

HAS AMERICAN SOCIETY BECOME SO RADICALIZED THAT TERRORISM IS THE NEW POLITICAL DISCOURSE?

EXPANDING THE PATRIOT ACT AND ITS ABILITY TO PROSECUTE DOMESTIC
TERRORIST ORGANIZATIONS IN ORDER TO HOLD POLITICAL LEADERS
CRIMINALLY RESPONSIBLE TO PROTECT THE AMERICAN PEOPLE.

Let's not excuse violence, or rationalize it, or participate in it. If we want...our
American society at large, to operate on a higher ethical code, then we have to
model that code ourselves.

-Former President Barack Obama¹

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¹ Barack Obama, *How to Make this Moment the Turning Point for Real Change*, MEDIUM (June 1, 2020), <https://barackobama.medium.com/how-to-make-this-moment-the-turning-point-for-real-change-9fa209806067>

I. Introduction

The United States was once intended to be “one nation” and “indivisible.”² But with recent trends in political polarization, our country is arguably more divided today than ever before. Although Americans have always participated in partisan group identity, recently a new type of division has emerged—the dislike and distrust of the opposing party. This new wave is known as ‘affective polarization’³ and has major consequences on the American society. Partisans with high levels of animus toward the other party are more motivated to distinguish themselves from their political opponents by taking positions on new issues that differ from the other, disliked party and match those of their own preferred party.⁴ In a 2019 study, researchers found that 42% of the people in each party view the opposition as “downright evil.”⁵



As political polarization has surged in recent years, so too has support for violent tactics. This article will explore the need for change in our criminal law in order to combat and deter this violence. Part II of this article will analyze how the evolution of the media and political elites have both, in combination of each other led to political violence. It will also analyze the January 6th Capitol attack that will stand as this Article’s focus

² 4 U.S.C.A. § 4 (West 2021).

³ James N. Druckman, *et. al*, *Affective Polarization, local contexts and. public opinion in America*, NATURE HUMAN BEHAVIOUR, <https://www.nature.com/articles/s41562-020-01012-5> (Affective polarization is the tendency for partisans to dislike and distrust those from the other party.)

⁴ James Druckman, *supra* note 3.

⁵ Nathan Kalmoe & Lilliana Mason, *Lethal Mass Partisanship: Prevalence, Correlates, & Electoral Contingencies*, https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe___mason_ncapsa_2019_-_lethal_partisanship_-_final_lmedit.pdf.

as to why change is necessary. Next, Part III will examine the current terrorism law in the United States and how international and domestic terrorism are criminally distinguished. Finally, Part IV will propose change to our domestic terrorism law by criminalizing ‘encouraging terrorism’ by drawing inspiration from the Canada’s Anti-Terrorism Act and the United Kingdom’s Terrorism Act of 2000, in addition to being structured around current American jurisprudence.

II. Political Violence

The United States has two main political party affiliations: Republicans and Democrats. Over the last quarter century, each party has moved farther to their side of the political spectrum.⁶ Because of this, Americans today identify consistently with the ‘hot button’ topics of their chosen party, and often change their beliefs on minor issues to match such party, which reinforces division.⁷ With the rise of political polarization, political violence has almost become expected in our society.

A. The media not only contributed to political polarization, it paved the way for radicalization.

“Well, with the end of the Fairness Doctrine in 1987 by the Reagan administration, and the rise of first talk radio and then the internet, you have a very fractured media landscape in which you don’t have to offer both sides. You instead press one point of view very aggressively. And so, you had the rise of Rush Limbaugh, the rise of Matt Drudge. You had the creation of, then, Fox News. And there were efforts on the left to try to counter this. They were never as effective as those on the right. But you see the media landscape start to fracture, and so politics becomes incredibly polarized.”⁸

⁶ *Explainer: Political Polarization in the United States*, FACING HISTORY & OURSELVES, <https://www.facinghistory.org/educator-resources/current-events/explainer/political-polarization-united-states>

⁷ *Explainer: Political Polarization in the United States*, supra note 6.

⁸ Sean Wilentz & Kevin Kruse, *Conversation: What Just Happened*, PRINCETON ALUMNI WEEKLY (April 12, 2017), <https://paw.princeton.edu/article/conversation-what-just-happened>

The Federal Communications Commission (“FCC”) was created by Congress in 1934 and was granted the ability to regulate broadcasting in the public interest.⁹ The public interest was “[v]ery shortly thereafter [interpreted to require] ample play for the free and fair competition of opposing views” and applied “to all discussions of issues of importance to the public.”¹⁰ The fairness doctrine arose out of this public interest and was predicated upon the concept that the fundamental purpose underlying the doctrine was the public’s right to be informed.¹¹ In compliance with the public interest, the fairness doctrine imposed two requirements on broadcast coverages regarding any topic concerning public importance. First, the broadcaster was required to give an issue of public concern adequate coverage, and second, it must accurately reflect different points of view.¹² Both prongs of the fairness doctrine reflected the principle that the public has a right to the free flow of information and access to opposing points of view on topics of public interest.

In 1959, Congress amended the Communications Act with a portion of the fairness doctrine’s equal airtime provision and, thus, became law.¹³ Even with a major win in the Supreme Court case *Red Lion Broadcasting Co. v. Federal Communications Commission*¹⁴, the FCC repealed the doctrine in 1987 because of its “chilling effect” upon free speech.¹⁵ Later in 1987,

⁹ *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (“The touchstone provided by Congress was the public interest, convenience, or necessity, a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit (internal citations omitted”).

¹⁰ *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 377.

¹¹ *United Mine Works of Am. Int’l Union v. Parsons*, 604 F.3d 177, 397.

¹² *Red Lion Broadcasting Co.*, *supra* note 10, at 377.

¹³ Pub. L. 73-416 (The equal-time rule is still in effect while the other provisions of the doctrine are not).

¹⁴ *Red Lion Broadcasting Co.*, *supra* note 10.

¹⁵ *General Fairness Doctrine Obligations of Broadcast Licensees*, 50 Fed. Reg. 35418 (1985).

Congress attempted to preempt the FCC decision and codify the entire Fairness Doctrine; however, this legislation was vetoed by President Reagan, thus, leading to the demise of the doctrine.¹⁶

In combination with the demise of the Fairness Doctrine, much of the distrust in media can be attributed to Newt Gingrich. “One of the great problems we have in the Republican Party is that we don’t encourage you to be nasty. We encourage you to be neat, obedient, and loyal, and faithful, and all those Boy Scout words, which would be great around the campfire but are lousy in politics.”¹⁷ Gingrich popularized the trend of political elites using strongly moralized language to gain support and retain office.¹⁸ He continuously taunted that for the republican party to survive, the next generations of republicans would have to learn how to “raise hell,” “stop being so nice,” and to realize that politics was, above all, a cutthroat “war for power”—and to start acting like it.¹⁹

In the aftermaths of Watergate, the Republican party was at its lowest point and many had been voted out of office.²⁰ Because Republicans were the minority and on a rocky ground with the public, they were more willing to compromise with the Democrats to keep congressional business moving.²¹ But to Gingrich, this was a culture of constant and consistent defeat.²² Gingrich’s plan was to dismantle bi-partisan coalitions that were essential to legislating and capitalize on the resulting dysfunction to wage a war against the institution of Congress itself.²³

¹⁶ The Fairness in Broadcasting Act of 1987, S. 742 & H.R. 1934, 100th Cong., 1st Sess. (1987)

¹⁷ McKay Coppins, *The Man Who Broke Politics*, THE ATLANTIC (October 17, 2018), <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/>

¹⁸ Eji J. Finkel, *et. al*, *Political Sectarianism in America*, SCIENCE (October 30, 2020), <https://www.science.org/doi/10.1126/science.abe1715>

¹⁹ McKay Coppins, *supra* note 17.

²⁰ McKay Coppins, *supra* note 17.

²¹ McKay Coppins, *supra* note 17.

²² McKay Coppins, *supra* note 17.

²³ McKay Coppins, *supra* note 17.

Once Gingrich realized if he could destroy Congress with the media, casting himself as its savior in the fight against corruption, it became clear that Gingrich was more interested in performing a show than legislating for his district. “Mr. Gingrich made his name in the House...by denouncing the Democrats on the floor while the cameras rolled. What they did not show, because they were locked into a narrow field of vision, was that Mr. Gingrich was hurling his barbs at an empty chamber, when his victims could not respond.”²⁴

With Gingrich’s political success, other republicans were inspired and were quick to follow suit. In his 1990 Grand Ole Party Action Committee (GOPAC)²⁵ memo, *Language: A Key Mechanism of Control*, Gingrich prepared a directory of words “to help clearly define the policies and record of your opponent and the Democratic party.”²⁶ The list includes words such as: sick, pathetic, lie, anti-flag, traitors, radical, and corrupt.²⁷ This form of warfare gained the Republican party a path to power and spearheaded the way to modern political polarization.

With the fast pace technological advances America has experienced, researchers have found that social media companies, such as Facebook, Twitter, and YouTube, have played an influential role in political discourse, intensifying political sectarianism.²⁸ Social media companies employ ‘algorithms’²⁹ to filter what content pops up on a user’s feed based on relevancy instead

²⁴ Katharine Q. Seelye, *Gingrich First Mastered the Media and then Rose to be King of the Hill*, NEW YORK TIMES, Dec. 14, 1994.

²⁵ GOPAC is a Republican communications group, with its mission detailed as: “Since 1978, GOPAC has been a force in America because we realize Republicans must champion the ideas that unite voters around a vision of creating jobs, getting government spending under control, making government more effective, and keeping America safe. This is why Republicans turn to GOPAC for coaching and best practices on effective ways to communicate conservative ideas and solutions.” See <https://www.gopac.org/mission/>

²⁶ *Language: A Key Mechanism of Control*, Gingrich, 1990 GOPAC memo

²⁷ *Language: A Key Mechanism of Control*, Gingrich, 1990 GOPAC memo

²⁸ Eji J. Finkel, *supra* note 18.

²⁹ Algorithms in social media platforms can be defined as technical means of sorting posts based on relevancy instead of publish time, in order to prioritize which content a user sees first

of publish time.³⁰ Algorithms are the leading force behind divisive content on social media—maximizing engagement increases polarization, especially within networks of like-minded users.³¹ This creates an “echo chamber” in which users are only presented with information and opinions that reflect and reinforce their own. In fairness to social media platforms, they did not intend their algorithms to specifically catalyze polarization, but it would be foolish to not recognize the consequences of such technology.³² Because Facebook is *fully aware* of how its algorithm promotes political polarization, the company periodically adjusts its algorithms to reduce the flow of what will incite political extremism.³³ But such adjustments to the level of exposure its users will have to incendiary content are only *temporary* as making them permanent will negatively impact Facebook’s bottom dollar.³⁴

The death of presenting controversial issues from both perspectives paved the road for politicians and news stations to demonize the other side. Along with moralizing rhetoric, which is credited to Newt Gingrich, political polarization quickly gained popularity within American politics and society. In combination with social media algorithms that create ‘echo chambers’, polarized groups spun into radicalized ones.

according to the likelihood that they will actually engage with such content. For more <https://www.internetjustsociety.org/algorithms-in-social-media-platforms>

³⁰ Publish time is when the post was actually published by the user to the website.

³¹ Paul M. Barrett, *et. al*, *Fueling the Fire: How Social Media Intensifies U.S. Political Polarization—And What Can Be Done About It*, NYU STERN CENTER FOR BUSINESS AND HUMAN RIGHTS (September 2021),

https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/613a4d4cc86b9d3810eb35aa/1631210832122/NYU+CBHR+Fueling+The+Fire_FINAL+ONLINE+REVISED+Sep7.pdf

³² Paul M. Barrett, *supra* note 31 (“Social media companies do not seek to boost user engagement because they want to intensify polarization. They do so because the amount of time users spend on a platform liking, sharing, and retweeting is also the amount of time they spend looking at the paid advertising that makes the major platforms so lucrative.”)

³³ Paul Barrett, *How tech platforms fuel U.S. political polarization and what government can do about it*, BROOKINGS (Sept. 27, 2021).

³⁴ Paul Barrett, *supra* note 33.

B. The January 6th Attack on the United States Capitol

On January 6, 2021, Congress met to certify the electoral votes of then President-Elect Joe Biden Jr. The chaotic and violent event unfolded when thousands of President Trump's supporters gathered in Washington D.C. to attempt to 'stop the count'³⁵ of the electoral votes. Before a single American cast a ballot in the 2020 presidential election, Former President Trump made it clear that the only way he would abide by the verdict of the American people, was if the polls showed his name as the next president.³⁶ To better understand the political climate surrounding the January 6th attack, perspective needs to be shed on the role President Donald Trump took that led to the violence.

1. One Year Timeline Preceding the Capitol Attack

April 30, 2020: Armed protestors storm the Michigan state capitol building. Two of the protestors are eventually charged in the attempted kidnapping of Michigan Democratic Governor Gretchen Whitmer.³⁷

Following Executive Order No. 2020-42³⁸, more than 1,000 cars, many draped with flags supporting President Trump, drove around the Michigan State Capitol, blaring their horns and

³⁵ "Stop the Count" was a phrase popularized by Former President Trump in reference to stopping the count of both the actual votes from American citizens and electoral votes. President Trump used the phrase to promote the idea that the election was stolen by the Democrats by using mail-in ballots.

³⁶ Nick Niedzwiadek, *The 9 Most Notable Comments Trump Has Made About Accepting the Election Results*, POLITICO (Sept. 24, 2020).

³⁷ Ryan Goodman, *et. al*, *Incitement Timeline: Year of Trump's Actions Leading to the Attack on the Capitol*, JUST SECURITY (Jan. 11, 2021).

³⁸ MI Executive Order No. 2020-42. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html

condemning Governor Whitmer's COVID-19 lockdown orders.³⁹ Hundreds of others, armed with military-style weapons, milled about on the lawn.⁴⁰ Two weeks later, on April 30, 2020, following President Trump's tweet, "LIBERATE MICHIGAN!", the armed protestors returned, this time rushing the State Capitol.⁴¹ They demanded entry into the House of Representatives' chamber, chanting, "Let us in!"⁴²



May 1, 2020: Trump tweeted in favor of the Michigan protestors.⁴³

President Trump tweeted, "The Governor of Michigan should have given a little, and put out the fire. These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal."⁴⁴

May 28, 2020: Trump retweets, with praise, a video of a supporter saying, "The only good Democrat is a dead Democrat."⁴⁵

³⁹ Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, NEW YORK TIMES (Jan. 9, 2021). <https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html>

⁴⁰ Kathleen Gray, *supra* note 39.

⁴¹ Kathleen Gray, *supra* note 39.

⁴² Kathleen Gray, *supra* note 39.

⁴³ Kathleen Gray, *supra* note 39.

⁴⁴ Kathleen Gray, *supra* note 39.

⁴⁵ Aaron Blake, "The only good Democrat is a dead Democrat." "When the looting starts, the shooting starts." Twice in 25 hours, Trump tweets conspicuous allusions to violence, THE WASH POST (May 29, 2020). <https://www.washingtonpost.com/politics/2020/05/28/trump-retweets-video-saying-only-good-democrat-is-dead-democrat/>

June 4, 2020: The Trump campaign sends out a fundraising email asking supporters to enlist in the “Trump Army.”⁴⁶



July 9, 2020: President Trump refuses to say whether he will accept the election results.⁴⁷

In an exclusive interview with FOX News, President Trump claimed that mail-in voting, which Democrats have offered as an alternative to in-person voting during the COVID-19 pandemic, “is going to rig the election.”⁴⁸ When reporter Chris Wallace asked President Trump if he would accept the election results, Trump responded, “No. I have to see.”⁴⁹ When asked again if he would accept the results, Trump said, “No, I’m not just going to say yes. I’m not going to say no, and I didn’t last time either.”⁵⁰

August 17, 2020: President Trump condemns Antifa as the Proud Boys descend on Portland, Oregon

The Proud Boys⁵¹ lead an “End Domestic Terrorism Rally” in Portland, Oregon, in opposition to Antifa⁵². The demonstrations gained the support of President Trump, who tweeted in reference to the event, “Major consideration is being given to naming ANTIFA an “ORGANIZATION OF

⁴⁶ Ryan Goodman, *supra* note 37.

⁴⁷ Ryan Goodman, *supra* note 37.

⁴⁸ Ronn Blitzer, *Trump pushes back against critics on coronavirus, addresses whether he will accept election results in exclusive interview*, FOX NEWS (July 19, 2020).
<https://www.foxnews.com/politics/trump-pushes-back-against-critics-on-coronavirus-addresses-whether-he-will-accept-election-results-in-exclusive-interview>

⁴⁹ Ronn Blitzer, *supra* note 48.

⁵⁰ Ronn Blitzer, *supra* note 48.

⁵¹ The Proud Boys are an American far-right, neo-fascist, and exclusively male organization that promotes and engages in political violence in the United States.

⁵² Antifa is a left-wing, anti-fascist and anti-racist political movement in the United States. As a highly decentralized array of autonomous groups, Antifa uses both nonviolent and violent direct action to achieve its aims rather than policy reform.

TERROR.” Portland is being watched very closely. Hopefully the Mayor⁵³ will be able to properly do his job!”⁵⁴

August 17, 2020: Trump claims the only way he will lose the election is if it is rigged.⁵⁵

In a campaigning speech given in Oshkosh, Wisconsin, Trump claims that the “only way we’re going to lose this election is if the election is rigged, remember that. It’s the only way we’re going to lose this election.”⁵⁶

August 24, 2020: Trump gives a speech at the Republican National Conference claiming the only way he will lose the election is if it is rigged.⁵⁷

After being formally nominated as the Republican party’s presidential candidate, President Trump spoke at the Republican National Convention, claiming, “The only way they can take this election away from us is if this is a rigged election. We’re going to win this election.”⁵⁸

August 31, 2020: President trump declines to condemn white nationalist-led violent protests.⁵⁹

After the police shooting of Jacob Blake in Kenosha, Wisconsin, protestors poured in Kenosha’s streets to decry the shooting.⁶⁰ Amid the unrest, some in Kenosha have torched buildings and law enforcement pushed back with tear gas in an attempt to clear the streets.⁶¹ Counter protests emerged, gunfire broke out, and innocent lives were taken. The violence came as demonstrators scuffled with a group of men with long-guns who were “protecting the area from looting.”⁶² When asked to condemn his supporters firing paintball guns at people and spraying them with pepper spray during the President’s News Conference, Trump responded:

“Well, I understand that had large numbers of people that were supporters, but that was a peaceful protest... And paint is not — and paint as a defensive mechanism, paint is not bullets. ... These people, they protested peacefully. They went in very peacefully... That was a peaceful protest, totally.”⁶³

⁵³ Portland Mayor Ted Wheeler is a democrat.

⁵⁴ Nicole Acevedo, *Far-Right rally in Portland met by anti-fascist protesters*, NBC NEWS (Aug. 17, 2019). <https://www.nbcnews.com/news/us-news/far-right-rally-portland-met-anti-fascist-protesters-n1043646>

⁵⁵ Ryan Goodman, *supra* note 37.

⁵⁶ *Donald Trump Speech Transcript Wisconsin August 17*, REV (AUG. 17, 2020). <https://www.rev.com/blog/transcripts/donald-trump-speech-transcript-wisconsin-august-17>

⁵⁷ *Donald Trump Speech Transcript Wisconsin August 24*, REV (August 24, 2020). <https://www.rev.com/blog/transcripts/donald-trump-2020-rnc-speech-transcript-august-24>

⁵⁸ *Donald Trump Speech Transcript Wisconsin August 24*, *supra* note 57.

⁵⁹ Ryan Goodman, *supra* note 37.

⁶⁰ Julie Bosman and Sarah Mervosh, *Justice Dept. to Open Investigation into Kenisha Shooting*, THE NEW YORK TIMES (Aug. 26, 2020). <https://www.nytimes.com/2020/08/26/us/kenosha-shooting-protests-jacob-blake.html>

⁶¹ Julie Bosman and Sarah Mervosh, *supra* 61.

⁶² Julie Bosman and Sarah Mervosh, *supra* 61.

⁶³ *The President’s News Conference* (Aug. 31, 2020)

<https://www.govinfo.gov/content/pkg/DCPD-202000632/html/DCPD-202000632.htm>

September 23, 2020: President Trump refuses to say he will ensure a peaceful transfer of power if he loses the election.⁶⁴

During a White House press conference, a reporter asks President Trump if he will “commit to making sure that there is a peaceful transfer of power after the election?”⁶⁵ Trump responds, “Well, we’re going to have to see what happens...Get rid of the ballots and you’ll have a very peaceful—there won’t be a transfer, frankly. There will be a continuation.”⁶⁶

September 29, 2020: First Presidential Debate

During the first presidential debate, Debate Moderator Chris Wallace asked President Trump if he would urge his supporters to “stay calm during this extended period [of waiting for the election results], not to engage in any civil unrest,” Trump answers that “bad things happen in Philadelphia. Bad things. And I am urging my people. I hope it’s going to be a fair election.”⁶⁷ Later in the debate, when asked to condemn white supremacist militias like the Proud Boys, Trump speaks directly to the Proud Boys and tells them to “Stand back and stand by,” and that “somebody’s got to do something about Antifa and the left.”⁶⁸ Hours after President Trump’s remarks, the Proud Boys added his words to their logo.⁶⁹



October 7, 2020: Justice Department indicts thirteen men for attempting to kidnap Michigan Governor.⁷⁰

The Justice Department announced indictment of thirteen men for conspiring to kidnap Governor Whitmer.⁷¹ Governor Whitmer blamed President Trump for “stoking” hate:

“Just last week, the president of the United States stood before the American people and refused to condemn white supremacists and hate groups like these two Michigan militia groups. ‘Stand back and stand by’ he told them...Hate groups heard the president’s words not a rebuke, but as a rallying cry, as a call to action. When our leaders speak, their words matter. They carry weight.”

⁶⁴ Ryan Goodman, *supra* note 37.

⁶⁵ The Associated Press, *Trump Refuses to Commit to Peaceful Transfer of Power After Election*, THE NEW YORK TIMES (Sept. 23, 2020).

<https://www.nytimes.com/video/us/elections/100000007359070/trump-refuses-to-commit-to-peaceful-transfer-of-power-after-election.html>

⁶⁶ The Associated Press, *supra* note 66.

⁶⁷ Ryan Goodman, *supra* note 37.

⁶⁸ Ryan Goodman, *supra* note 37.

⁶⁹ Marissa J. Lang, *As Fractures emerge among Proud Boys, experts warn of a shift toward extremist violence*, THE WASHINGTON POST (Feb. 26, 2021).

https://www.washingtonpost.com/local/proud-boys/2021/02/25/fabdea30-73ad-11eb-b8a9-b9467510f0fe_story.html

⁷⁰ Ryan Goodman, *supra* note 37.

⁷¹ *United States v. Fox, et. al*, Case No. 1:20-cr-00183-RJJ, Indictment (12/16/20).

<https://www.justice.gov/usao-wdmi/press-release/file/1346126/download>

During his Lansing, Michigan rally on October 27, 2020, President Trump responds to Governor Whitmer:

“...[I]t was our people that helped her out with her problem. I mean, we’ll have to see if it’s a problem. Right? People are entitled to say maybe it was a problem, maybe it wasn’t. It was our people—my people, our people that helped her out. And then she blamed me for it. She blamed me and it was our people that helped her. I don’t get it. How did you put her there?”⁷²

November 1, 2020 President Trump praises his supporters who, with their cars, swarm a Biden campaign bus traveling in Texas.⁷³

On October 30, 2020, a Biden campaign bus was traveling on Interstate-35 in Texas when a caravan of President Trump’s supporters surrounded and physically collided with the bus.⁷⁴ After the Federal Bureau of Investigations announced that it was opening an investigation of the ‘Trump Train’ incident, President Trump tweeted, “In my opinion, these patriots did nothing wrong. Instead, the FBI & Justice should be investigating the terrorists, anarchists, and agitators of ANTIFA.”⁷⁵ During a Trump rally on November 1, 2020, Senator Marco Rubio praised the group by stating, “I saw yesterday a video of these people in Texas. Did you see it? All the cars on the road, we love what they did.”⁷⁶



November 3, 2020: President Trump lost the election

November 13, 2020: President Trump’s allies spearhead a media campaign and a call to action of the President’s supporters.⁷⁷

Mike Flynn urged his followers to defend America tweeting, “This is a serious constitutional crisis as our has ever faced. We will only be the beacon of hope for the world if we are willing to stand with courage and integrity & defend our republic.”⁷⁸ Flynn also tweeted a link to a news release

⁷² Maegan Vazquez and Nikki Carvajal, *Trump appears to give a pass to the domestic kidnapping plot against Whitmer*, CNN POLITICS (Oct. 27, 2020).

<https://www.cnn.com/2020/10/27/politics/trump-gretchen-whitmer-kidnapping-michigan/index.html>

⁷³ Ryan Goodman, *supra* note 37.

⁷⁴ Katie Shepherd, *Trump cheers supporters who swarmed a Biden bus in Texas: “These patriots did nothing wrong”* WASH. POST (Nov. 2, 2020).

<https://www.washingtonpost.com/nation/2020/11/02/trump-caravan-biden-bus/>

⁷⁵ Katie Shepherd, *supra* note 75.

⁷⁶ Katie Shepherd, *supra* note 75.

⁷⁷ Ryan Goodman, *supra* note 37.

⁷⁸ Rebecca Ballhaus, *et. al*, *Trump and His Allies Set the Stage for Riot Well Before January 6*, WALL STREET JOURNAL (Jan. 8, 2021). <https://www.wsj.com/articles/trump-and-his-allies-set-the-stage-for-riot-well-before-january-6-11610156283>

from a conservative group that called on Trump to invoke “limited martial law” and to hold a new election.⁷⁹ This same day, Sidney Powell said in a Fox Business Network Interview, “This is essentially a new American Revolution. And anyone who wants this country to remain free needs to step up right now.”⁸⁰

December 1, 2020: While the President’s supporters continue to call for martial law and use of force, Republicans are concerned that President Trump’s rhetoric will lead to violence.⁸¹

Gabriel Sterling, a Republican election official in Georgia, begs Trump in an avid viral speech, “Stop inspiring people to commit potential acts of violence. Someone is going to get shot, someone is going to get killed. And it’s not right.”⁸²

December 2, 2020: Lin Wood spews violent rhetoric to a crowd of the President’s supporters at a “Stop the Steal” rally.⁸³

“We’re going to slay Goliath, the communists, the liberals, the phonies. Joe Biden will never set foot in the Oval Office of the country. It will not happen on our watch. Never gonna happen,” Lin Wood⁸⁴ exclaim at a “Stop the Steal” Rally in Alpharetta, Georgia.⁸⁵



December 9, 2020: During an interview on pro-Trump TV station, New Tang Dynasty Television, Lin Wood foretells, “I believe there will be violence in our streets soon.”⁸⁶

After the interview, Sidney Powell answered a Twitter user who asked, “How do we rise up?” She suggested to “swarm the state capital,

Congress.”⁸⁷ Mike Flynn retweeted her response.⁸⁸

December 12, 2020: As “Stop the Steal” rallies turn violent across the country, President Trump expresses his support for his supporters’ participation in the rallies.⁸⁹

⁷⁹ Rebecca Ballhaus, *supra* note 79.

⁸⁰ Rebecca Ballhaus, *supra* note 79.

⁸¹ Ryan Goodman, *supra* note 37.

⁸² Ryan Goodman, *supra* note 37.

⁸³ Rebecca Ballhaus, *supra* note 79.

⁸⁴ Lin Wood is a far-right lawyer and fierce loyalist who spread baseless conspiracy theories about the election and tried to overturn the presidential election result to Trump’s benefit.

⁸⁵ Rebecca Ballhaus, *supra* note 79.

⁸⁶ Ryan Goodman, *supra* note 37.

⁸⁷ Rebecca Ballhaus, *supra* note 79.

⁸⁸ Rebecca Ballhaus, *supra* note 79.

⁸⁹ *US. election: Pro-Trump rallies see scuffles in US cities*, BBC NEWS (Dec. 13, 2020). <https://www.bbc.com/news/election-us-2020-55292610>

President Trump tweets, “Wow! Thousands of people forming in Washington [D.C.] for Stop the Steal. Didn’t know about this, but I’ll be seeing them! #MAGA”.⁹⁰



December 14, 2020: With credible threats of violence in response to the Electoral College meeting on statehouses across the nation to certify the 2020 election, Michigan’s Capitol shuts down and Arizona’s Capitol receives increased security.⁹¹

December 19, 2020: President Trump begins to rally his supporters to attend a protest in

Washington D.C. on January 6th.⁹²

Trump tweets, “Big protest in DC on January 6th. Be there, will be wild!”⁹³

December 27, 2020: President Trump tweets, “See you in Washington, DC, on January 6th. Don’t miss it. Information to follow.”⁹⁴

December 28, 2020: Former Trump White House official Olivia Troye says she is “very concerned that there will be violence on January 6th because the president himself encourages it.”⁹⁵

Troye elaborates, “This is what [President Trump] does. He tweets. He incites it. He gets his followers and supporters to behave in this manner, and these people think that they’re being patriotic because they are supporting Donald Trump.”⁹⁶

⁹⁰ *US. election: Pro-Trump rallies see scuffles in US cities, supra* note 90.

⁹¹ Teo Armus, *Michigan closes legislative buildings due to ‘credible threats of violence’ ahead of electoral college vote*, WASH. POST (Dec. 14, 2020).

<https://www.washingtonpost.com/nation/2020/12/14/michigan-arizona-threats-electoral-college/>

⁹² Ryan Goodman, *supra* note 37.

⁹³ Ryan Goodman, *supra* note 37.

⁹⁴ Ryan Goodman, *supra* note 37.

⁹⁵ MSNBC (@MSNBC), YOUTUBE (Dec. 28, 2020),

<https://www.youtube.com/watch?v=fuvNrrEna6I>.

⁹⁶ MSNBC, *supra* note 96.

December 29, 2021: The Proud Boys announce they will attend the January 6 event, saying they will do so “incognito.” This statement is widely reported by conservative news outlets (including FOX News).⁹⁷ President Trump, after condemning white supremacists, did not issue a statement that the Proud Boys are not welcome.



January 1, 2021: As momentum builds for the January 6th rally, there are increased calls for violence by Trump supporters.⁹⁸

President Trump retweets Kylie Jane Kremer’s, chair of Women for America First⁹⁹, tweet from December 19, 2020, “The calvary[sic] is coming, Mr. President! JANUARY 6th.”¹⁰⁰ The President responds, “A great honor!” in his retweet on January 1, 2021.¹⁰¹

Rep. Louie Gohmert (R-TX) says in an interview on Newsmax¹⁰² that as a consequence of the dismissal of his lawsuit enjoining Mike Pence to overturn the election results, “you got to go to the streets and be as violent as Antifa and BLM.”¹⁰³

January 3, 2021: Senator Ted Cruz (R-TX) encourages supporters to show up to the January 6th protest.¹⁰⁴

Senator Ted Cruz, at a rally in Georgia, says, “We will not go quietly into the night. We will defend liberty. And we are going to win.”¹⁰⁵

January 4, 2021: President Trump calls his supporters to “fight like hell.”¹⁰⁶

During a pre-election (for the Georgia runoff election) rally in Georgia, President Trump says, “They’re not taking this White House. We’re going to fight like hell.”¹⁰⁷

2. The January 6th Attack on the Capitol

⁹⁷ Andrew Beaujon, *Proud Boys Say They’ll be “incognito” During January 6 Trump Rallies in DC*, WASHINGTONIAN (Dec. 31, 2020). <https://www.washingtonian.com/2020/12/31/proud-boys-say-theyll-be-incognito-during-january-6-trump-rallies-in-dc/>

⁹⁸ Ryan Goodman, *supra* note 37.

⁹⁹ Women for America First is a pro-Trump organization who helped spread false narratives about the election being stolen.

¹⁰⁰ Ryan Goodman, *supra* note 37.

¹⁰¹ Ryan Goodman, *supra* note 37.

¹⁰² Newsmax is an American far-right news station and opinion website.

¹⁰³ Ryan Goodman, *supra* note 37.

¹⁰⁴ Ryan Goodman, *supra* note 37.

¹⁰⁵ The Hill (@thehill), TWITTER (Jan. 3, 2021, 10:31AM), <https://twitter.com/thehill/status/1345754541560573954>

¹⁰⁶ Ryan Goodman, *supra* note 37.

¹⁰⁷ Rebecca Ballhaus, *supra* note 79.

On January 6, 2021, with Vice President Mike Pence presiding, members of Congress assembled to perform its constitutional duty of counting the electoral votes for the President of the United States. This ceremony has been marked the peaceful transfer of power in the United States for centuries.¹⁰⁸ There has never been a time in this nation’s history where foreign or domestic enemies have obstructed Congress’s counting of the votes nor has a president ever refused to accept election results.¹⁰⁹ That is, until President Trump lost the 2020 presidential election.

Down the street from the Capitol, as President Trump took the stage at his “Save America Rally”, his lawyer, Rudy Giuliani had already addressed the crowd and had called for “trial by combat.”¹¹⁰ Once President Trump got behind the podium, which bared the Seal of the President of the United States, he praised Giuliani: “He’s got guts, he fights.”¹¹¹

For the next hour, President Trump repeatedly reiterated his claim that Democrats had “stolen” the election.¹¹² He encouraged the crowd to “fight much harder” to “stop the steal” and “take our country back.”¹¹³ President Trump even demanded that Vice President Pence overturn President-elect Joe Biden Jr.’s victory.¹¹⁴

¹⁰⁸ *In re Impeachment of President Donald J. Trump* Brief, <https://www.documentcloud.org/documents/20468375-house-impeachment-brief>

¹⁰⁹ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹¹⁰ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹¹¹ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹¹² Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹¹³ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹¹⁴ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).



At numerous points during the rally, President Trump urged the crowd toward the Capitol, where members of Congress were about to start the ceremony of counting the electoral ballots.¹¹⁵ In response to this encouragement, an early

wave of his supporters went to the Capitol and started to tear down barricades around the perimeter.¹¹⁶

As the mob stormed the Capital, the mob yelled out “President Trump Sent Us,” “Hang Mike Pence,” and “Traitor Traitor Traitor.”¹¹⁷ As they penetrated the Capitol walls, they assaulted police officers with weapons and chemical agents.¹¹⁸ President Trump used rhetoric that was calculated to incite violence to this armed, angry crowd. He declared, “we fight, we fight like hell,” because “if you don’t fight like hell you’re not going to have a country anymore.”¹¹⁹ Immediately after President Trump told the crowd that “you’ll never take back our country with weakness,” and that “you have to show strength,” his supporters can be heard shouting “take the Capitol

¹¹⁵ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹¹⁶ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹¹⁷ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹¹⁸ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹¹⁹ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

building!”¹²⁰ Later in the speech, the crowd interrupted him with chants of “Fight for Trump!”¹²¹ President Trump simply smiled and responded, “Thank you.”¹²²

President Trump concluded his speech by, once again, encouraging his supporters to march to the Capitol, shouting, “So let’s walk down Pennsylvania Avenue!”¹²³ The thousands of people heeded President Trump’s request and marched straight to the Capitol doors.

The mob of President Trump supporters crashed through security barriers that were placed around the Capitol perimeter, tore down the scaffolding, and bludgeoned law enforcement guarding the Capitol.¹²⁴ Members of the mob, proudly wearing



Trump paraphernalia, shoved and punched Capitol Police officers, gouged their eyes, assaulted them with pepper spray and projectiles, and denounced them as “cowards” and “traitors.”¹²⁵ The weapons the rioters used to attack the Capitol Police were either brought or stolen from the police: sledgehammers, baseball bats, hockey sticks, crutches, flagpoles, police shields, and fire extinguishers.¹²⁶ They tore off officer’s helmets, beat them with batons, and deployed chemical

¹²⁰ Ryan Goodman & Justin Hendrix, “*Fight for Trump*”: *Video Evidence of Incitement at the Capitol*, JUST SECURITY (Jan. 25, 2021).

¹²¹ Ryan Goodman & Justin Hendrix, *supra* note 120.

¹²² Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹²³ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

¹²⁴ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹²⁵ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹²⁶ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

irritants including bear spray¹²⁷.¹²⁸ Some members of the mob wore gas masks and bulletproof vests and many carried fire arms—while others carried knives, brass knuckles, a noose, and other deadly weapons.¹²⁹ One officer attempting to guard the Capitol described the attack as a “medieval battle scene.”¹³⁰

As the mob stormed the barricades surrounding the Capitol, one rioter screamed, “What are we waiting for? We already voted and what have they done? They stole it! We want out fucking country back! Let’s take it!”¹³¹ After they overwhelmed law enforcement and stormed past the barricades, they smashed windows to gain access inside.¹³²

The mob breached the Capitol on the Senate side first, after the House of Representatives and Senate separated for each Chamber to consider an objection to Arizona’s Electoral



College votes.¹³³ Secret Service members rushed Vice President Pence out of the Senate and evacuated him and his family elsewhere in the Capitol.¹³⁴ Eugene Goodman, a Capitol Police

¹²⁷ Bear spray is a specific aerosol spray bear deterrent, whose active ingredients are highly irritant capsaicin and related capsaicinoids, that is used to deter aggressive or charging bears.

¹²⁸ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹²⁹ Officer Christopher Frank Affidavit, at 1 (Jan. 6, 2021).

¹³⁰ Peter Hermann, “We Got to Hold this Door,” WASH. POST (Jan. 14 2021).

¹³¹ Ryan Goodman & Justin Hendrix, *supra* note 121.

¹³² Marc Fisher, *et al.*, *The Four-Hour Insurrection*, WASH. POST (Jan. 7, 2021).

¹³³ Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, NEW YORK TIMES (Jan. 15, 2021).

¹³⁴ Lauren Leatherby & Anjali Singhvi, *supra* note 134.

officer, bravely tricked a violent crowd away from the Senate Chamber, preventing them from overcoming Senators who remained just feet away.¹³⁵

Video from inside the Capitol that day show that the mob specifically hunted Vice



President Pence and House Speaker Nancy Pelosi—the first and second in the line of Presidential succession.¹³⁶ “Once we found out Pence turned on us and that they had stolen the election, like, officially, the crowd went crazy. I mean, it became a mob,” one rioter said.¹³⁷ Rioters chanted, “Hang Mike Pence!”¹³⁸ Another shouted, “Mike Pence, we’re coming for you...fucking traitor!”¹³⁹ One rioter said that he and other rioters “kicked in Nancy Pelosi’s office door” and that “Crazy Nancy¹⁴⁰ probably

would have been torn into little pieces but she was nowhere to be seen.”¹⁴¹

III. Current American Terrorism Law

“The greatest terrorism threat to the Homeland we face today is posed by lone offenders¹⁴², often radicalized online, who look to attack soft targets¹⁴³ with easily

¹³⁵ Rebecca Tan, *A Black Officer Faced Down a Mostly White Mob at the Capitol. Meet Eugene Goodman*, WASH. POST (Jan. 14, 2021).

¹³⁶ *In re Impeachment of President Donald J. Trump* Brief, *supra* 108.

¹³⁷ Ashley Parker, *et. al.*, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021).

¹³⁸ Ryan Goodman & Justin Hendrix, *supra* note 120.

¹³⁹ Matthew S. Schwartz, *As Inauguration Nears, Concern of More Violence Grows*, NPR (Jan. 9, 2021).

¹⁴⁰ “Crazy Nancy” is a nickname that Former President Trump used to taunt Nancy Pelosi.

¹⁴¹ David K. Li & Ali Gostanian, *Georgia Lawyer Said He Kicked in Pelosi’s Door, She could’ve Been ‘Torn Into Little Pieces’*, NBC NEWS (Jan. 19, 2021).

¹⁴² The FBI and DHS defines a lone offender as individual motivated by one or more violent extremist ideologies who, operating alone, supports or engages in acts of unlawful violence in furtherance of that ideology or ideologies that may involve or influence from a larger terrorist organization.

¹⁴³ A “soft target” is a person, thing, or location that is easily accessible to the general public and relatively unprotected, making it vulnerable to military or terrorist attack.

accessible weapons. Many of these violent extremists are motivated and inspired by a mix of socio-political goals and personal grievances against their targets.”¹⁴⁴

After the September 11th attack on the World Trade Center in 2001, Congress enacted the PATRIOT Act by overwhelming bipartisan margins and nearly unanimously by the Senate 98-1 and 357-66 in the House.¹⁴⁵ The PATRIOT Act armed law enforcement to fight terrorism with many of the same tools that have been used for decades to fight organized crime and drug dealers. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act, "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists."¹⁴⁶

Even though the Federal Bureau of Investigations and the Department of Homeland Security classifies domestic terrorism as a top priority, the law does not reflect this same sense of urgency.¹⁴⁷ While law enforcement is now armed with the tools of the PATRIOT Act to combat terrorism, these tools are only for *international* terrorism as opposed to domestic terrorism.

A. While international terrorism is criminalized and prosecuted, domestic terrorism is not.

American jurisprudence draws a distinct line between the two categories of terrorism: international and domestic. International terrorism covers threats with an international nexus, even if the threats stem from American citizens or residents acting within the United States.¹⁴⁸ Domestic

¹⁴⁴ Federal Bureau of Investigation & Department of Homeland Security, *Strategic Intelligence Assessment and Data on Domestic Terrorism* (May 2021), <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view>

¹⁴⁵ Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty*, https://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf

¹⁴⁶ Cong. Rec., 10/25/01.

¹⁴⁷ Federal Bureau of Investigation & Department of Homeland Security, *supra* note 144.

¹⁴⁸ Michael Leiter, 'Muddy Distinctions' Between International, Domestic Terror, CIPHER BRIEF (Nov. 1, 2017).

terrorism applies to political violence that is domestic in its origin and intended impact.¹⁴⁹ Essentially, to determine if terrorism is international or domestic, there is a geographic test: if the terrorist activities are “primarily within” the United State, they are domestic, but if they “transcend national boundaries,” they are international.¹⁵⁰ But rather than classify activities or suspects according to one or the other category, the Federal Bureau of Investigations and the Department of Homeland Security classify threats as a whole based on ideology. Thus, “racially or ethnically motivated violent extremists” and “anti-government or anti-authority violent extremists” are key components of the domestic terrorism threat.¹⁵¹ While people motivated by Islamic extremism are international terrorist threats, regardless of international affiliations or ties.¹⁵²

The classification of international or domestic terrorism will determine many crucial legal consequences. Federal law punishes international terrorism more severely than domestic terrorism and requires less judicial oversight of law enforcement and intelligence investigations.¹⁵³ Perhaps the strongest distinction is the use of material support charges to international terrorism which is discussed in more detail below. But what is even more troubling is that, while the US Code defines terrorism, there is not a criminal statute that outlaws those acts. Additionally, there is no legal mechanism to designate a purely domestic organization as a terrorist organization.

While some critics argue that the distinction is justified by international terrorism posing a graver threat to Americans, the FBI has released data that shows domestic terrorism has claimed

¹⁴⁹ Michael Leiter, *supra* note 148.

¹⁵⁰ Michael Leiter, *supra* note 148.

¹⁵¹ Michael Leiter, *supra* note 148.

¹⁵² Michael Leiter, *supra* note 148.

¹⁵³ Michael Leiter, *supra* note 148.

more American lives in recent years than its international counterpart.¹⁵⁴¹⁵⁵ This claim can also be refuted on the grounds that nothing in the federal statutes limit the harsher treatment to solely significant threats of terrorism.

B. International Terrorism

1. Designation as a Foreign Terrorist Organization

Section 411 of the PATRIOT ACT of 2001 (8 USC § 1182) authorizes the Secretary of State, in consultation with or upon the request of the Attorney General, to designate terrorist organizations for immigration purposes.¹⁵⁶ The criteria for designation is: (1) it must be a foreign organization; (2) the organization must engage in terrorism¹⁵⁷, terrorist activity¹⁵⁸, or retain the capability and intent to engage in terrorist activity or terrorism; and (3) the organization's terrorist activity or terrorism must threaten the security of the U.S. nations or the national security of the United States.¹⁵⁹ Once an organization is designated a terrorist organization, there are severe legal consequences for those who promote, support, or voluntarily decide to join such organizations. Data on the effectiveness of designation status reveal that it results in numerous arrests and convictions.¹⁶⁰ Research also reveals that being listed as a foreign terrorist organization can cut off sources of funding and reduce the number of attacks.¹⁶¹

¹⁵⁴ Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism>

¹⁵⁵ Statements Before the House Homeland Security Committee, *Global Terrorism: Threats to the Homeland* (Oct. 30, 2019), <https://www.fbi.gov/news/testimony/global-terrorism-threats-to-the-homeland-103019>

¹⁵⁶ 8 U.S.C.A. § 1182 (West 2021).

¹⁵⁷ 22 U.S.C.A. § 2656f(d) (West 2021).

¹⁵⁸ 8 U.S.C.A. § 1182(a)(3)(B) (West 2021).

¹⁵⁹ I.N.A. § 219

¹⁶⁰ Anna Meier, *What Does a "Terrorist" Designation Mean?*, LAWFARE (July 19, 2020), <https://www.lawfareblog.com/what-does-terrorist-designation-mean>

¹⁶¹ <https://www.lawfareblog.com/what-does-terrorist-designation-mean>

2. Material Support

18 U.S.C.A. § 2339B prohibits support designated to *international* terrorism and thus, excludes domestic terrorism.¹⁶² It states:

Whoever knowingly provides material support or resources to a *foreign* terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than [twenty] years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.¹⁶³

Although 18 USC § 2339A is not restricted to international terrorism, the statute prohibits material support only where an individual knows or intends that it will be used to commit, or prepare to commit, enumerated federal terrorism offenses.¹⁶⁴ The primary differences in the two statutes are that § 2339A has a stricter culpability requirement and can be applied to domestic terrorism while § 2339B is limited only to international terrorism.

The material support provision prohibits “material support or resources” to a designated foreign terrorist organization where a person knows that the organization is designated or that it has engaged in terrorism.¹⁶⁵ Congress enacted this provision in 1996 to cut off financial support to foreign terrorist organizations.¹⁶⁶ The term ‘material support’ involves not only money but also “any property, tangible, or intangible, or device, 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, personal (one or more individuals who may be or include oneself), and

¹⁶² 18 U.S.C.A. § 2339B (West 2021).

¹⁶³ 18 U.S.C.A. § 2339B (West 2021).

¹⁶⁴ 18 U.S.C.A. § 2339A (West 2021).

¹⁶⁵ 18 U.S.C.A. § 2339B (West 2021).

¹⁶⁶ Wadie E. Said, *Crimes of Terror: The Legal and Political Implications Of Federal Terrorism Prosecutions* (2015).

transportation, except medicine or religious materials.”¹⁶⁷ Congress justified this provision by reasoning that these organizations are so tainted by their terroristic activities that *any* contribution to them promulgates that conduct.¹⁶⁸ Since 9/11, the government has used this provision extensively against individuals who join, train with, or act on behalf of designated organizations.¹⁶⁹

Keonna Thomas, a 30-year-old from Philadelphia, was charged under 18 U.S.C. § 2339B for “knowingly attempt[ing] to provide material support and resources...including personnel, including Thomas herself, to a designated foreign terrorist organization...Islamic State of Iraq and the Levant (ISIL), which was designated as a foreign terrorist organization under Section 219 of the Immigration and nationality Act...knowing that the organization was a designated terrorist organization, that the organization had engaged in and was engaging in terrorist activity and terrorism, and the defendant is a United States national.”¹⁷⁰

In an affidavit in support of probable cause, an FBI agent pointed to tweets that Thomas “re-posted on Twitter” supporting the militant group.¹⁷¹ One of her first tweets in 2013 pictured a young boy wearing firearm magazine pouches with the caption, “Ask yourselves, while this young man is holding magazines for the Islamic state, what are you doing for it? #ISIS.”¹⁷² A tweet in 2014 contained images of a skull, flames, and a gun which a caption that read, “I need a permanent vacation that can only mean one thing.”¹⁷³ Another Twitter user responded with “istishhaadi,” the Islamic word for martyrdom.¹⁷⁴ Shortly thereafter, Thomas married Abu Khalid al-Amriki, an

¹⁶⁷ Wadie E. Said, *supra* note 166.

¹⁶⁸ Wadie E. Said, *supra* note 166.

¹⁶⁹ Wadie E. Said, *supra* note 166.

¹⁷⁰ *United States v. Keonna Thomas*, Case No. 15-417-M, Criminal Complaint (11/11/15). <http://media.philly.com/documents/KeonnaThomasComplaint.pdf>

¹⁷¹ *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷² *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷³ *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷⁴ *United States v. Keonna Thomas*, *supra* note. 170.

Islamic State recruit in the organization's headquarters in Syria, in an online ceremony and planned to travel to the Middle East to join him.¹⁷⁵ When her husband first contacted her in 2015, he asked her whether she was willing to take part in a suicide attack, which Thomas responded, "That would be amazing...a girl can only wish."¹⁷⁶ In preparation to travel to Syria, Thomas obtained a passport and plane ticket.¹⁷⁷ Thomas pleaded guilty to attempting to provide material support to ISIS and was sentenced to eight years in prison along with 10 years of supervised release.¹⁷⁸

C. Domestic Terrorism

Since the PATRIOT Act was passed after the September 11, 2001 attack, it mainly focuses on *international* terrorism as opposed to *domestic* terrorism. Domestic terrorism was first defined in 2001 in the enactment of the PATRIOT Act. Domestic Terrorism is defined as activities that:

- (A) involves acts dangerous to human life that are a violation of the criminal laws of the united states or any state;
- (B) appear to be intended:
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.¹⁷⁹

While domestic terrorism is defined under federal law, it is not actually criminalized therein—only a “federal crime of terrorism” is listed. That crime applies to offenses that are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” while also committing one or more of the enumerated

¹⁷⁵ *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷⁶ *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷⁷ *United States v. Keonna Thomas*, *supra* note. 170.

¹⁷⁸ *Keonna Thomas*, COUNTEREXTREMISM,

<https://www.counterextremism.com/extremists/keonna-thomas>

¹⁷⁹ 18 U.S.C.A. § 2331(5) (West 2021).

crimes in the statute.”¹⁸⁰ The relevant enumerated crime for this article is, “offenses concerning “targets of . . . violence where there is a distinct federal interest, such as violence against federal officials, federal facilities...”¹⁸¹ The federal crime of terrorism is prefaced with, “whoever, *involving conduct transcending national boundaries...*”¹⁸² and while that applies to conduct solely within the United States, domestic terrorism, in and of itself, is not a criminalized act.

Although there is no federal crime of domestic terrorism, *any other felony* that “involved, or was intended to promote, the federal crime of terrorism” is eligible for a terrorism sentencing enhancement.¹⁸³ In other words, an individual may commit criminal acts that are widely considered domestic terrorism and be prosecuted for the criminal acts themselves, but cannot be charged with committing an act of domestic terrorism under federal law. For example, Timothy McVeigh, widely considered a domestic terrorist, was convicted of murder, conspiracy, and using a weapon of mass destruction in the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City that killed 168 people¹⁸⁴, but he was not *convicted of domestic terrorism*.¹⁸⁵

The FBI has also emphasized that domestic terrorists do not simply operate in the homeland, but they must also lack foreign direction.¹⁸⁶ The FBI’s shorthand definition of domestic terrorists is “Americans attacking Americans based on U.S.-based extremist ideologies.”¹⁸⁷ In May 2019 Congressional testimony, Michael McGarrity, former Assistant Director for the FBI’s Counterterrorism Division, stated “[d]omestic terrorists are individuals who commit violent

¹⁸⁰ 18 U.S.C.A. § 2332b (West 2021).

¹⁸¹ 18 U.S.C.A. §§ 2331-2239D (West 2021).

¹⁸² 18 U.S.C.A. § 2332b(a)(1) (West 2021).

¹⁸³ *United States v. Graham*, 275 F.3d. 490, 517 (6th Cir. 2001).

¹⁸⁴ *infra* note 234.

¹⁸⁵ *Domestic Terrorism and the Attack on the U.S. Capitol*, CONGRESSIONAL RESEARCH SERVICE (Jan. 13, 2021), <https://sgp.fas.org/crs/terror/IN11573.pdf>

¹⁸⁶ *Domestic Terrorism and the Attack on the U.S. Capitol*, *supra* note 185.

¹⁸⁷ *Domestic Terrorism and the Attack on the U.S. Capitol*, *supra* note 185.

criminal acts in furtherance of ideological goals stemming from domestic influence, such as racial bias and anti-government sentiment.”¹⁸⁸

IV. Proposal for Change: Criminalizing Encouraging Domestic Terrorism

A. Expanding Current Terrorism Laws under the PATRIOT Act to Include Canada’s Designation of Domestic Terrorist Organizations.

While currently in the United States, there is no legal means to label a purely domestic organizations as terrorist groups, the FBI does openly delineate domestic terrorist “threats.”¹⁸⁹ The FBI has confirmed in hearings that while extremists are subject to ongoing domestic terrorism investigations, they will not designate any organization a “domestic terrorist organization.”¹⁹⁰ They justify this based on the First-Amendment’s protection of freedom of speech, as belonging to an ideological group in and of itself is not a crime in the United States. However, in July 2019 congressional testimony, Director Wray said the FBI “does not investigate ideology, it investigates violence.”¹⁹¹ As we have seen from recent events such as Unite the Right¹⁹², these groups not only share a common ideology, but they also share outward displays of such ideologies that manifest in forms of violence.

¹⁸⁸ <https://www.fbi.gov/news/testimony/confronting-the-rise-of-domestic-terrorism-in-the-homeland>

¹⁸⁹ Micheal McGarrity, *Confronting the Rise of Domesic Terrorism in the Homeland*, FBI (May 8, 2019), <https://sgp.fas.org/crs/terror/IN11573.pdf>

¹⁹⁰ <https://www.judiciary.senate.gov/meetings/07/23/2019/oversight-of-the-federal-bureau-of-investigation>

¹⁹¹ *Oversight of the Federal Bureau of Investigation* (July 23, 2019), <https://www.judiciary.senate.gov/meetings/07/23/2019/oversight-of-the-federal-bureau-of-investigation>

¹⁹² The Unite the Right Rally occurred in Charlottesville, Virginia, in August of 2017. This was one of the largest, most violent gatherings in the United States in decades, bringing together white supremacists and the alt-right. The organizers of the rally said its goal was to save a Confederate statue from being removed. Along with chanting slogans used in Nazi Germany, many brought full battle gear, including torches, weapons, shields, and flags with either Nazi or Confederate insignia. The violent rally concluded when an attendee drove his car into a group of counter-protesters, killing one person and injuring nineteen.

Some have argued that formally establishing a designation for domestic terrorist groups would be a mistake due to the decentralized nature of the terrorism threat in the United States; thus, this would be an ineffective use of resources.¹⁹³ Designating specific organizations as terrorist would be ineffective as the primary terrorist threat in the United States comes from loose networks of extremists and individual actors rather than discrete, organized groups.¹⁹⁴ They also argue that it would be challenging to create a designation process that does not infringe upon first amendment rights.¹⁹⁵

Despite these concerns, other countries such as the Canada, have set precedent by designating terrorist groups that operate domestically. These designations would provide law enforcement with additional tools to disrupt and dismantle domestic terrorism, such as the provision of arresting those who encourage the groups' terroristic attacks.¹⁹⁶ Without designation, these groups and their members can only be held accountable under criminal law and those who encourage their acts of terror will not be held accountable.

The Canadian Anti-Terrorism Act was adopted in response to the September 11, 2001, attacks that happened on U.S. soil.¹⁹⁷ Terrorism is defined as an act committed in whole or in part for a political...or ideological purpose, object, or cause with the intention of intimidating the public...with regard to its security.¹⁹⁸ Terrorist activity means an act or omission, in or outside

¹⁹³ *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019).

¹⁹⁴ *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, *supra* note 193.

¹⁹⁵ *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, *supra* note 193.

¹⁹⁶ *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, *supra* note 193.

¹⁹⁷ *Anti-Terror Legislation in Canada*, <https://terrorvictimresponse.ca/legislation-in-canada/>

¹⁹⁸ *Anti-Terror Legislation in Canada*, *supra* note 197.

Canada, that is committed in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security...compelling a...government...to do or refrain from doing any act [regardless if the person or organization is inside or outside Canada]...that intentionally causes death or serious bodily harm, endangers a person's life, causes substantial property damage, or causes serious interference with or serious disruption of an essential service.¹⁹⁹ A terrorist group is an entity that...facilities or carries out *any* terrorist activity.²⁰⁰ Canada's law further clarifies that the expression of a political or ideological belief or opinion is not a terrorist activity unless it constitutes an act or omission that satisfies their codified terrorist activity.²⁰¹

One concern presented in the United States is that by criminalizing participation in domestic terrorist organization, there may be a possible infringement of the First Amendment's freedom of association. However, the Anti-Terrorism Act requires some *overt act* in support of unlawful group terrorist activities, and does not proscribe mere membership in a listed entity.²⁰² Additionally, under the United States Racketeering Influenced and Corrupt Organization Act ("RICO Act"), it is a criminal act for any person to be *associated* with any enterprise engaged in a pattern of racketeering activity.²⁰³ A criminal enterprise is defined as including any individual or association associated in fact though not a legal entity.²⁰⁴ Thus, because U.S. law already criminalizes mere association

¹⁹⁹ Criminal Code, R.S.C. 1985, c. C-46, <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-13.html>

²⁰⁰ *supra* note 199.

²⁰¹ *supra* note 199.

²⁰² Canada, Department of Justice, News Release, "Notes for the Minister of Justice's Appearance before the House of Commons Justice and Human Rights Committee" (18 October 2001), online: Canada Department of Justice <http://canada.justice.gc.ca/en/news/sp/2001/doc_27832.html> ["Notes for the Minister of Justice, 18 October"].

²⁰³ 18 U.S.C.A. § 1962(c) (West 2021).

²⁰⁴ 18 U.S.C.A. § 1961(4) (West 2021).

via the RICO Act and Canada's Anti-Terrorism Law requires an overt act from the organization, the First Amendment's freedom of association would not be infringed.

B. Expanding the PATRIOT Act's Material Support to Include Encouragement by Adopting the United Kingdom's Encouragement Provision under the Terrorism Act.

"It provides the measures which Parliament considers is necessary to prevent political or paramilitary violence and thereby protect the citizens of the United Kingdom, and enable a democratic society to operate without fear."²⁰⁵

The United Kingdom ("U.K.") Parliament passed the Terrorism Act 2000 to prevent and punish terrorism stemming from the long-standing Northern Ireland Conflict.²⁰⁶ The Act expanded the definition of "terrorism" under British criminal law and granted authorities a number of additional powers to control and defeat terrorist threats. Under the act, "'terrorism' means the use or threat of action where[:]

(a) the action [is one prohibited by the Act], (b) *the use or threat is designed to influence the government...or to intimidate the public or a section of the public,* and (c) *the use or threat is made for the purpose of advancing a political, religious...or ideological cause* (emphasis added)."²⁰⁷

Actions prohibited under the statute include conduct which:

(a) involves serious violence against a person, (b) involves damage to property, (c) endangers a person's life..., (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system."²⁰⁸

The Act goes farther to prevent terrorism than the PATRIOT Act in that they not only criminalize providing material support for terrorism or attempting or conspiring to do so, but they also criminalize *words or actions that promote radicalization*.²⁰⁹ In a 2018 case, defendant

²⁰⁵ *Attorney General's Reference (No. 4 of 2002)* [2003] EWCA Crim. 762, [2003] 3 WLR 1153.

²⁰⁶ *Attorney General's Reference (No. 4 of 2002)*, *supra* note 205.

²⁰⁷ *Attorney General's Reference (No. 4 of 2002)*, *supra* note 205.

²⁰⁸ *Attorney General's Reference (No. 4 of 2002)*, *supra* note 205.

²⁰⁹ *Attorney General's Reference (No. 4 of 2002)*, *supra* note 205.

Mohammed Choudry (“Defendant”) was convicted of materially supporting a recognized terrorist organization.²¹⁰ The Defendant organized meetings where he made speeches concerning jihad²¹¹.²¹² The Defendant told the attendees of these meetings that “the sun was setting on the British Empire and rising in the Islamic State,” that “Muslims had an obligation to fulfill and should stop procrastinating,” that those “fighting on the front line” in Tunisia and Kuwait were “the best of the best,” and that “victory for Islam could soon be achieved.”²¹³ The Court of Appeals upheld the conviction and reasoned that such statements would reasonably be understood by attendees as encouraging them to take action, and not simply adopt a similar opinion.²¹⁴

“To *invite the support* for a proscribed organization is to *promote that organization*. The fact that a proscribed organization has an increased number of supporters is in itself a benefit and boost to that organization, whether or not the support of all is manifested in practical or concrete ways” (emphasis added).²¹⁵

In a 2016 case, the defendants’ convictions for supporting a proscribed terrorist group were upheld.²¹⁶ Here, the Defendants were “experienced speakers, perceived by other as leaders” who had a “large following on social media” where they often shared propaganda from ISIS.²¹⁷ The Defendants also made several speeches to “emphasis the obligation on others to provide support to the leader of ISIS.”²¹⁸ The Defendants argued that because their speeches did not contain explicit invitations to commit violence, but merely invited generalized support for ISIS, they did not “encourage” terrorism in a way that constituted indirect support for it.²¹⁹ The Court of Appeals

²¹⁰ *R. v. Alamgir and Others* [2018] EWCA Crim 21 (Eng.).

²¹¹ Jihad is a struggle or fight against the enemies of Islam.

²¹² *Alamgir*, EWCA Crim 21, 8.

²¹³ *Alamgir*, *supra* note 212.

²¹⁴ *Alamgir*, *supra* note 212.

²¹⁵ *Choudary and Rahman v. R.* [2016] EWCA Crim 61 at 40 (Eng.)

²¹⁶ *Choudary and Rahman v. R.* [2016] EWCA Crim 61 (Eng.)

²¹⁷ *Id.* at 11-14.

²¹⁸ *Id.* at 15.

²¹⁹ *Id.* at 15-16.

rejected this argument, concluding that providing “support” for terrorism, as that term is ordinarily understood, simply means engaging in any “conduct that strengthens, promotes, or assists organizations which are concerned with terrorism.”²²⁰ This includes a individual providing “moral or intellectual support” for a proscribed group even if no one else is in fact induced by it.²²¹ Such affirmation constitutes the *actus reus* of the offense while the defendant’s awareness of their conduct and the proscribes status of the group constitutes its *mens rea*.²²² The Court emphasized that this understanding of “supporting” terrorism is likewise consistent with the statutory construction of both Acts’ provisions which criminalize “encouraging” terrorism.²²³

The Terrorism Act focuses on criminalizing not just tangible support, but also encouragement of terrorism. While this law is designed to prevent terrorism rather than prosecute it, it is a tool the United States needs to combat and deter the pervasive threat of domestic terrorism. Because the United Kingdom’s terrorism laws, unlike the PATRIOT Act, apply equally to both domestic and international terrorism, once an organization is designated as a terrorist organization, all of the legal consequences that flow from that designation apply, regardless of whether the organization is purely domestic.

While the PATRIOT Act does not include “encouraging” terrorists within material support, enacting such provision is not inconsistent with current American law. Inciting someone to commit a crime of violence is already criminalized under federal statute.²²⁴ Additionally, despite broad

²²⁰ *Id.* at 37-46.

²²¹ *Id.* at 59.

²²² *Id.* at 16, 48, 51-2.

²²³ *Choudary and Rahman v. R.* [2016] EWCA Crim 61 (Eng.), *supra* note 216.

²²⁴ 18 U.S.C.A. § 373 (West 2021) (The Government must prove two elements: (1) the defendant had the intent that another person engage in conduct constitution a felony crime of violence and (2) the defendant commanded, induced, or otherwise endeavored to persuade the other person to commit the felony.)

protections for free speech under the First Amendment of the Constitution, the Supreme Court of the United States has consistently held that “fighting words” are not protected speech under the First Amendment.²²⁵ Fighting words are “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.”²²⁶ Both Arizona and Virginia have statutes explicitly criminalizing the encouragement of terrorism.²²⁷

Critics to the criminalization of encouraging terrorism argue that it will be difficult to prosecute offenders because the prosecutors would have to obtain the attacker’s online history, text messages, emails, and the like.²²⁸ After it is collected, it would still need to be analyzed to determine if the attackers did receive the offender’s encouragement and the identity of the offender.²²⁹ They additionally argue that the content of the communications between the attacker and their inciter (the offender) would also need to sufficiently evidence the offender’s intent, hope, or belief terrorism would result to prove the requisite *mens rea* (knowingly).²³⁰

However, the court addressed these concerns by reasoning that if an individual is providing “moral or intellectual support” for a proscribed group, this would constitute the encouragement *even if no one else is in fact induced by it*.²³¹ These critics are also failing to

²²⁵ *Cohen v. California*, 403 U.S. 15, 20, 91 S. Ct. 1780 (1971).

²²⁶ *Cohen v. California*, 403 U.S. 15, 20, 91 S. Ct. 1780 (1971).

²²⁷ Ariz. Rev. Stat. Ann. § 13-2308.01 (West 2021); Va. Code Ann. § 18.2-46.5 (West 2019). *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333 (2019).

²²⁸ *The Globalization of Hate: Are Domesic Terrorism Laws Sufficient to Quell New Threats from Alt-Right Lone-Wolf Extremists?* 9 PENN. ST. J. L. & INT’L AFF. 133.

²²⁹ Restatement (Third) of Foreign Relations Law § 476(1)(c) (1987).

²³⁰ Restatement (Third) of Foreign Relations Law § 476(1)(c) (1987).

²³¹ *The Globalization of Hate: Are Domesic Terrorism Laws Sufficient to Quell New Threats from Alt-Right Lone-Wolf Extremists?* *supra* note 228 at 59.

recognize a group of people who need not directly communicate with others in order to encourage violence: governmental leaders and political elites.²³²

D. If the above proposed laws were in effect at the time of the January 6th attack on the United States Capitol, President Trump could have been held criminally responsible for encouraging domestic terrorism.

Although current terrorism law is focused primarily on foreign threats, in recent years domestic threats have posed a great threat to citizens of the United States. From the Ku Klux Klan's campaign of terror against African Americans following the Civil War²³³ to the anti-government bombing in Oklahoma City²³⁴, terrorism disguised as political violence have been engrained in American history for centuries. After the 9/11 attack, there was a consensus that this form of terrorism was the gravest threat to the U.S. homeland and the government was willing to take unprecedented measures to counter it. However, the government is not as forthcoming in their efforts to counter domestic terrorism. Today, as American politics are increasingly polarized combined with social media, groups can more readily radicalize and assemble. A report by the Center for Strategic and International Studies (CSIS) found "far-right terrorism has significantly outpaced terrorism from other types of perpetrators, including from far-left networks and individuals inspired by the Islamic State and al-Qaeda. Right-wing attacks and plots account for the majority of all terrorist incidents in the United States since 1994, and the total number of right-

²³² It is also important to note that while the President of the United States enjoys absolute immunity from civil liability, this immunity does not extend to criminal liability, *see: Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Additionally, no member of Congress has immunity from treason, *see: U.S. Const. Art. 1, Section VI, Clause 1*.

²³³ The Ku Klux Klan is a white supremacist organization that terrorized many African American communities in the south. For more information, *see: <https://www.fbi.gov/history/famous-cases/kkk-series>*

²³⁴ The 1995 bombing in Oklahoma City was the deadliest homegrown attack in the United States. For more information, *see: <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing>*

wing attacks and plots has grown significantly during the past six years. Right-wing extremists perpetrated two thirds of the attacks and plots in the United States in 2019 and over 90 percent between January 1 and May 8, 2020.”²³⁵ The shift in the primary terrorist threat to the United States is no longer a debate.

1. Designation of Domestic Terrorist Organizations

Designation as a terrorist organization carries legal weight. Some of the consequences include providing support and assistance to a designated group to carry out their terroristic attacks. Under Canada’s Anti-Terrorism Act, a terrorist group is an entity that...facilitates or carries out *any* terrorist activity.²³⁶ Terrorist activity is an act committed with some intention to intimidating the public or compelling a government to do or refrain from doing any act.²³⁷ The activity must intentionally cause the death or serious bodily harm, endangers a person’s life, causes substantial property damage, or causes serious interference with or serious disruption of an essential service.²³⁸

The Proud Boys

“We will kill you. That’s the Proud Boys in a nutshell. We will kill you.”²³⁹

a. The Proud Boys are an entity.

The Proud Boys are a self-proclaimed “pro-western fraternity” right-wing extremist group. According to Founder Kevin McInnes’ written bylaws, the group is organized into local chapters

²³⁵ Seth G. Jones, *et. al*, “The Escalating Terrorism Problem in the United States,” CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, June 17, 2020, <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>.

²³⁶ *supra* note 199.

²³⁷ *supra* note 199.

²³⁸ *supra* note 199.

²³⁹ “*Gavin McInnes Show*” (June 2016 podcast).

spanning across the nation.²⁴⁰ Each chapter is controlled by that local chapter's leadership. Membership is divided into ranks from one to four.²⁴¹ To attain level one, an initiate must publicly state: "I am a proud Western chauvinist, I refuse to apologize for creating the modern world."²⁴² To reach level two, he initiate must be beaten by his fellow members while reciting the names of five breakfast cereals in order to demonstrate adrenaline control.²⁴³ To reach level three, the member must get a Proud Boys tattoo.²⁴⁴ Finally, the fourth level is an honorary degree awarded for a "material sacrifice or service by a brother."²⁴⁵ In an interview, McInnes explained, "[The fourth degree is awarded for] a major fight for the cause. You get beat up, kick the crap out of an Antifa," but he later backpedaled, saying it "obviously doesn't mean you go to someone's house or even pick a fight with one at a rally. Fourth degree is a consolation prize for being thrust into a shitty situation and surviving."²⁴⁶

Members are easily recognizable because they frequently wear black and yellow Fred Perry polo shirts, other black and yellow clothing, "Make America Great Again" merchandise, and tactical gear.²⁴⁷

b. The Proud Boys have carried out terroristic acts with the intent to intimidate the public and compel the government to refrain from partaking in an act.

²⁴⁰ *Introducing: The Proud Boys*, TAKI'S MAGAZINE (SEPT. 15, 2016), https://www.takimag.com/article/introducing_the_proud_boys_gavin_mcinnes/

²⁴¹ *Proud Boys*, ADL, <https://www.adl.org/proudboys>

²⁴² *Proud Boys*, *supra* note 241.

²⁴³ *Proud Boys*, *supra* note 241.

²⁴⁴ *Proud Boys*, *supra* note 241.

²⁴⁵ *Proud Boys*, *supra* note 241.

²⁴⁶ Kimberly M. Aquilina, *Gavin McInnes explains what a Proud Boy is and why porn and wanking are bad*, METRO (FEB. 17, 2017), <https://www.metro.us/gavin-mcinnes-explains-what-a-proud-boy-is-and-why-porn-and-wanking-are-bad/>

²⁴⁷ *Proud Boys*, *supra* note 241.

During the past three years, the Proud Boys have established themselves as a dominant force in the alt-right extremist movement as members have taken part in multiple acts of brutal violence and intimidation.²⁴⁸

i. 2019 End Domestic Terrorism Rally

The End Domestic Terrorism rally was a far-right demonstration organized by the Proud Boys and held in Portland, Oregon on August 17, 2019. The event was to promote the idea that the Antifa movement should be classified as domestic terrorism. Joe Biggs, Proud Boys leader, promoted the event by posting a video in which he carries a “Trump-themed” baseball bat and t-shirt with the text “Training to Throw Communists Out of Helicopters,” in reference to the execution of political dissenters under Chile’s military dictatorship.²⁴⁹

Although police did their best to limit interactions between the opposing groups, some violence still erupted, leaving six people injured while thirteen people were arrested as left-wing anti-fascist demonstrators spent hours counter-protesting against right-wing extremists, including the Proud Boys.²⁵⁰ Police seized several weapons including knives, metal and wood poles, chemical sprays, and tasers.²⁵¹

ii. 2021 Summer of Love Rally

On August 22, 2021, far right groups gathered in Portland, Oregon for an event they called the “Summer of Love,” a rally to commemorate a violent clash with left-wing groups at a

²⁴⁸ For a full list of their participation in violent riots, *see* <https://www.adl.org/proudboys>.

²⁴⁹ Jason Wilson, *Portland prepares for city’s largest far-right rally of the Trump Era*, THE GUARDIAN (Aug. 16, 2019).

²⁵⁰ Mike Baker and Nicholas Bogel-Burroughs, *Antifa and Far-Right Groups Face Off in Portland as Trump Weighs In*, NEW YORK TIMES (Aug. 17, 2019), <https://www.nytimes.com/2019/08/17/us/portland-oregon-protests.html>

²⁵¹ Mike Baker and Nicholas Bogel-Burroughs, *supra* note 250.

demonstration against police brutality.²⁵² While many left-wing activists watched the event unfold from a distance, videos of the event that surfaced online show the violence that erupted between the Proud Boys, identified by their black and yellow uniform, and the left-wing demonstrators. “I’m sick and tired and if we have to die to defend ourself, our families, and our fucking freedom in America, we’re gonna do it. We’re gonna lay our lives down,” Tusitala Toese, a well-known Proud Boy, exclaimed as the violence erupted.²⁵³ One Proud Boy was captured in a photo breaking into a man’s truck and severely beating him.²⁵⁴ Another video shows that Proud Boy members caused a driver to crash his medical van and shot a paintball gun and sprayed a chemical agent at the driver in close range. Proud Boy members then smashed the van’s windows, flipped it over, and defaced it with “FAFO,” a popular Proud Boy acronym for “Fuck Around and Find Out.”²⁵⁵ Video also shows multiple Proud Boy members open fire paintball rounds into a group of left-wing demonstrators.²⁵⁶

iii. January 6, 2021 Attack on the United States Capitol

Before January 6, 2021, members of the Proud Boys were pre-planning to storm the United States Capitol in order to “Stop the Steal.”²⁵⁷ On December 29, 2020, Enrique Tarrio, Proud Boy

²⁵² Mike Baker and Nicholas Bogel-Burroughs, *supra* note 250.

²⁵³ News2Share (@News2Share), YOUTUBE, <https://www.youtube.com/watch?v=FB4FIQk3iCc>

²⁵⁴ Jason Wilson, *Hundreds clash in Portland as Proud Boys rally descends into Violence*, THE GUARDIAN (Aug. 23, 2021), <https://www.theguardian.com/us-news/2021/aug/23/portland-oregon-clashes-protests-proud-boys-antifascist>

²⁵⁵ New Kid in the Bloc (@riotcrotch), TWITTER (Aug. 23, 2021), <https://twitter.com/riotcrotch/status/1429855721877741568?s=20>

²⁵⁶ News2Share, *supra* note 253.

²⁵⁷ Stop the Steal is a far-right and conservative campaign and protest movement in the United States promoting the conspiracy theory that falsely posits that widespread electoral fraud occurred during the 2020 presidential election to deny incumbent President Donald Trump victory over former vice president Joe Biden.

leader, posted a message on the social media site Parler²⁵⁸ about rallies planned for January 6, 2021.²⁵⁹ Tarrio announced that the Proud Boys would “turn out in record numbers on Jan 6th but this time with a twist...We will not be wearing our traditional Black and Yellow. We will be incognito and we will be spread across the downtown DC in smaller teams. And who knows...we might dress in all BLACK for the occasion.”²⁶⁰ Similarly, on the same day, Joe Biggs, another Proud Boy leader, posted to his followers on Parler, “We will not be attending DC in colors. We will be blending in as one of you. You won’t see us. You’ll even think we are you...”²⁶¹

On January 6, 2021, the Proud Boys were spotted on the east side of the U.S. Capitol in the moments preceding the attack.²⁶² None of the members were wearing the usual black and yellow uniform, but instead went “incognito” in all black dress, which is consistent with the dress code for the attack set by the Proud Boy leaders months earlier.²⁶³ Proud Boys were captured on film marching towards the Capitol chanting, “Whose streets? Our streets!”²⁶⁴ While the joint session of Congress was meeting to certify the electoral votes, a crowd of thousands gathered and quickly overwhelmed Capitol police as the crowd advanced forward towards the Capitol. Video captured of the attack shows Proud Boy member Dominic Pezzola breaking the window of the U.S. Capitol Building with a clear plastic police shield.²⁶⁵ Pezzola, along with others, enter the Capitol through the broken window.²⁶⁶ One individual then opened a nearby door and Joe Biggs can be seen

²⁵⁸ Redacted FBI Agent Joseph R. Biggs Affidavit, <https://www.justice.gov/opa/page/file/1357251/download>.

²⁵⁹ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁰ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶¹ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶² Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶³ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁴ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁵ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁶ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

entering the Capitol.²⁶⁷ Several Proud Boy members can be seen inside the Capitol wearing ear pieces and others are seen with walkie-talkie communication devices.²⁶⁸ The FBI believes that these devices were used to communicate with members outside the Capitol in real time.²⁶⁹

c. The Proud Boys should be designated as a domestic terrorist organization.

Under the Canadian law, a group that is involved in terrorist activities can be designated a domestic terrorist organization. On February 3, 2021, Canada designated the Proud Boys as a terrorist entity in an effort to minimize ideologically motivated violent extremism.²⁷⁰ Canada's Public Safety Minister, Bill Blair, categorized this extremism as "the most significant threat to domestic security."²⁷¹ The designation came less than a month after some of the Proud Boys members joined the violent group that stormed the U.S. Capitol after attending a rally by President Trump in the hope of overturning the presidential election.²⁷² The designation also followed the Department of Homeland Security's warning about the heightened threat of "ideologically motivated violent extremists with objections to the exercise of governmental authority and the presidential transition" and "perceived grievances fueled by false narratives."²⁷³ The Canadian Government said that the Proud Boys played a "pivotal role" in the attack on the Capitol, and that "leaders planned their participation by setting out objectives, issuing instructions and directing members during the insurrection."²⁷⁴

²⁶⁷ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁸ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁶⁹ Redacted FBI Agent Joseph R. Biggs Affidavit, *supra* 258.

²⁷⁰ Amanda Coletta, *Canada declares the Proud Boys a terrorist group*, WASH. POST (Feb. 3 2021), https://www.washingtonpost.com/world/the_americas/canada-proud-boys-terrorist-capitol-siege/2021/02/03/546b1d5c-6628-11eb-8468-21bc48f07fe5_story.html

²⁷¹ Amanda Coletta, *supra* note 270.

²⁷² Amanda Coletta, *supra* note 270.

²⁷³ Amanda Coletta, *supra* note 270.

²⁷⁴ Amanda Coletta, *supra* note 270.

The United States needs to similarly designate the Proud Boys as a domestic terrorist organization and adopt Canada's definition of domestic terrorism. To be considered domestic violence under the Anti-Terrorism Act, a terrorist group is an entity that...facilitates or carries out *any* terrorist activity.²⁷⁵ Terrorist activity is an act committed with some intention to intimidating the public or compelling a government to do or refrain from doing any act.²⁷⁶ The activity must intentionally cause the death or serious bodily harm, endangers a person's life, causes substantial property damage, or causes serious interference with or serious disruption of an essential service.²⁷⁷

The Proud Boys are an organized group with written bylaws, local and national chapters, an initiation process, and a uniform. As the three examples above show, the group has participated in acts of violence to both intimidate the public and compel the government to refrain from an activity.

The 2019 End Domestic Terrorism Rally and the 2021 Summer of Love Rally both show that the Proud Boys intended to intimidate the public. The Proud Boys organized the 2019 End Domestic Terrorism Rally to draw attention to the alleged violence associated with left-wing organizations. To promote this event, a Proud Boy leader posted a video in which he carries a "Trump-themed" baseball bat and t-shirt with the text "Training to Throw Communists Out of Helicopters," in reference to the execution of political dissenters under Chile's military dictatorship.²⁷⁸ Police also confiscated several deadly weapons at the event.²⁷⁹ Thus, it is not arguable that the Proud Boys intended to intimidate the public by hosting this event. Additionally,

²⁷⁵ *supra* note 199.

²⁷⁶ *supra* note 199.

²⁷⁷ *supra* note 199.

²⁷⁸ Jason Wilson, *supra* note 249.

²⁷⁹ Jason Wilson, *supra* note 249.

the Proud Boys committed multiple acts of violence at a demonstration hosted by left-wing organizations. They can be seen both in photos and in video beating, macing, and shooting with paintball guns left-wing protesters. This is also evidence of their intention to intimidate the public because they went to an event hosted by opposing organization with weapons and used those weapons. The January 6, 2021 Capitol Attack is evidence of the Proud Boys committing acts of violence in order to compel the United States government to refraining from certifying the electoral votes of the presidential election. Proud Boy members can be seen on video storming through Capitol police and barricades, forcibly stealing police weapons, and smashing Capitol windows to enter the Capitol. The pre-planning of the attack shows their intention to not be recognized and coordinate the attack. Since all three events either ended with death, serious bodily injury, or substantial property destruction, the Proud Boys meet the criteria as a domestic terrorist organization.

2. President Trump could be held criminally responsible for encouraging terrorism.

A pillar of American democracy is the peaceful transfer of power between presidents. Ever since the first presidential transition, the founders set the stage for how to peacefully transition from one administration to the next—a critical process which is necessary to maintain continuity of government and demonstrate to the world that despite our differences, we are all united as Americans.²⁸⁰ On September 23, 2020, this country heard then-President Trump declare that there would not be a peaceful transfer of power: “[T]here won’t be a transfer, frankly. There will be a continuation.”²⁸¹

²⁸⁰ Rep. Francis Rooney, *Time to concede: The Peaceful transition of power is an American tradition*, THE HILL (Nov. 15, 2020), <https://thehill.com/blogs/congress-blog/politics/526067-time-to-concede-the-peaceful-transition-of-power-is-an-american>

²⁸¹ The Associated Press, *supra* note 66.

Providing support for terrorism simply means that one engages in conduct that strengthens or promotes an organization which is concerned with terrorism.²⁸² The *actus reus* is the individual actually providing this support while the *mens rea* (knowingly) is the individual's awareness of their conduct and the proscribed status of the group.²⁸³ In other words, to be convicted of encouraging terrorism, the defendant must provide support to a group *and* be aware that the group is a designated terrorist organization that engages in terrorist activities.

i. Mens Rea: Assuming the United States proscribed the Proud Boys a domestic terrorist organization and that Trump is aware of such proscription as the President of the United States, President Trump was also aware of the Proud Boys' terrorist activities²⁸⁴.

(1) The 2019 Ending Domestic Terrorism Rally

Following a violent riot that the Proud Boys and Antifa were at in Portland, President Trump tweeted on August 17, 2019, "Major consideration is being given to naming Antifa an 'ORGANIZATION OF TERROR.' *Portland is being watched very closely.* Hopefully the Mayor will be able to properly do his job!" (emphasis added).²⁸⁵ This shows that Trump was aware of and watching the violence that occurred in the Portland riot that was organized by the Proud Boys.²⁸⁶ According to a leaked law enforcement report, the FBI classified the Proud Boys as an extremist group just months prior to the Portland rally.²⁸⁷ Even if one argues that Trump only knew of the violence by ANTIFA, the only reasonable conclusion is that Antifa was engaged in violence with the alt-right extremists. As President of the United States, Trump would have been made aware of the situation in Portland because, as President, Trump would have been briefed on the FBI's classification of the Proud Boys as an extremist group. Even if Trump claims he was not aware that the black and yellow uniforms are associated with the Proud Boys, the President of the United States would have been aware of this fact. Additionally, the President would have been aware that members of the Proud Boys were among the 13 arrested at the rally.²⁸⁸ President Trump cannot claim he was unaware of Portland Mayor Wheeler's press conference where he directly responded

²⁸² Choudary and Rahman, *supra* note 216.

²⁸³ Choudary and Rahman, *supra* note 216.

²⁸⁴ See D(1)(b)(i)-(iii) above.

²⁸⁵ Nicole Acevedo, *supra* note 54.

²⁸⁶ Jason Wilson, *Portland rally: Proud Boys vow to march each month after biggest protest of Trump Era*, THE GUARDIAN (Aug. 17, 2019), <https://www.theguardian.com/us-news/2019/aug/17/portland-oregon-far-right-rally-proud-boys-antifa>

²⁸⁷ Clark County Sheriff's Office, Internal Affairs Case No. IQ18-008 (Completed Aug. 10, 2018), <https://propertyofthepeople.org/document-detail/?doc-id=5189588>

²⁸⁸ Cole Miller, *et. al*, *Wheeler: PPB 'kept extremists on both sides separated'*, KOIN 6 NEWS (Aug. 17, 2019), <https://www.koin.com/news/oregon/portland-protests-proud-boys-patriot-prayer-three-percenters-antifa-august-17-2019/>

to Trump's tweet saying that Joe Biggs, a known Proud Boys leader, was responsible for creating an environment of national fear in Portland.²⁸⁹

(2) The August 22, 2021 “Summer of Love” Rally in Portland, Oregon

When asked to denounce “his supporters’” use of paintball guns during a presidential press conference, President Trump said, “Well, I understand that had large numbers of people that were supporters, but that was a peaceful protest...And paint is not — and paint as a defensive mechanism, paint is not bullets. ... These people, they protested peacefully. They went in very peacefully... That was a peaceful protest, totally.”²⁹⁰ As previously discussed, President Trump would have been made aware of the Proud Boys’ black and yellow uniforms and their extremist classification. President Trump, by nature of his Presidential status, would have been briefed on the violence happening in Portland streets and the presence of extremist groups. Additionally, the photos and videos of the Proud Boys aiming and shooting paintball guns at counterprotesters was nationally circulated on social media. This statement not only shows that President Trump is aware of who the Proud Boys are and their violent acts, but he also knows they are his supporters and he does not see their violence as an issue.

ii. *Actus Reus*: President Trump provided support to domestic terrorists in the form of encouragement.

Since it has been established in the prior section that President Trump was aware of the Proud Boys’ terrorist activities, his words of support can be viewed as the *actus reus* of the crime of encouraging terrorism. The United Kingdom court held that “support” for terrorism simply means to encourage any conduct that strengthens or promotes an organization that is involved in terrorism.²⁹¹ The court also reasoned that this included providing “moral or intellectual support” for a proscribed group *even if no one was in fact induced by it*.²⁹² Thus, affirmation constitutes the *actus reus*.

(1) “Stand back and stand by”

During the first presidential debate when asked to condemn the Proud Boy militia group, President Trump responded, “Proud Boys, stand back and stand by...somebody’s[sic] got to do something about Antifa and the Left.”²⁹³ Following President Trump’s statement, Proud Boys leader Joe Biggs wrote how the “stand by” remark was “the president basically sa[ying] to go f[uc]k them up. This makes me so happy. President Trump told the proud boys to stand by because someone

²⁸⁹ Cole Miller, *supra* note 288.

²⁹⁰ Cole Miller, *supra* note 288.

²⁹¹ *supra* note 220.

²⁹² *supra* note 221.

²⁹³ Ryan Goodman, *supra* note 37.

needs to deal with ANTIFA...well sir! we're ready."²⁹⁴ This response shows that the Proud Boys viewed Trump as a leader and that they were standing by waiting for his command. The Proud Boys later wrote that they saw President Trump's remarks as an endorsement of their violence and they had received a spike in "new recruits" because of it.²⁹⁵

(2) "Save America" Speech on January 6, 2021

"...The radical left knows exactly what they were doing. They are ruthless, and it's time that somebody did something about it..."²⁹⁶

This statement is a direct link of President Trump's prior statement to the Proud Boys to "stand back and stand by...somebody's[sic] got to do something about...the left."²⁹⁷ The words of both statements are carefully crafted to resemble one another and to call the Proud Boys to action. As you will recall, Proud Boy Leader Biggs said they were standing by for the President. Here, the President is calling them to action.

"...Constitution says you have to protect our country, and you have to protect our Constitution, and you can't vote on fraud, and fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you are allowed to go by very different rules..."²⁹⁸

Here, Trump is justifying the actions that are about to take place. To attain level four membership status, Proud Boy members must make "a material sacrifice for the group." In order to do this, a member must be out in a "shitty" situation and must fight their way out. During this speech, President Trump repeatedly claims that the Left "stole the election." This signifies to the Proud Boys that they have been put in a situation where they are allowed to fight back because the Left committed fraud.

"...We fight like hell, and if you don't fight like hell you're not going to have a country anymore...We are going to walk down to the Capitol...you'll never take back our country with weakness. You have to show strength, and you have to be strong...I know that everyone here will soon be marching over to the Capitol Building..."²⁹⁹

This is the actual call to action by President Trump that encouraged the Proud Boys, and others, to attack the Capitol in order to stop the constitutional process of certifying the electoral ballots.

²⁹⁴ Ewan Palmer, *Donald Trump Gives Proud Boys New Slogan as "Stand By" Merchandise Appears*, NEWSWEEK (Sept. 20, 2020), <https://www.newsweek.com/proud-boys-stand-trump-debate-1535240>

²⁹⁵ Ewan Palmer, *supra* note 294.

²⁹⁶ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

²⁹⁷ Ewan Palmer, *supra* note 294.

²⁹⁸ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

²⁹⁹ Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump, RSN TV (Jan. 6, 2021).

To reiterate, to be convicted of encouraging terrorism, the defendant must provide support to a group *and* be aware that the group is a designated terrorist organization that engages in terrorist activities. Assuming the United States had designated the Proud Boys as a domestic terrorist organization prior to the above events and President Trump, by his presidential status, knew of this designation, President Trump could be held criminally responsible for encouraging the Proud Boys to attack the United States Capitol. President Trump was aware of the Proud Boys violent attacks as evidenced by his Tweets and Presidential Press Conferences. Despite this knowledge, President Trump encouraged the Proud Boys to attack the Capitol on January 6, 2021. This is evidenced in his “Save America” speech that took place just moments before the attack. Thus, both the prongs of the criminal act of encouraging terrorism, *actus reus* and *mens rea*, is satisfied and President Trump can be held criminally responsible.

V. Conclusion

It is consistent with current American law to both designate a purely domestic group a terrorist organization and to expand material support to include encouragement. Without the designation of a domestic terrorist organization, the material support charges would not be applicable to hold those who support domestic terrorism criminally responsible. Without the expansion of material support to include encouragement, political officials would not be held accountable. Thus, both are necessary to combat radical extremist groups, such as the Proud Boys.

The First Amendment would be left unfringed with the adoption of Canada’s designation standard and the United Kingdom’s encouragement standard. The designation of a domestic terrorist organization requires an overt act from the individual or group before it will be proscribed. Unlike the American RICO Act, the designation standard does not criminalize mere association. Thus, the First Amendment’s freedom of association is unfringed and the designation standard

is in compliance with American jurisprudence. The First Amendment's freedom of speech is not unlimited and the Supreme Court of the United States has held that fighting words are not protected. Additionally, solicitation of a felony is not protected speech and is criminalized under current law. Thus, the encouragement standard does not infringe the freedom of speech because it interrelated with fighting words and solicitation. Therefore, this article's proposal is coherent with American jurisprudence.

With the death of the fairness doctrine, news media stations that presents dividing, controversial issues from both viewpoints has perished with it. Unbiased media has developed into deliberate partisan media which led to many politicians seizing the opportunity with moralizing rhetoric of the other side. This rhetoric led to the demise of trust across the political aisle. In combination with social media echo chambers which lead to further division, American politics evolved from polarized to radicalized.

Although President Trump could not be held criminally responsible if these proposals are enacted because they were not law at the time of his acts, the January 6th Attack on the United States Capitol reflects the urgent need for Congressional intervention to both combat and deter domestic terrorism. These proposals are needed to combat the violence that is a natural, direct, and probable consequence of radicalization. These proposals also recognize the need to hold government officials accountable for their role in encouraging and facilitating radical extremist violence and to deter future officials from engaging in such acts. Without such intervention, the United States will remain violently divided into two Americas: the left and the right.