] In order to fully exercise one's right to speech, it is essential to engage in those speech activities with others.[105] If a person's right to be a member of a certain group or to join in speech activities with like-minded individuals is abridged, this constitutes a violation of the First Amendment.[106] "A 'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'"[107] This domestic application of the freedom of association principle directly contrasts with its application in a case involving FTOs.

As previously discussed, the *Holder* Court accepted the executive branch's assertion that any material support to the organizations in question constituted assistance to its unlawful goals.[108] In the *Claiborne Hardware* case, however, the Court held that prohibiting material support or membership in a group holding both lawful and unlawful objectives violates the First Amendment.[109] The key difference is the domestic nature of the issue in *Claiborne Hardware* as opposed to the international nature of the issue in *Holder*.[110] The *Holder* Court went so far as to say that, in the international context, criminalizing material support to a properly designated FTO did not violate constitutional liberties as the "statute

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[103] *See* United States v. Rundo, 497 F. Supp. 3d 872, 874-75, 876 (C.D. Cal. 2019), *rev'd and remanded*, 990 F.3d 709 (9th Cir. 2021); *see also* United States v. Miselis, 972 F.3d 518, 525 (4th Cir. 2020).
[104] NAACP v. Alabama, *ex rel.* Patterson 357 U.S. 449 (1958); U.S. CONST. amend. I.
[105] *See generally* NAACP v. Alabama, *ex rel.* Patterson 357 U.S. 449 (1958).
[106] *Id.* at 462.
[107] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919 (1982) (internal citation omitted).
[108] Holder v. Humanitarian L. Project, 561 U.S. 1, 25-26 (2010).
[109] *Claiborne Hardware Co.*, 458 U.S. 886, 908-09 (1982).
[110] *Claiborne Hardware Co.*, 458 U.S. 886; *Holder*, 561 U.S. 1 (2010).

does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals" of the FTO.[111] Instead, the statute authorizing the FTO designation merely prohibited provision of financial assistance.[112]

However, in the context of an American organization with American members, constitutional protections are more robust.[113] Pursuant to *Claiborne*, a group's aims must be illegal and the individual must hold "a specific intent to further those illegal aims" for membership to be prohibited.[114] This presents an entirely different test and sets a much higher bar for any DTO designation.

IV. PROPOSED SOLUTIONS TO THE DTO DESIGNATION ISSUE

Constitutional limitations on laws implicating freedom of speech and association make it impossible to broadly define a DTO in the same way the federal government already defines FTOs.[115] While there is a possibility that a limited definition of a DTO could pass constitutional muster (discussed below), the most likely solution to the domestic terrorism threat is a multi-faceted approach requiring participation from state and federal government as well as law enforcement at all levels.[116] These solutions involve creating an administrative process similar to the FBI's gang designations; repurposing federal criminal statutes; utilizing the existing FTO framework to designate FTO analogues to our domestic terrorist threat; and bringing existing state law to bear in order to combat paramilitary organizations.

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[111] *Holder*, 561 U.S. at 39 (citing Humanitarian L. Project v. Reno, 205 F. 3d 1130, 1133 (9th Cir. 2000)).
[112] *Id.*
[113] *See Holder*, 561 U.S. at 38 ("We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.").
[114] *Claiborne Hardware Co.*, 458 U.S. at 920.
[115] *Holder*, 561 U.S. 1.
[116] *See generally* Francesca Laguardia, *Considering A Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 212, 244 (2020).

A. Pass Legislation Defining DTOs

As discussed above, the First Amendment provides an effective shield against limitations on speech and association.[117] However, the courts have carved out limited exceptions which could, in theory, provide the basis for the designation of DTOs.[118] An extremely limited definition of a DTO might not violate constitutional rights if it targets only the most heinous groups.[119]

In order for speech to be criminalized, that speech must contain a true threat,[120] constitute criminal incitement,[121] or communicate intent to commit violence or intimidate others.[122] Pursuant to *Claiborne Hardware*, in order for criminal liability "to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[123] These factors combined present an extremely high constitutional threshold for a DTO designation. Such a high bar, in fact, that only groups that are actively involved in or imminently about to commit criminal misconduct would likely qualify. In essence, only groups that would already be subject to charges for criminal conspiracy would be eligible for designation.

The limits of the type of group activity coupled with the high level of required criminal intent provide such a narrow basis for a DTO designation that it is unrealistic to implement on any level that would have a meaningful impact. If a criminal enterprise has reached the point where group classification is permissible without infringing on First Amendment rights, then law enforcement already has a basis to initiate and investigate under normal criminal procedures. Additionally, the list of DTOs would evolve so rapidly that there would be no realistic

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[117] *See generally* NAACP v. Alabama, *ex rel.* Patterson 357 U.S. 449 (1958); *Claiborne Hardware Co.*, 458 U.S. 886; *Holder*, 561 U.S. 1 (2010).
[118] *See generally* Virginia v. Black, 538 U.S. 343 (2003).
[119] VICTORIA L. KILLION, CONG. RSCH. SERV., TERRORISM, VIOLENT EXTREMISM, AND THE INTERNET: FREE SPEECH CONSIDERATIONS 37 (2019), https://sgp.fas.org/crs/terror/R45713.pdf ("[A] law that is narrowly drafted to prohibit online speech that falls within one of the so-called unprotected categories of speech may not trigger heightened First Amendment scrutiny.").
[120] *See* Watts v. United States, 394 U.S. 705 (1969); *see also* Elonis v. United States, 575 U.S. 723 (2015).
[121] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
[122] *See Black*, 538 U.S. at 363.
[123] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982).

method to keep up with the changes in a way that would facilitate preventative activities. Finally, in order to prevent these criminal conspiracies from coming to fruition, law enforcement typically depends on secrecy which would be obviated by announcing the group and their intentions on a public DTO list.[124] This solution does not meet the intention behind designating DTOs in the first place: to provide attention, funding and resources to combat threats presented by dangerous and persistent organizations.[125]

Another potential way to create a DTO list is to place groups on a post-offense registry, similar to existing federal structures for a sex offender list. Sex offender registration has survived repeated constitutional challenges as it is narrowly tailored to serve the compelling government interest of protecting society from sex offenders.[126] It is essential that any registration requirements remain narrowly tailored to information and precautions deemed necessary to protect society.[127]

Similar to sex offender status, the domestic terrorism definition provides lawmakers and courts with status criteria associated with domestic terrorism.[128] In support of this domestic terrorist status, the government could argue its constitutionality based on a compelling government interest to protect society from terrorists. The category would be narrowly tailored based on an existing statute and requiring only limited information on offenders.

However, this analogy to sex offender status in regards to DTOs is tenuous at best. Using the sex offender registration framework presents problems if used in advance of any criminal activity because sex offender registration requires a criminal conviction, whereas

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[124] Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021, 11:17 AM), https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism ("[T]he use of confidential informants and undercover agents is perhaps the most important in domestic terrorism investigations.").

[125] *See Foreign Terrorist Organizations*, U.S. DEP'T OF STATE: BUREAU OF COUNTERTERRORISM, https://www.state.gov/foreign-terrorist-organizations/ (last visited Oct. 22, 2021).

[126] *See generally* Smith v. Doe, 538 U.S. 84 (2003).

[127] Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (court struck down blanket provision preventing sex offenders from accessing social media sites).

[128] 18 U.S.C. § 2331(5).

advance DTO designation (if analogous to the FTO designation) is an administrative decision.[129] Thus, the preventative aspect of DTO designation is, again, obviated.

Additionally, this framework, if applied to a group where only one member has been convicted, is likely unconstitutional for the First Amendment reasons discussed above. For example, not all members of RAM travelled to the Unite the Right rally or participate in alleged criminal activity.[130] Thus, designating a group like RAM as a DTO based on the conviction of a few members would violate the First Amendment rights of those members who did not participate in the alleged conspiracy as they had no intent to further the group's illegal aims, as required by the *Claiborne* Court.[131]

In fact, the United States has already experimented with criminalizing organizational membership. The Smith Act, passed in 1940, was used for about twenty years to target the Communist party in the United States and other groups who advocated for the overthrow of the U.S. government.[132] However, in the late 1950s and early 1960s, the Supreme Court began to probe the Smith Act's constitutional weaknesses. In the *Scales* case, the Supreme Court specifically reviewed the Smith Act's membership provision and found that the defendant was not a mere member of the Communist party, but that he actively participated in the organization and had knowledge of its illegal advocacy.[133] Later that same year, in the *Noto* case, the Supreme Court held that mere membership and advocacy were insufficient for criminal liability, instead, "there must be some substantial direct or circumstantial evidence of a call to violence now or in the future."[134] Thus while the Smith Act is still a viable statute, the Supreme Court effectively struck down the membership prohibition contained therein.

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[129] Justin S. Daniel, *Blacklisting Foreign Terrorist Organizations: Classified Information, National Security, and Due Process*, 166 U. PA. L. REV. 213, 217-18 (2017).

[130] *See generally Rise Above Movement (R.A.M.),* S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/rise-above-movement (last visited Nov. 8, 2021) (four R.A.M. members were arrested in Charlottesville, the group has an estimated membership of 50).

[131] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982).

[132] 18 U.S.C. § 2385 (2021); *See generally* Alec Thomson, *Smith Act of 1940,* FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1048/smith-act-of-1940 (last visited Nov. 8, 2021).

[133] Scales v. United States, 367 U.S. 203, 220 (1961).

[134] Noto v. United States, 367 U.S. 290, 298 (1961).

After the violent protests in Charlottesville in 2017, Virginia attempted to pass legislation defining a DTO and create a reporting requirement designating all groups which met that definition.[135] However, this bill was criticized the American Civil Liberties Union ("ACLU") of Virginia.[136] The primary concern articulated by the ACLU of Virginia was "about the First Amendment risks that come from government branding groups with unpopular beliefs as terrorist and criminal."[137] This summarizes concerns from our past. Not too long ago in our nation's history, the FBI conducted surveillance and interference operations on unpopular groups, such as the Community Party and the Socialist Workers Party, with little or no evidence of unlawful activities in the name of national security.[138] Against this historic backdrop and heavy criticism, Virginia's DTO bill failed.

As demonstrated by our nation's recent past, if lawmakers open the aperture too much, the result is a true danger of chilling or violating rights protected by the Constitution. The Constitution rightly prohibits any practicable prohibition against DTOs through legislation. Although an outright DTO designation is untenable, there are other solutions to combat this threat facing our nation.

B. Use FBI Gang Designation Framework to Designate DTOs

Since 2005, the FBI has been collecting information on gang activity and disseminating that information to Congress, other federal agencies, as well as federal, state, and local law enforcement.[139] The Department of Justice ("DOJ") has a lengthy definition which

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[135] H.B. 1601 (Va. 2018); Daryl Johnson, *State of Virginia Proposes Domestic Terrorism Law*, S. POVERTY L. CTR. (Feb. 16, 2018), https://www.splcenter.org/hatewatch/2018/02/16/state-virginia-proposes-domestic-terrorism-law ("Michael Kelly, a spokesperson for Virginia's Office of Attorney General, said the genesis of the bill emanated from the violent aftermath of the August 12, 2017, racist "alt-right" rally in Charlottesville, Virginia.")

[136] Claire G. Gastañaga, *Why We Can't Support HB 1601, Domestic Terrorism Legislation*, ACLU OF VA., https://acluva.org/en/news/why-we-cant-support-hb-1601-domestic-terrorism-legislation (last visited Oct. 12, 2020).

[137] *Id.*

[138] *And Justice for All, 1954-1971*, FBI, https://www.fbi.gov/history/brief-history/and-justice-for-all (last visited Oct. 14, 2020).

[139] 34 U.S.C. § 41507.

essentially states that a gang is a group of three or more people who collectively identify themselves to create fear or intimidation in order to engage in criminal activity with the intent to enhance or preserve the group's power, reputation or economic resources.[140] As agencies of the federal government, DOJ and FBI decision making and challenges to those decisions are governed by the Administrative Procedures Act ("APA").[141]

The APA sets forth regulations and procedures governing how federal agencies issue decisions as well as legal standards for the review of those decisions. For a decision by an administrative agency to be ripe for judicial review, the decision must constitute final agency action.[142] In order for agency action to be considered final, the action must mark the "consummation" of the agency's decision-making process and the action must determine "rights or obligations . . . from which legal consequences will flow."[143]

In the context of gang designations, the FBI's decision does not constitute final agency action because there are no legal consequences associated with the designation.[144] Gangs often complain that their inclusion in the FBI's report causes law enforcement to target them in violation of their rights under the Constitution.[145] However, "harms caused by agency decisions are not legal consequences if they stem from independent actions taken by third parties."[146] The FBI's report is simply informational pursuant to a Congressional order.[147] There is no requirement that local law enforcement act on the information

[140] *About Violent Gangs*, DEP'T OF JUST., https://www.justice.gov/criminal-ocgs/about-violent-gangs (Apr. 30, 2021).
[141] Administrative Procedure Act, 5 U.S.C. § 551(a).
[142] Administrative Procedure Act, 5 U.S.C. § 704.
[143] Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948), then quoting Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).
[144] Parsons v. US Dep't of Just., 878 F.3d 162, 171 (6th Cir. 2017).
[145] *See generally Insane Clown Posse File Lawsuit Challenging FBI Gang Designation*, ACLU OF MICH. (Jan. 8 2014), https://www.aclumich.org/en/press-releases/aclu-insane-clown-posse-file-lawsuit-challenging-fbi-gang-designation.
[146] *Parsons*, 878 F.3d at 168 (internal citation omitted).
[147] 34 U.S.C. § 41507(c).

therein.[148] Thus, the gang designation imposes no legal consequences and cannot be challenged pursuant to the APA due to a lack of ripeness.[149]

The structure of the APA and conditions for judicial review of agency action enable the gang designation to survive constitutional scrutiny.[150] Indeed, law enforcement action predicated on information contained in such an informational report is still subject to constitutional challenge.[151] This ensures that law enforcement is still beholden to constitutional considerations and that they respect civil liberties. If law enforcement agencies violate those standards, they can be held accountable for constitutional violations.[152]

This solution could be implemented in one of two ways: the FBI could use the existing gang definition and framework to start defining DTOs as gangs, or Congress could pass another legislative authorization for the FBI to designate and publish reports regarding the domestic terrorist threat.[153] Due to the narrowly tailored language of the definition of "gang," many DTOs would not qualify.[154] Typically, DTOs have the primary goal of forwarding a particular ideology or result (such as a second civil war) which fails the DOJ's current requirement that a gang have the intent to enhance or preserve their power, reputation, or economic interests. Those DTOs with overlapping priorities would be targetable pursuant to the existing definition.

The better option is for Congress to establish a National Terrorist Organization Intelligence Center just as they established a National Gang Intelligence Center. The legislative authorization for the National

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[148] *Parsons*, 878 F.3d at 171 ("the Juggalo gang designation does not limit (or compel) action by other government actors and no government officials are required to consider or abide by the gang designation.").

[149] It should be noted that the court did not even reach the question of whether an informational report (such as the National Gang Threat Assessment) actually constitutes agency action. *Id.* at 169 n.7.

[150] *Id.* at 162.

[151] *Insane Clown Posse File Lawsuit Challenging FBI Gang Designation*, ACLU OF MICH. (Jan. 8 2014), https://www.aclumich.org/en/press-releases/aclu-insane-clown-posse-file-lawsuit-challenging-fbi-gang-designation.

[152] *Parsons*, 878 F.3d at 179 n. 9.

[153] *See generally* Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong. § 6 (2019).

[154] *See About Violent Gangs*, U.S. DEP'T OF JUST. (Apr. 30, 2021), https://www.justice.gov/criminal-ocgs/about-violent-gangs.

Gang Intelligence Center was fairly simple.[155] It merely established which agencies the FBI should consult in writing the report; agencies to whom the report should be distributed; a reporting requirement; and an appropriations authorization.[156] It did not even include a definition of a gang.[157]

In the National Defense Authorization Act ("NDAA") for Fiscal Year 2020, Congress required the FBI, the Department of Homeland Security, and the director of National Intelligence to submit annual reports "with detailed data on domestic terrorism incidents and a strategic intelligence assessment of the threat."[158] However, the NDAA only required reporting for five years and the first report was produced more than 10 months after the initial deadline. This lackluster legislative effort demonstrates the need for a better enforced, long-term requirement to investigate domestic terrorism through an administrative scheme similar to the gang designation process.

If Congress applied this administrative scheme to DTOs, it would likely cause concern for civil rights groups.[159] However, the DOJ and FBI's definition of a DTO would become public (just as the gang definition is) and would be subject to review by the highest levels of government.[160] With the understanding that it may be difficult to gather the political will necessary to pass even a basic authorization and appropriation as the one proposed, designation of qualifying DTOs as gangs could suffice until sufficient political will exists to establish a National Terrorist Organization Intelligence Center equivalent. As seen in the next section, federal statutes have been used to successfully

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[155] 34 U.S.C. § 41507.

[156] *Id.*

[157] *Id.*

[158] Simon Clark, et al., *4 First Steps for Congress to Address White Supremacist Terrorism*, CTR. FOR AM. PROGRESS (Oct. 30, 2020), https://www.americanprogress.org/issues/security/reports/2020/10/30/492095/4-first-steps-congress-address-white-supremacist-terrorism/.

[159] *See* Gastañaga, *supra* note 136.

[160] The terrorist definition employed by the FBI could also include FTOs in order to provide a more cohesive understanding due to the increasingly transnational nature of any form of terrorism (if this is deemed to be appropriate after consultation with the Department of Justice and the FBI). For purposes of federal sentencing enhancement, Congress promulgated a definition of "criminal street gang" which reflects the DOJ's internal definition. *See* 18 U.S.C. § 521(a); *see also About Violent Gangs*, U.S. DEP'T OF JUST. (Apr. 30, 2021), https://www.justice.gov/criminal-ocgs/about-violent-gangs.

prosecute gangs whose ideologies overlap with domestic terrorist threats.[161]

While this solution does not directly result in the prosecution of domestic terrorists, it would allow and require the FBI to conduct research into DTOs and disseminate the information to law enforcement across the country. This would ensure that law enforcement is on the same page and aware of current threats. It would also allow law enforcement to apprise the FBI of any known threats that are missing from their report resulting in two-way communication between authorities at all levels.

C. Repurposing Existing Federal Statutes

Utilizing non-terrorist charges sometimes obscures the government's efforts to combat domestic terrorism. For example, Patrick Crusius is accused of committing a mass shooting at an El Paso Walmart and killing twenty-two people in an effort to combat the "Hispanic invasion of Texas."[162] It was one of the most deadly domestic terrorist attacks in the United States but the perpetrator is charged with state murder and federal hate crimes.[163] No terrorist offense made it onto the charge sheet.[164] Rhetoric and criminal charges are important in fighting domestic terrorism; however, federal law simply does not have an applicable terrorism charge in most cases of domestic crime. In the absence of a federal domestic terrorist criminal offense, prosecutors must make do with the available statutes to ensure perpetrators of violent crimes are held accountable.

Thus, in conjunction with establishing an administrative process to investigate and gather information on DTOs, the federal government should also repurpose and apply existing criminal statutes to certain DTOs. Two such statutes are the Racketeer Influenced and Corrupt Organizations Act ("RICO") and 18 U.S.C. § 2332b ("§ 2332b") which

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[161] Press Release, U.S. Dep't of Just., Three Aryan Brotherhood of Texas Gang Members Plead Guilty to Federal Racketeering Charges (Nov. 21, 2013) (on file with author).

[162] Michael Balsmo & Cedar Attanasio, *Walmart Shooting Suspect Charged with Federal Hate Crimes*, AP NEWS, (Feb. 6, 2020), https://apnews.com/article/540119399f935dcc9ff1c151663a8c23.

[163] *Id.*

[164] Indictment, United States v. Crusius, No. EP-20-CR-00389, 2020 U.S. Dist. LEXIS 132901 (W. D. Tex. Feb. 6, 2020), available at https://www.justice.gov/opa/press-release/file/1245761/download.

criminalizes acts of terrorism transcending national boundaries.[165] These two statutes will not apply to every act of domestic terrorism by any means.[166] However, opening the aperture of available charges will enable investigators and prosecutors to be broader in their investigations. This will result in greater accountability for domestic terrorists and act as an additional deterrent.

1. Racketeer Influenced and Corrupt Organizations Act

Scholars have discussed bringing RICO to bear against terrorist organizations for at least three decades.[167] In a nutshell, RICO makes it "unlawful for anyone employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[168] The broad reach of RICO allows prosecutors to charge all individuals associated with a criminal enterprise (such as leadership and administrative personnel), not just those directly committing the violent acts.[169]

Unfortunately, it can be difficult to demonstrate that a terrorist is part of a specific enterprise or group due to an increase of "lone wolf" perpetrators.[170] It is becoming more common for domestic terrorists to

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[165] 18 U.S.C. § 96; 18 U.S.C. § 2332b.

[166] AMY C. COLLINS, GEO. WASH. UNIV., THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM, PROGRAM ON EXTREMISM 12-13 (2020), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf; Laguardia, *supra* note 116, at 244 (Addressing RICO, the use of this statute to prosecute terrorists "has been rare." Specifically, "[p]resumably, crimes committed in order to gain entrance to or gain prestige in a terroristic gang such as RAM, therefore, could be prosecuted under this statute, although crimes committed in order to vaguely support RAM's ideology could not.").

[167] *See* Laguardia, *supra* note 116, at 244.

[168] *Rico Charges*, DEP'T OF JUST. CRIM. RES. MANUAL (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-109-rico-charges.

[169] *See* 18 U.S.C. § 1961(1).

[170] Daniel L. Byman, *How to Hunt a Lone Wolf: Countering Terrorists who Act on their Own*, BROOKINGS INST. (Feb. 14, 2017), https://www.brookings.edu/opinions/how-to-hunt-a-lone-wolf-countering-terrorists-who-act-on-their-own/.

not claim membership in any particular group.[171] Instead, these lone wolf actors find their inspiration online and through the acts and manifestos of previous terrorists.[172] It is also difficult to apply RICO in these cases as the statute requires multiple violent acts as a basis for the charge. Historically, many of these lone wolf actors only perpetrate one act of domestic violence. Thus, RICO is likely not a viable avenue to target these individual actors.

While there are many domestic terrorists who act alone, there are still groups of individuals that can be targeted by RICO. For example, federal prosecutors used RICO to successfully convict three members of the Aryan Brotherhood of Texas, a white nationalist gang who planned to commit several violent crimes in furtherance of protecting white supremacy.[173] Even more recently, dozens of members of the New Aryan Empire group in Arkansas will be prosecuted under RICO in order to hold accountable the leaders of the organization.[174]

Admittedly, both of these groups are designated as gangs, but this shows the efficacy of the FBI's gang program and its potential application to domestic terrorism. Domestic terrorism, specifically white supremacist terrorist activity, is "an underexplored area of study."[175] The utilization of RICO, in conjunction with establishing an

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[171] *See* Jeffrey C. Connor & Carol Rollie Flynn, *What to Do About Lone Wolf Terrorism? Examining Current Trends and Prevention Strategies*, FOREIGN POL'Y RSCH. INST. (Nov. 26, 2018), available at https://www.fpri.org/article/2018/11/what-to-do-about-lone-wolf-terrorism-examining-current-trends-and-prevention-strategies/ ("The incidence of lone terrorist attackers has continued to increase in the U.S.").

[172] Patrick Crusius demonstrated direct influence from the Christchurch, New Zealand shooting in his manifesto which he released online before killing twenty-three people at a Walmart in El Paso, Texas. *See* Tim Arango, et al., *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html.

[173] Press Release, U.S. Dep't of Just., Three Aryan Brotherhood of Texas Gang Members Plead Guilty to Federal Racketeering Charges (Nov. 21, 2013) (on file with author); *See also Aryan Brotherhood of Texas*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/aryan-brotherhood-texas (last visited Oct. 29, 2021).

[174] Scott Carroll & Nick Popham, *Dozens with Ties to Arkansas White Supremacist Group Indicted, Authorities Say*, ABC 7 (Feb. 12, 2019), https://katv.com/news/local/54-members-of-arkansas-white-supremacist-group-indicted-authorities-say.

[175] Clark, *supra* note 158.

administrative process for the FBI to investigate and gather data on DTOs, could lead to the prosecution and dismantling of the larger and more dangerous DTOs in the United States. As the FBI has done with gangs, they can target identified DTOs and investigate them with an eye toward prosecution under criminal statutes such as RICO.

2. 18 U.S.C. § 2332b

The second statute, § 2332b, gives law enforcement a potential avenue to target those lone wolf actors that are unreachable by RICO. This statute criminalizes "conduct transcending national boundaries" which results in the death, kidnapping, maiming, or assault of any person in the United States.[176] Despite the transnational component of the statute, it is required that the actual offense be committed in the United States.[177] Given the increasingly transnational nature of terrorism, this seems like the perfect statute to combat domestic terrorism.

A primary issue with the statute, however, is the definition, or lack thereof, of "conduct transcending national boundaries."[178] The statute defines the term as "conduct occurring outside of the United States in addition to the conduct occurring in the United States."[179] According to the DOJ, the statute "is intended to reach violent international terrorist activity that takes place within the United States where at least a part of that activity also occurs outside the United States."[180] While many of the lone wolf actors are inspired by manifestos and websites from foreign terrorists, it is unlikely that simply accessing a website constitutes "transnational conduct" as there is no physical activity occurring outside the United States.

However, the statute could still be used to prosecute those lone wolves who travel abroad in order to receive inspiration and training. For example, the Russian Imperial Movement ("RIM") hosts training camps outside St. Petersburg and trains individuals from all around the

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[176] 18 U.S.C. § 2332b(a) (the statute also criminalizes substantial risk of serious bodily harm by damaging real property in the United States).
[177] 18 U.S.C. § 2332b(a).
[178] 18 U.S.C. §2332b(g)(1).
[179] 18 U.S.C. § 2332b(g)(1).
[180] *Terrorism Transcending National Boundaries*, DEP'T OF JUST. CRIM. RES. MANUAL (Jan. 16, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-13-terrorism-transcending-national-boundaries-18-usc-2332b.

world in close combat and how to use weapons and explosives.[181] If an American citizen travels to any such training camp and then uses those tactics to carry out a violent crime in the United States, federal prosecutors could charge the individual with § 2332b.[182] Using this statute would help to sever transnational connections between domestic terrorist groups and help deter these groups on a global scale. It will also allow federal prosecutors to better control the narrative of a case by getting a "terrorism" charge on the books.

D. Designate Additional FTOs

Currently, the vast majority of organizations on the FTO list are Islamic or Arabic terrorist organizations.[183] On April, 6 2020, the State Department announced that due to a "surge in white supremacist terrorism" it would designate RIM as an SDGT.[184] This is the first time that a white supremacist group has made it onto a State Department terrorist list and constitutes a step forward in America's fight against new terrorist threats.[185] However, this effort falls drastically short of what is necessary and proper to combat the global threat of white supremacy; a threat that the State Department press release claimed, "is a top priority for this Administration."[186] Instead of designating RIM as an FTO, the State Department chose to categorize it as an SDGT which

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[181] Tim Hume, *German Neo Nazis are Getting Explosives Training at a White Supremacist Camp in Russia*, VICE NEWS (June 6, 2020), https://www.vice.com/en/article/g5pqk4/german-neo-nazis-are-getting-explosives-training-at-a-white-supremacist-camp-in-russia.
[182] 18 U.S.C. § 2332b.
[183] For current listing of FTOs, see *Foreign Terrorist Organizations, Bureau of Counterterrorism*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited Oct. 8, 2020).
[184] Nathan A. Sales, *Designation of the Russian Imperial Movement*, U.S. DEP'T OF STATE (Apr. 6, 2020), https://2017-2021.state.gov/designation-of-the-russian-imperial-movement/index.html.
[185] *Russian Imperial Movement*, STAN. UNIV.: MAPPING MILITANT ORGS., https://cisac.fsi.stanford.edu/mappingmilitants/profiles/russian-imperial-movement (Feb. 2021). ("The U.S. State Department listed RIM as a Specially Designated Global Terrorist (SDGT) in April 2020. It is the first white supremacist group to be designated as a SDGT.")
[186] *Id.*

has fewer legal consequences and, arguably, carries less weight in the international community.[187]

Right-wing extremist groups (including white supremacists) accounted for over 90% of terrorist attacks in the United States between January 1 and May 8, 2020.[188] The FBI director stated that the greatest threat faced by the U.S. right now is "lone actors radicalized online who look to attack soft targets with easily accessible weapons."[189] Designating right-wing extremist groups as FTOs would allow the federal government to investigate and pursue charges against perpetrators as Homegrown Violent Extremists ("HVE").[190] HVEs "are individuals who have been radicalized primarily in the United States, and who are inspired by, but not receiving individualized direction from, foreign terrorist organizations."[191]

A prime example of an FTO-eligible, foreign, white supremacist terrorist organization is Combat 18, a British neo-Nazi group.[192]

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[187] As previously discussed, legal consequences for SDGT primarily consist of financial sanctions. See Exec. Order No. 13224, *supra* note 37 for more information on the SDGT process.

[188] JONES ET. AL., *supra* note 9, at 1.

[189] *Worldwide Threats: Hearing Before the Comm. on Homeland Sec.*, 116th Cong. (2020) (statement of Christopher Wray, Dir. of Fed. Bureau of Investigation), at 2.

[190] NAT'L COUNTERTERRORISM CTR., DOMESTIC TERRORISM CONFERENCE REPORT 2 (2020) ("Noting the legal challenges to enacting a domestic terrorist organization designation, there was support for using the foreign terrorist designation process to proscribe DT analogues overseas."); Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015), https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism ("A homegrown violent extremist who is inspired by a foreign terrorist organization can be prosecuted for acts of terrorism 'transcending national boundaries.' Section 2332b does not require that 'conduct transcending national boundaries' include any actual contact with or direction from foreign terrorist organizations. But a purely domestic terrorist with a purely domestic political agenda clearly does not engage in conduct that 'transcends national boundaries.' Therefore, in theory, Person A who shoots up a clinic based on a radicalized anti-abortion viewpoint would not be charged with a terrorism offense but with local murders, while Person B, who shoots up some other public place based on a radicalized viewpoint inspired by a foreign terrorist organization, could be charged federally as a terrorist.").

[191] NAT'L COUNTERTERRORISM CTR., *supra* note 190.

[192] Other white supremacist groups that the State Department could likely designate include National Action (which the British government has already

Combat 18 is the violent offshoot of Blood & Honour (another British neo-Nazi group) and uses violence against minority, LGBTQ, and Jewish populations in an attempt to create all-white nations.[193] Despite the rise of non-violent groups sharing the same ideology, Combat 18 has continued to publicly espouse the need for violence to carry out their objectives.[194] In fact, when the Canadian government banned Combat 18 in June of 2019, it labeled the group as the "armed branch" of Blood & Honour.[195] Additionally, the German government has recently banned the group after police investigation linked the group to the murder of a prominent German politician.[196]

In order to be designated as an FTO, an organization must be foreign, engage in terrorism, and threaten the security of U.S. nationals.[197] Although Combat 18 now has membership and cells all over the world, the organization was founded in London and has spread to other nations (not unlike al Qaeda and other designated FTOs).[198]

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designated as a terrorist group) and Generation Identity. *See National Action*, COUNTER EXTREMISM PROJECT, https://www.counterextremism.com/supremacy/ national-action (last visited Oct. 16, 2020); *see also Generation Identity*, COUNTER EXTREMISM PROJECT, https://www.counterextremism.com/supremacy/generation-identity (last visited Oct. 16, 2020).

[193] *Combat 18*, COUNTER EXTREMISM PROJECT, https://www.counterextremism.com/supremacy/combat-18 (last visited Oct. 16, 2020) [hereinafter "Combat 18"].

[194] *Id.*

[195] *Currently Listed Entities*, PUB. SAFETY CAN., https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#60 (last visited Oct. 16, 2020).

[196] *Germany bans Combat 18 as police raid neo-Nazi group*, BBC (Jan. 23, 2020), https://www.bbc.com/news/world-europe-51219274 [hereinafter "BBC Article"].

[197] 8 U.S.C. § 1189(1) (West 2021).

[198] Combat 18, *supra* note 193; J.T. Caruso, Acting Assistant Dir., Fed. Bureau of Investigations Counterterrorism Div., Speech Before the Subcommittee on International Operations and Terrorism, Committee on Foreign Relations in the U.S. Senate, (Dec. 8, 2001), transcript available at https://archives.fbi.gov/archives/news/testimony/al-qaeda-international ("From its inception until approximately 1991, the group was headquartered in Afghanistan and Peshawar, Pakistan. Then in 1991, the group relocated to the Sudan where it was headquartered until approximately 1996, when Bin Laden, Mohammed Atef and other members of Al-Qaeda returned to Afghanistan. During the years Al-Qaeda was headquartered in Sudan the network continued to maintain offices in various parts of the world and

Combat 18 clearly engages in terrorist activity. The group has been linked to bombings in Greece, attacks on immigrant families in the Czech Republic, and the murder of a prominent German politician all in furtherance of their goal of eradicating non-white people from "white nations."[199]

The third FTO criteria is more subjective; however, Canada, the United Kingdom, and Germany (all U.S. allies) have recognized the threat of Combat 18 and have all banned the group in one way or another.[200] Combat 18 presents a real threat to anyone who violate the group's prohibition against minorities in a "white nation."[201] As the group continues to grow, it constitutes more of a threat to American citizens who are deemed inferior according to Combat 18 standards. If the Secretary of State designates Combat 18 as an FTO, federal law will be able to link HVEs to Combat 18's ideologies instead of placing bad actors into the hate crime category.[202] This designation will allow these terrorists to be legally labeled as terrorists and expose them to additional criminal penalties and consequences.

However, there are powerful political and societal forces in play in the United States which make concrete action against domestic terrorist groups difficult, particularly right-wing extremist groups. This is indicated by the State Department's designation of RIM as an SDGT instead of the more powerful FTO designation as well as by the general defensive posture taken by the previous administration in regard to condemning right-wing extremism.[203]

One of the main factors in combatting domestic extremism is that "Americans hold a wide array of beliefs."[204] Unlike the jihadist

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established businesses which were operated to provide income and cover to Al-Qaeda operatives.").

[199] Combat 18, *supra* note 193; BBC Article, *supra* note 196.

[200] The British Government does not allow members of Combat 18 to become police officers or prison guards. *See* BBC Article, *supra* note 125.

[201] Combat 18, *supra* note 193.

[202] Federal prosecutors can charge terrorist acts "involving conduct transcending national boundaries." 18 U.S.C. § 2332b(a)(1).

[203] Kathleen Ronayne & Michael Kunzelman, *Trump to far-right extremists: 'Stand back and stand by'*, AP NEWS (Sept. 30, 2020), https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f.

[204] NAT'L SEC. COUNCIL, NATIONAL SECURITY STRATEGY FOR COUNTERING DOMESTIC TERRORISM 2 (2021), https://int.nyt.com/data/documenttools/biden-s-strategy-for-combating-domestic-extremism/22ddf1f2f328e688/full.pdf.

ideologies behind the 9/11 attacks which unified the vast majority of Americans against a primarily foreign enemy, there are non-violent American citizens who endorse some of the same values and ideologies as violent domestic terrorist groups and actors (both left- and right-wing).[205] For example, according to a recent Gallup poll, 20% of Americans believe that all types of abortion should be illegal.[206] Only a very small portion of these Americans, though, take violent action against abortion providers and clinics.[207] However, it is easy to see a portion of that 20% supporting an individual, like Scott Roeder, not for his use of violence, but for his commitment to the defense of unborn children.[208]

Unfortunately, given the amount of division and discord in American society, it may take another large-scale atrocity with more direct ties to a foreign terrorist group (like Combat 18 or RIM) to galvanize our society and political leaders into action. However, the option of designating a broader range of FTOs remains. This solution will not only allow the federal government to prosecute and deter DTOs, but it will also allow the United States to gain more credibility with its

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[205] Frank Newport, *Public Opinion of the War in Afghanistan*, GALLUP (Oct. 31, 2001), https://news.gallup.com/poll/9994/public-opinion-war-afghanistan.aspx ("88% of Americans approve of the military action"); NAT'L SEC. COUNCIL, *supra* note 204, at 9 ("Other domestic terrorists maybe motivated to violence by single- issue ideologies related to abortion-, animal rights-, environmental-, or involuntary celibate-violent extremism, as well as other grievances– or a combination of ideological influences."); NAT'L SEC. COUNCIL, *supra* note 204, at 11 (Domestic violent extremism is receiving "escalating support from persons in the United States.").

[206] *Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx (last visited Dec. 4, 2020).

[207] *See* NAT'L ABORTION FED'N, 2019 VIOLENCE AND DISRUPTION STAT., https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf (last visited Dec. 4, 2020).

[208] Carey Gillam, *Activist Convicted for Slaying Kansas Abortion Doctor*, REUTERS (Jan. 29, 2010), https://www.reuters.com/article/us-abortion-usa-trial/activist-convicted-for-slaying-kansas-abortion-doctor-idUSTRE60S4UB20100129 (at Scott Roeder's trial for the murder of abortion doctor George Tiller, "[a]nti-abortion activists from around America…flocked to Wichita to defend Roeder's actions."); *see also Abortion*, *supra* note 206.

allies by taking a more serious and modern stance on the evolving global terrorist threat as permitted by our domestic laws.[209]

E. Use State Law to Prosecute Unauthorized Paramilitary Groups

The following scene played out in Charlottesville, Virginia during the Unite the Right rally from August 11-12, 2017.

> Several white nationalist groups arrived outfitted in helmets and matching uniforms and deployed shields, batons, clubs, and flagpoles as weapons in skirmishes with counter-protesters that the instigating groups coordinated under centralized command structures. Meanwhile, private militia groups – many dressed in camouflage fatigues, tactical vests, helmets, and combat boots, and most bearing assault rifles – stood guard as self-designated protectors of the protesters and counter-protesters.[210]

White supremacist and neo-Nazi militant groups assumed a pseudo-law enforcement role which caused confusion and "was unnerving to law enforcement officials on the scene."[211] While these paramilitary groups certainly wield a great deal of power, most of them are operating outside the law.[212] All fifty states have some provision in their state constitution or statutory scheme that can make paramilitary and private militia conduct subordinate to the state.[213] Essentially, paramilitary groups cannot lawfully operate without the consent of the governor of that state.

The legal framework outlawing paramilitary groups is well-established. The Supreme Court has consistently held that the Second Amendment protects an individual's right to bear arms, but it does not

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[209] *See* Romm & Harwell, *supra* note 65.
[210] INST. FOR CONST. ADVOC. AND PROT., PROHIBITING PRIVATE ARMIES AT PUBLIC RALLIES: A CATALOG OF RELEVANT STATE CONSTITUTIONAL AND STATUTORY PROVISIONS 1 (GEO. L. 3d ed. 2020).
[211] Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/.
[212] INST. FOR CONST. ADVOC. AND PROT., *supra* note 210, at 4.
[213] *Id.*

protect or sanction the organization of private paramilitary groups.[214] This legal theory has been successfully applied in Texas and North Carolina in the 1980s to enjoin paramilitary groups from operating.[215] Leaders of these groups were found guilty of criminal contempt after they violated the injunctions.[216] While each state has different provisions and ways to prohibit paramilitary activities, there is a system in each state to do so.[217]

Enforcement of these laws depend entirely on state governments and precedent shows that these laws are infrequently brought to bear.[218] This lack of precedent could make state prosecutors wary of charging these offenses as they have no experience with how issues will play out in court. Uneven enforcement amongst states could lead to "safe harbor" states where paramilitary groups will gather and potentially gain even more power and momentum. Even if all fifty states started bringing the full weight of these statutes to bear, it is possible that paramilitary groups will become violent in an effort to preserve themselves and their perceived rights.

However, these barriers are not without their own solutions. States should employ a progressive scale of enforcement mechanisms. For example, they could begin with a simple cease and desist letter rather than moving straight to civil or criminal sanctions. It is possible that paramilitary organizations will respond to the initial letter without

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[214] *See* District of Columbia v. Heller, 554 U.S. 570, 621 (2008) (holding that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."); *see also* Presser v. Illinois, 116 U.S. 252, 267 (1886) (holding that "[m]ilitary operations and military drill are subjects especially under control of the government of every country. They cannot be claimed as a right independent of law.").

[215] *See* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982); *see also* Presser v. Miller, 854 F.2d 656 (4th Cir. 1988).

[216] Philip Zelikow, *The Domestic Terrorism Danger: Focus on Unauthorized Private Military Groups*, LAWFARE (Aug. 15, 2017), https://www.lawfareblog.com/domestic-terrorism-danger-focus-unauthorized-private-military-groups.

[217] INST. FOR CONST. ADVOC. AND PROT., *supra* note 210, at 4.

[218] MARY B. MCCORD, BRENNAN CTR. FOR JUST., DISPELLING THE MYTH OF THE SECOND AMENDMENT 5 (2021), https://www.brennancenter.org/sites/default/files/2021-06/McCord_final_0.pdf ("Although infrequently enforced, there is precedent for the use of these state law provisions beyond the late 19th and early 20th centuries.")

requiring court action. If court action is ultimately required, there is case law from the Supreme Court to shore up the constitutional ground of these state statutes.[219] Consistent enforcement along with enacting stronger legislation for those states with fewer enforcement options would help combat the domestic terrorist threat. Finally, if paramilitary organizations become violent or hole up in a group compound, law enforcement should consider using tactics already employed by certain state agencies and the FBI to deescalate the situation.[220]

Utilizing existing state provisions against paramilitary groups does not give the federal government any increased ability to track the threats posed by domestic terrorism. This solution relies entirely on state power and pre-existing criminal acts under state law. This proposal is simply a practical means to combat some of the most lethal domestic terrorist threats faced by America today.[221]

V. CONCLUSION

The fight against domestic terrorism will continue regardless of whether the federal government can legally designate DTOs. As demonstrated above, the Constitution rightly forbids the designation of DTOs due to the likelihood that such a designation would violate the exercise of freedom of speech and association under the First Amendment.[222] Only a DTO whose purpose was entirely unlawful might be subject to designation.[223] However, even if such a group existed, the constitutional limits on the designation would make it infeasible to accomplish the purpose of such a designation in practical application.[224]

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[219] *See* District of Columbia v. Heller, 554 U.S. 570, 621 (2008) (holding that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."); *see also* Presser v. Illinois, 116 U.S. 252, 267 (1886) (holding that "[m]ilitary operations and military drill are subjects especially under control of the government of every country. They cannot be claimed as a right independent of law.").

[220] *15-Year Standoff in East Texas Over, Charges Dismissed Over a Year Ago*, KLTV (Jan. 8, 2016), https://www.kltv.com/story/30919824/15-year-stand-off-over-charges-dismissed-over-a-year-ago.

[221] *See* JONES ET AL., *supra* note 9.

[222] See Holder v. Humanitarian L. Project, 561 U.S. 1 (201); Watts v. United States, 394 U.S. 705 (1969); Elonis v. United States, 575 U.S. 723 (2015); Brandenburg v. Ohio, 395 U.S. 444 (1969); Virginia v. Black, 538 U.S. 343, 363 (2003); and NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[223] *Claiborne Hardware Co.*, 458 U.S. 886.

[224] *Foreign Terrorist Organizations*, *supra* note 30.

Thus, it is necessary to use alternative solutions to effectively combat this threat and allow the federal government to channel resources and funds to that end. One of the most dangerous threats posed to national security in regards to domestic terrorism is paramilitary groups.[225] These organizations can be disbanded or prosecuted using existing state criminal laws.[226] Other domestic terrorist threats, such as white supremacist and anti-government groups, can be addressed through the increasingly transnational nature of these organizations. Repurposing existing criminal statutes (like RICO and § 2332b) as well as designating more FTOs will allow the federal government to investigate and prosecute a greater variety of cases.[227] Lastly, the Department of Justice can repurpose its gang definition or Congress can authorize an analogous DTO designation in order to allow the FBI to research and gather information on DTOs.[228] This solution would allow the FBI to categorize and publicize threats while unifying law enforcement at all levels. Although an administrative DTO designation does not directly impose any legal consequences on DTOs, it would allow the threat facing our nation to receive the attention, resources, and funding that it deserves.

While DTO designation raises serious the constitutional concerns and is likely prohibited, there are other solutions that will enable counter-domestic terrorist efforts to receive the attention and funding needed to combat this rapidly evolving threat. These proposed solutions tackle the domestic terrorism problem from different angles. While none of them are perfect individually, together these solutions create an effective platform to combat the domestic terrorism threat which allows freedom of speech and association to remain unfettered while protecting our nation.

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[225] NAT'L SEC. COUNCIL, *supra* note 204, at 8 (Another key component of the threat comes from anti- government or anti- authority violent extremists. This significant component of today's threat includes self-proclaimed "militias and militia violent extremists who take steps to violently resist government authority or facilitate the overthrow of the U.S. Government based on perceived overreach.").

[226] INST. FOR CONST. ADVOC. AND PROT., *supra* note 210, at 4.

[227] 18 U.S.C. § 1961; 18 U.S.C. § 2332b.

[228] *About Violent Gangs*, *supra* note 140.