



Program on Extremism

THE GEORGE WASHINGTON UNIVERSITY

CONFRONTING RACIALLY AND ETHNICALLY
MOTIVATED TERRORISM: A CALL TO DESIGNATE
FOREIGN WHITE IDENTITY EXTREMIST GROUPS
UNDER U.S. FEDERAL LAW

AMY C. COLLINS
September 2020

About the Program on Extremism

The Program on Extremism at George Washington University provides analysis on issues related to violent and non-violent extremism. The Program spearheads innovative and thoughtful academic inquiry, producing empirical work that strengthens extremism research as a distinct field of study. The Program aims to develop pragmatic policy solutions that resonate with policymakers, civic leaders, and the general public.

About the Author

Amy Collins is a third-year law student at the George Washington University Law School. She has worked at the National Security Section of the U.S. Attorney's Office for the District of Columbia, at the Department of Justice's Office of International Affairs, the Department of Justice's Counterterrorism Section, the Department of Justice's Money Laundering and Asset Recovery Section, and at the Department of the Treasury's Office of the General Counsel, International Affairs. Collins has published pieces on topics related to national security law and policy at outlets such as the George Washington Law School's Criminal Law Brief and War on the Rocks. The views expressed in this article are the author's own and do not necessarily reflect those of the United States or its government agencies.

The views expressed in this paper are solely those of the author, and not necessarily those of the Program on Extremism or the George Washington University.

TABLE OF CONTENTS

I. INTRODUCTION3

**II. RACIALLY/ETHNICALLY MOTIVATED VIOLENT EXTREMISM:
A THREAT ON PAR WITH ISLAMIC EXTREMISM**4

III. DESIGNATION FRAMEWORK9

A. OVERVIEW9

B. FOREIGN TERRORIST ORGANIZATIONS (FTOs)10

1. CRIMINAL CHARGES 11

2. IMMIGRATION SANCTIONS.....12

3. FINANCIAL SANCTIONS & REGULATIONS12

C. SPECIALLY DESIGNATED GLOBAL TERRORISTS (SDGTs)13

D. BACKGROUND AND LIMITATIONS14

IV. CONCLUSION18

I. Introduction

The September 11, 2001 terrorist attacks shook the United States to its core. “Despite all [of] the warnings of the looming terrorist threat,” the United States was caught unprepared.¹ In the years that have followed, the counterterrorism narrative has shifted from “what if” to “what next.”² However, once again, despite all of the warnings, another threat has emerged, accounting for the significant majority of terrorism-related deaths since September 11, 2001: racially/ethnically motivated violent extremism (RMVE), particularly white identity extremism.³

Although this threat is typically thought of in the context of domestic terrorism, worldwide, white identity extremists are increasingly militarizing, training, organizing, recruiting, information-sharing, embracing violent tactics, and forming global networks of membership in a way consistent with foreign Islamic extremists both prior to and following September 11, 2001.⁴ Despite these key similarities warranting the employment of similar enforcement mechanisms, the U.S. government’s efforts to combat foreign

¹ *Crisis Response Capabilities to Domestic Acts of Terrorism Related to Weapons of Mass Destruction: Hearing Before the H. Military Procurement Subcomm. of the H. Comm. on Armed Services*, 107th Cong. (2002) (statement of Rep. Curt Weldon, Chairman, H. Military Procurement Subcomm.).

² *Id.*

³ See Domestic Terrorism Prevention Act of 2020, H.R. 5602, 116th Cong. § 2 (2nd Sess. 2020) (citations omitted) (“[F]atalities resulting from attacks by far right wing violent extremists have exceeded those caused by radical Islamist violent extremists in 10 of the 15 years, and were the same in [three] of the years since September 12, 2001.”); *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Security*, 116th Cong. (2019) (“[From 2009 to 2018,] 73.3 percent [of extremist-related killings in the United States] were committed by right-wing extremists . . . [and three out of four of this number] were committed by [w]hite supremacists.”); see also *FBI Oversight: Hearing Before the H. Judiciary Comm.* (Feb. 5, 2020) (statement of Christopher Wray, Director, Federal Bureau of Investigation (FBI)). In this paper, the term “white identity extremism” is a term I created to refer to neo-Nazism, white supremacy, neo-Confederates, Sovereign Citizens, white nationalists, and the like. “White identity extremism” is not a term used by the U.S. government, but this term is consistent with at least one instance of self-identification by an individual associated with a group discussed below. See 165 Cong. Rec. S5514 (daily ed. Sept. 17, 2019) (statement of Sen. Durbin) (“white identarian”). I employ the term “white identity extremism” here simply to maintain focus on the primary RMVE threat at the issue in this paper. However, despite limiting the scope of my paper to discussing incidents of white identity extremism, I aim to simply use this category of extremism as an archetype for racially/ethnically based extremism.

⁴ See Soufan Center, *White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement* 6, 28 (Sept. 2019), <https://thesoufancenter.org/wp-content/uploads/2019/09/Report-by-The-Soufan-Center-White-Supremacy-Extremism-The-Transnational-Rise-of-The-Violent-White-Supremacist-Movement.pdf> [hereinafter *Transnational Rise of the Violent White Supremacist Movement*]; see also Jon Lewis, Seamus Hughes, Oren Segal & Ryan Greer, *White Supremacist Terror: Modernizing Our Approach to Today’s Threat*, GW PROGRAM ON EXTREMISM (April 6, 2020), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/White%20Supremacist%20Terror%20final.pdf> (quoting Thomas Brzozowski, Domestic Terrorism Counsel for the U.S. Department of Justice, Address at the George Washington University Program on Extremism’s Event: *Domestic Terrorism at Home and Abroad: A Discussion with the Department of Justice’s Domestic Terrorism Counsel* (Jan. 14, 2020) (“This issue, in many respects, has become transnational in nature.”)).

white identity extremist groups have been out of step with the rise, transnational growth, and domestic influence of these groups. To adequately meet this threat and to undermine the narrative that race or religion plays a role in counterterrorism enforcement, when the requisite criteria are met, U.S. leadership should designate foreign white identity extremist groups as Foreign Terrorist Organizations (FTOs), pursuant to § 219(a)(1) of the Immigration and Nationality Act (INA), codified as amended at 8 U.S.C. § 1189(a)(1),⁵ and Specially Designated Global Terrorists (SDGTs), pursuant to Executive Order 13224, as amended by Executive Order 13886.⁶ This approach is consistent with First Amendment protections and statutory grants of authority and allows the U.S. government to utilize effective and appropriate counterterrorism tools such as 18 U.S.C. § 2339B (providing “material support or resources” to an FTO).

II. Racially/Ethnically Motivated Violent Extremism: A Threat on Par with Islamic Extremism

It was only in February 1993 that “Middle Eastern terrorism” arrived on U.S. soil with the bombing of the World Trade Center.⁷ For the U.S. government, this terrorist event was “the first indication that terrorism was evolving from a regional phenomenon outside of the United States to a transnational phenomenon.”⁸ Before the U.S. government could comprehensively respond, on April 19, 1995, members of a “radical right-wing survivalist” group based in Michigan, including Timothy McVeigh, perpetrated the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma—the second deadliest terrorist attack on U.S. soil, second only to the September 11, 2001 attacks perpetrated by al-Qaeda affiliates.⁹

While the United States has confronted countless acts of terrorism on U.S. soil since September 11, 2001, a few in particular stand out: on August 12, 2017, in Charlottesville, Virginia, a neo-Nazi sympathizer drove into a crowd of counter-protestors, killing one

⁵ See Immigration and Nationality Act § 219(a)(1) (as amended by Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, Pub. L. No. 108-458, 118 Stat. 3801 (2004)) (codified as amended at 8 U.S.C. § 1189(a)(1) (2018)).

⁶ See Exec. Order No. 13224, as amended by Exec. Order No. 13886, Modernizing Sanctions to Combat Terrorism, 84 Fed. Reg. 48,041 (Sept. 9, 2019).

⁷ *First Strike: Global Terror in America*, FBI (Feb. 26, 2008), https://archives.fbi.gov/archives/news/stories/2008/february/tradebom_022608.

⁸ Bureau of Diplomatic Security, “1993 World Trade Center Bombing,” U.S. DEP’T OF STATE (Feb. 21, 2019), <https://www.state.gov/1993-world-trade-center-bombing/>.

⁹ JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW (2017), [hereinafter BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW]; “Oklahoma City Bombing: 20 Years Later,” FBI (April 16, 2015), <https://www.fbi.gov/news/stories/oklahoma-city-bombing-20-years-later>; “Oklahoma City Bombing,” FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing>; “Oklahoma City Bombing,” HISTORY (March 30, 2020), <https://www.history.com/topics/1990s/oklahoma-city-bombing>.

individual and injuring nineteen others¹⁰; on December 7, 2017, two students were killed by a gunman at Aztec High School in Aztec, New Mexico¹¹; on October 27, 2018, eleven Jewish worshipers were killed at Pittsburgh’s Tree of Life Synagogue in what was the deadliest attack on Jewish people in U.S. history¹²; and, on August 3, 2019, twenty-two people were killed at a Walmart in El Paso, Texas, in a shooting by an anti-immigrant individual targeting people of Mexican heritage.¹³ At first glance, one might miss the most significant connection among each of these violent acts. However, upon a more thorough review, one will find that the suspects of each of these attacks had connections to foreign white identity extremist groups.¹⁴

Although U.S. counterterrorism policy and legislation following September 11, 2001 has largely focused on Islamic extremism, white identity extremism is the most lethal and prominent terrorist threat that the United States has since faced, both at home and abroad.¹⁵ Indeed, while Islamic extremists have not killed a single American on U.S. soil

¹⁰ See Recognizing the Global Threat Transnational White Supremacist Extremism Presents to America and Its Interests, H.R. Res. 884, 116th Cong. (2020); 163 Cong. Rec. H7288 (daily ed. Sept. 12, 2017).

¹¹ See Recognizing the Global Threat Transnational White Supremacist Extremism Presents to America and Its Interests, H.R. Res. 884, 116th Cong. (2020).

¹² See *id.*

¹³ See *id.*; Mike Giglio, *The Fight Against White Nationalism Is Different*, ATLANTIC (Aug. 7, 2019), <https://www.theatlantic.com/politics/archive/2019/08/the-difficulties-of-fighting-white-nationalism/595609/>.

¹⁴ See Recognizing the Global Threat Transnational White Supremacist Extremism Presents to America and Its Interests, H.R. Res. 884, 116th Cong. (2020).

¹⁵ See *FBI Oversight: Hearing Before the H. Judiciary Comm.* (Feb. 5, 2020) (statement of Christopher Wray, Director, Federal Bureau of Investigation); JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, *THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS* (2013) [hereinafter BJELOPERA, *THE DOMESTIC TERRORIST THREAT*]; *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, DEP’T OF HOMELAND SEC. (Sept. 19, 2019), https://www.dhs.gov/sites/default/files/publications/19_0920_ply_strategic-framework-countering-terrorism-targeted-violence.pdf (“White supremacist violent extremism . . . is one of the most potent forces driving domestic terrorism. Lone attackers . . . generally perpetrate these kinds of attacks. But they are also part of a broader movement.”); see also 165 Cong. Rec. H8028 (daily ed. Sept. 26, 2019) (letter from the Anti-Defamation League, July 12, 2019); *Rise of Radicalization: Is the U.S. Gov’t Failing to Counter Int’l and Domestic Terrorism: Hearing Before the H. Comm. on Homeland Sec.*, 114th Cong. (2016) (statement of J. Richard Cohen, President, Southern Poverty Law Center) (“[A]s has been widely reported, more persons have been killed since 9/11 by radical right terrorists than by Islamic extremists.”); *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the H. Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight and Reform*, 116th Cong. (2019). While the various open-source statistical data utilized here supports these claims, the actual numbers vary depending on the source’s criteria for assessment, terminology used, and scope of the study. For instance, the U.S. Department of Justice compiles hate crime and terrorism data based on statutory charges and sentencing enhancements, but the hate crime statistics are not broken down by specific ideological motivation (instead, it is broken down broadly, such as incidents based on race, LGBTQ, etc.) and the terrorism data does not necessarily provide the full picture because it functions on a charge- and sentence-based approach and the U.S. government has typically relied on hate crime charges as opposed to terrorism-related charges when it comes to issues related to white identity extremism given the lack of appropriate statutory alternatives (e.g., no federal domestic terrorism statute), among other factors.

since 2016, this cannot be said of white identity extremists.¹⁶

While Afghanistan served as a safe haven for numerous Islamic extremist groups, as a result of the Donbass War, Ukraine has begun to serve a similar function for white identity extremist groups to assemble, train in irregular warfare, radicalize, and develop transnational networks—with Russia also playing a significant role.¹⁷ Thus far, an estimated 17,000 people from fifty countries—including the United States—have traveled to Ukraine at the behest of the Russian Imperial Movement (RIM) and the Azov Battalion, both of which are extremist groups that developed from far-right militias during the war.¹⁸ Following the conflict, members of the Azov Battalion and RIM aim to return to their origin countries or relocate to third-party countries in order to cause widespread terror and destruction and recruit through the use of violence.¹⁹

However, these groups, their membership, and their supporters have already engaged in violent acts of terrorism fueled by white identity extremist ideology in the United States and elsewhere. For instance, two Swedish members of the Nordic Resistance Movement (NRM), Viktor Melin and Anton Thulin, attended a RIM-affiliated paramilitary training camp in St. Petersburg, Russia, just months before conducting a series of attacks in Sweden.²⁰ RIM's connections in the United States include the Traditionalist Worker Party founded by Matthew Heimbach—a key organizer of the Unite the Right rally in

¹⁶ See Heidi Beirich, *Internet Companies Must Act to Combat White Nationalist Movement*, SOUTHERN POVERTY LAW CENTER (May 6, 2019).

¹⁷ See *Transnational Rise of the Violent White Supremacist Movement*, *supra* note 9, at 28-32.

¹⁸ *Id.* at 8; Ben Norton, *Bomb-Plotting Extremist American Soldier Tried to Join U.S.-Backed Neo-Nazi Militia in Ukraine*, GRAY ZONE (Sept. 23, 2019), <https://thegrayzone.com/2019/09/23/bomb-extremist-us-soldier-fbi-ukrainian-nazi-azov/>.

¹⁹ See *Transnational Rise of the Violent White Supremacist Movement*, *supra* note 9, at 32.

²⁰ See *Nordic Resistance Movement (NRM)*, COUNTEREXTREMISM PROJECT, <https://www.counterextremism.com/threat/nordic-resistance-movement-nrm>; Ambassador Nathan A. Sales, Coordinator for Counterterrorism, U.S. Dep't of State, *Designation of the Russian Imperial Movement* (April 6, 2020), <https://www.state.gov/designation-of-the-russian-imperial-movement/> (on file with author); Jan M. Olsen, *Swedish Right-Wing Extremists Guilty of Bomb Attacks on Migrants*, USA TODAY (July 7, 2017, 8:26 AM) <https://www.usatoday.com/story/news/world/2017/07/07/swedish-right-wing-extremists-guilty/458311001/>; *Sweden Charges Right-Wing Extremists Over Bomb Attacks*, ASSOCIATED PRESS (June 9, 2017), <https://www.usatoday.com/story/news/world/2017/06/09/sweden-charges-bomb-attacks/102662582/>. In October 2018, the Trump administration published a U.S. National Strategy for Counterterrorism stating that NRM's use of violence and intent to destabilize societies often puts American lives at risk." H.R. Res. 884, 116th Cong. (2020). This assertion implies that U.S. designation of NRM would be appropriate. Further, beyond the issue of whether or not NRM *should* be designated, U.S. counterterrorism efforts would be particularly effective against the NRM, as this group is financed solely through "member donations and sympathetic individuals and organizations" and provides physical training for members. *Our Path: New Politics for a New Time*, NORDIC RESISTANCE MOVEMENT (2015), <https://www.frihetskamp.net/wp-content/uploads/2016/12/Our-Path.pdf>. The Trump administration's 2018 U.S. National Strategy for Counterterrorism also mentioned groups such as the National Action Group from the United Kingdom, which "has engaged with like-minded groups in the United States . . . expanding the potential influence of its violent ideology." Nat'l Strategy for Counterterrorism of the United States of America (Oct. 2018).

Charlottesville, Virginia.²¹ Similarly, the Azov Battalion has cultivated relationships with U.S.-based white identity extremist groups such as the Atomwaffen Division (AWD),²² an accelerationist group tied to a number of violent acts from 2017 to 2018,²³ and the Rise

²¹ See Dakin Andone, Mallory Simon & Sara Sidner, *White Nationalists Dwarfed by Crowds of Counterprotesters in Washington*, CNN (Aug. 13, 2018, 10:39 AM), <https://www.cnn.com/2018/08/12/us/unite-the-right-charlottesville-anniversary/index.html>.

²² See *Atomwaffen Division*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/atomwaffen-division>; Rachel Weiner & Matt Zaposky, *Five Arrested, Accused of Targeting Journalists as Part of Neo-Nazi Atomwaffen Group*, WASHINGTON POST (Feb. 26, 2020, 3:10 PM), https://www.washingtonpost.com/local/public-safety/propublica-named-him-as-an-atomwaffen-leader-feds-say-he-struck-back/2020/02/26/c9548ac4-57e5-11ea-ab68-101ecfec2532_story.html; Press Release, U.S. Dep't of Justice, *Guilty Plea: Soldier at Fort Riley Described How to Make Explosive Devices* (Feb. 10, 2020) (pleaded guilty to unlawfully distributing instructions for making explosive devices as a member of the U.S. Army), <https://www.justice.gov/usao-ks/pr/guilty-plea-soldier-fort-riley-described-how-make-explosive-devices> (on file with author). According to a criminal complaint, the Atomwaffen Division's goal is to challenge "the established laws, social order, and government" through "terrorism and violent acts." Jon Lewis, Seamus Hughes, Oren Segal & Ryan Greer, *White Supremacist Terror: Modernizing Our Approach to Today's Threat*, GW PROGRAM ON EXTREMISM (April 6, 2020) (citations omitted). Although the Atomwaffen Division originated in the United States and has a membership that spans across at least twenty-three states, it also has significant overseas membership in the Baltic States (Feuerkrieg Division), Canada (Northern Order), Germany (AWD Deutschland), and the United Kingdom (Sonnenkrieg). See H.R. Res. 884, 116th Cong. (2020); see also Paul Jackson, *Transnational Neo-Nazism in the USA, United Kingdom and Australia*, GW PROGRAM ON EXTREMISM (Feb. 2020); Jamie Grierson, *U.K. to Ban Neo-Nazi Sonnenkrieg Division as a Terrorist Group*, GUARDIAN (Feb. 24, 2020), <https://www.theguardian.com/uk-news/2020/feb/24/uk-ban-neo-nazi-sonnenkriegdivision-terrorist-group>; *Neo-Nazi "Atomwaffen Division" Spreads Fear in Germany*, SPIEGEL INT'L (Nov. 13, 2019), <https://www.spiegel.de/international/germany/neo-nazi-group-atomwaffen-division-takes-root-in-germany-a1295575.html>; Mack Lamoureux & Ben Makuch, *Atomwaffen, an American Neo-Nazi Terror Group, is in Canada*, VICE (June 19, 2018), https://www.vice.com/en_us/article/a3a8ae/atomwaffen-an-american-neo-nazi-terror-group-is-in-canada; *Feuerkrieg Division (FKD)*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/feuerkrieg-division-fkd>; Subcomandante X, *Telegram Messages Reveal Details about Neo-Nazi Group Feuerkrieg Division*, MEDIUM (Oct. 2, 2019), <https://medium.com/americanodyssey/telegram-messages-feuerkrieg-division-jarrett-william-smith-arrested-neo-nazi-34d8dbd32653>; Subcomandante X, *Feuerkrieg Division Attempts to Recruit in the United States, Announces Creation of More "Cells"*, MEDIUM (Aug. 8, 2019), <https://medium.com/americanodyssey/feuerkrieg-division-atomwaffen-division-neo-nazi-far-right-group-a4e698abc1>; Complaint, *United States v. Climo*, 2:19-mj-00593 (D. Nev. Aug. 9, 2019); Mack Lamoureux & Ben Makuch, *An American Neo-Nazi Group Has Dark Plans for Canada*, VICE (July 10, 2018), https://www.vice.com/en_us/article/ev847a/an-american-neo-nazi-group-has-dark-plans-for-canada.

²³ See *Atomwaffen Division*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/atomwaffen-division>; Mack Lamoureux & Zachary Kamel, *Neo-Nazi Terror Groups Are Using iFunny to Recruit*, VICE (Nov. 14, 2019), https://www.vice.com/en_us/article/vb5kx3/neo-nazi-terror-groups-are-using-ifunny-to-recruit [hereinafter Lamoureux & Kamel, *Neo-Nazi Terror Groups Are Using iFunny to Recruit*].

Nicholas Giampa was charged as an adult for the murder of his girlfriend's parents. See Juatin Jovenal, *Va. Teen Accused of Killing Girlfriend's Parents to Be Tried as an Adult*, Wash. Post (Sept. 24, 2019 7:08 PM), https://www.washingtonpost.com/local/public-safety/va-teen-accused-of-killing-girlfriends-parents-to-be-tried-as-an-adult/2019/09/24/3e628fae-af13-11e9-a0c9-6d2d7818f3da_story.html. Devon Arthurs, who planned to commit "large-scale violence," was charged with murder, kidnapping, and aggravated assault for events surrounding an alleged double homicide. Priyanka Boghani, Marcia Robiou & Catherine Trautwein, *Three Murder Suspects Linked to Atomwaffen: Where Their Cases Stand*, FRONTLINE (June 18, 2019), <https://www.pbs.org/wgbh/frontline/article/three-murder-suspects-linked->

Above Movement (RAM), a militant group whose members have engaged in several other acts of violence.²⁴ Some members of AWD have also identified themselves as members of a self-proclaimed “international survivalist and self-defense network”²⁵ and neo-Nazi, white supremacist, and accelerationist militant organization called the Base, which has been active in the United States since 2018.²⁶ Like other groups mentioned, the Base has organized training camps in North America for its members to train in “weaponry and military tactics,”²⁷ its membership extends beyond U.S. borders²⁸ and has engaged in

to-atomwaffen-where-their-cases-stand [hereinafter Boghani, Robiou & Trautwein, *Three Murder Suspects Linked to Atomwaffen*]. Brandon Russell, AWD leader and roommate of Arthurs, pleaded guilty to unlawful storage of explosive material and possession of an unregistered destructive device and was sentenced to a term of five years imprisonment. *See id.* Sam Woodward was charged with murder and received a hate-crime sentencing enhancement for targeting victim for his sexual orientation and possibly his religious beliefs. *See* Lamoureux & Kamel, *Neo-Nazi Terror Groups Are Using iFunny to Recruit*. Arthurs told police that AWD is a “terrorist organization” that wants to “build a Fourth Reich.” Janet Reitman, *All-American Nazis: How a Senseless Double Murder in Florida exposed the Rise of an Organized Fascist Youth Movement in the United States*, ROLLING STONE (May 2, 2018), <https://www.rollingstone.com/politics/politics-news/all-american-nazis-628023/>.

²⁴ *See* Indictment, *United States v. Shea*, No. CR20-032-JCC (W.D. Wash. March 4, 2020) (charging four RAM members with one count of conspiracy to mail threatening communications and commit cyberstalking and three counts of mailing threatening communications); Affidavit in Support of a Criminal Complaint and Arrest Warrant, *United States v. Denton*, No. 1:20-mj-84 (E.D.V.A. Feb. 25, 2020) (interstate threats to injure and conspiracy to commit an offense against the United States); *Rise Above Movement (R.A.M.)*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/rise-above-movement-ram>; Dakin Andone & Konstantin Toropin, *Four People with Alleged Ties to Neo-Nazi Group Charged with Planning to Harass Journalists and Activists*, CNN (Feb. 27, 2020, 5:27 PM), <https://www.cnn.com/2020/02/27/us/atomwaffen-division-alleged-neo-nazi-arrests/index.html>; Press Release, U.S. Dep’t of Justice, *Three Members of California-Based White Supremacist Group Sentences on Riot Charges Related to August 2017 “Unite the Right” Rally in Charlottesville* (July 19, 2019), <https://www.justice.gov/usao-wdva/pr/three-members-california-based-white-supremacist-group-sentenced-riots-charges-related> (three AWD members charged with conspiracy to riot) (on file with author); Press Release, U.S. Dep’t of Justice, *California Man Pleads Guilty to Conspiracy to Riot* (Nov. 30, 2018), <https://www.justice.gov/usao-wdva/pr/california-man-pleads-guilty-conspiracy-riot> (another AWD member plead guilty to conspiracy to riot) (on file with author); Emily Sullivan, *Four White Supremacists Face Federal Charges in California Attacks*, NPR (Oct. 25, 2018, 3:28 AM), <https://www.npr.org/2018/10/25/660401404/four-white-supremacists-face-federal-charges-in-california-attacks>.

²⁵ *U.S. White Supremacy Groups*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/content/us-white-supremacy-groups> (citations omitted).

²⁶ *See id.*; Lamoureux & Kamel, *Neo-Nazi Terror Groups Are Using iFunny to Recruit*; Ben Makuch & Mack Lamoureux, *Neo-Nazis Are Organizing Secretive Paramilitary Training Across America*, VICE (Nov. 20, 2018), https://www.vice.com/en_us/article/a3mexp/neo-nazis-are-organizing-secretive-paramilitary-training-across-america.

²⁷ *European Ethno-Nationalist and White Supremacy Groups*, COUNTEREXTREMISM PROJECT, <https://www.counterextremism.com/european-white-supremacy-groups> (citing Jeremy Roebuck, *South Jersey Man Accused in Synagogue Vandalisms, Revealing Dark Network of Neo-Nazi Organizing Online*, PHILA. INQUIRER (Nov. 15, 2019), <https://www.inquirer.com/news/richard-tobin-synagogue-vandalism-the-base-white-supremacist-racine-wisconsin-hancock-michigan-20191115.html>; and then citing Ryan Thorpe, *Homegrown Hate*, WINNIPEG FREE PRESS (Aug. 16, 2019), <https://www.winnipegfreepress.com/local/homegrown-hate-547510902.html>)).

²⁸ The Base’s active membership extends to Canada, Australia, South Africa, and Europe. *See U.S. White Supremacy Groups*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/content/us-white-supremacy-groups> (citations omitted); Lamoureux & Kamel, *Neo-Nazi Terror Groups Are Using*

violent criminal acts in recent years.²⁹

September 11, 2001 impressed a particular image of terrorism into the American consciousness. Despite the shift in global circumstance, the U.S. government has remained at somewhat of a standstill as it confronts a new counterterrorism obstacle. As the designation framework stands, the United States is treating similar terrorist threats differently based solely on the motivating ideology.³⁰

III. Designation Framework

A. OVERVIEW

In the United States, there is no crime of “being a terrorist” or “thinking terrorist thoughts,” as this would undermine key constitutional protections such as freedom of expression and freedom of association. Further, First Amendment jurisprudence dictates that persons in the United States cannot be prosecuted for their thoughts alone. Accordingly, the U.S. criminal justice system focuses on *definable acts*—and counterterrorism enforcement is no exception to this approach.

Broadly speaking, the U.S. government primarily relies on two types of terrorism-related designations: FTO designations and SDGT designations. These designations, among others, are fundamental to the United States’ counterterrorism efforts. Designations (and the accompanying regulations) encourage vigilance and caution by entities that serve a vital role in the success of terrorist groups (e.g., banks, social media companies),³¹ support the U.S. government’s efforts to curb terrorist financing (and encourage other governments to do the same), deter economic transactions with or donations or contributions to designated groups, stigmatize and isolate designated groups, heighten public knowledge and awareness of terrorist groups, and place pressure on other

iFunny to Recruit.

²⁹ See Press Release, U.S. Dep’t of Justice, *Three Alleged Members of the Violent Extremist Group “The Base” Facing Federal Firearms and Alien-Related Charges* (Jan. 16, 2020), [https://www.justice.gov/usao-md/pr/three-alleged-members-violent-extremist-group-base-facing-federal-firearms-and-alien-\(three-Base-members-arrested-prior-to-planned-attack-on-pro-Second-Amendment-rally\)-\(on-file-with-author\)](https://www.justice.gov/usao-md/pr/three-alleged-members-violent-extremist-group-base-facing-federal-firearms-and-alien-(three-Base-members-arrested-prior-to-planned-attack-on-pro-Second-Amendment-rally)-(on-file-with-author)); Ben Makuch & Mack Lamoureux, *Neo-Nazis Are Organizing Secretive Paramilitary Training Across America*, VICE (Nov. 20, 2018), https://www.vice.com/en_us/article/a3mexp/neo-nazis-are-organizing-secretive-paramilitary-training-across-america (Richard Tobin, who is a member of both AWD and the Base, was charged for vandalizing synagogues in what he called “Operation Kristallnacht”).

³⁰ While the Secretary of State has designated RIM as a Specially Designated Terrorist (SDGT), the State Department is not putting to use the most effective and meaningful tool within the U.S. designation framework: Foreign Terrorist Organization (FTO) designations.

³¹ See Daniel L. Byman, *Should We Treat Domestic Terrorists the Way We Treat ISIS?: What Works—and What Doesn’t*, BROOKINGS (Oct. 3, 2017), <https://www.brookings.edu/articles/should-we-treat-domestic-terrorists-the-way-we-treat-isis-what-works-and-what-doesnt/>.

governments to acknowledge the security threats posed by designated groups.³²

B. FOREIGN TERRORIST ORGANIZATIONS (FTOs)

Pursuant to § 219(a)(1) of the Immigration and Nationality Act (INA), as amended by § 7119 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3801 (2004) and codified as amended at 8 U.S.C. § 1189(a)(1), the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, may designate an entity as an FTO if three elements are met:³³ (1) the organization is foreign³⁴; (2) the organization engages in “terrorist activity”³⁵ or “terrorism,”³⁶ or retains the capability and intent to do so³⁷; and (3) the organization’s activities threatens the security of U.S. nationals or the national security of the United States.³⁸ If the Secretary of State decides that an organization meets these criteria, he or she may add it the “FTO list” by

³² See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/>.

³³ Additionally, the Secretary of State may designate an organization that it finds is an alias for or is otherwise “one in the same” as another organization that is already designated as an FTO. See § 219(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1189(b)(1); *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192, 138-39 (D.C. Cir. 2001).

³⁴ Although the INA does not define “foreign,” the Secretary of State has interpreted that term to comprise several factors, including, *inter alia*, whether the leaders and members are primarily non-U.S. citizens or located outside the United States; whether the group’s headquarters, offices, facilities, or training camps are located outside the United States; whether the group’s conferences or other significant meetings are located outside the United States; and whether the group’s activities are directed or controlled by members or leaders who are not U.S. citizens or who are located outside the United States. See Memorandum from Philip C. Wilcox, Coordinator for Counterterrorism, U.S. Department of State (Feb. 27, 1997) (on file with author).

³⁵ Under § 212(a)(3)(B) of the INA, “engag[ing] in terrorist activity” includes providing training for the commission of terrorist acts. Immigration and Nationality Act § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv); see also Jon Lewis & Mary B. McCord, *The State Department Should Designate the Russian Imperial Movement as a Foreign Terrorist Organization*, LAWFARE (April 14, 2020), <https://www.lawfareblog.com/state-department-should-designate-russian-imperial-movement-foreign-terrorist-organization>. Further, “terrorist activity” is defined as “any activity which is unlawful under the laws of the place where it is committed” or would be unlawful under U.S. law, and which involves various violent acts or the threat, or attempt, or conspiracy to commit them. Immigration and Nationality Act § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii). These acts include: hijacking or sabotage; kidnapping to compel government action; attacks against internationally protected persons; assassination; use of a weapon of mass destruction; and use of an explosive, firearm, or other dangerous device with the intent to endanger persons or damage property. See *id.*

³⁶ “Terrorism” is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 § 140(d)(2), 22 U.S.C. § 2656f(d)(2).

³⁷ The Secretary of State considers several factors when making a determination as to capability and intent, including (1) retention of or access to funds and weapons; (2) continued membership base and recruitment or new members; and (3) reformed conduct or ideology indicating good faith abandonment of terrorist intentions.

³⁸ Immigration and Nationality Act § 219(d)(2), 8 U.S.C. § 1189(d)(2), defines “national security” as “the national defense, foreign relations, or economic interests of the United States.” Under U.S. policy, all international terrorism and terrorist activity qualifies as a threat to U.S. national security.

informing Congress and publishing a notice to that effect in the Federal Register.³⁹ An FTO designation provides prosecutors and law enforcement with many unique avenues for preventing and combating terrorist activity by members and supporters—the most significant of these avenues being the criminalization of providing “material support” and the regulation of financial institutions under 18 U.S.C. § 2339B,⁴⁰ the criminalization of receiving military-type training from a designated organization under 18 U.S.C. § 2339D, the establishment and enforcement of financial sanctions under Executive Order 13224⁴¹ and 8 U.S.C. § 1189(2)(C), and the implementation of immigration sanctions under 8 U.S.C. § 1182(a)(3)(B) and 8 U.S.C. § 1227.

1. CRIMINAL CHARGES

The material support statute 18 U.S.C. § 2339B has proved to be one of the most effective tools for federal terrorism prosecutors in the United States.⁴² Pursuant to § 2339B(a)(1), the U.S. Department of Justice may prosecute any person in the United States or subject to U.S. jurisdiction for *knowingly* attempting to, conspiring to, or providing “material support or resources”⁴³ to a designated FTO, even if done for benevolent purposes. Thus, § 2339B(a)(1) effectively allows the U.S. Department of Justice to prosecute individuals for providing funds,⁴⁴ personnel (one or more individuals, including oneself,⁴⁵ to work under the organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of the organization⁴⁶), and specialized advice or assistance to groups designated as FTOs—among other acts.⁴⁷

³⁹ See 18 U.S.C. § 1189(a)(2)(A)(i)-(ii).

⁴⁰ See 18 U.S.C. § 2339B(a)(1)-(2)(B).

⁴¹ See Exec. Order No. 13224, as amended by Exec. Order No. 13886, Modernizing Sanctions to Combat Terrorism, 84 Fed. Reg. 48,041 (Sept. 9, 2019).

⁴² See Jeff Breinholt, *Material Support: An Indispensable Counterterrorism Tool Turns 20*, WAR ON THE ROCKS (April 19, 2016), <https://warontherocks.com/2016/04/material-support-an-indispensable-counterterrorism-tool-turns-20/>; see also Jon Lewis & Mary B. McCord, *The State Department Should Designate the Russian Imperial Movement as a Foreign Terrorist Organization*, LAWFARE (April 14, 2020), <https://www.lawfareblog.com/state-department-should-designate-russian-imperial-movement-foreign-terrorist-organization> (“The material support charge is the most commonly charged terrorism offense in the U.S. Code since 9/11 . . . Indeed, the U.S. material support statute was a model for the Global Counterterrorism Forum’s 2015 plan of action encouraging countries to enact similar criminal laws; deploy investigative techniques, including undercover operations to enforce those laws; and cooperate through expanded information sharing related to recruitment and facilitation. [T]he material support statute has been a key to the success of the U.S. government’s counterterrorism program.”).

⁴³ As defined in 18 U.S.C. § 2339A(b)(1), “material support or resources” means “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel [], and transportation, except medicine or religious materials.”

⁴⁴ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

⁴⁵ Beth Van Schaack, *John Walker Lindh’s Legacy: To Join The Fight Is Criminal*, JUST SEC. (Sept. 5, 2014), <https://www.justsecurity.org/14616/john-walker-lindhs-legacy-crime-fighting/>.

⁴⁶ See § 2339B(h).

⁴⁷ See § 2339B(a)(1). The material support statute § 2339B also provides aiding and abetting liability. See

Similarly, and sometimes overlapping with § 2339B, 18 U.S.C. § 2339D criminalizes the act of knowingly receiving military-type training from or on behalf of a designated organization—including training in means or methods that can cause death or serious bodily injury as defined by 18 U.S.C. § 1365(h)(3),⁴⁸ destroy or damage property, or disrupt services to public or private critical infrastructure (e.g., water supply systems, telecommunications networks, financing and banking systems, transportation systems and services, emergency services), or training on the use, storage, production, or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction, as defined in 18 U.S.C. § 2232a(c)(2).⁴⁹

2. IMMIGRATION SANCTIONS

In addition to the criminal charges one may face for one’s FTO activities, one may also be subject to immigration sanctions pursuant to one of two provisions of the Immigration and Nationality Act. For instance, under § 212(a)(3)(B) of the INA, as codified by 8 U.S.C. § 1182(a)(3)(B), non-U.S. citizens or nationals are inadmissible and therefore ineligible to receive visas or to enter the United States if they are members or representatives of a designated FTO or if they have received military-type training from or on behalf of a designated FTO, as set forth in 18 U.S.C. § 2339D. Although § 212(a)(3)(B) only provides immigration sanctions against individuals seeking entry into the United States, § 237 of the INA, as codified by 8 U.S.C. § 1227, provides that non-U.S. citizens located in the United States may be deported back to the individual’s country of origin if the individual is a member or representative of a designated FTO or has received military-type training from or on behalf of a designated FTO.⁵⁰

18 U.S.C. § 2339B(d)(1)(F).

⁴⁸ 18 U.S.C. § 1365(h)(3) defines “serious bodily injury” as “bodily injury” involving “a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” Moreover, 18 U.S.C. § 1365(h)(4) defines “bodily injury” as “a cut, abrasion, bruise, burn, or disfigurement, physical pain, illness, impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary.”

⁴⁹ See 18 U.S.C. § 2339D(a). 18 U.S.C. § 2232a(c)(2) defines “weapon of mass destruction” as any destructive device as defined in 18 U.S.C. § 921 (e.g., any explosive, incendiary, or poison gas), “any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors,” “any weapon involving a biological agent, toxin, or vector” (as those terms are defined in 18 U.S.C. § 178), or “any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.” Further, 18 U.S.C. § 178 defines “toxin” as the toxic material or product of plants, animals, microorganisms, or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production; “delivery system” as any vector (i.e., a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host); or any apparatus, equipment, device, or means of delivery specifically designed to deliver or disseminate a biological agent, toxin, or vector.

⁵⁰ While these immigration sanctions might seem somewhat basic, they effectively place law enforcement on notice, allowing it to step in and remove individuals who pose a threat before any tangible harm becomes actualized.

3. FINANCIAL SANCTIONS AND REGULATIONS

18 U.S.C. § 2339B’s criminal charge for material support has been an invaluable tool for countering terrorism. However, 18 U.S.C. § 2339B also requires financial institutions to retain possession of all designated foreign terrorist organization funds and report their existence to the Secretary of State.⁵¹ More specifically, § 2339B(a)(2) provides that, except as authorized by the Secretary of State, a financial institution that becomes aware that it has possession of or control over any funds in which an FTO or its agents has an interest must retain possession of or maintain control over such funds and report to the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC).⁵²

Similar to 18 U.S.C. § 2339B(a)(2)’s regulation of financial institutions, pursuant to 8 U.S.C. § 1189(2)(C), the Secretary of the Treasury may require U.S. financial institutions possessing or controlling any assets of an FTO to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, an act of Congress, or a court order.

C. SPECIALLY DESIGNATED GLOBAL TERRORISTS

Through its Specially Designated Global Terrorist (SDGT) list, Executive Order 13224, as amended by Executive Order 13886, provides an additional terrorism-related designation authority for U.S. leadership. Executive Order 13224 allows the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security, to designate and subsequently sanction foreign entities and individuals who have “participated in training to commit acts of terrorism that threaten the security of [U.S.] nationals or the national security, foreign policy, or economy of the United States.”⁵³ However, unlike the FTO designation process, Executive Order 13224 grants the Secretary of the Treasury designation authority as well.⁵⁴ More specifically, under Executive Order 13224, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, may designate entities and individuals determined (i) to be “owned or controlled by, or act for or on behalf of a SDGT or by or for persons determined to be subject to” the Executive Order 13224; (ii) to “assist in,

⁵¹ See § 2339B(a)(2).

⁵² See *id.*

⁵³ Exec. Order No. 13224, as amended by Exec. Order No. 13886, Modernizing Sanctions to Combat Terrorism, 84 Fed. Reg. 48,041 (Sept. 9, 2019); Jason M. Blazakis, *What’s the New Terror Financing Executive Order All About?*, JUST SEC. (Sept. 17, 2019), <https://www.justsecurity.org/66206/whats-the-new-terror-financing-executive-order-all-about/>.

⁵⁴ See *Terrorism Designations FAQs*, U.S. DEP’T OF STATE (Feb. 27, 2018), <https://www.state.gov/terrorism-designations-faqs/>; *Executive Order 13224*, U.S. DEP’T OF STATE, <https://www.state.gov/executive-order-13224/>.

sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated in or under” the Executive Order 13224; or (iii) to be “otherwise associated with certain individuals or entities designated in or under” the Executive Order 13224. Further, § 1F(b) of Executive Order 13224 gives the Secretary of the Treasury, in consultation with the Secretary of State, the ability to revoke or deny banks and other financial institutions access to the U.S. dollar if they knowingly provide correspondent services to an SDGT or a person acting on behalf of or at the direction of, or owned or controlled by, a SDGT.⁵⁵ On April 6, 2020, the State Department designated its very first white identity extremist group, the Russian Imperial Movement (RIM), and three of its leaders⁵⁶ pursuant to Executive Order 13224.⁵⁷ The designation of RIM marks the State Department’s first designation of a white identity extremist group—or any type of racially or ethnically motivated group.⁵⁸

D. BACKGROUND AND LIMITATIONS

The United Kingdom, Canada, and Germany have extended their terrorist designation processes to domestic groups to combat the rise in global RMVE activities.⁵⁹ While this approach may be feasible in other countries, the United States is limited in its ability to designate domestic groups, especially in a way which attaches civil or criminal liability.

⁵⁵ Press Release, U.S. Dep’t of the Treasury, *Treasury Targets Wide Range of Terrorists and Their Supporters Using Enhanced Counterterrorism Sanctions Authorities* (Sept. 10, 2019), <https://home.treasury.gov/news/press-releases/sm772> (on file with author).

⁵⁶ The designated RIM leaders are Stanislav Anatolyevich Vorobyev, Denis Valliulloviich Gariyev, and Nikolay Nikolayevich Trushchalov. See Ambassador Nathan A. Sales, Coordinator for Counterterrorism, U.S. Dep’t of State, *Designation of the Russian Imperial Movement* (April 6, 2020), <https://www.state.gov/designation-of-the-russian-imperial-movement/> (on file with author).

⁵⁷ See Press Release, Michael R. Pompeo, Secretary of State, U.S. Dep’t of State, *United States Designates Russian Imperial Movement and Leaders as Global Terrorists* (April 7, 2020), <https://www.state.gov/united-states-designates-russian-imperial-movement-and-leaders-as-global-terrorists/> (noting that designations resulted from RIM providing “training for acts of terrorism that threaten the national security and foreign policy of the United States” and for leadership of such a group) (on file with author); Ambassador Nathan A. Sales, Coordinator for Counterterrorism, U.S. Dep’t of State, *Designation of the Russian Imperial Movement* (April 6, 2020), <https://www.state.gov/designation-of-the-russian-imperial-movement/> (on file with author).

⁵⁸ See Press Briefing, Ambassador Nathan A. Sales, Coordinator for Counterterrorism, U.S. Dep’t of State, *Briefing on the United States Designation of the Russian Imperial Movement and Its Leaders as Global Terrorists* (April 6, 2020), <https://www.state.gov/briefing-with-coordinator-for-counterterrorism-ambassador-nathan-a-sales-on-the-united-states-designation-of-the-russian-imperial-movement-and-its-leaders-as-global-terrorists/> (on file with author).

⁵⁹ See *European Ethno-Nationalist and White Supremacy Groups*, COUNTEREXTREMISM PROJECT, <https://www.counterextremism.com/european-white-supremacy-groups>; Masood Farivar, *Some U.S. Lawmakers Consider Designating White Supremacists as Terrorists*, VOICE OF AMERICA NEWS (Sept. 16, 2019, 5:35 PM), <https://www.voanews.com/usa/some-us-lawmakers-consider-designating-white-supremacists-terrorists>; Harmeet Kaur, *For the First Time, Canada Adds White Supremacists and Neo-Nazi Groups to Its Terror Organization List*, CNN (June 28, 2019, 5:24 PM), <https://www.cnn.com/2019/06/27/americas/canada-neo-nazi-terror-organization-list-trnd/index.html>.

First, the freedom of speech protections under the First Amendment of the U.S. Constitution drastically limits the U.S. government’s ability to regulate content and viewpoints in a domestic setting, especially compared to its more expansive authority over foreign affairs.⁶⁰ For example, in upholding 18 U.S.C. § 2339B, the Supreme Court in *Holder v. Humanitarian Law Project* emphasized the unique nature of international relations, acknowledging that, in giving executive authority over matters of foreign affairs, Congress “must necessarily paint with a brush broader than that it customarily wields in domestic areas.”⁶¹ The Court further asserted that its holding “does not suggest that Congress could extend the same prohibition on material support . . . to domestic organizations.”⁶²

Second, history guides what actions can be taken by the federal government as it pertains to domestic law enforcement. In January 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (widely known as “the Church Committee”⁶³) was formed to investigate allegations of the U.S. government spying on U.S. citizens.⁶⁴ Apart from the National Security Administration’s (NSA) infamous Project SHAMROCK and Project MINARET,⁶⁵ the Church Committee also reviewed the FBI’s covert counterintelligence program known as COINTELPRO, which was designed to “expose,” “disrupt,” “discredit,” and “otherwise neutralize” the activities of “subversive” domestic groups and their leaders, members, and supporters.⁶⁶ By way of techniques previously developed to combat Communists and persons who associated with Communists, through COINTELPRO, the FBI collected domestic intelligence of these

⁶⁰ See *United States v. Curtiss-Wright Export Corporation et al.*, 299 U.S. 304, 319 (1936) (asserting that the federal power over external affairs is different in origin and essential character, but also in the exercise of the power, as the president is the “sole organ of the nation in its external relations, and its sole representative with foreign nations”) (citations omitted).

⁶¹ *Humanitarian Law Project*, 561 U.S. at 30 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

⁶² *Id.* at 34.

⁶³ The colloquial name, the “Church Committee,” was a natural result of Senator Frank Church heading the committee.

⁶⁴ See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>; S. REP. NO. 94-755, pt. 1 (1976) (citations omitted).

⁶⁵ Project SHAMROCK began as an effort to improve wartime foreign intelligence activities; however, its liberal post-war use indirectly resulted in the collection of U.S. citizens’ private communications. See Dave Owen, *A Review of Intelligence Oversight Failure: NSA Programs that Affected Americans Military Intelligence* 34 (2012). Project MINARET functioned as the NSA’s watchlist, using Signals Intelligence (SIGINT) access to search for “terms, names, and references” associated with certain U.S. citizens. *Id.*

⁶⁶ See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>; S. REP. NO. 94-755, pt. 1 (1976) (citations omitted). Subversive groups consisted of “White Hate” groups (e.g., Ku Klux Klan, American Nazi Party), “Black Nationalists” (e.g., Black Panthers), and the “New Left” (e.g., Weather Underground, Students for a Democratic Society, anti-Vietnam War groups). S. REP. NO. 94-755, pt. 1, § 2 (1976) (citations omitted).

“subversive” organizations, which included Weather Underground,⁶⁷ the Ku Klux Klan, and the Black Panthers.⁶⁸

After reviewing the numerous intelligence programs, the Church Committee concluded that “[i]ntelligence agencies . . . undermined the constitutional rights of citizens.”⁶⁹ Under COINTELPRO, instead of collecting domestic intelligence solely in service of protecting national security, this intelligence activity was abused as a method of disrupting political opponents and groups with “subversive” messages.⁷⁰ In addition to chilling First Amendment protections, such abuse inherently threatens democracy itself.⁷¹ Accordingly, to conform government intelligence activities to the “[U.S.] Constitution and the laws of the United States,” the Church Committee recommended (1) the limiting of the FBI “to investigating conduct rather than ideas or associations,”⁷² and (2) the continuance of “intelligence investigations of hostile foreign intelligence activity.”⁷³ The Church Committee recommendations materialized in three primary ways over the years following the Committee’s final report: (1) the creation of the Foreign Intelligence Surveillance Act (FISA)—which split surveillance procedures into two parts to distinguish between domestic and foreign surveillance,⁷⁴ set stricter standards for surveillance of U.S. persons, and carved out activities protected under the First Amendment⁷⁵—and the Foreign Intelligence Surveillance Court (FISC, or FISA Court),⁷⁶ (2) the creation of the Electronic

⁶⁷ The Weather Underground Organization (WUO) was an offshoot of the Students for a Democratic Society that committed acts of political violence in the late-1900s. See *Bomb Explodes in Capitol Building*, HISTORY (Feb. 27, 2020), <https://www.history.com/this-day-in-history/bomb-explodes-in-capitol-building>. Such acts of violence included the bombing of the U.S. Capitol building on March 1, 1971, which caused hundreds of thousands of dollars in property damage. See *id.*

⁶⁸ S. REP. NO. 94-755, pt. 1, § 2 (1976) (citations omitted); David Cunningham & Barb Browning, *The Emergence of Worthy Targets: Official Frames and Deviance Narratives within the FBI*, 19 SOCIOLOGICAL FORUM 347, 347-69 (2004), www.jstor.org/stable/4148816; See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. Plus descriptions

⁶⁹ See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. The Church Committee followed the same logic as the Supreme Court in *United States v. Curtiss-Wright Export Corporation et al.*, 299 U.S. 304 (1936), emphasizing that the pattern of checks and balances relating to foreign intelligence activity is reflected in the constitutional provisions addressing foreign affairs and national defense. See S. REP. NO. 94-755, pt. 1, § 3 (1976).

⁷⁰ Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1317, 1320 (2004) [hereinafter Swire, *System of Foreign Intelligence Surveillance Law*].

⁷¹ See *id.* at 1320.

⁷² *Id.*

⁷³ S. REP. NO. 94-755, pt. 2 (1976) (citations omitted).

⁷⁴ See 18 U.S.C. § 2511(2)(f) (2000) (setting out that Title III and FISA “shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire and oral communications may be conducted”).

⁷⁵ See 50 U.S.C. § 1805(a)(3)(A).

⁷⁶ See 50 U.S.C. § 1801 *et seq.* FISA was created from two legal traditions: Supreme Court jurisprudence requiring judicial supervision for wiretaps and the national security imperative for allowing some foreign

Communications Privacy Act (ECPA) of 1986, which protects communications that are being made, in transit, and stored,⁷⁷ and (3) the establishment of the Attorney General’s Guidelines, which limited techniques allowable in domestic security investigations and distinguished three types of domestic security investigations.⁷⁸ Years later, the legacy of the Church Committee persists in additional forms, as shown by Congress explicitly defining “domestic terrorism” as a category distinct from “international terrorism.”⁷⁹ Lastly, and also consistent with the Church Committee’s recommendations, because the respective Immigration and Nationality Act and Executive Order 13224 provisions only provide for the designation of *foreign* entities as a result of First Amendment protections, there is no official grant of authority to designate domestic terrorist organizations (DTOs) unless a sufficient foreign link exists.⁸⁰ Instead of officially and publicly listing domestic groups, the U.S. government delineates domestic terrorist “threats” which are based on federal law enforcement assessments.⁸¹ Such threats include animal rights,

intelligence wiretaps. See Swire, *System of Foreign Intelligence Surveillance Law*, *supra* note 70, at 1321.

⁷⁷ See 18 U.S.C. § 2510-2523. The ECPA of 1986 embraces both the Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act and has been amended in subsequent years in response to new communications technologies and methods. See *Electronic Communications Privacy Act of 1986 (ECPA)*, 18 U.S.C. §§ 2510-2523, U.S. DEP’T OF JUSTICE, <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1285>.

⁷⁸ See Immigration and Nationality Act § 219(a)(1) (codified as amended at 8 U.S.C. § 1189(a)(1) (2018)), § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii); Exec. Order No. 13224, as amended by Exec. Order No. 13886, Modernizing Sanctions to Combat Terrorism, 84 Fed. Reg. 48,041 (Sept. 9, 2019). The first set of A.G. Guidelines (effective April 6, 1976) were issued by Attorney General Levi. See Office of the Inspector General, *Special Rep. on FBI’s Compliance with A.G.’s Investigative Guidelines* (Sept. 2005), <https://oig.justice.gov/special/0509/chapter2.htm> [hereinafter Office of the Inspector General, *Special Rep. FBI’s Compliance with A.G.’s Guidelines*]; see also Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (*The Church Committee*), U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. Other Attorney Generals have issued A.G. Guidelines since. See Office of the Inspector General, *Special Rep. FBI’s Compliance with A.G.’s Guidelines*, *supra*. Because the A.G. Guidelines are only *guidelines*, there is no external enforcement mechanism. See *More About FBI Spying*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/more-about-fbi-spying> (describing the deficiencies in implementing the A.G. Guidelines).

⁷⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 § 802, Pub. L. 107-56, 18 U.S.C. §2331(5).

⁸⁰ There has been some support for using the FTO framework to designate domestic terrorist analogues overseas. See National Counterterrorism Center, *Domestic Terrorism Conference Report* (Jan. 2020), https://www.dni.gov/files/2020-01-02-DT_Conference_Report.pdf.

⁸¹ See BJELOPERA, THE DOMESTIC TERRORIST THREAT, *supra* note 15, at 3. Some government officials have faced this very problem in trying to embrace a non-existent DTO framework. In September 2019, San Francisco’s Board of Supervisors approved a resolution classifying the National Rifle Association (NRA) as a “domestic terrorist organization.” Mariel Padilla, *San Francisco Declares the N.R.A. a ‘Domestic Terrorist Organization’*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/04/us/san-francisco-nra-terrorist.html>; *San Francisco Backs Down: Facing a Lawsuit by the NRA, Mayor Breed Declares – We Won’t Blacklist NRA Contractors*, NRA INSTITUTE FOR LEGAL ACTION (Oct. 1, 2019), <https://www.nra.org/articles/20191001/san-francisco-backs-down-facing-a-lawsuit-by-the-nra-mayor-breed-declares-we-won-t-blacklist-nra-contractors>. Fearful that this action was violative of First and Second Amendment rights, city officials quickly retreated, declaring that city policies and processes would not change as a result of this resolution. See *id.* Moreover, Senators Ted Cruz and Bill Cassidy have advocated for the designation of Antifa, an anarchist group with foreign ties, as a DTO. See A Resolution

environmental rights, white supremacy, anarchism and anti-government ideals, black separatism, and anti-abortion beliefs.⁸²

IV. Conclusion

Almost twenty years after the September 11, 2001 attacks, the United States must ask the same questions put forth just years after the tragedy: “What lessons were learned? Where do we stand in our ability to detect and deter the next attack that we know is being plotted? And is our government ready to respond effectively to mitigate the damage to our citizens and our way of life should another terrorist attack be carried out?”⁸³ September 11, 2001 changed the way the United States approaches and perceives terrorism and national security—it showed U.S. officials the devastation that can result when a government sides with reactive, rather than proactive, policies and laws.⁸⁴ Accordingly, the U.S. government must act swiftly, but responsibly, to quash this transnational threat.

Calling for the Designation of Antifa as a Domestic Terrorist Organization, S. Res. 279, 116th Cong. (2019); LISA N. SACCO, CONG. RESEARCH SERV., IF10839, ANTIFA—BACKGROUND (2018). As aforementioned, while designation as a DTO is impracticable for the reasons aforementioned, because of Antifa’s foreign links, the State Department could certainly consider whether Antifa would qualify for designation as an FTO.

⁸² *Id.*

⁸³ *Confronting the Terrorist Threat to the Homeland: Six Years after 9/11, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 1 (statement of Sen. Joe Lieberman).

⁸⁴ *Crisis Response Capabilities to Domestic Acts of Terrorism Related to Weapons of Mass Destruction: Hearing Before the H. Military Procurement Subcomm. of the H. Comm. on Armed Services*, 107th Cong. 13 (2002) (statement of Rep. Curt Weldon, Chairman, H. Military Procurement Subcomm.).