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National Security and Domestic Terrorism: The Legal and Legal Policy Implications of Creating a Domestic Terrorism Organization List

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I. Introduction

The terrorist attacks of 9/11 radically altered the U.S. counter-terrorism apparatus and resulted in the creation of a host of new governmental departments and agencies tasked with safeguarding the country against the scourge of international terrorism. By many accounts, however, domestic terrorism remains the greater threat. According to a recently released Office of the Director of National Intelligence (ODNI) report on domestic violent extremism, domestic violent extremists "pose an elevated threat to the Homeland in 2021."[2] During his testimony before the House Judiciary Committee in February 2020, FBI Director Christopher Wray, acknowledging the increased threat, noted that the FBI has "elevated to the top-level priority racially motivated violent extremism so it's on the same footing in terms of our national threat banding as ISIS and homegrown violent extremism."[3] This enhanced domestic terrorism threat stems from a surge in domestic terrorist attacks and plots over the past several years, with the number of overall domestic terrorism incidents peaking in 2020.[4] In terms of casualties, 2019 was the deadliest year for domestic terrorism since 1995, the year of the Oklahoma City bombing.[5] According the FBI, 2019 also saw approximately 107 domestic terrorism subjects arrested, with 63 subjects charged federally, 42 subjects charged with state and/or local charges, and two subjects charged with both federal and state and/or local charges.[6]

Despite the proven lethality of domestic terrorists, there currently exists only one specialized statute aimed at domestic terrorism per se, the Animal Enterprise Terrorism Act (AETA), which criminalizes damaging or interfering with the operations of an animal enterprise.[7] But the AETA is narrow in scope and stands in stark contrast to the wealth of available statutory offenses pertaining to international terrorism.[8] For example, the material support statute,[9] is among the most frequently used federal anti-terrorism statutes. It criminalizes knowingly providing material support to a foreign terrorist organization (FTO).[10] The material support statute is unavailable in any prosecution of a domestic terrorist group and has no analogue in a domestic context because the government does not maintain a domestic terrorist organization list. In light

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[2] OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE (ODNI), DOMESTIC VIOLENT EXTREMSIM POSES HEIGHTENED THREAT IN 2021 2 (2021).
[3] FBI OVERSIGHT: HEARING BEFORE THE H. COMM. ON THE JUDICIARY, 116th Cong. (2020) (testimony of Christopher A. Wray, Director, Federal Bureau of Investigation).
[4] Robert O'Harrow Jr., Andrew Ba Tran & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 14, 2021), https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/ [https://perma.cc/4GR8-Z34J].
[5] FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF HOMELAND SECURITY, STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM (SUBMITTED TO THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, THE COMMITTEE ON HOMELAND SECURITY, AND THE COMMITTEE OF THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AND THE SELECT COMMITTEE ON INTELLIGENCE, THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, AND THE COMMITTEE OF THE JUDICIARY OF THE UNITED STATES SENATE) 8 (2021).
[6] *Id.* at 22.
[7] 18 U.S.C. § 43.
[8] *See*, *e.g.*, 18 U.S.C. § 2332(b) (outlawing acts of terrorism transcending national boundaries); 18 U.S.C. § 2332(d) (criminalizing the conduct of financial transactions with a country designated by the Secretary of State as "supporting international terrorism").
[9] 18 U.S.C. § 2339B.
[10] *Id.*

of the persistent—and growing—threat posed by domestic terrorist organizations and networks, this article will address two questions. First, why is there no statutory mechanism for prosecuting domestic terrorist groups? Second, what are the legal and legal policy implications of creating an official domestic terrorist organization (DTO) list similar to the FTO list?

On balance, this paper finds that there are significant legal barriers to creating a DTO list and argues that even if those barriers were removed, there remain several policy implications that weigh against the creation of such a list. This paper contains four parts. Following this introduction, Part II examines the legal architecture undergirding the U.S. government's designation of FTOs and the law allowing for the prosecution of those who knowingly provide material support to such groups. Part III assesses whether the same legal framework might support the creation of an official DTO list and attendant statutory proscriptions on knowingly providing material support to DTOs. Finally, Part IV considers the legal policy implications of such a statutory construct.

II. THE FTO LIST AND THE MATERIAL SUPPORT STATUTE

The U.S. Secretary of State, pursuant to section 219 of the Immigration and Nationality Act, as amended under the Antiterrorism and Effective Death Penalty Act of 1996 and codified at 8 U.S.C. § 1189, is authorized to designate certain groups as "foreign terrorist organizations."[11] Before making such a determination, the Secretary must find that

> (A) the organization is a foreign organization;
>
> (B) the organization engages in terrorist activity…or terrorism…or retains the capability and intent to engage in terrorist activity or terrorism; and
>
> (C) the terrorist activity or terrorism of the organization threatens the security of the United States nationals or the national security of the United States.[12]

Although the Secretary makes the final decision, an FTO designation usually involves extensive inter-agency collaboration.[13] Once a group has been designated as an FTO, the organization may seek judicial review of the Secretary's determination in the U.S. Court of Appeals for the District of Columbia Circuit.[14] A few groups currently designated as FTOs include Boko Haram, al-Qa'ida in the Arabian Peninsula (AQAP), and al-Shabaab.[15]

The legal consequences of being designated an FTO are substantial. For example, domestic financial institutions generally are required to block an FTO's funds, members of FTOs who are aliens may be removed from the United States, and anyone in the United States who knowingly provides material support or resources to the group can be imprisoned for up to twenty years or for life if the death of any person results.[16] The term "material support" applies to a wide range of

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[11] 8 U.S.C. § 1189.
[12] 8 U.S.C. § 1189(a)(1).
[13] AUDREY KURTH CRONIN, CONG. RSCH. SERV., RL32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 2 (2003).
[14] 8 U.S.C. § 1189(c).
[15] *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/CM8N-MAPX].
[16] *Id.;* 18 U.S.C. 2339B.

activities, including the provision of "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."[17] These measures, including this broad, detailed definition of material support, give investigators ample legal authority to identify those providing such support to FTOs. They also, in equal measure, equip the government with a potent means of prosecuting such activity.[18] In addition, according to the Department of State (DOS), the designation "[s]tigmatizes and isolates designated terrorist organizations internationally."[19]

Both the law granting the executive the authority to designate FTOs (8 U.S.C. § 1189) and the material support statute (18 U.S.C. § 2339B) have survived multiple attacks. Over the years, a few groups like the People's Mojahedin Organization of Iran and the National Council of Resistance of Iran have challenged their designations as FTOs in court on statutory and due process grounds.[20] Although these cases have generated a body of law governing the designation of FTOs, they have also routinely confirmed the constitutionality of 8 U.S.C. 1189 in the process. Similarly, repeated efforts to test the constitutionality of the material support statute have not borne fruit. The strength of the government's interest in combating terrorism has helped produce these results: the Supreme Court noted in one case that "[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."[21]

Surprisingly, 1189 and 2339B have not been tested on two key grounds: congressional authority and non-delegation. National security is a shared legislative and executive function.[22] Congress is vested "with all legislative powers[]" and the derived authority "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[23] The president, in turn, is entrusted with the "executive Power[,]" the commander-in-chief power, and inherent "plenary and exclusive power" in foreign affairs.[24] He is also responsible for "tak[ing] care that the laws be faithfully executed."[25] Although the constitutionality of 8 U.S.C. § 1189, and by extension, 18 U.S.C. 2339B, have been challenged on other theories,[26] the authority of Congress to delegate authority to the Executive—a key feature of 8 U.S.C. § 1189 and a decisive facet of 18 U.S.C. § 2339B—has not generated much debate.

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[17] 18 U.S.C. 2339A. In particular, see 18 USC § 2339A(b)(3): "the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge." *See also* 18 USC § 2339A(b)(2) ("the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge").

[18] Cronin, *supra* note 13, at 7 (The measures are designed to "bring[] legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them.").

[19] U.S. DEP'T OF STATE, *supra* note 15.

[20] *See generally* People's Mojahedin Org. v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003).

[21] Holder v. Humanitarian Law Project, 561 U.S. 1, 4 (2010).

[22] *See* JAMES E. BAKER, IN THE COMMON DEFENSE 32-36 (2007).

[23] U.S. CONST. art. I, §§ 1, 8.

[24] U.S. CONST. art. II, § 1; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[25] U.S. CONST. art. II, § 3.

[26] *See* Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of "Foreign Terrorist Organization" Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 178 A.L.R. FED. 535 (2012) (collecting and discussing all cases decided under the FTO provision of AEDPA).

In general, "Congress has some constitutional power to make delegations of authority to the Executive."[27] This power is a narrow exception to the non-delegation doctrine that prohibits Congress from delegating its legislative power to other entities. When Congress exercises this power, courts have determined, "[it] must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform."[28] Critically, whereas Congress generally cannot outsource its legislative function, it can delegate fact-finding decisions to the Executive, a power of central significance to the FTO designation regime.[29] Moreover, "[a] statute that delegates factfinding decisions to the President which rely on his foreign relations powers is less susceptible to attack on nondelegation grounds than one delegating a power over which the President has less or no inherent Constitutional authority."[30]

In *United States v. Curtiss-Wright*, for example, the Supreme Court upheld a joint resolution that predicated the operation of a criminal statute on Executive factfinding in an area in which the Executive has inherent constitutional authority, namely foreign affairs.[31] The case concerned a weapons manufacturer who sold military aircraft to Bolivia during the Chaco War, a conflict between Paraguay and Bolivia in the early 1930s. The sale violated a Joint Resolution of Congress and a proclamation issued by President Roosevelt, banning U.S. weapons manufacturers from aiding Paraguay or Bolivia during the conflict. In upholding the Resolution, the Court determined that Roosevelt had the discretion to determine what impact the weapons ban might have on foreign affairs. In so finding, the Court drew a distinction between the President's authority in foreign and domestic affairs, noting that the federal government had no authority to surpass its enumerated powers regarding internal issues, but enjoyed a broader scope of discretion in foreign affairs.[32] This distinction influenced the Court's decision to reject the non-delegation challenge and uphold the Resolution. As FTO determinations involve government fact-finding similar to those in *Curtiss-Wright*, courts likely would reject a non-delegation challenge to the FTO regime.

This judicial deference to the executive in foreign affairs proved determinative in a key material support case: *Holder v. Humanitarian Law Project* (*HLP*) (2010). In *HLP*, the Court reasoned that because "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not[,]" the government's "informed judgment" is entitled to deference.[33] The court deferred to the government's determination that "[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates such conduct."[34] Based on this "considered judgment of Congress and the Executive[,]" the Court upheld the material support statute, ruling that "given the sensitive

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[27] Owens v. Republic of the Sudan, 531 F.3d 884, 889 (D.C. Cir. 2008).
[28] *Id.*
[29] *Id.* at 892 (internal quotation marks and citation omitted).
[30] *Id.* at 891.
[31] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936).
[32] *See id.* at 321.
[33] Holder v. Humanitarian Law Project, 561 U.S. 1, 35, 34 (2010). As some commentators have noted, the Court's "quiet return to ... [the] jurisprudential tradition [of] exercis[ing] categorical deference to broad executive branch judgments" reliably tracks its earlier approach in cases concerning "serious but amorphous national security threats." *The Supreme Court, 2009 Term: Leading Cases*, 124 HARV. L. REV. 259, 267–68 (2010).
[34] *Humanitarian Law Project*, 561 U.S. at 29 (internal quotation marks omitted).

interests in national security and foreign affairs at stake[,]" the particular forms of support that it regulates are not protected under the First and Fifth Amendments.[35]

Yet the Court took pains to underscore *HLP*'s outer bounds. In the Court's estimation, the material support statute reaches "only a narrow category of speech to, under the direction of, or in coordination with foreign groups the speaker knows to be terrorist organizations."[36] It does not prevent independent advocacy or expression, nor does it prohibit anyone from becoming a member of an FTO.[37] As a content-based regulation of speech, however, the material support statute is subject to a heightened standard of review, a high bar that the Court ruled it cleared.[38] Just as in *Curtiss-Wright*, the Court emphasized the distinction between domestic and foreign affairs:[39]

> We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.[40]

Although a detailed examination of the Court's holding in *HLP* is beyond the scope of this paper, the Court's emphasis on the government's expertise in national security and foreign affairs as a justification for the FTO list is particularly germane to the constitutional viability of a similar DTO list.

III. CAN THE FEDERAL GOVERNMENT DESIGNATE DTOS AND CRIMINALIZE THE PROVISION OF MATERIAL SUPPORT TO SUCH GROUPS?

As previously mentioned, the United States lacks a list of designated domestic terrorist organizations akin to the FTO list described above. The sound arguments for and against creating a DTO list have a common starting point: the authority of the federal government in the realm of domestic security. It is axiomatic that "the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.'"[41] "Implicit in that duty is the power to protect ... [the United States] against those who would subvert or overthrow it by unlawful means."[42] Beyond sharing this core constitutional principle, however, the legal arguments for and against a DTO list diverge considerably.

A. Arguments Against Creating a DTO List

The argument against creating such a list and any attendant material support prohibition is the stronger of the two. Although domestic security is indisputably a fundamental executive

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[35] *Id.* at 36, 40.
[36] *Id.* at 26.
[37] *Id.*
[38] A content-based law or regulation restricts speech based on the substance of what it communicates, whereas a content-neutral law applies to expression without regard to its substance. *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).
[39] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936).
[40] *Humanitarian Law Project*, 561 U.S. at 39.
[41] United States v. United States District Court, 407 U.S. 297, 310 (1972).
[42] *Id.*

constitutional function, it is saddled with many qualifications that weigh against the creation of a DTO list.

First, the amorphous nature of the term "domestic security" may inspire confusion and resistance from the public and from courts. The menace posed by foreign adversaries is easier to explain to the broader public than the menace posed by domestic groups. When the government's gaze is directed inward, it reflexively raises suspicion and alarm. As the Court cautioned in *United States v. United States District Court*, "[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."[43]

Second, the inchoate nature of the term "domestic security" also introduces a number of practical limitations on governmental power. Both Congress and the courts give extra discretion to the Executive in foreign affairs. As *Curtiss-Wright* instructs, it is not clear whether the government's "considered judgment" on domestic issues would enjoy the same deference the courts extended to its conclusions on foreign national security threats. Indeed, the Court in *HLP* routinely referenced the government's superior competence in the field of "national security and foreign affairs" together.[44] This suggests that judicial respect for Executive determinations is chiefly predicated on recognition of the president's primacy in the field of foreign relations.[45] When the government's expertise in foreign affairs is stripped from the equation, however, the calculus changes considerably.

Third, the freedom of association guaranteed under the First Amendment also weighs against the creation of an official DTO list. Generally, the First Amendment restricts the government's ability to impose liability on an individual solely because of his or her association with another. As outlined above, the government follows a clearly prescribed statutory framework in publicly listing foreign groups associated with "terrorist activity" or "terrorism." Although the term "domestic terrorism" is itself defined by statute,[46] the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) "delineate domestic terrorist *threats* ... [as opposed to] naming specific *groups*."[47] Notably, while the U.S. government does not believe it would be possible to distinguish FTOs' support for violent activities from their support for nonviolent activities,[48] similar statements regarding domestic terrorist groups are not as forthcoming. This

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[43] *Id.* at 314.

[44] *Humanitarian Law Project*, 561 U.S. at 34–36 (referencing "national security and foreign affairs," "national security and foreign relations," and "international affairs and national security").

[45] *See id.* at 35 ("Because of the changeable and explosive nature of contemporary international relations, [the government] must of necessity paint with a brush broader than it customarily wields in domestic areas.") (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

[46] *See* 18 U.S.C. § 2331(5).

[47] JEROME P. BJELOPERA, CONG. RES. SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS 10 (2013).

[48] In *HLP*, the Court relied on a number of government statements concerning the nature of FTOs, including the following: "In the Executive's view: 'Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions – regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.'" *Humanitarian Law Project*, 561 U.S. at 33 (quoting then-Associate Director of the State Department Counter Terrorism Office Kenneth R. McKune).

approach likely reflects recognition of the robust protection afforded to domestic advocacy groups under the First Amendment and a concomitant reticence to paint a given domestic group's activities with a broad brush.

As a result, the mens rea component of 18 U.S.C. § 2339B(a)(1) would likely be difficult to replicate in a similar provision criminalizing material support to a DTO. Under 18 U.S.C. § 2339B(a)(1), a violation requires only knowledge of the foreign group's designation as an FTO, not a specific intent to further the group's terrorist activities.[49] A domestic counterpart to § 2339B, conversely, would run afoul of longstanding case law concerning membership in domestic organizations that engage in both violent and nonviolent activities.[50] On the other hand, a "specific intent" mens rea rule—that, unlike § 2339B, required specific intent to further a DTO's terrorist activities—would likely only duplicate existing conspiracy statutes.

In *Scales v. United States*, for example, the Supreme Court read a specific intent element into the Smith Act's prohibition on membership in organizations bent on the overthrow of the government.[51] This statute made it a crime to organize or become a member of an organization that teaches, advocates, or encourages the overthrow of government by force or violence. Although the Court affirmed that the law was constitutional, it also opined that "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause . . . does not make criminal all association with an organization which has been shown to engage in illegal advocacy."[52] Only an "active" member of the [Communist] Party— one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.

The Supreme Court further clarified the nature of First Amendment associational rights in *NAACP v. Claiborne Hardware*.[53] On October 31, 1969, the NAACP coordinated an economic boycott against white businesses in Port Gibson, Miss., after negotiations for racial equality broke down. Although most marches in support of the boycott were generally peaceful, some individuals enforced the boycott through violence and threats of violence. After white merchants sued the NAACP, the Mississippi Supreme Court imposed liability against the entire organization for the lawless acts of certain members. In considering the issue, the Supreme Court outlined three separate theories that would justify holding a speaker liable for the unlawful conduct of others: (1) authorizing or directing certain tortious activity; (2) inciting lawless action; and (3) instructing others to carry out violent acts or threats.[54] Finding none of these three theories applicable on the facts, the Court reversed and concluded that uncontrolled violence by a few members could not be imputed to the group as a whole, which retained constitutional protection for its peaceful demonstration.[55] *Scales* and *Claiborne Hardware* thus underscore some of the constitutional

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[49] 18 U.S.C. § 2339B(a)(1).
[50] *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).
[51] 367 U.S. 203, 207–08 (1961).
[52] *Id.* at 229.
[53] 458 U.S. 886 (1982).
[54] *Id.* at 927.
[55] *Id.* at 933–34.

challenges to any effort to criminalize all association with domestic groups having both legal and illegal aims.

In addition to the above obstacles, *Brandenburg v. Ohio*, the "seminal speech protection case in American jurisprudence," is perhaps the most difficult legal hurdle for the creation of an official DTO list.[56] In the fifty-year-old case, which remains blackletter law, the Supreme Court established the standard for incitement.[57] In *Brandenburg*, the leader of an Ohio Ku Klux Klan (KKK) group invited a local television reporter to film portions of a KKK rally. During the rally, several hooded figures, some of whom were armed, encircled a large wooden cross, which was then burned. The KKK leader made a speech, during which he called for "the [n-word] … [to] be returned to Africa [and] the Jew returned to Israel."[58] The leader was later convicted under an Ohio Criminal Syndicalism statute for "advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[59] In striking down the Ohio statute, the Supreme Court held that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[60]

In so ruling, the *Brandenburg* Court effectively stripped the state of its erstwhile power to punish even violent advocacy, absent a showing of imminence. Under *Brandenburg*, the new incitement standard required the government, before prosecuting a speaker for incitement, to show an (1) intent to incite another; (2) to imminent violence; and (3) in a context that makes it highly likely that such violence will occur. Because the Court has infrequently entertained such issues since its *Brandenburg* decision in 1969, *Brandenburg*'s outer limits have not been rigorously tested. It is clear, however, that the imminence requirement, which is "the central focus of the test,"[61] establishes a high bar.[62]

The *Brandenburg* test would apply to DTOs, despite the ruling in *HLP*. Interestingly, the majority opinion in *HLP* did not discuss, or even cite, *Brandenburg*. As observed in the dissenting opinion, "no one contends that the [advocacy at issue] ... could be prohibited as incitement under *Brandenburg*."[63] The proposed advocacy in *HLP* ("training and expert advice or assistance") was, standing alone, lawful activity. What criminalized it, according to the majority, was that the

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[56] AMOS N. GUIORA, TOLERATING INTOLERANCE: THE PRICE OF PROTECTING EXTREMISM 142 (2014).
[57] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[58] *Id.* at 447.
[59] *Id.* at 444–45.
[60] *Id.* at 447.
[61] S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1194 (2000).
[62] *Brandenburg*, 395 U.S. at 448 ("[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" [and] [a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments[,] sweep[ing] within its condemnation speech which our Constitution has immunized from governmental control.").
[63] Holder v. Humanitarian Law Project, 561 U.S. 1, 44 (2010) (Breyer, J., concurring).

advocacy was to be "under the direction of, or in coordination with," an FTO.[64] Indeed, the majority distinguished independent advocacy from proscribed advocacy coordinated with an FTO. Yet it would seem that this formulation only holds when applied in the context of a group that is "so tainted by [its] criminal conduct that any contribution to such an organization facilitates that conduct"—namely, an FTO.[65] Even the nonviolent conduct of these organizations is unprotected because, in part, these groups are foreign. However, because domestic groups routinely engage in both violent (unprotected) and nonviolent (protected) activity, *Brandenburg*'s imminence requirement still constitutes the central test for pure advocacy of even the most unlawful activity in the domestic context. This stringent test would severely limit the efficacy of any DTO list, given that only advocacy constituting actual incitement could be outlawed. Advocacy of the sort at issue in *HLP* ("training and expert advice or assistance") would remain under the First Amendment's protective umbrella even if offered in support of a listed DTO.

B. Arguments for Creating a DTO List

Several commentators and lawmakers have lobbied for the construction of a DTO list even in the face of *Brandenburg* and the myriad other obstacles to its creation. The recent surge in domestic-terrorism related attacks, including the violence at the Capitol on January 6, 2021, has occasioned recognition of the inherent limitations in the U.S. domestic intelligence infrastructure and precipitated calls for more assertive enforcement capabilities. According to Richard Falkenrath of the Council on Foreign Relations, "[w]e're at a point where you have to start asking hard questions about changing the law, and/or the executive orders that interpret the law, to be more permissive."[66] A recent Congressional Research Service report observed that the absence of a DTO list has been cited as a particular hindrance to evaluating the domestic terrorism threat.[67] A designation regimen for domestic terrorist groups, the argument goes, might enhance the government's ability to stamp these organizations with the imprimatur of "terrorism" and, in so doing, enhance the public's appreciation of the domestic terrorist threat.[68] Similarly, many commentators and lawmakers have suggested that an official DTO list would establish a moral equivalency between domestic and international terrorism and dispel the persistent notion that the government views domestic terrorism as the lesser threat.[69]

Proponents of an official DTO list also might be heartened by the apparent space created by the *HLP* Court with regard to *Brandenburg*'s imminence requirement. Although the majority stressed that its holding should not be read to "suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations[,]" this curious locution does not categorically foreclose the possibility that Congress could extend some prohibitions on material support to domestic organizations.[70] The *HLP* Court repeatedly stressed its deference to

[64] *Id.* at 26.
[65] *Id.* at 29.
[66] Jonathan Masters, *Militant Extremists in the United States*, COUNCIL ON FOREIGN RELS. (Feb. 7, 2011, 7:00 AM), https://www.cfr.org/backgrounder/militant-extremists-united-states [https://perma.cc/3WP2-HWY8].
[67] Bjelopera, *supra* note 47, at 60–61.
[68] *Id.* at 62.
[69] Mary McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism,* LAWFARE (Aug. 21, 2017), https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism.
[70] *Humanitarian Law Project*, 561 U.S. at 39.

the "considered judgment" of Congress and the Executive in the areas of national security and foreign affairs in its assessment of 18 U.S.C. § 2339B. As national security encompasses both domestic and international terrorism, the Court likely would similarly consider the Executive's authority and expertise in the realm of domestic terrorism. Should Congress craft a narrowly tailored statute designed to prevent imminent harms associated with domestic terrorism—harms supported by the Executive's empirical conclusions—such a provision might survive constitutional scrutiny.

The dissent, seizing on the majority's prophylactic attempt to cabin the reach of its holding, retorted that, in effect, the ruling's implications were already apparent:

> We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in *this* country directed to *our* government and *its* policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress.[71]

In the end, the *HLP* Court upheld a statute that criminalizes the advocacy of political ideas in the service of the government's interest in combating terrorism. In *HLP*, the law in question concerned international terrorism. As the dissent cautioned, however, the Court may yet be presented with a domestic analogue and be forced to consider the difficult issues accompanying it.

Professor Cole, who represented the Humanitarian Law Project before the Supreme Court, advances a similar argument for the creation of a DTO list. Writing that "[m]uch lawful advocacy [can] be linked, at least in the indirect way deemed sufficient in *Humanitarian Law Project*, to wrongdoing by another[,]" Cole questions whether *HLP* might foreshadow future incursions into the sanctuary that *Brandenburg* has long provided speech advocating lawful, peaceable activity.[72]

Could the state prohibit the provision of job training to gang members on the theory that the skills might make them more effective criminals? Could training in nonviolent mediation be prohibited on the ground that it might "legitimate" the gang, thereby making it more attractive to new members who might commit future crimes? Could peaceable environmental advocacy coordinated with Greenpeace be banned because the organization sometimes engages in illegal trespass or property damage as civil disobedience?[73]

In the wake of *HLP*, Cole observes, "the answers [to such questions] are less clear" and "[i]f past is prologue, future threats to our security will prompt the political branches to impose additional restrictions on speech and association."[74] The creation of a DTO list may very well be such a step.

On balance, the legal case against the creation of an official DTO list is more compelling. Although the president is charged with the responsibility to "preserve, protect and defend the

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[71] *Id.* at 42 (Breyer, J., concurring).
[72] David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 157 (2012).
[73] *Id*.
[74] *Id*. at 156, 158.

Constitution of the United States[,]'"[75] the executive branch's powers in the realm of domestic security are checked by the fundamental liberties enshrined in the Bill of Rights.[76] The *HLP* Court, in expressly limiting the scope of its holding to "foreign terrorist groups," has not overtly challenged this elemental construct.

Yet in upholding a statute that criminalizes certain species of peaceful domestic advocacy, the Court hewed to the existing legal framework concerning speech and association but signaled an openness to a re-calibration of First Amendment jurisprudence in the face of certain threats to national security. The force of the First Amendment, weighed over the years via a series of changeable measures, has waxed and waned as the Republic has aged.[77] In today's hyper-vigilant security environment, the Court has signaled a willingness to redefine the guarantees afforded by the First Amendment in the face of competing national security imperatives. If it eventually removes the legal barriers to a DTO list, such a list would have serious legal policy implications.

III. THE LEGAL POLICY IMPLICATIONS OF A DTO LIST

Law and policy move in concert with history.[78] The arc of First Amendment jurisprudence bears this out, as existential threats to national security have sapped the First Amendment of its vitality. As Justice Brandeis observed, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[79] Another terrorist attack like the Oklahoma City bombing or the mass shooting in El Paso perpetrated by a self-styled white nationalist could spur well-meaning government officials to create an official DTO list and attendant material support statute. The Supreme Court, in assessing its constitutionality, may be inclined to abandon *Brandenburg*'s stringent imminence requirement and adopt a new test more congenial to governmental efforts to stifle domestic terrorism. Although sanctioned by the Court, the DTO list in such a scenario would still risk suppressing speech and associational freedoms.

The government could use a DTO list to cudgel its political opponents and silence beliefs or speech it deems "radical" or "extreme." From the 1950s through the early 1970s, the FBI administered the Counterintelligence Program ("COINTELPRO"), a domestic intelligence program targeting domestic dissident groups with a view towards "disrupting" and "neutralizing" them.[80] During the course of the program, the FBI compiled over 500,000 files on American citizens and collected information on a variety of domestic organizations. FBI targets included the Women's Liberation Movement; numerous university, church, and political groups opposed to the

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[75] U.S. CONST. art. II, § 1.
[76] New York Times Co. v. United States, 403 U.S. 713, 718 n.5 (1971) (Black, J., concurring) (quoting James Madison's remarks concerning the intended effect of the Bill of Rights).
[77] *See* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 778 (2008) ("Within the last hundred years, the Court's decisions on speech and press have - broadly speaking - swung from tolerance of state repression toward a more libertarian conception that protects an enormous range of communications. There are sharply opposing views as to whether the Court has gone far enough in guarding expression or, on the contrary, too far.").
[78] James E. Baker, Remarks at Class Meeting of Managing National Security (May 23, 2013).
[79] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
[80] S. REP NO. 94-755, BOOK II, at 10 (1976) [hereinafter Church Committee Report].

Vietnam War; and groups involved in the non-violent civil rights movement, such as Martin Luther King's Southern Christian Leadership Council and the National Association for the Advancement of Colored People (NAACP).[81] Congress formed a subcommittee, the Church Committee, to investigate these and other governmental activities. The Committee concluded that the FBI had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence."[82] It went on to report that "[m]any of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent activity."[83]

In many ways, COINTELPRO reflects the predictable result of the exercise of unchecked governmental power under the auspices of domestic security. Although it is unlikely that the creation of a DTO list would immediately result in similar abuses, an unintended policy implication could be the inauguration of an environment favorable to the slow, but steady, erosion of the core constitutional rights of speech and association. Indeed, one of the Church Committee's central findings concerned governmental investigations of domestic groups: "The Committee has found serious abuses in past FBI investigations of groups. In the conduct of these investigations, the FBI often failed to distinguish between members who were engaged in criminal activity and those who were exercising their constitutional rights of association."[84]Although an official DTO list might blunt the threat of domestic terrorism, it is likely to sweep in too much, diminishing the need to make principled distinctions between activities that will further terrorist conduct and those which will not. In so doing, the creation of such a list raises the specter of government overreach and invites a return to previous abuses done in the name of national security.

IV. CONCLUSION

Although the utility of an official DTO list in the fight against domestic terrorism cannot be discounted, its disadvantages are significant. There are many legal obstacles, including constitutional ones, to creating such a list. Some of these include the difficulty in defining the domestic security interest in the first instance, the degree to which Congress and the courts should defer to the executive in the domestic sphere, and the freedom of speech and association guaranteed under the First Amendment. That said, the Supreme Court decision in *HLP* does not categorically foreclose the possibility of a DTO list, notwithstanding the considerable policy implications that militate against its creation. As COINTELPRO demonstrates, balancing the competing interests of liberty and authority is a particularly fraught enterprise. When "the fog of public excitement obscures the ancient landmarks set up in [the] Bill of Rights[,]"[85] the best course to chart is that recommended by Chief Justice Hughes in *DeJonge v. Oregon*. When the peril to our institutions is most acute, it is all the more vital to "preserve inviolate" those core constitutional rights

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[81] *Id.* at 167.
[82] S. REP NO. 94-755, BOOK III, at 3 (1976).
[83] *Id.*
[84] Church Committee Report, *supra* note 80, at 321.
[85] American Communications Ass'n v. Douds, 339 U.S. 382, 453 (1950) (Black, J., dissenting).

safeguarded by the First Amendment so that government remains, as it always should, in the service of the people.[86]

[86] De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.").