NOTES & COMMENTS

DOMESTIC TERRORISM: NOT ACTUALLY A CRIME, BUT DESPERATELY IN NEED OF A FEDERAL RESPONSE

by
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Since the founding of the United States, the U.S. Government has dealt with national security threats, both external and internal. While there are federal laws in place to protect the nation against external actors, these instruments cannot be turned directly inward to address the rising threat of domestic terrorism. This Comment explains the issues with that approach and concludes by proposing specific solutions, focusing on the need for a coordinated response from the agencies and departments tasked with the investigation, intelligence, and prevention of domestic violent extremism and terrorism.

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INTRODUCTION

Amidst an undeniable surge of violent domestic extremism incidents in America,[1] the hotly contested 2020 election set the stage for a rioting mob to breach the heart of the legislative branch: the U.S. Capitol Building. Over the years, violent individuals have perpetrated attacks on Capitol grounds, but the last time a violent mob invaded the U.S. Capitol, the building stood under construction during the War of 1812, and the invaders were British troops.[2] After taking office in January

[1] Robert O'Harrow Jr., Andrew Ba Tran & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/.

[2] *History of the U.S. Capitol Building*, ARCHITECT OF THE CAPITOL, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building/history (last visited Sept. 17, 2021).

2021, President Joe Biden directed the federal government to perform a comprehensive review on domestic extremism and terrorism in the United States.[3]

The internet, particularly social media, enables extremist groups to quickly and easily coordinate gatherings, presenting increasing challenges to law enforcement response capabilities. Averaging 1,000 domestic terrorism investigations each year, the Federal Bureau of Investigation (FBI) devotes significant resources to fighting against violent extremism, including white supremacist groups and the far-left Antifa.[4] In 2020, months of nightly clashes between far-left and far-right groups in Portland, Oregon, required extra law enforcement presence, pulling agents from their regular duties with the FBI and the Department of Homeland Security (DHS).[5] Another investigation in Michigan led the FBI to arrest six men actively plotting to kidnap the state's governor and hold her for "trial" because their anti-government extremist group, the "Wolverine Watchmen," disagreed with her coronavirus response policies.[6] Part of the plan involved detonating a bomb under a highway bridge as a distraction.[7] In its 2020 Homeland Threat Assessment, DHS warned that the "domestic threat environment is rapidly evolving," and noted that the agency now considers domestic terrorism the most significant terror threat to the United States.[8]

The principal aim of this Comment is to propose a way forward in the fight against domestic terrorism. Advancements in technology demand a coordinated response from agencies and departments tasked with the investigation, intelligence, and prevention of domestic violent extremism and terrorism. Interagency coordination is vital to tackling the problem. Part I will walk through the history of the U.S. Government's response to national security threats, both internal and external. Then, Part II will explore the legislation enacted post-9/11 to address the suddenly very real threat of terrorism. Finally, Part III explains why the outward-facing tools used to deal with external threats cannot be directly applied to today's domestic terrorism problem. Instead, this Comment details three specific solutions, none of

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[3] Zolan Kanno-Youngs & Nicole Hong, *Biden Steps Up Federal Efforts to Combat Domestic Extremism*, N.Y. TIMES, https://www.nytimes.com/2021/04/04/us/politics/domestic-terrorism-biden.html (June 15, 2021).

[4] Adam Goldman, Katie Benner & Zolan Kanno-Youngs, *How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat*, N.Y. TIMES, https://www.nytimes.com/2021/01/30/us/politics/trump-right-wing-domestic-terrorism.html (Feb. 1, 2021).

[5] *Id.*

[6] Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES, https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html (Apr. 13, 2021).

[7] *Id.*

[8] U.S. DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT: OCTOBER 2020, at 17, 19 (2020).

which are mutually exclusive. The government could pass new legislation criminalizing domestic terrorism, publish a new national strategy, or simply add another specialized task force to the FBI's repertoire. Effective coordination and implementation of resources is the overarching requirement, and no matter the eventual response, agencies and departments must prioritize effective coordination to curb the recent surge of domestic terrorism incidents.

I. HISTORY OF THE RESPONSE OF THE FEDERAL GOVERNMENT TO PERCEIVED INTERNAL AND EXTERNAL THREATS

Since the founding days of the United States, Americans have rejected the idea of federal troops using military force to deal with daily civil matters.[9] Before the Continental Congress signed the Declaration of Independence on July 4th, 1776, British troops deployed to colonial America enjoyed entry rights to private homes, often stealing from colonists and engendering feelings of deep resentment.[10] The presence of British soldiers "trained for warfare on city streets, among the civilian populace, and using them to enforce laws . . . enraged colonists."[11] Hammering on King George III's reliance on his standing army as "totally unworthy . . . of a civilized nation,"[12] the Declaration decisively denounced the presumption that the fledgling nation would automatically establish a peacetime standing army. Though the Founding Fathers carefully addressed the issue of a standing army in the Constitution and Bill of Rights,[13] concerns over civil use of the military again took center stage following the Civil War and continue to be a source of debate today.

A. The Posse Comitatus Act

After the Civil War, the nation remained deeply divided. The U.S. legislature, recognizing the need for unifying legislation, passed a variety of laws aimed at suppressing hostilities and moving the nation towards recovery.[14] In 1878, Congress passed the Posse Comitatus Act (PCA) as a rider to an Army appropriations bill.[15]

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[9] THE DECLARATION OF INDEPENDENCE para. 13–14 (U.S. 1776).

[10] RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 14 (2013).

[11] *Id.*

[12] THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

[13] *See* U.S. CONST. art. I, § 8, cl. 12–16; *id.* amends. II, III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

[14] Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The* Posse Comitatus Act *and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 152 (2003).

[15] Posse Comitatus Act (Use of Army), ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2018)).

Accomplishing more than solely prohibiting and criminalizing the use of the army as a "posse comitatus,"[16] the PCA also served to preserve the states' role in law enforcement by restricting the U.S. military from direct participation in related activities, including making arrests, conducting searches, and seizing evidence.[17] Before the Civil War, the federal government often used soldiers to enforce civil laws by policing voting booths to ensure only authorized persons took part in the vote.[18] During the post-war Reconstruction Era, Democratic members of Congress strongly suspected that federal troops stationed in the south had influenced the vote in the 1876 election.[19] Closely contested, the election was ultimately decided by a congressional vote, which tipped the election in favor of Republican candidate Rutherford B. Hayes as the 19th President of the United States.[20] Shortly after the election, President Hayes pulled federal troops from the South, marking the end of the Reconstruction Era, and Congress passed the PCA, restricting civil use of the military.[21]

Despite the PCA, presidents tended to ignore its restrictions and continued to deploy troops to quell civil disorder on occasion: President Grover Cleveland deployed soldiers in 1894 to aid suppression of rioting railroad strikers with no complaints from Congress,[22] and in 1899, President William McKinley sent 500 troops to help local police deal with union miners in Idaho.[23] The Wounded Knee standoff of 1973 garnered national attention, and the resulting court cases contradicted each other to the point that Congress amended the PCA in an effort to clarify the domestic boundaries of the military.[24] The legislative changes favored the reasoning of the South Dakota District Court in *United States v. Red Feather*, effectively increasing the government's ability to provide military aid to local authorities.[25] The *Red Feather* court crafted its holding by separating military support activities into "active" and "passive" categories.[26] Using these categories to shape the 1981 amend-

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[16] "Posse Comitatus" is defined as "power of the county[.] A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations." *Posse comitatus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[17] Gizzo & Monoson, *supra* note 14, at 161.

[18] *Id.* at 153.

[19] Arthur Rizer, *Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?*, 16 NEV. L.J. 467, 475 (2016).

[20] *Id.*

[21] *Id.* at 475–76.

[22] *Id.* at 477.

[23] *Id.*

[24] Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 126 (2003).

[25] *Id.* at 129.

[26] United States v. Red Feather, 392 F. Supp. 916, 924–25 (D.S.D. 1975).

ments, Congress outlined prohibited "active" measures like search, seizure, and arrest, and left room for permitted "passive" measures like logistical support and training.[27]

B. Examples of Federal Government Responses to Perceived Domestic Threats

The U.S. Government has allowed national security fears due to perceived threats, both internal and external, to lead to action and legislation that blatantly violated civil rights and, in the worst case, resulted in the deaths of innocent students.

1. The Alien and Sedition Acts

In 1798, government action undertaken in the name of national security led to the passage of four laws known as the Alien and Sedition Acts. Anticipating a possible war with France, Congress passed the Acts less than a decade after the Bill of Rights specifically preserved freedom of speech—the Sedition Act targeted perceived domestic threats by temporarily criminalizing speech critical of the federal government.[28] The Republicans heavily criticized the Federalist-backed Acts as unconstitutional limits on freedom of speech and the press, and an obvious attempt by the Federalists in power to chill political dissent.[29] Before the Sedition Act's expiration in 1801, U.S. federal courts used it to prosecute at least 26 Americans—all of whom were known to oppose President John Adams's administration—on charges of "publishing false information or speaking in public with the intent to undermine support for the federal government."[30] Republicans detested the Acts with such vehemence that it prompted discussions on the overall idea of constitutional government itself and the meaning of free press and public discussion.[31] Thomas Jefferson's 1800 presidential campaign benefitted greatly from the widespread anger that the obviously partisan Acts ignited during the run-up to the election.[32] Following his loss of the presidency to Jefferson, Adams recognized the faults of the Acts and

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[27] Canestaro, *supra* note 24, at 129 (citing *Red Feather*, 392 F. Supp. at 924–25).

[28] Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438, 447–48 (2007); Sedition Act, ch. 74, 1 Stat. 596–97 (1798).

[29] Lash & Harrison, *supra* note 28, at 448.

[30] BRUCE A. RAGSDALE, FED. JUD. CTR., *The Sedition Act Trials: A Short Narrative*, *in* THE SEDITION ACT TRIALS 1, 1 (2005).

[31] RAGSDALE, *Media Coverage and Public Debates*, *in* THE SEDITION ACT TRIALS, *supra* note 30, at 42–43.

[32] Charles Pinckney, *On the Election of the President of the United States*, CAROLINA GAZETTE (Sept. 11, 1800), *reprinted in* RAGSDALE, *Historical Documents*, *in* THE SEDITION ACT TRIALS, *supra* note 30, at 45, 75.

backed off his support.[33] With the exception of the Alien Enemies Act, each of the Alien and Sedition Acts expired or were repealed by 1802.[34]

2. McCarthyism and the Red Scare

Later, shortly after the end of World War II, the United States' relations with the Soviet Union plummeted from wartime ally to suspicious adversary, which led to the rise of "McCarthyism" and the "Red Scare."[35] Though the movement that used Senator Joseph McCarthy's name began several years earlier than his involvement, like many ambitious politicians, he enthusiastically contributed to the crusade of intimidation that damaged reputations and caused job losses based on mere suspicion of association with communist activities.[36] The House Un-American Activities Committee investigated within the federal government and pressured other industries, particularly Hollywood, to expose and blacklist suspected communists.[37] In 1947, President Harry Truman issued Executive Order 9835—the Loyalty Order—declaring that "maximum protection must be afforded the United States against infiltration of disloyal persons . . . [t]here shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government."[38]

J. Edgar Hoover, longtime director of the FBI and staunch anti-communist, helped fan the flames of suspicion through investigations, public relations campaigns, and extensive compilations of files on suspected subversives.[39] Prosecutions aided by FBI investigatory power led to the imprisonment of hundreds of people and the famous electric chair executions of Julius and Ethel Rosenberg.[40] With the highest government institutions fully focused on national security, infringements on civil rights happened regularly, including illegal surveillance and lack of due process and free speech protections.[41] Even the U.S. Supreme Court failed to protect free speech, allowing convictions and terminations of many people based on political membership. In *Dennis v. United States*, the Court upheld convictions of leaders of

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[33] RAGSDALE, *Biographies*, *in* THE SEDITION ACT TRIALS, *supra* note 30, at 27, 28.

[34] Ken Drexler, *Alien and Sedition Acts: Primary Documents in American History*, LIBR. CONG., https://guides.loc.gov/alien-and-sedition-acts (Sept. 27, 2019).

[35] *See* Ellen Schrecker, *McCarthyism: Political Repression and the Fear of Communism*, 71 SOC. RSCH. 1041, 1042–43, 1051 (2004); *Revelations from the Russian Archives: The Soviet Union and the United States*, LIBR. CONG., https://www.loc.gov/exhibits/archives/sovi.html (last visited Sept. 17, 2022).

[36] ELLEN SCHRECKER & PHILLIP DEERY, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 1, 60–62, 73 (3d ed. 2017).

[37] *Id.* at 76–77.

[38] Exec. Order No. 9835, 12 Fed. Reg. 1,935, 1,935 (Mar. 21, 1947).

[39] SCHRECKER & DEERY, *supra* note 36, at 11, 23–24.

[40] Schrecker, *supra* note 35, at 1045.

[41] *Id.* at 1044.

the American Communist Party,[42] and a 6–3 ruling in *Adler v. Board of Education* allowed schools to terminate teachers found to be "subversive."[43] The Justices, sharing the concerns of many other Americans at the time, allowed the invocation of national security to override the importance of guarding individual rights.[44] Impassioned dissents by Justices Black and Douglas denouncing the *Dennis* decision foreshadowed the Warren Court's eventual rollback of the effects of McCarthyism.[45] Justice Black argued that the majority's opinion, which allowed the government to restrict speech based on "our own notions of mere 'reasonableness,'" stripped the First Amendment of its teeth such that "it amount[ed] to little more than an admonition to Congress."[46]

After the nation regained its sense of security and the anti-communist panic subsided, the Court moved to restore First Amendment protections.[47] The Court's 1969 opinion in *Brandenburg v. Ohio* ruled that speech may only be regulated where speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[48] Justice Douglas concurred, noting that except in rare instances where speech and action are inseparable, "speech is, I think, immune from prosecution."[49] The reinvigoration of civil rights did not happen overnight, and the term "McCarthyism" remains synonymous with the government-initiated spread of "anticommunist political repression" at the beginning of the Cold War.[50] The Red Scare of the 1940s and 50s serves as an example of national security fears causing government sanctioned infringements on civil rights.[51]

3. Kent State

In the spring of 1970, Ohio National Guardsmen opened fire on Kent State University students, wounding nine and killing four.[52] The Kent State shooting is one of the most famous and tragic examples of misuse of military power in a domestic setting. Breakdowns in communication and preparation led to a tragic federal

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[42] Dennis v. United States, 341 U.S. 494, 516–17 (1951).

[43] Adler v. Bd. of Educ., 342 U.S. 485, 495 (1952).

[44] Schrecker, *supra* note 35, at 1045–46.

[45] *Dennis*, 341 U.S. at 579 (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting).

[46] *Id.* at 580 (Black, J., dissenting).

[47] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (forbidding universities from forcing faculty to sign oaths affirming they were not currently, nor previously, communists); Yates v. United States, 354 U.S. 298, 303, 310 (1957) (reversing convictions after narrowly construing the Smith Act).

[48] *Brandenburg*, 395 U.S. at 447.

[49] *Id.* at 456–57 (Douglas, J., concurring).

[50] Schrecker, *supra* note 35, at 1043.

[51] SCHRECKER & DEERY, *supra* note 36, at 90.

[52] Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, KENT STATE UNIV., https://www.kent.edu/may-4-historical-accuracy (last visited Sept. 17, 2022).

response to a situation that, in hindsight, clearly could have been addressed without the use of lethal force.[53] With the United States four years into the highly unpopular Vietnam War, President Richard Nixon gave a televised address informing the nation that, instead of withdrawing from the conflict, he had directed U.S. troops to invade Cambodia.[54] Given his 1968 election promises to end U.S. involvement in Vietnam, this invasion that thrust the United States deeper into the region, along with the end of college deferment for the draft, escalated what had been mostly peaceful protests.[55] The day after the President's announcement, students at Kent State University held an anti-war rally, giving impassioned speeches and burying a copy of the Constitution to symbolize its death because Congress had not issued a declaration of war prior to the United States' involvement in Vietnam.[56] In anticipation of another anti-war rally scheduled for noon on May 4, Kent Mayor Leroy Satrom officially requested National Guard presence from Ohio Governor James Rhodes.[57]

On May 4, Kent State's common area contained over 3,000 students set to protest both the war and the presence of the National Guard on campus.[58] Approximately 100 armed troops faced the students from the burned-out Reserve Officers' Training Corps building—it had been set aflame within the last few days, and efforts to douse the flames had been hampered by students cutting firehoses.[59] Shortly before the rally's scheduled start time, local law enforcement made attempts to disperse the crowd, informing them through a bullhorn that the rally was no longer permitted. Far from its desired effect, the attempts to shut down the rally—including clouds of tear gas that floated ineffectively away in the wind—inflamed protestors, who threw rocks and expended gas canisters back at the soldiers.[60] The National Guardsmen advanced, and more than 60 bullets later, four students lay dead and nine wounded.[61] The tragic events at Kent State prompted immediate investigations and reviews, producing over 8,000 pages of FBI reports.[62] The massacre also forced the National Guard, federal agencies, and local law enforcement to readdress meth-

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[53] THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 289 (1970).

[54] *Kent State Shootings*, OHIO HIST. CENT., https://ohiohistorycentral.org/w/Kent_State_Shootings (last visited Sept. 17, 2022); Lewis & Hensley, *supra* note 52.

[55] *Kent State Shootings*, *supra* note 54.

[56] Lewis & Hensley, *supra* note 52.

[57] *Id.*

[58] *Id.*

[59] *Id.*; *Kent State Shootings*, *supra* note 54.

[60] *Kent State Shootings*, *supra* note 54.

[61] THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, *supra* note 53, at 273–74.

[62] *Id.* at 233.

ods of interagency cooperation to better prepare for and handle crowd-control situations.[63] The resulting changes and recommendations from the investigations remain relevant today.[64]

4. Executive Order 12,333

In the wake of Kent State, the federal government recognized the necessity of providing a framework within which agencies can effectively work together to lawfully provide the best available intelligence to U.S. decision makers. To facilitate the cooperation of U.S. federal agencies and the Central Intelligence Agency, President Ronald Reagan signed Executive Order 12,333 (EO 12,333) in December of 1981.[65] This established the U.S. Intelligence Community (IC), and authorized it to "conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States."[66] Further, EO 12,333 authorized the collection of information "constituting foreign intelligence or counterintelligence," provided that such collection was not "undertaken for the purpose of acquiring information concerning the domestic activities of United States persons."[67] Today, EO 12,333 is often cited by the IC as defining legal limitations for the expansion of data-collecting activities—it limits intelligence agencies to collection, retention, and dissemination "concerning United States persons only in accordance with procedures . . . approved by the Attorney General," [68] and then only after consultation with the director of national intelligence.[69]

C. Modern Concerns

Advancements in technology and tactics have changed the structure of the battlefield, blurring lines that were once clearly defined by rows of trenches and uniforms.[70] Unconventional attacks by non-state actors on American soil can muddy the distinction between war and crime, causing confusion as to the proper form of defense—military action, law enforcement, or possibly a structured combination.[71]

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[63] *Id.* at 12; Lewis & Hensley, *supra* note 52.

[64] *See* THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, *supra* note 53, at 7–17.

[65] Exec. Order No. 12,333, 3 C.F.R. §§ 1.1, 1.6(a) (1981), *reprinted in* 50 U.S.C. app. § 401 (1982).

[66] *Id.* § 1.4.

[67] *Id.* § 2.3.

[68] *Id.*

[69] Alexander W. Joel, *The Truth About Executive Order 12333*, POLITICO (Aug. 18, 2014), https://www.politico.com/magazine/story/2014/08/the-truth-about-executive-order-12333-110121/.

[70] C.J. Williams, *An Argument for Putting the Posse Comitatus Act to Rest*, 85 MISS. L.J. 99, 104 (2016).

[71] *Id.*

Adding to the complexity of employing the correct preventative measures and responses, newer terms like "domestic terrorism" and "domestic extremism" must find a place within a legal structure that did not anticipate them.

1. Effects of Changing Technology

Technological advances are the main drivers of changes—and challenges—in the methodology of targeting bad actors and ensuring public safety.[72] Not only does new technology, especially in the realm of encrypted internet-based communications, pose challenges for law enforcement in tracking and surveilling threats, it also presents opportunities for more advanced forms of surveillance and detection.[73] In the early days of government surveillance, information came almost exclusively through the efforts of informants who infiltrated meetings, but today, expertise in cryptology and cyberspace operations is essential for outfoxing adversaries.[74] Many people conduct a large portion of their lives on the internet, from good friends and family, to criminals, terrorists, and extremist groups.[75] Almost a non-optional part of daily life, the internet provides tremendous value, but also opens up its users to vulnerabilities that were previously unimaginable.[76] Practical difficulties arise when the legal authority to intercept electronic communications outpaces provider resources and capabilities—obtaining vital information may be rendered impossible by capability gaps even when the method is legal.[77]

2. The Law and Electronic Surveillance

As technology advanced, the legislature and courts were forced to consider how best to apply constitutional standards to capabilities that were unimaginable when the Constitution was drafted. With *Olmstead v. United States*, the law enforcement tactic of wiretapping captured national attention in 1928.[78] The Supreme Court ruled that Fourth Amendment protections did not extend to conversations that take place over telephone wires because "those who intercepted the projected voices were not in the house of either party to the conversation."[79] Chief Justice Taft's majority

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[72] *Going Dark: Lawful Electronic Surveillance in the Face of New Technologies: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Valerie Caproni, General Counsel, Federal Bureau of Investigation).

[73] *Id.* at 13–16.

[74] *Understanding the Threat*, NAT'L SEC. AGENCY, https://www.nsa.gov/what-we-do/understanding-the-threat/ [https://web.archive.org/web/20210918005059/https://www.nsa.gov/what-we-do/understanding-the-threat/].

[75] *Id.*

[76] *Id.*

[77] *Going Dark: Lawful Electronic Surveillance in the Face of New Technologies: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, *supra* note 72.

[78] *See* Olmstead v. United States, 277 U.S. 438 (1928).

[79] *Id.* at 466.

opinion effectively gave law enforcement free rein to wiretap anyone in the quest for justice. Justice Brandeis's dissent, however, would prove prescient, declaring that Fourth Amendment protections cannot erode with advancing technologies because "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions."[80]

As use of electronic communications quickly expanded, President Franklin Delano Roosevelt signed the Communications Act of 1934, establishing a legal basis for the regulation of wired and wireless communications.[81] Today, the Federal Communications Commission regulates telecommunications services and is charged with managing the protection of consumer privacy and oversight of strengthening the defense of the U.S. communications infrastructure.[82] Two cases in 1967 clarified the Supreme Court's views on eavesdropping and wiretaps. First, in *Berger v. New York*, the Court observed that "[t]he law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge."[83] In the majority opinion, Justice Clark clarified that the warrants needed to be specific and particular,[84] noting that "[t]he need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope."[85] A few months later, the Supreme Court overruled *Olmstead* and significantly expanded Fourth Amendment protections with its opinion in *Katz v. United States*.[86] Writing for the Court, Justice Stewart noted that "the Fourth Amendment protects people, not places."[87] Justice Harlan's concurring opinion laid out the practical two-part test for determining whether a person has a subjective expectation of privacy that society considers reasonable.[88] This decision restricted the ability of the federal government to perform unconsented searches and wiretaps on American citizens.

In response to the Supreme Court's decisions in *Katz* and *Berger*, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968, also

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[80] *Id.* at 472–73 (Brandeis, J., dissenting).

[81] Communications Act of 1934, ch. 652, § 2, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 152 (2018)); 1959 FCC, SILVER ANNIVERSARY REP. 14.

[82] *About the FCC: What We Do*, FED. COMMC'NS COMM'N, https://www.fcc.gov/about-fcc/what-we-do (last visited Sept. 17, 2022).

[83] Berger v. New York, 388 U.S. 41, 49 (1967).

[84] *Id.* at 55.

[85] *Id.* at 56.

[86] Katz v. United States, 389 U.S. 347, 359 (1967).

[87] *Id.* at 351.

[88] *Id.* at 361 (Harlan, J., concurring).

known as the "Wiretap Act."[89] Directly dealing with Congress's findings that extensive wiretapping had been performed by private parties and government entities without consent, Title III initially regulated solely wire and oral communications, but was expanded in 1986 to cover electronic communications.[90] A significant exception is the allowance for "persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act [FISA] of 1978."[91] This allows designated persons to legally intercept transmissions in support of intelligence activities with either a court order or certified exemption from the U.S. Attorney General—no warrant required in some circumstances.[92] Only legally obtained communications may be used as evidence.[93] As society moves forward and continues to establish new types of communication, surveillance law will need to evolve too.

II. U.S. GOVERNMENT RESPONSE TO 9/11: LEGISLATIVE TOOLS TO FIGHT TERRORISM

The terrorist attacks of 9/11 rocked the inherent sense of security American citizens associated with living safely in the most powerful country in the world. Immediate and decisive, the U.S. response to 9/11 included new, wide-reaching legislation to combat the external threats that had reached American shores. These laws, though amended over the years, remain largely in force.

A. The 9/11 Report

In November 2002, President George W. Bush signed legislation that required a report detailing what really happened on 9/11.[94] To accomplish this, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) formed and, after a year of investigating U.S. preparedness and response, released

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[89] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211–25 (codified as amended at 18 U.S.C. §§ 2510–2520 (2018)); *Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act)*, U.S. BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1284 (last visited Sept. 17, 2022).

[90] *Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act)*, *supra* note 89.

[91] 18 U.S.C. § 2511(2)(a)(ii) (2018).

[92] *Id.* § 2511(2)(a)(ii)(B).

[93] 18 U.S.C. § 2515 (2018).

[94] Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408 (2002).

the 9/11 Commission Report in 2004.[95] The 9/11 Report detailed the failure of federal and local agencies to coordinate and share information. General and specific findings detailed key failures ranging from poor information sharing to lack of first responder coordination.[96] The 9/11 Commission's recommendations included a complete restructuring of U.S. intelligence agencies, including a national intelligence director and increased unity of efforts among agencies to integrate strategic intelligence into joint operational planning.[97]

B. U.S. Legislative Response to Domestic Terrorism Threats

While the military cannot be used to directly accomplish law enforcement goals,[98] the secretary of the DHS can coordinate with the Department of Defense and other agencies to form Joint Task Forces (JTFs).[99] The FBI also manages Joint Terrorism Task Forces (JTTFs), which are often composed of investigators and agents from the FBI, local law enforcement, and DHS personnel who work together to support counterterrorism missions and neutralize Homegrown Violent Extremist (HVE) threats.[100] Immediately after 9/11, Congress passed a myriad of legislative actions to facilitate the newly declared "war on terror."[101] As time passed, some pieces of legislation were applied to situations not originally contemplated at the time of enactment.[102] The following Sections explore a few of those instances before this Comment turns to a deeper examination of one of the most well-known post-9/11 laws—the USA PATRIOT Act.

1. Authorized Use of Military Force

Passed within a week of 9/11, the Authorized Use of Military Force (AUMF) gave the president the authority to use "all necessary and appropriate force" against those who were involved in the 9/11 attacks.[103] In the AUMF's preamble, Congress

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[95] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, at xv, 361 (2004), https://www.9-11commission.gov/report/911Report.pdf.

[96] *Id.* at 79, 321.

[97] *Id.* at 407–08, 411.

[98] 18 U.S.C. § 1385 (2018).

[99] 6 U.S.C. § 348(b)(1) (2018).

[100] OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-20-59, HSI EFFECTIVELY CONTRIBUTES TO THE FBI'S JOINT TERRORISM TASK FORCE, BUT PARTNERING AGREEMENTS COULD BE IMPROVED (REDACTED) 1, 25 app. (2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-59-Aug20.pdf.

[101] Rebekah Mintzer, *Five Laws and Regulations that Emerged from 9/11*, NAT'L L.J. (Sept. 9, 2016), https://www.law.com/nationallawjournal/almID/1202767045010/ [https://plus.lexis.com/api/permalink/56c5af0e-7eab-429e-aa85-1e22ffc8bd86/?context=1530671].

[102] *See, e.g.*, *id.*

[103] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

emphasized the "acts of treacherous violence" on September 11, and the "continue[d] . . . unusual and extraordinary threat" that terrorism posed to the United States.[104] Passage of the AUMF allowed executive action "to deter and prevent acts of international terrorism against the United States,"[105] specifically intending that the U.S. Government be permitted to neutralize the al Qaeda terrorist network using whatever force was necessary.[106] In a textbook example of "mission creep,"[107] use of the AUMF gradually expanded beyond its original scope, as discussed below.

In 2004, the Supreme Court ruled that the AUMF's "necessary and appropriate force" clause applied to detaining enemy combatants until the cessation of hostilities.[108] The Court reasoned that, despite the fact that the AUMF did not specifically use language authorizing detention, "prevent[ing] a combatant's return to the battlefield is a fundamental incident of waging war."[109] This, combined with a 2008 Supreme Court ruling, meant that the AUMF authorized continuous detention for as long as hostilities persisted between U.S. forces and al Qaeda, provided that a writ of habeas corpus or an adequate substitute was made available to detainees.[110] Currently, the AUMF is used as authorization to neutralize terrorist targets globally.[111] Instead of going back to Congress for new approvals or passing new legislation, the government is able to use the AUMF to continue military actions around the world.[112] The Obama and Trump administrations rejected the need for a new AUMF, and in 2017, then Secretary of Defense James Mattis noted that "[a] new [war authorization] is not legally required to address the continuing threat posed by al Qaeda, the Taliban, and ISIS."[113] Given the language of the AUMF's preamble, it is reasonable to conclude that its drafters did not anticipate the AUMF's continued use as a blank check to conduct war independent of direct congressional approval.

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[104] *Id.* at 115 Stat. at 224 pmbl.

[105] *Id.*

[106] *Id.*; S. REP. NO. 113-323, at 2 (2014).

[107] *Mission Creep*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/mission%20creep (last visited Sept. 17, 2022) ("the gradual broadening of the original objectives of a mission or organization").

[108] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

[109] *Id.* at 519.

[110] Boumediene v. Bush, 553 U.S. 723, 794–95, 798 (2008).

[111] Charles V. Peña, *Here's Why Authorization to Use Military Force Is So Important*, HILL (Dec. 4, 2017, 4:20 PM), https://thehill.com/opinion/national-security/363182-heres-why-authorization-to-use-military-force-is-so-important.

[112] *Id.*

[113] *Id.*

2. USA PATRIOT Act

Though this Comment will investigate the USA PATRIOT Act more thoroughly in Parts IV and V, a brief introduction is appropriate here. Following the attacks of 9/11, Congress voted to enact the PATRIOT Act nearly unanimously in the Senate 98–1, and the House 357–66.[114] The swift passage of such a sweeping piece of legislation with overwhelming bipartisan support made clear the lawmakers' prioritization of preventing future terrorist attacks. Further demonstrating Congress's intent, USA PATRIOT is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."[115] To face the challenges and dangers posed by an international terrorist network, Congress expanded the permitted uses of tools already available to law enforcement for investigating drug trafficking and organized crime.[116] Specific authorizations aimed to improve counter-terrorism efforts: The PATRIOT Act authorized roving wiretaps for terrorism investigations, expanded FISA authorizations, and removed barriers that had previously prevented law enforcement and intelligence communities from communicating.[117] Additionally, the PATRIOT Act increased penalties for crimes involving terrorism, including provisions for prosecuting not only those who engage in terrorist acts, but also those who harbor, conspire, or support terrorist operations.[118] Despite its sunset provision, Congress has never allowed the PATRIOT Act to fully expire, and the 2001 law, with amendments and updates, is still on the books today.[119]

3. Foreign Intelligence Surveillance Act of 1978

In 1978, following the events of Watergate, the American public deeply distrusted the federal government, and Congress responded by enacting guidelines to provide a statutory framework for collection of foreign intelligence.[120] Within this framework, Congress established the Foreign Intelligence Surveillance Court (FISC), an Article III court that operates in complete secrecy.[121] Originally, Congress only regulated government use of electronic surveillance, but eventually

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[114] *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEP'T OF JUST., https://www.justice.gov/archive/ll/highlights.htm (last visited Sept. 17, 2022).

[115] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1(a), 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, 50, and 51 U.S.C. (2018)).

[116] *The USA PATRIOT Act: Preserving Life and Liberty*, *supra* note 114.

[117] USA PATRIOT ACT §§ 206–207, 504.

[118] *Id.* §§ 810–811.

[119] *Id.* § 224.

[120] Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C. (2018)).

[121] *Id.* § 103(a).

amendments, including the PATRIOT Act, allowed FISA to regulate pen registers and trap and trace devices, physical searches, and access to specified business records.[122] FISA allows agencies to avoid alerting targets through public records by adding a layer of secrecy in the form of applications.[123] Agencies usually submit FISA applications to the FISC, which grants government agents permission to conduct surveillance on targets if there is probable cause that the target is affiliated with a foreign power.[124]

4. Effect of the PATRIOT Act on FISA

In the wake of 9/11, the federal government felt extreme pressure to harden U.S. defenses against the suddenly very real threat of international terrorism. Congress passed the PATRIOT Act to provide law enforcement officials authorization to hunt down those responsible and ensure similar attacks never happened again.[125] To that end, the PATRIOT Act amended FISA in a myriad of ways that promoted closer working relationships between criminal and foreign intelligence investigators.[126] Prior to the PATRIOT Act, any FISA application for a surveillance permit required certification that "the purpose of the surveillance is to obtain foreign intelligence information."[127] Section 218 of the PATRIOT Act changed the language of the law from "the purpose" to "a significant purpose," effectively allowing domestic investigators to use FISA warrants to search for nonintelligence evidence for use in criminal proceedings.[128]

In a 2006 decision, *United States v. Ning Wen*, the Seventh Circuit ruled that FISA also applies to communications interceptions that have only a "significant purpose" grounded in international intelligence, and if "agents discover evidence of a domestic crime, they may use it to prosecute for that offense."[129] This affirmed the PATRIOT Act's expansion of FISA, as the Seventh Circuit agreed with the FISC's conclusion that "the amended statute allows domestic use of intercepted evidence

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[122] EDWARD C. LIU, CONG. RSCH. SERV., IF11451, FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA): AN OVERVIEW 1 (2021).

[123] *See id.* at 1–2.

[124] *Id.*

[125] CHARLES DOYLE, CONG. RSCH. SERV., RL31377, THE USA PATRIOT ACT: A LEGAL ANALYSIS 1 (2002).

[126] *Id.* at 8–10.

[127] Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, § 104(a)(7)(B), 92 Stat. 1783, 1788–89, *amended by* 50 U.S.C. § 1804(a)(7)(B) (2001).

[128] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (codified as amended at 50 U.S.C. § 1804(a)(6)(B) (2018)).

[129] United States v. Ning Wen, 477 F.3d 896, 898 (7th Cir. 2006).

as long as a 'significant' international objective is in view at the intercept's inception."[130] Legally obtained communications may be used as evidence.[131]

Again, instead of passing new legislation, Congress further amended FISA in 2008 to remove roadblocks to obtaining warrants.[132] Sections 702, 703, and 704 deal with procedures for obtaining foreign intelligence concerning both U.S. and non-U.S. persons located outside the United States, and section 702 includes an allowance for time-sensitive surveillance to be approved by FISC up to seven days following the actual beginning of the investigation.[133] These authorizations are a significant expansion of FISA's original language and show that, like the AUMF, FISA's current form differs greatly from the original legislation passed by Congress. The U.S. Government has proven its willingness to repurpose existing legislation to deal with new threats and may be poised to do so again in response to the attack on the U.S. Capitol on January 6, 2021.[134]

III. EXISTING LEGISLATION IS NOT SUFFICIENT: NEW LEGISLATION OR A NEW NATIONAL STRATEGY IS NEEDED TO FIGHT DOMESTIC TERRORISM

Rather than passing a new bill, Congress is more likely to use existing laws to deal with the growing threat of domestic terrorism. Attempts to find a single solution will likely prove impossible due to complications caused by the continual advancement of technology, which often results in legal ambiguity, increased costs, and potential gaps in enforcement capabilities.[135] Considering domestic extremism a major threat since President Biden's first day in office, the Biden administration signaled that it will consider using legislative tools to address the rising threat.[136] The administration plans to ask appropriate arms of the federal government to "coordinate on monitoring and countering evolving threats, radicalization, operational

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[130] *Id.* at 897 (citing *In re* Sealed Case, 310 F.3d 717, 723 (FISA Ct. Rev. 2002)).

[131] 18 U.S.C. § 2515 (2018).

[132] *See* LIU, *supra* note 122, at 1.

[133] *Id.* at 1–2.

[134] LISA N. SACCO, CONG. RSCH. SERV., IN11573, DOMESTIC TERRORISM AND THE ATTACK ON THE U.S. CAPITOL 3 (2021).

[135] *See Going Dark: Lawful Electronic Surveillance in the Face of New Technologies: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Valerie Caproni, General Counsel, Federal Bureau of Investigation).

[136] *See* Natasha Bertrand, *White House Launches 'Comprehensive Threat Assessment' on Domestic Extremism*, POLITICO (Jan. 22, 2021, 2:39 PM), https://www.politico.com/news/2021/01/22/white-house-assessment-domestic-extremism-461390.

responses, social media activity," and more.[137] Acknowledging the need for a solution is the easy part, but identifying the best way to prevent domestic terrorism presents a myriad of challenges. This Part of the Comment delves more deeply into why attempting to directly apply existing legislation as written without implementing stronger coordination requirements is unlikely to achieve success against internal threats, and offers possible solutions that aim to provide security without infringing on civil liberties.

A. The PATRIOT Act is Not the Answer

1. Defining Terrorism

Existing legislation fails to provide law enforcement room to maneuver between labeling an American citizen a deadly threat worthy of surveillance and merely recognizing someone as an outspoken extremist who makes family holidays awkward. Passed before domestic extremism became the most prominent threat in the United States,[138] the PATRIOT Act focused on providing the IC and law enforcement the tools needed to combat the immediate threat of international terrorism.[139]

The terrorism threat has evolved since 9/11, branching off into two recognized types: international and domestic.[140] In the past, law enforcement and the media did not immediately look to classify the type of terrorist attack, but today, one of the first questions asked after an attack is whether it originated internationally or domestically. "International terrorism" refers to "violent, criminal acts committed by individuals and/or groups who are inspired by, or associated with, designated foreign terrorist organizations or nations (state-sponsored)."[141] Domestic terrorism is a different animal entirely—while a person can be charged with international terrorism, domestic terrorism, though defined by law, is not a specifically chargeable offense.[142] While the PATRIOT Act and FISA provide for broad surveillance powers targeting foreign threats, they were not designed to handle purely domestic terrorism threats.[143] Along with a list of specific statutory offenses, suspicion of international terrorism-related activity can merit a FISA warrant for surveillance, but

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[137] *Id.*

[138] *See* Jeffrey V. Gardner, *Homeland Security Network to Address Domestic Extremism*, AM. MIL. UNIV. (Apr. 20, 2021), https://amuedge.com/homeland-security-network-to-address-domestic-extremism/.

[139] *The USA PATRIOT Act: Preserving Life and Liberty*, *supra* note 114.

[140] *What We Investigate: Terrorism*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/terrorism (last visited Sept. 17, 2022).

[141] *Id.*; *see* Antiterrorism Act of 1990, 18 U.S.C. §§ 2331(1), 2332 (2018).

[142] *See* FED. BUREAU OF INVESTIGATION, DOMESTIC TERRORISM: DEFINITIONS, TERMINOLOGY, AND METHODOLOGY 1 (2020) (providing that 18 U.S.C. § 2331(5) is "a definitional statute, not a charging statute").

[143] DOYLE, *supra* note 125, at 1, 13.

suspicion of domestic terrorism activity absent a predicate statutory offense is not enough.[144] Further complicating matters, multiple definitions of "domestic terrorism" exist in the U.S. Code. The FBI uses the definition of domestic terrorism found in 18 U.S.C. § 2331,[145] but DHS looks to the definition found in section 101 of the Homeland Security Act.[146] The definitions are similar in substance, but not identical.[147] It is impossible to overstate the importance of solid communication and coordination among agencies.

To facilitate synchronization of efforts, the FBI and DHS standardized their terminology for matters related to domestic terrorism, using the term "Domestic Violent Extremist (DVE) to describe an individual based and operating primarily within the territorial jurisdiction of the United States who seeks to further their ideological goals wholly or in part through unlawful acts of force or violence."[148] DHS uses DVE interchangeably with "domestic terrorist."[149] The PATRIOT Act narrowed the definition of domestic terrorist to the point that someone suspected of it would need to be engaging in wrongdoing involving predicate criminal "acts dangerous to human life" to merit surveillance.[150] The threat of domestic extremism demands proactive solutions that respect American civil liberties, but that are also available before a situation devolves into a potentially deadly act of domestic terrorism. Political groups peacefully dissenting from government views are not the targets of the PATRIOT Act's surveillance provision—there is no law restricting beliefs, and neither strong rhetoric, nor the advocacy of ideological positions, constitute DVE.[151] Unless domestic terrorism is formally criminalized, the federal government should provide guidance for officials to address and record incidents of escalating extremist views without necessarily initiating a surveillance order.

2. Domestic Terrorism: Not an Actual Crime

To merit the charge of terrorism, a person must be suspected of acting in support of a designated *foreign* terrorist organization identified by the State Department.[152] This means that someone can orchestrate a mass attack and, though charged with other offenses, if they do not have ties to one of the identified terrorist

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[144] *Id.* at 12–14.

[145] 18 U.S.C. § 2331(5) (2018).

[146] Homeland Security Act of 2002, 6 U.S.C. § 101(18) (2018).

[147] FED. BUREAU OF INVESTIGATION, *supra* note 142, at 1.

[148] *Id.* at 2.

[149] *Id.* at 2 n.1 (citing DEP'T OF HOMELAND SEC., OFF. OF INTEL. & ANALYSIS, Policy No. IA-1000, INTELLIGENCE OVERSIGHT PROGRAM AND GUIDELINES (2017)).

[150] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 802(a), 115 Stat. 272, 376 (codified as amended at 18 U.S.C. § 2331(5) (2018)).

[151] FED. BUREAU OF INVESTIGATION, *supra* note 142, at 1.

[152] *See* Antiterrorism Act of 1990, 18 U.S.C. §§ 2331(1), 2332b(g)(5) (2018); Immigration and Nationality Act, 8 U.S.C. § 1189(a)(1) (2018).

organizations, they will not be federally charged with terrorism.[153] On the flip side, as explained in the prior Section, no federal criminal statute officially outlaws domestic terrorism.[154] Though not a criminal offense, domestic terrorism can be used as an aggravating factor for a chargeable crime and as a reason for investigation of an individual or group.[155]

The 1995 Oklahoma City bombing perpetrator, Timothy McVeigh, certainly qualifies as a domestic terrorist. Independent of any foreign direction or influence, he committed "the worst act of homegrown terrorism in the nation's history,"[156] but the jury convicted him of charges related to conspiracy, use of weapons of mass destruction, destruction of government property, and first-degree murders, not domestic terrorism.[157]

McVeigh is the type of person law enforcement wants to target, not the person who is simply outspoken about their ideological beliefs. The FBI is in the business of investigating violence, not ideology, and walks a fine line to ensure First Amendment rights are preserved.[158] For that reason, the FBI does not actually designate groups as domestic terrorist organizations, though they might label the criminal activity performed by some groups as domestic terrorist threats.[159] Since the PATRIOT Act very narrowly defines domestic terrorism and it is not a chargeable offense, the FBI and DHS use broad threat categories and specific terminology to describe different ideological extremists, though this effort is hampered by a lack of communication and mandatory requirements for reporting.[160] While the FBI employs the terms "domestic terrorism incident" and "domestic terrorism plot" to describe criminal activity that represents either a single occurrence or planned escalation "in furtherance of a domestic ideological goal," a comprehensive understanding on a national level is rendered impossible due to the lack of mandatory reporting requirements at state and local levels.[161]

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[153] Greg Myre, *What Is, and Isn't, Considered Domestic Terrorism*, NPR (Oct. 2, 2017, 4:51 PM), https://www.npr.org/2017/10/02/555170250/what-is-and-isnt-considered-domestic-terrorism.

[154] *See supra* Part III.A.1.

[155] *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. 1 (U.S. SENT'G COMM'N 2018); *see, e.g.*, *id.* § 2B1.1 cmt. 21(A)(ii), 2J1.2(b)(1)(C), 2Q1.2 cmt. 9(C); FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 5 (2021).

[156] *Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing (last visited Sept. 17, 2022).

[157] *Charges Against McVeigh*, CNN (June 2, 1997, 4:00 PM), http://www.cnn.com/US/9706/02/charges/.

[158] SACCO, *supra* note 134, at 2.

[159] *Id.*

[160] FED. BUREAU OF INVESTIGATION, *supra* note 142, at 2–3.

[161] *Id.* at 3.

B. Alternate Proposals to Existing Legislation

Rather than simply unleashing the PATRIOT Act and FISA into the fight against domestic terrorism, new guidance is needed to address the obstacles raised by the lack of tools in place to deal with law enforcement's knowledge gap where domestic extremism devolves towards domestic terrorism. Merely criminalizing domestic terrorism may not be the answer, but new legislation providing support and an official framework for reporting domestic terrorism incidents and plots would greatly aid current law enforcement efforts. Absent timely new legislation, a joint national strategy offers a more flexible solution where multiple executive agencies can standardize and publish reporting requirements, systems, and terminology. Further, implementation of Joint Extremist Task Forces (JETFs) modeled after the FBI's JTTFs could provide a coordinated way to close the knowledge gap by using established resourcing and operational frameworks.

1. New Legislation

Since 2015, the surge in domestic extremism caused over 300 plots or attacks resulting in 110 deaths.[162] New legislation could clamp down on domestic extremists, but First Amendment concerns may hamper the progress of bills that attempt to criminalize domestic terrorism.[163] In 2019, House Representative Adam Schiff (D-CA) introduced a bill that not only criminalized domestic terrorism, but also gave the attorney general broad discretion to tack terrorism charges onto anyone who committed or threatened an act with the intention of intimidating a civilian population or influencing government policy through coercion.[164] Given that folks protesting government policy are, by definition, trying to influence government policy, the potential for abuse of such a law is glaringly obvious, particularly in the context of protestors and political opponents.[165]

Schiff's bill ultimately died in the Senate,[166] but House Bill 5602: the Domestic Terrorism Prevention Act of 2020, a bipartisan bill, passed the House in September of 2020.[167] Given the events at the U.S. Capitol on January 6 and the Biden admin-

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[162] O'Harrow et al., *supra* note 1.

[163] Faiza Patel, *New Domestic Terrorism Laws Are Unnecessary for Fighting White Nationalists*, BRENNAN CTR. FOR JUST. (Oct. 2, 2019), https://www.brennancenter.org/our-work/research-reports/new-domestic-terrorism-laws-are-unnecessary-fighting-white-nationalists.

[164] Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. § 1332j(a)(1), (e) (2019).

[165] Michael German, *What in the World Is Adam Schiff Thinking with His Domestic Terrorism Bill?*, HILL (Aug. 26, 2019, 8:30 AM), https://thehill.com/opinion/criminal-justice/458764-what-in-the-world-is-adam-schiff-thinking-domestic-terrorism/.

[166] *See* H.R. 4192.

[167] H.R. 5602, 116th Cong. (2020) (as passed by the House, Sept. 22, 2020); Press Release, Brad Schneider, Rep., House Passes Schneider, Durbin Bipartisan Domestic Terrorism

istration's intended crackdown on domestic terrorism, Congress may be more receptive to passing a bill that specifically targets its prevention.[168] House Bill 5602 provides for interagency task forces and further formalizes domestic terrorism incident reporting among the Department of Justice, DHS, and the FBI, which would help close the knowledge gaps currently caused by the lack of mandatory incident reporting.[169] It also creates a legal relationship between domestic terrorism and hate crimes, and criminalizes domestic terrorism.[170] Currently, House Bill 5602 is awaiting Senate action after referral to the Committee on the Judiciary in September of 2020.[171]

2. First Amendment Considerations

Constitutional challenges, particularly of the First Amendment flavor, may present issues to legislation attempting to introduce a criminal charging statute for domestic terrorism.[172] The Supreme Court has long recognized the essential importance of the First Amendment and its guarantee of freedom of thought and expression. In 1937, Justice Cardozo noted that the freedom provided by the First Amendment "is the matrix, the indispensable condition, of nearly every other form of freedom."[173] There is no question that freedom of speech is highly valued in the context of public protests, where the people are often speaking passionately against government policies and viewpoints.[174] In fact, the Supreme Court has recognized that such a commitment to the free flow of ideas can lead to "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[175] A few years later, the Court went on to note that greater latitude is permitted for speech generally classified as a public protest against government policies as opposed to personal threats.[176] These protections are reflected by the FBI's policies, which ensure that activities protected by the First Amendment are never the sole basis of investigative efforts.[177]

So then, when does free speech turn into unprotected threatening speech? In *Watts v. United States*, the Supreme Court ruled that a "true threat" is unprotected

Prevention Act (DTPA) (Sept. 21, 2020), https://schneider.house.gov/media/press-releases/house-passes-schneider-durbin-bipartisan-domestic-terrorism-prevention-act-dtpa.

168 Bertrand, *supra* note 136.

169 H.R. 5602 § 4(a)(1)–(3), 4(b)(1), (3).

170 *Id.* § 4(a), (b)(3).

171 *Id.*

172 Myre, *supra* note 153.

173 Palko v. Connecticut, 302 U.S. 319, 326–27 (1937).

174 German, *supra* note 165.

175 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

176 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–48 (1974).

177 FED. BUREAU OF INVESTIGATION, *supra* note 142, at 1.

by the First Amendment, but the Court did not fully define the term.[178] Instead, the Court recommended that a statement be evaluated contextually, with consideration for its "conditional nature" and the "reaction of the listeners."[179] This lack of specificity allows the states to more freely interpret what qualifies as a "true threat,"[180] which would greatly complicate attempts to implement a single national standard for speech worthy of a federal charge of domestic terrorism. In 2003, the Supreme Court again addressed the issue, holding that a law can constitutionally ban burning a cross on a person's front lawn with the intent to intimidate and signal impending bodily harm.[181] However, cross burning by itself is not prima facie evidence of intimidation.[182] The Court went on to say that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[183] Because courts would likely lean on their state's interpretation of the "true threat" standard and the comparatively rigorous *Brandenburg* incitement standard,[184] the potential looms large for a slew of clashing domestic terrorism charges and First Amendment appeals. For the reasons discussed above, a new national strategy that better aligns resources and a centralized tracking system to combat domestic terrorism is likely a more feasible and realistic solution.

3. National Strategy and Joint Extremist Task Forces

While waiting for new legislation that may or may not be passed, federal departments and agencies tasked with fighting domestic terrorism should work together to produce a new national strategy. In 2019, the National Counterterrorism Center hosted the first Intelligence Community Domestic Terrorism Conference with the goal of identifying obstacles to combating domestic terrorism.[185] An identified difficulty included a lack of common terminology among organizations charged with fighting domestic terrorism—current terms favor investigative agencies, with less applicability for those tasked with intelligence and preventative missions.[186]

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[178] Watts v. United States, 394 U.S. 705, 708 (1969).

[179] *Id.*

[180] Lori Weiss, *Is the True Threats Doctrine Threatening the First Amendment?* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists *Signals the Need to Remedy an Inadequate Doctrine*, 72 FORDHAM L. REV. 1283, 1314 (2004).

[181] Virginia v. Black, 538 U.S. 343, 363 (2003).

[182] *Id.* at 367.

[183] *Id.* at 359.

[184] *See* discussion *supra* Part I.B.2.

[185] NAT'L COUNTERTERRORISM CTR., DOMESTIC TERRORISM CONFERENCE REPORT 2 (2020).

[186] *Id.* at 3.

A new national strategy should be implemented using recommendations from the current agency reports to provide a useful set of guidelines that functionally apply to departments and agencies with differing mission sets, instead of automatically pressing for full standardization.[187] In today's instantly connected world, authorities working the front lines of national security must be properly resourced to deal with bad actors who employ advanced technology that demands proportional responsive capabilities.[188]

Another element of the proposed national strategy should involve consultation with the U.S. State Department to investigate adapting international programs aimed at combating violent extremism that look for peaceful ways to de-escalate a situation.[189] Further, the FBI should consider adding another specialized task force to its ranks in the form of JETFs. Instead of building from scratch, JETFs would benefit from the established framework and institutional knowledge of the JTTFs. These new task forces would be ideally situated and resourced to ensure accurate records of domestic terrorism incidents and plots, and to facilitate the sharing of information, which is a continual priority for today's law enforcement agencies, along with the public and private sectors.[190] Further, should Congress pass new legislation criminalizing domestic terrorism and resulting in a reshuffling of FBI resources, JETFs could be folded into JTTFs without losing community connections and knowledge.

If the domestic terrorist began as a domestic extremist, when did they decide to cross the line into threatening or actively performing a violent expression of their views? Efforts must be aimed at stopping someone with extremist views before they cross that line, which is something that only exists as a possibility, not a certainty, until the line is actually crossed. Opponents of JETFs voice concerns that the task forces are effectively causing the exercise of federal police powers in a sort of national police force.[191] Their solution is to encourage states to decline task force involvement.[192] This seems unwise and short-sighted—refusing to coordinate with re-

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[187] *Id.*

[188] *Going Dark: Lawful Electronic Surveillance in the Face of New Technologies: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 16 (2011) (statement of Valerie Caproni, General Counsel, Federal Bureau of Investigation).

[189] *See Bureau of Conflict and Stabilization Operations: Our Mission*, U.S. DEP'T OF STATE, https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-conflict-and-stabilization-operations/ (last visited Sept. 17, 2022).

[190] NAT'L COUNTERTERRORISM CTR., *supra* note 185, at 6.

[191] Mike Maharrey, *Joint Law Enforcement Task Forces are Creating a National Police State*, TENTH AMENDMENT CTR. (Apr. 16, 2020), https://tenthamendmentcenter.com/2020/04/16/joint-law-enforcement-task-forces-are-creating-a-national-police-state/.

[192] *Id.*

sourced agencies would result in effectively turning down help in keeping communities safer. Waiting until extremists turn violent and only learning of unreported domestic terrorism incidents after the fact cannot be the answer, but U.S. law enforcement does need to stop short of predictive actions that an observer might mistake for a scene from *Minority Report*.[193] No system will ever be perfect, but through coordination, communication, and centralized reporting, JETF's implementation of national guidelines can help curb the surging domestic extremism problem in the United States.[194]

CONCLUSION

While existing legislation can certainly be helpful in obtaining legal authority to surveil a target suspected of international terrorism, laws originally designed to deal with external threats cannot be turned inwards and directly used for prevention without intermediary steps. The PATRIOT Act and FISA provide broad surveillance powers to law enforcement in specific situations, and trying to turn those powers wholesale on American citizens who have not been accused of international crimes would run afoul of free speech and privacy rights. Americans possess constitutional rights that must be respected, which demands a proactive approach to countering domestic extremism before it devolves into domestic terrorism.

One of the more frustrating aspects of national security is that, even though we now live in a world where news coverage and notoriety can be a single social media post away, the average American citizen will never know how many times existing national security-focused laws averted disaster. The public learns more about local and national defense in a crisis than it does in times of peace, and if the Intelligence Community is only viewed through the lens of very rare failures, then it is naturally easier to claim the ineffectiveness of existing laws and intelligence methodologies. If Congress passes legislation criminalizing domestic terrorism, the courts should brace for an influx of constitutional challenges. Alternatively, new legislation does not need to designate domestic terrorism a crime, but can instead direct the development of a national strategy and the establishment of JETFs capable of training state, local, and tribal officials to include mandatory reporting requirements for domestic terrorism incidents and plots to a centralized database. Regardless of which route the federal government chooses, inaction is not an option, and any successful action will be underscored by proactive communication among all entities.

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[193] MINORITY REPORT (Dreamworks Pictures & 20th Century Fox 2002).

[194] O'Harrow et al., *supra* note 1.