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## Criminalizing Material Support to Domestic Terrorist Organizations: A National Security Imperative

### Cover Page Footnote

Professor of Law, Notre Dame Law School. The author served as Under Secretary of Enforcement, U.S. Department of the Treasury from 2001-2003, and played a prominent role in developing the U.S. Government's counter-terrorism financing program. I would like to thank Jeffrey Meehan, NDLS '22, for his excellent research assistance and Lauren Vaca, NDLS '21, for her invaluable efforts editing the article.

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## CRIMINALIZING MATERIAL SUPPORT TO DOMESTIC TERRORIST ORGANIZATIONS: A NATIONAL SECURITY IMPERATIVE

*Jimmy Gurulé\**

### INTRODUCTION

Domestic terrorism poses a serious threat to U.S. national security. According to the Department of Homeland Security (“DHS”), “[i]deologically motivated lone offenders and small groups pose the most likely terrorist threat to the Homeland, with Domestic Violent Extremists (“DVEs”) presenting the most persistent and lethal threat.”<sup>1</sup> Since 9/11, right-wing extremists have killed more people in the U.S. than foreign terrorists.<sup>2</sup> Federal Bureau of Investigation (“FBI”) Director Christopher A. Wray raised these concerns at a hearing before the U.S. House of Representatives Committee on Homeland Security.<sup>3</sup> These self-radicalized violent extremists are “motivated by a variety of domestic terrorist ideologies, such as racially- and ethnically-motivated extremism, including white supremacist violent extremism, anti-government, and anti-authority violent extremism, and other ideological strains that drive terrorist violence,” according to the Department of Homeland Security.<sup>4</sup> Moreover, racially and ethnically motivated violent extremists, mostly white supremacists, make up a majority of domestic terrorism threats.<sup>5</sup> Wray testified that the FBI averaged approximately 1,000 domestic terrorism investigations

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<sup>1</sup> DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 17 (2020).

<sup>2</sup> Peter Bergen et al., *Terrorism in America After 9/11*, NEW AM., <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> (last visited Feb. 21, 2021) (stating that 114 people were killed in attacks by right-wing terrorists in the United States as compared to 107 people killed by international terrorists).

<sup>3</sup> *Worldwide Threats to the Homeland Before the H. Comm. on Homeland Sec.*, 116th Cong. (2020) [hereinafter *Worldwide Threats to the Homeland*] (statement of Christopher A. Wray, Director, Federal Bureau of Investigation).

<sup>4</sup> DEP’T OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE 4–5 (2019).

<sup>5</sup> *Id.* at 10.

and had arrested about 120 domestic terrorism suspects in 2020, which demonstrates an escalating problem.<sup>6</sup> Wray told the committee that white supremacists and anti-government groups remain the most persistent and lethal threat to the Homeland.<sup>7</sup>

In January 2021, the Department of Homeland Security issued a National Terrorism Advisory System Bulletin stating that: "[S]ome ideologically-motivated violent extremists with objections to the exercise of governmental authority and the presidential transition, as well as other perceived grievances fueled by false narratives, could . . . mobilize to incite or commit violence."<sup>8</sup> The DHS terrorism advisory bulletin warned that DVEs might be targeting elected officials and government facilities for deadly attack.<sup>9</sup> Today, far right, DVE, and anti-government militia groups pose a greater threat to the Homeland than foreign terrorist organizations.<sup>10</sup>

Despite the deadly threat posed by domestic terrorists, there is no federal statute punishing acts of domestic terrorism. Under 18 U.S.C. § 2331(5), the term "domestic terrorism" means activities that:

- (a) involve acts dangerous to human life that are a violation of criminal laws of the United States or of 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 kidnaping.<sup>11</sup>

The prohibited conduct must also occur primarily within the territorial jurisdiction of the United States.<sup>12</sup>

However, domestic terrorism is not a punishable offense in the federal criminal code. Instead, prosecutors must prosecute acts of terrorism under other federal statutes. Federal prosecutors could charge domestic terrorists with murder, kidnaping, and other violent crimes if there is federal jurisdiction over the offense. In the absence of a federal nexus, state authorities would be responsible for prosecuting the domestic terrorists. Ultimately, federal authorities must identify a federal offense that punishes the offender consistent with the severity of the crime and the defendant's moral culpability. Acts of domestic terrorism are often motivated by anti-government, racial, ethnic, or religious hatred. However, the substitute federal offenses may not fully capture the offender's malevolent purpose in committing the crime. Furthermore, federal hate crime legislation generally applies only where the crime affected interstate or foreign commerce or the protected person was participating in federally protected activity, such as public education, employment,

<sup>6</sup> *Worldwide Threats to the Homeland*, *supra* note 3.

<sup>7</sup> *Id.* Wray testified that the FBI views the left-wing anti-fascist movement known as Antifa "as more of an ideology or a movement more than an organization." *Id.*

<sup>8</sup> DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN 1 (Jan. 27, 2021), [https://www.dhs.gov/sites/default/files/ntas/alerts/21\\_0127\\_ntas-bulletin.pdf](https://www.dhs.gov/sites/default/files/ntas/alerts/21_0127_ntas-bulletin.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> DEP'T OF HOMELAND SEC., *supra* note 1, at 18.

<sup>11</sup> 18 U.S.C. § 2331(5).

<sup>12</sup> *Id.*

travel, or the enjoyment of public accommodations.<sup>13</sup> Finally, hate crime laws do not cover crimes motivated by anti-government animus. Ultimately, existing federal law is inadequate to deal with the problem. Thus, there is a compelling case for criminalizing domestic terrorism.

Foreign and domestic terrorist organizations do not act alone. Individuals who embrace the terrorist organization's goals, objectives, and ideology enable and facilitate their unlawful activities. Terrorist sympathizers provide these extremist groups with funding, weapons, equipment, training, and logistical support. While these individuals do not directly participate in terrorist attacks, their provision of material support facilitates these deadly activities. Title 18 U.S.C. § 2339B, prohibits the provision of "material support or resources" to a "foreign terrorist organization."<sup>14</sup> In enacting material support legislation, Congress made a finding that terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."<sup>15</sup> The same holds true for the provision of material support to domestic terrorist organizations.

Currently, there is no equivalent federal statute criminalizing material support for domestic terrorism. Moreover, in the absence of proof that the defendant acted with the specific intent to commit a particular terrorist crime, the provision of material support would not be punishable under a theory of aiding and abetting or conspiracy.<sup>16</sup> A terrorist sympathizer could sell weapons and explosives to a right-wing militia group with knowledge of the group's deadly agenda and avoid criminal liability by merely claiming that he lacked the specific intent to facilitate the commission of the predicate crime. Thus, while it is a federal crime to provide material support or resources to foreign terrorist organization, the provision of assistance to a domestic terrorist group is not a punishable offense. There is no compelling reason to distinguish between the provision of material support to foreign and domestic terrorist groups on this basis. Persons that knowingly provide material support to domestic terrorist organizations support and sustain these groups and enable their terrorist-related activities. These persons are equally responsible for acts of terrorism perpetrated by these extremist groups. As such, they must be held accountable.

Part I of this Article analyzes the threat to national security posed by right-wing violent extremist groups, focusing on the January 6th, 2021 attack on the U.S. Capitol, as well as the conspiracy to kidnap Michigan Governor Gretchen Whitmer. Violent, anti-government militia groups played a central role in both incidents. Part II examines the ideology and organizational structure of three of the most prominent domestic terrorist groups, the Oath Keepers, Proud Boys, and Three Percenters, and

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<sup>13</sup> See Matthew Shepard & James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249; Fair Housing Act, 42 U.S.C. § 3631; Church Arson Prevention Act, 18 U.S.C. §§ 241, 247.

<sup>14</sup> 18 U.S.C. § 2339B. A violation of the material support statute is punishable by twenty years in prison.

<sup>15</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996).

<sup>16</sup> See MODEL PENAL CODE, § 2.06(3)(a) (providing that a person is an accomplice of another person in the commission of an offense if "with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees to aid such other person in planning or committing it"). See also MODEL PENAL CODE, § 5.03(1) ("A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime . . .").

the threat they pose to national security. Part III provides a brief overview of the federal material support statute, 18 U.S.C. § 2339B, which should serve as a model for criminalizing the provision of material support to domestic terrorist organizations. Part IV outlines a proposed statute to criminalize the provision of material support for domestic terrorism, focusing on the criteria and process for designating an entity as a “domestic terrorist organization.” Finally, Part V critically analyzes the arguments launched against such legislative efforts to criminalize material support for domestic terrorist organizations. Specifically, this Part will address the claim that such conduct is protected by the First Amendment. However, this Part will demonstrate that the Supreme Court rejected a similar First Amendment argument with respect to the federal material support statute in *Holder v. Humanitarian Law Project* in 2010.<sup>17</sup>

## I. THE THREAT TO NATIONAL SECURITY

On January 6th, 2021, a domestic terrorism threat materialized when a violent mob of Trump supporters, including members of anti-government militia groups, stormed the U.S. Capitol. The mob interrupted a joint session of the U.S. House of Representatives and U.S. Senate convened in separate chambers of the U.S. Capitol building to certify the votes of the Electoral College for the 2020 Presidential Election.<sup>18</sup> Vice President Mike Pence, assuming his constitutional duty as President of the Senate, presided over the Joint Session. Vice President-elect Kamala D. Harris, in her role as a Senator representing California, was also present. Convinced that voter fraud decided the Presidential election in favor of Joe Biden, the rioters attempted to “Stop the Steal” and prevent the peaceful transfer of power to President-Elect Biden. Hundreds of angry and violent Trump supporters vastly overwhelmed U.S. Capitol Police and forced entry into the Capitol building, breaking windows and ramming open doors.<sup>19</sup> The rioters forcibly stormed past security barricades, attacked, and assaulted police officers with clubs, flagpoles, stun guns, and other weapons.<sup>20</sup> Other crowd members encouraged and assisted the forced entry. Some of the participants wore paramilitary gear: reinforced vests, helmets, goggles.<sup>21</sup> They carried mace, tear gas, and wooden clubs.<sup>22</sup> The insurgents assaulted U.S. Capitol Police and District of Columbia Metropolitan Police officers, killing one officer and inflicting injuries to over 130 others.<sup>23</sup> Approximately eighty-one Capitol police officers and fifty-eight members of the Metropolitan Police Department were assaulted during the attack.<sup>24</sup> The violent siege led to the death of five participants,

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<sup>17</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>18</sup> See Indictment ¶ 4, *United States v. Caldwell et al.*, Crim. No. 21-cr-28-APM (D.D.C. Feb. 19, 2021) [hereinafter *Caldwell Indictment*].

<sup>19</sup> *Id.* at ¶ 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at ¶¶ 26(f), (h).

<sup>22</sup> *Id.*

<sup>23</sup> See Daniel Villarreal, *Capitol Police Union Reveals Cops Suffered “Brain Injuries,” Loss of Eye After Pro-Trump Riot*, NEWSWEEK (Jan. 27, 2021), <https://www.newsweek.com/capitol-police-union-reveals-cops-suffered-brain-injuries-loss-eye-after-pro-trump-riot-1564993>.

<sup>24</sup> See *Caldwell Indictment*, *supra* note 18, at ¶ 10.

including a woman that the mob trampled to death.<sup>25</sup> A Capitol Police officer shot another woman when she attempted to make her way through a broken window of a door outside of the Speaker’s Lobby, a hallway that contains entrances to the House Chamber.<sup>26</sup>

Members of the media were assaulted – cameras and other equipment were destroyed.<sup>27</sup> The Capitol suffered millions of dollars in damage, including “broken windows and doors, graffiti, and residue of various pepper sprays, tear gas, and fire extinguishers deployed both by crowd members who stormed the Capitol and by Capitol Police officers trying to restore order.”<sup>28</sup> Law enforcement agents later recovered two deadly pipe bombs placed outside the Democratic National Committee and Republican National Committee headquarters.<sup>29</sup>

The violent invaders were carrying lead pipes, clubs, zip ties, explosives, chemical irritants, and waving Trump banners and Confederate flags.<sup>30</sup> Apparently, the zip ties were going to be used to arrest members of Congress and charge them with treason and election fraud.<sup>31</sup> Fearing for their safety, Capitol Police officers evacuated members of the House and Senate (including Vice President Pence and Vice President-elect Harris) from their respective chambers. Members of the mob ransacked the office of House Speaker Nancy Pelosi. The rioters also chanted “Hang Mike Pence,” venting their anger and rage at the Vice President for his refusal to disregard the Electoral College votes and declare Trump the winner of the presidential election.<sup>32</sup> Members of the angry mob stormed onto the floor of the House and Senate chambers.<sup>33</sup>

The rioters temporarily delayed Congress’ certification of the Electoral College vote. The Joint Session of Congress and election certification proceedings were halted while Capitol Police and other law enforcement officers worked to restore order and clear the Capitol of the violent insurrectionists. However, later that night, law enforcement regained control of the Capitol, and the Joint Session reconvened, presided over by Vice President Pence, who had remained hidden from the insurrectionists throughout the attack.<sup>34</sup> Ultimately, President-elect Biden was certified as the next President of the United States.

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<sup>25</sup> The 2014 U.S. Army/Marine Corps Counterinsurgency Field Manual defines “insurgency” as the “organized use of subversion and violence to seize, nullify, or change political control of a region.” U.S. ARMY/MARINE CORPS INSURGENCIES AND COUNTERING INSURGENCIES, FM 3-24/MCWP 3-33.5 (May 2014). The goal of the insurgents was to overturn the results of the 2020 presidential election. *See also* Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. Times (Feb. 22, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

<sup>26</sup> *The Journey of Ashli Babbitt*, BELLINGCAT (Jan. 8, 2021), <https://www.bellingcat.com/news/2021/01/08/the-journey-of-ashli-babbitt/>.

<sup>27</sup> *See* Tiffany Hsu & Katie Robertson, *Covering Pro-Trump Mobs, the News Media Became a Target*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/business/media/media-murder-capitol-building.html>.

<sup>28</sup> Caldwell Indictment, *supra* note 18, at ¶ 10.

<sup>29</sup> Tim Mak & Dina Temple-Raston, *What We Know About the Suspect Who Planted Bombs Before the Capitol Riot*, NPR.COM (Apr. 14, 2021), <https://www.npr.org/2021/04/14/986457987/what-we-know-about-the-suspect-who-planted-bombs-before-the-capitol-riot>.

<sup>30</sup> Elaine Godfrey, *It Was Supposed to Be So Much Worse*, THE ATLANTIC (Jan. 9, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-rioters-wanted-more-violence-worse/617614/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Caldwell Indictment, *supra* note 18, at ¶ 9.

The attack on the U.S. Capitol was not a spontaneous event. Several anti-government militia groups played a prominent role in organizing and leading the insurrection, including the Proud Boys and Oath Keepers. These groups engaged in extensive planning and coordination for the January 6th operation. The Proud Boys—a far-right nationalist group with a history of violence—were key instigators in storming the Capitol. According to government prosecutors, the Proud Boys’ Dominic Pezzola was “one of the first to lead the charge both outside and inside the Capitol, helping overwhelm Capitol police defenses after stealing an officer’s riot shield.”<sup>35</sup> Before January 6th, 2021, social media posts by the Proud Boys indicated that they were organizing a large group that would attempt to overwhelm police barricades and enter the Capitol building.<sup>36</sup> One member of the Proud Boys posted a video on Parler, which was captioned, “Let them remember the day they decided to make war with us.”<sup>37</sup> In a social media post, dated January 4, 2021, a Proud Boys member declared, “We are in a war.”<sup>38</sup> Additionally, the Proud Boys raised money on fundraising sites to pay for protective gear and communications equipment needed for the January 6th operation and fund their travel to Washington, D.C.<sup>39</sup> Specifically, the founding member of the Proud Boys Hawaii Chapter raised funds via the internet to finance his travel to Washington, D.C. from Hawaii.<sup>40</sup>

Meanwhile, the Oath Keepers – another anti-government militia- was also soliciting recruits to incite violence within the days following the November presidential election. In Ohio and North Carolina, Oath Keepers conducted military training.<sup>41</sup> Using social media, text messaging, and messaging applications, they sent incendiary messages to recruit followers.<sup>42</sup> They coordinated busloads of militia members to travel from North Carolina to Washington, D.C. The Oath Keepers coordinated and trained with one date in mind: January 6th.

Thirteen members of the Oath Keepers who were criminally charged in the U.S. Capitol attack began soliciting recruits for potential violence within days of the November 2020 presidential election.<sup>43</sup> Later, the Oath Keepers conducted military training for members in Ohio and North Carolina and arranged the transportation of

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<sup>35</sup> Rachel Weiner & Spencer S. Hsu, *Actions by Proud Boy at Capitol show ‘planning, determination, and coordination,’ U.S. alleges*, WASH. POST (Jan. 29, 2021, 7:23 PM), [https://www.washingtonpost.com/local/legal-issues/brothers-charged-eugene-goodman-chase/2021/01/29/80dec868-6239-11eb-afbe-9a11a127d146\\_story.html](https://www.washingtonpost.com/local/legal-issues/brothers-charged-eugene-goodman-chase/2021/01/29/80dec868-6239-11eb-afbe-9a11a127d146_story.html).

<sup>36</sup> Complaint, *United States v. Nordean*, Crim. No. 21-cr-175 (D.D.C. Feb. 2, 2021).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Indictment ¶ 21, *United States v. DeCarlo*, Crim. No. 1:12-cr-73-BAH (D.D.C. Feb. 3, 2021) [hereinafter *DeCarlo Indictment*].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> There is some discrepancy as to how many Oath Keepers have been charged related to January 6<sup>th</sup>. As of publication of this Article, some new sources have claimed twelve Oath Keepers were charged, while others claim thirteen have been charged. This Article will operate under the assumption that thirteen Oath Keepers have been charged. See Alan Feuer, *Oath Keeper Pleads Guilty and Will Cooperate in Jan. 6 Riot Inquiry*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/us/politics/oath-keeper-guilty-plea.html> (noting that twelve Oath Keepers had been charged in the Capitol riots); Clare Hymes & Cassidy McDonald, *Florida member of the Oath Keepers charged with conspiracy in connection to Capitol riot*, CBS NEWS (March 11, 2021), <https://www.cbsnews.com/news/oath-keepers-capitol-riot-florida-conspiracy-charge-kenneth-harrelson/> (explaining that thirteen members of the Oath Keepers had been charged).



weapons to Washington, D.C., according to U.S. authorities.<sup>44</sup> The Oath Keepers and other anti-government militia groups used social media, text messaging, and messaging applications to send incendiary messages to recruit as many followers as possible to travel to Washington, D.C. for the January 6th operation. Plans were made to transport a busload of militia members from North Carolina to Washington, D.C.<sup>45</sup> Members of the Oath Keepers also attended military training camps in Ohio and North Carolina.<sup>46</sup> One member communicated to recruits, “I need you fighting fit by inauguration [sic].”<sup>47</sup> She further added, “[I]t is our duty as Americans to fight, kill and die for our rights.”<sup>48</sup> On January 6th, once inside the Capitol, members of the Oath Keepers communicated and coordinated their actions using a walkie-talkie application with a curated channel named “Stop the Steal J6.”<sup>49</sup> On this channel, one member stated: “We have a good group. We have about 30-40 of us. We are sticking together and sticking to the plan.”<sup>50</sup>

These militia groups did not act alone. Instead, they received material support and money from other individuals and entities. Weeks before the attack, right-wing activists who organized the “Stop the Steal” movement, hatched a plan to hold a major political rally in Washington, D.C. to coincide with Congress’ vote to certify the Electoral College votes.<sup>51</sup> The purpose of the rally was to support former President Trump’s challenge to the election results and prevent Congress from certifying President-Elect Joe Biden as President, including by the use of intimidation and force. According to media reports, a top Trump campaign fundraiser and donor funded the rally at the Washington Ellipse that preceded the January 6th riot. “Julie Jenkins Fancelli, a prominent donor to the Trump campaign and heir[] to the Publix Super Markets Inc. chain,” allegedly committed \$300,000 to the cause.<sup>52</sup> Her donation accounted for the lion’s share of the \$500,000 spent to organize the rally at the Ellipse where Trump spoke.<sup>53</sup> Alex Jones, a far-right show host and conspiracy theorist, personally pledged more than \$50,000 in seed money for the January 6th event.<sup>54</sup> The Rule of Law Defense Fund (“RLDF”), a 501(c)(4) of the Republican Attorneys General Association (“RAGA”), helped organize and fund the protest preceding the deadly attack on the U.S. Capitol.<sup>55</sup> The RAGA is a political organization that helps elect Republican attorneys general and can accept unlimited contributions from wealthy individuals and corporations. RLDF appeared in a list of

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<sup>44</sup> Caldwell Indictment, *supra* note 18, at ¶ 24.

<sup>45</sup> *Id.* at ¶ 34.

<sup>46</sup> *Id.* at ¶ 27.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at ¶ 29.

<sup>49</sup> *Id.* at ¶ 26(k).

<sup>50</sup> *Id.* at ¶ 74(a).

<sup>51</sup> Shalini Ramachandran et al., *Jan. 6 Rally Funded by Top Trump Donor, Helped by Alex Jones, Organizers Say*, WALL ST. J. (Feb. 1, 2021), <https://www.wsj.com/articles/jan-6-rally-funded-by-top-trump-donor-helped-by-alex-jones-organizers-say-11612012063>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Laura Strickler & Lisa Cavazuti, *Republican AGs group sent robocalls urging march to the Capitol*, NBC News (Jan. 8, 2021), <https://www.nbcnews.com/news/us-news/republican-ags-group-sent-robocalls-urging-march-capitol-n1253581>.

groups on the “March to Save America” website along with entities including Stop the Steal, Turning Point Action, Tea Party Patriots, and others.<sup>56</sup>

Henry “Enrique” Tarrío, the national chairperson of the Proud Boys, raised money to support the group’s participation in the “Stop the Steal” rally using GiveSendGo.com, a Christian crowdfunding website that bills itself as “a place to fund hope.”<sup>57</sup> According to one media report, within a week, the “Enrique Tarrío Defense Fund” raised more than \$113,000 from 2,359 donors.<sup>58</sup> “[A]t least \$247,000 [was] raised for 24 people—including at least eight members of the Proud Boys—who claimed...that the money was intended for travel, medical or legal expenses connected” with the January 6th “Stop the Steal” rally.<sup>59</sup> Nicholas Ochs, “a self-described Proud Boy from Honolulu . . . raised \$300 for expenses to attend the [January] 6 rally.”<sup>60</sup> Ochs added, “[w]e will try not to get stabbed but if one of us does that’s when the real bucks come in so keep an eye out for that fundraiser too.”<sup>61</sup> “A GiveSendGo fund listed under the name of Zach Rehl, . . . the president of the Proud Boys Philadelphia Chapter, raised more than \$5,500 for travel to the [January] 6 event.”<sup>62</sup> Another Proud Boy member raised \$1,300 to fund travel to Washington, D.C. for the rally.<sup>63</sup> One participant “asked donors to ‘sponsor a warrior’ and help ‘buy body armor and other protection pieces for our patriots.’”<sup>64</sup> Ultimately, money raised through GiveSendGo enabled members of the Proud Boys and other militia groups to travel to Washington, D.C. and participate in the violent siege of the U.S. Capitol.

The FBI has arrested and charged over 300 participants in the attack on the U.S. Capitol.<sup>65</sup> The federal charges include Obstruction of an Official Proceeding, 18 U.S.C. § 1512(c)(2), Destruction of Government Property, 18 U.S.C. §§ 1361, 2, Theft of Government Property, 18 U.S.C. §§ 641, 2, Knowingly Entering or Remaining in Restricted Building and Grounds, 18 U.S.C. § 1752(a)(1)–(2), and Aiding and Abetting, 18 U.S.C. § 2.<sup>66</sup> However, charging members of the violent mob with offenses like trespass, theft, and obstruction-related crimes is not enough. These criminal offenses do not accurately capture the severity of the crimes

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<sup>56</sup> Jamie Corey, *Republican Attorneys General Dark Money Group Organized Protest Preceding Capitol Mob Attack*, DOCUMENTED.NET (Jan. 11, 2021), <https://documented.net/2021/01/republican-attorneys-general-dark-money-group-organized-protest-preceding-capitol-mob-attack/>.

<sup>57</sup> Amy Brittain & David Willman, ‘A Place to Fund Hope’: How Proud Boys and Other Fringe Groups Found Refuge on a Christian Fundraising Website, WASH. POST (Jan. 18, 2021), [https://www.washingtonpost.com/investigations/a-place-to-fund-hope-how-proud-boys-and-other-fringe-groups-found-refuge-on-a-christian-fundraising-website/2021/01/18/14a536ee-574b-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/investigations/a-place-to-fund-hope-how-proud-boys-and-other-fringe-groups-found-refuge-on-a-christian-fundraising-website/2021/01/18/14a536ee-574b-11eb-a08b-f1381ef3d207_story.html).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Ochs was arrested on a misdemeanor charge stemming from his participation in the assault on the Capitol. With his criminal case pending, a new GiveSendGo page appeared in the “Legal Feeds for Nick Ochs” fund. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Alanna Durkin Richer & Colleen Long, *Charged in Jan. 6 riot? Yes, but prison may be another story*, ASSOC. PRESS (May 1, 2021) (detailing that over 400 individuals have been arrested related to the January 6<sup>th</sup> storming of the Capitol).

<sup>66</sup> See Caldwell Indictment, *supra* note 18. See also DeCarlo Indictment, *supra* note 40.

committed. The insurrectionists violently attacked the seat of our nation's democracy for the purpose of overturning the results of the 2020 presidential election. This conduct far exceeds the severity of the criminal charges filed against the insurgents. Furthermore, what about the individuals behind the scenes that provided financial assistance, transportation, communications equipment, and other logistical support for the insurgents? These individuals facilitated the events that occurred on January 6th and should be held accountable. However, no one has been charged with providing material support to the Proud Boys, Oath Keepers, or other militia groups responsible for planning and leading the attack on the Capitol.

The siege of the Capitol is not an isolated act of domestic terrorism. In December 2020, a federal grand jury charged six men with conspiracy to kidnap Michigan Governor Gretchen Whitmer.<sup>67</sup> The FBI arrested six individuals for plotting to kidnap the Democratic governor at her vacation home in northern Michigan. The conspirators were members of a Michigan-based militia group called the "Wolverine Watchmen," led by Ty Gerard Garbin.<sup>68</sup> The conspirators participated in a "field training exercise," where "the group practiced combat tactics, including assaulting motor vehicles using semiautomatic assault rifles and live ammunition."<sup>69</sup> At one field training exercise, the conspirators "attempted to detonate two improvised explosive devices."<sup>70</sup> They also "practiced assaulting a building in teams, and discussed tactics for fighting the Governor's security detail with improvised explosive devices, a projectile launcher, and other weapons," according to the indictment.<sup>71</sup> One defendant instructed his co-conspirators in an encrypted video message that "if they encountered police during a reconnaissance, they should give the officers one opportunity to leave, and kill them if they did not comply."<sup>72</sup> One conspirator "ordered \$4,000 worth of explosives from an undercover FBI agent posing as a co-conspirator."<sup>73</sup> The co-conspirators were arrested after four members were to meet with an FBI undercover agent and purchase explosives and other supplies.

Six members of the Wolverine Watchmen were charged with conspiracy to kidnap Governor Whitmer. However, it is unclear whether the Wolverine Watchmen received material support and assistance from other individuals. The indictment states that the conspirators conducted nighttime surveillance on Governor Whitmer's vacation home using two-way radios and a night-vision scope.<sup>74</sup> Their military training exercises involved the use of semiautomatic assault rifles and live ammunition and surveilled where to place improvised explosive devices under a bridge leading to Governor Whitmer's vacation home to prevent law enforcement officers from responding to the scene of the crime.<sup>75</sup> Where did the militia members

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<sup>67</sup> Indictment, *United States v. Fox et al.*, No. 1:20-cr-183-RJJ (W.D. Mich., Dec. 16, 2020).

<sup>68</sup> *Id.* at ¶ 2.

<sup>69</sup> *Id.* at ¶ 4–5.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at ¶ 11.

<sup>72</sup> *Id.* at ¶ 18.

<sup>73</sup> *Id.* at ¶ 15.

<sup>74</sup> *Id.* at ¶ 10.

<sup>75</sup> Jaclyn Peiser, *In Whitmer kidnapping plot, extremists also wanted to blow up a bridge, tried to buy explosives, feds say*, WASH. POST (April 29, 2021), <https://www.washingtonpost.com/nation/2021/04/29/whitmer-bridge-domestic-terrorism-michigan/>.

purchase their surveillance equipment, semi-automatic weapons, and materials used to construct the improvised explosive devices? More importantly, did the suppliers of the surveillance equipment and deadly weapons have knowledge that the Wolverine Watchman were planning to kidnap the Michigan governor and engage in violent and unlawful activity? Furthermore, who conducted the military training exercises? Did the militia members receive training on how to construct the improvised explosive devices? Did the individuals that provided the training have knowledge of the kidnaping plot? Finally, did the members of the Wolverine Watchmen receive funding from sympathetic donors who embraced their ideology and violent agenda? If so, the individuals that provided material support to these domestic terrorists with knowledge of their criminal objectives should be held accountable for enabling their criminal conduct.

Federal law punishes the provision of material support or resources to a foreign terrorist organization.<sup>76</sup> Unfortunately, there is no such provision that criminalizes material support to domestic terrorist groups. Also, there is currently no process by which the government can designate domestic groups as domestic terrorist organizations. Such a designation, as a domestic terrorist organization, would allow the government to impose criminal and economic sanctions against these militia groups and individuals that provide support and assistance to them. Domestic violent extremists, including right-wing, anti-government militia groups, pose a serious threat to national security. Moreover, the individuals and entities that knowingly provide material support or resources to these radicalized groups enable their criminal conduct, like the January 6th attack on the U.S. Capitol and the plot to kidnap the Michigan governor. In fact, according to FBI Director Wray, more deaths have been caused by DVEs than international terrorists in recent years.<sup>77</sup> Under the current statutory regime, 18 USC § 2339B only covers individuals and entities that provide material support to *foreign* terrorist organizations – but not domestic organizations. There is no compelling reason for our legal system to criminalize providing material support to foreign terrorist organizations all the while turning a blind eye to similar conduct with domestic organizations. Recent events dramatically highlight the need to reconsider the existing legal framework for preventing and criminalizing material support for domestic terrorism.

## II. DOMESTIC VIOLENT EXTREMIST GROUPS

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<sup>76</sup> See 18 U.S.C. § 2339B.

<sup>77</sup> See Opening Remarks and Q&A, Dep't of Justice, Senior FBI Official (Feb. 26, 2021) (on file with Dep't of Justice), <https://www.justice.gov/opa/speech/file/1373306/download> (“The primary terrorism threat to the homeland, without question, is from the lone offender, notably homegrown violent extremists as well as domestic violent extremists...”); see also Emily DeCiccio, *Domestic terrorism has superseded the threat of international terrorism, warns ex-NYC police commissioner*, CNBC (Jan. 15, 2021), <https://www.cnbc.com/2021/01/15/domestic-terrorism-has-superseded-the-threat-of-international-terrorism-warns-ex-nyc-police-commissioner.html>; see also Statement of Christopher A. Wray, Director of Federal Bureau of Investigation, Before the Committee on Homeland Security, U.S. House of Representatives, at 3 (Sept. 17, 2020).

According to FBI Director Wray, racially motivated violent extremism, mostly from white supremacists, recently has made up a majority of domestic terrorism threats.<sup>78</sup> Wray stated that the FBI averaged roughly 1,000 domestic terrorism investigations annually and had recorded about 120 arrests on domestic terrorism in 2020.<sup>79</sup> Furthermore, Wray made clear that white supremacist and anti-government groups were the primary threats.<sup>80</sup> In particular, neo-Nazi groups such as Atomwaffen Division and the Base have been the target of the FBI.

#### A. OATH KEEPERS

The Oath Keepers is one of the largest radical anti-government groups in the U.S. today. Formed following President Obama's election in 2009 by Yale Law School graduate Elmer Stewart Rhodes, the Oath Keepers claim to have up to 30,000 members, most of whom are former or current law enforcement officers or military.<sup>81</sup> "Some members of the Oath Keepers believe that the federal government has been co-opted by a cabal of elites actively trying to strip American citizens of their rights."<sup>82</sup> While they will accept anyone as members, what differentiates the Oath Keepers from other anti-government groups is their focus on recruiting current and former military and law enforcement personnel.<sup>83</sup> The militia's name references the oath sworn by members of the military and police to defend the Constitution "from all enemies, foreign and domestic."<sup>84</sup> The Oath Keepers embrace the central conspiracy theory of the anti-government "Patriot" movement of which it is a part. "Patriots" believe that:

[T]he government will at any moment impose martial law, probably with the aid of foreign or United Nations troops; that all guns belonging to normal citizens will then be seized; that the resisters will be thrown into concentration camps; and that, in the end, America will be forced into a one-world socialist government, 'The New World Order.'<sup>85</sup>

In 2013, the Oath Keepers announced the formation of "Citizen Preservation" militias, intended to defend Americans against the New World Order.<sup>86</sup> These militias have since been renamed "Civilian Preparedness Teams," and their goal is to "revitalize the American militia movement. . . ."<sup>87</sup> As reported by the

<sup>78</sup> See *Worldwide Threats to the Homeland*, *supra* note 3.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *About Oath Keepers*, OATH KEEPERS, <https://oathkeepers.org/about/> (last visited Mar. 20, 2021). According to the Oath Keepers website: "Oath Keepers is a non-partisan association of current and formerly serving military, police, and first responders, who pledge to fulfill the oath all military and police take to 'defend the Constitution against all enemies, foreign and domestic.'" *Id.* See also *Oath Keepers*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers> (last visited Feb. 20, 2021) [hereinafter *Groups Extremist Files*].

<sup>82</sup> See First Superseding Indictment at 4, *United States v. Caldwell* (D. D.C. Feb. 19, 2021) (No. 21-cr-28-APM) (charging nine members of the Oath Keepers with obstruction of an official proceeding and conspiracy to obstruct an official proceeding in violation of 18 U.S.C. §§ 1512(c)(2), 371, and other offenses).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *Groups Extremist Files*, *supra* note 81.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

Southern Poverty Law Center, Rhodes expressed his views on restoring the militia in the U.S. in a “Gods and Guns” podcast.<sup>88</sup> He said:

We want to see a restoration of the militia in this country. . . . We think a good first step is to have the veterans stand up in every community and go help form and train neighborhood watches, to get people to take back into their own hands their own personal self-defense and security.<sup>89</sup>

Heavily armed members of the Oath Keepers showed up in Ferguson, Missouri, during the racial unrest that followed the killing of Michael Brown, an African American teenager, by police officers. The heavily armed group members allegedly patrolled neighborhoods to protect white-owned businesses from rioters.<sup>90</sup> Today, the Oath Keepers have affiliates in several states across the country, including Ohio, North Carolina, Oregon, and Montana.<sup>91</sup>

The Oath Keepers has a command structure. Their founder and leader is Stewart Rhodes.<sup>92</sup> The group has the ability to recruit members across the country. While the exact number of members is unknown, the group’s membership is estimated to be in the thousands. As previously noted, the Oath Keepers consists of affiliated militia groups across the country. Furthermore, the Oath Keepers conducts military training for its members. They have a command structure and ability to plan anti-government operations, which is evident from their ability to plan, coordinate, and execute the January 6th assault on the Capitol.<sup>93</sup> Approximately thirteen members of the Oath Keepers have been indicted for their participation in the January 6th, 2021 assault.<sup>94</sup>

## B. PROUD BOYS

The Proud Boys was formed in 2016 by *Vice Media* co-founder Gavin McInnes, a Canadian.<sup>95</sup> The far-right, male-only group describes itself as a “pro-Western fraternal organization for men who refuse to apologize for creating the

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The Ohio State Regular Militia is a subset of the Oath Keepers. Government’s Memorandum in Support of Pre-Trial Detention at 3, *United States v. Watkins* (D.D.C. Feb.11, 2021) (1:21-cr-28-APM-3).

<sup>92</sup> *Id.*

<sup>93</sup> According to the FBI, Jessica Watkins, a former U.S. Marine who has been criminally charged for her role in the attack on the Capitol, considers herself the commander of the Ohio State Regular Militia which is affiliated with the Oath Keepers. *See id.* The FBI arrested other people suspected of being in the Oath Keepers, including Jon Schaffer, an Indiana musician and Larry R. Brock, a retired Air Force lieutenant colonel from Texas. *See* Adam Goldman et al., *Investigators Eye Right-Wing Militias at Capitol Riot*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/18/us/politics/capitol-riot-militias.html>; *see also* Government’s Memorandum in Support of Pre-Trial Detention at 3, *United States v. Watkins* (D.D.C. Feb.11, 2021) (1:21-cr-28-APM-3).

<sup>94</sup> Hymes & McDonald, *supra* note 43.

<sup>95</sup> *See Proud Boys*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys> (last visited Mar. 14, 2021).

modern world: aka Western Chauvinists.”<sup>96</sup> While the actual membership is unknown, it is believed to be in the thousands.<sup>97</sup> The group has forty-four active chapters across the country.<sup>98</sup> The Proud Boys have a history of street violence, including against Black Lives Matter demonstrators.<sup>99</sup> In the summer of 2017, neo-Nazis, Klansmen, and other white supremacist groups participated in the “Unite the Right” rally in Charlottesville, Virginia. The organizer of the event was a member of the Proud Boys.<sup>100</sup> In June 2018, the Proud Boys attended the “Freedom and Courage” rally in Portland, Oregon, where they engaged in violent clashes with Black Lives Matter protestors.<sup>101</sup> The Proud Boys have an initiation process for new members, which includes taking an “oath.”<sup>102</sup> Their members pay monthly dues.<sup>103</sup> Proud Boys members wear yellow and black apparel, as well as other clothing adorned with Proud Boys-related logos and emblems.<sup>104</sup>

The Proud Boys have a command structure: the ability to communicate nationwide and direct the activities of their members. The self-described chairperson of the Proud Boys, Enrique Tarrío, directs such activities. Ethan Nordean heads the Washington State Proud Boys.<sup>105</sup> Beginning as early as December 2020, Proud Boys organizers encouraged members to attend the January 6th, 2021 event in Washington, D.C. Tarrío posted a message on the social media site Parler about the demonstration planned that day.<sup>106</sup> He instructed the Proud Boys on how to dress for the event to avoid detection by law enforcement officers.<sup>107</sup> Tarrío directed the Proud Boys to spread across downtown Washington, D.C. organized in smaller teams.<sup>108</sup>

The Proud Boys were the single largest organized group that participated in the January 6th siege of the U.S. Capitol.<sup>109</sup> Two Proud Boys are accused of leading the mob of insurrectionists.<sup>110</sup> As of April of 2021, federal prosecutors have indicted approximately twenty-five Proud Boys for their role in the insurrection.<sup>111</sup> During the attack on the Capitol, the Proud Boys wore a piece of orange tape on their hats,

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<sup>96</sup> Statement of Facts, U.S. v. Nicholas DeCarlo, et al., (D.D.C. Jan. 8, 2021) (Crim. No. 21-mj-120). See also Affidavit in Support of Criminal Complaint and Arrest Warrant, ¶ 19, (D.D.C. Feb. 10, 2021) (Case No. 1:21-mj-00218) [hereinafter Proud Boys Complaint].

<sup>97</sup> David D. Kirkpatrick & Alan Feuer, *Police Shrugged Off the Proud Boys, Until They Attacked the Capitol*, N.Y. TIMES (Mar. 14, 2021), <https://www.nytimes.com/2021/03/14/us/proud-boys-law-enforcement.html?smid=em-share>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* See also *Proud Boys*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys> (last visited May 3, 2021).

<sup>102</sup> Proud Boys Complaint, *supra* note 77, at ¶ 19.

<sup>103</sup> See Memorandum in Support of Pre-Trial Detention at 2, United States v. Ethan Nordean, Crim. No. 21-MJ-67 BAT (W.D. Wash. Feb. 2, 2021).

<sup>104</sup> Kirkpatrick & Feuer, *supra* note 97.

<sup>105</sup> See Affidavit in Support of a Criminal Complaint at 2, United States v. Ethan Nordean, Crim. No. 1:21-cr-175 (D.D.C. Feb. 2, 2021).

<sup>106</sup> See Proud Boys Complaint, *supra* note 96, at ¶ 20.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Kirkpatrick & Feuer, *supra* note 97.

<sup>110</sup> *Id.*

<sup>111</sup> See Melissa Holzberg, *25<sup>th</sup> Man Affiliated With Proud Boys And His Brother Indicted by DOJ For Capitol Riot*, FORBES (Apr. 5, 2021), <https://www.forbes.com/sites/melissaholzberg/2021/04/05/25th-man-affiliated-with-proud-boys-and-his-brother-indicted-by-doj-for-capitol-riot/?sh=4bfd5926721>.

helmets, or backpacks to identify themselves from other members of the crowd during the violent assault.<sup>112</sup>

In February 2021, less than a month after members of the Proud Boys joined the violent mob that stormed the U.S. Capitol, the Canadian government designated the entity a terrorist organization, adding the far-right group to a list of terrorist organizations that includes al Qaeda, ISIS, and al-Shabab.<sup>113</sup> Designation as a terrorist organization carries financial and legal consequences. Police can seize the property of the group and its members; banks can seize their assets.<sup>114</sup> Additionally, it is a crime to provide material assistance to a designated terrorist organization.<sup>115</sup> Finally, group members can be denied entry to Canada.<sup>116</sup>

In order to be designated a domestic terrorist organization under Canadian law, a criminal or security intelligence report is submitted to the Minister of Public Safety for consideration.<sup>117</sup> The Minister then determines whether “there are reasonable grounds to believe that (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (b) the entity has knowingly acted on behalf of, at the direction of or in association with an entity referred to in paragraph (a).”<sup>118</sup> If the Minister finds reasonable grounds, then she may make a recommendation to have the entity placed on the list of terrorist organizations.<sup>119</sup>

The Canadian government also listed the Atomwaffen Division, a neo-Nazi group whose members participated in the violent Unite the Right rally in Charlottesville and the Base, another neo-Nazi group. Announcing the designation of the Proud Boys and two other domestic terrorist organizations, Public Safety Minister Bill Blair stated, “Their violent actions and rhetoric are fueled by white supremacy, anti-Semitism, racism, homophobia, Islamophobia and misogyny.”<sup>120</sup>

### C. OTHER ANTI-GOVERNMENT GROUPS

The Three Percenters is an anti-government group. Their name is a reference to the purported three percent of the American colonial population that rose up to fight the British Army in the American Revolution.<sup>121</sup> Unlike the Oath Keepers and Proud Boys, the Three Percenters lack a hierarchical leadership and organized

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<sup>112</sup> See Proud Boys Complaint, *supra* note 96, at ¶ 40.

<sup>113</sup> 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](https://www.washingtonpost.com/world/the_americas/canada-proud-boys-terrorist-capitol-siege/2021/02/03/546b1d5c-6628-11eb-8468-21bc48f07fe5_story.html).

<sup>114</sup> Canadian Criminal Code §83.08, R.S.C. 1985, c. C-46.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *About the Listing Process*, PUB. SAFETY CAN., <https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrsm/lstd-ntts/bt-lstng-press-en.aspx> (last updated Feb. 3, 2021).

<sup>118</sup> Canadian Criminal Code, R.S.C., c. C-46, § 83.05(1) (1985).

<sup>119</sup> *About the Listing Process*, *supra* note 117.

<sup>120</sup> Coletta, *supra* note 113. The Canadian government has designated at least two other neo-Nazi groups, Blood & Honor and Combat 18. *Id.* The United States has not designated a single domestic terrorist group.

<sup>121</sup> *Three Percenters*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/three-percenters> (last visited May 3, 2021).



national, state, and local chapters.<sup>122</sup> The Boogaloo Boys is considered a right-leaning, anti-government group that has connections to white supremacy and advocates for a second civil war. “The boogaloo culture operates as a diffuse movement rather than a traditional group organizational structure with a single leader.”<sup>123</sup> However, the Southern Poverty Law Center claims that the Boogaloo Boys has chapters in at least forty states.<sup>124</sup> Finally, there is scant public information about the Wolverine Watchmen, the right-wing militia group that plotted to kidnap Michigan’s governor, Gretchen Whitmer.

### III. PROVIDING MATERIAL SUPPORT TO FOREIGN TERRORIST ORGANIZATIONS

#### A. STATUTORY FRAMEWORK

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress enacted 18 U.S.C. § 2339A, making it a federal crime to provide material support or resources “knowing or intending” that they be used in preparation for, or in carrying out, statutorily enumerated crimes.<sup>125</sup> Congress further recognized that “[c]utting off ‘material support or resources’ from terrorist organizations deprives them of the means with which to carry out acts of terrorism and potentially leads to their demise.”<sup>126</sup>

Two years later, Congress enacted 18 U.S.C. § 2339B, criminalizing the provision of material support or resources to a foreign terrorist organization. In *Humanitarian Law Project v. Gonzales*, the court examined the legislative history of 18 U.S.C. § 2339B, stating:

Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds “under the cloak of a humanitarian or charitable exercise,” sought to pass legislation that would “severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.” As § 2339A was limited to donors intending to further the commission of specific federal offenses, Congress passed § 2339B to encompass donors who acted without the intent to further federal crimes.<sup>127</sup>

Section 2339B requires proof that the defendant “(1) knowingly provided material support[;] (2) to an organization designated as a foreign terrorist organization[; and] (3) with knowledge of the organization’s status as an FTO, or

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<sup>122</sup> *Antigovernment Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment> (last visited May 3, 2021).

<sup>123</sup> *Who are the Boogaloos, Who Were Visible at the Capitol and Latter Rallies*, S. POVERTY L. CTR. (Jan. 27, 2021), <https://www.splcenter.org/hatewatch/2021/01/27/who-are-boogaloos-who-were-visible-capitol-and-latter-rallies>.

<sup>124</sup> *Id.*

<sup>125</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 12005(a), 108 Stat. 1796, 2022-3 (1994) (codified at 18 U.S.C. § 2339A).

<sup>126</sup> *Humanitarian L. Project v. Mukasey*, 552 F.3d 916, 931 (9th Cir. 2009), *rev’d on other grounds*, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>127</sup> *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005) (internal citations omitted).

knowing that it engages in terrorism.”<sup>128</sup> The defendant must have knowledge that the foreign organization has been designated an FTO by the Secretary of State or that the organization has engaged or engages in “terrorist activity” or “terrorism.”<sup>129</sup> However, the government is not required to prove the defendant acted with the specific intent to commit a terrorist attack or to further the ideological goals of the terrorist group.<sup>130</sup> Under § 2339B, a defendant who acts with knowledge of the foreign entity’s connections to terrorism is criminally liable, even if harboring a benign intent or purpose.

While Congress’s principal aim was to deprive FTOs of funding, the statute punishes other forms of material support. The term “material support or resources” means:

Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>131</sup>

The material support statute is unprecedented in breadth and scope. In essence, § 2339B is a relaxed aiding and abetting statute. The statute does not punish the perpetrator of a terrorist attack, but instead it punishes enablers who provide assistance to the terrorist organization. Under traditional accomplice liability, the aider and abettor must share the intent of the principal and intend the commission of the target offense. However, under the material support statute, the government only has to prove that the offender acted with knowledge of the recipient’s membership in an FTO or association with a foreign entity engaged in terrorist activity. The offender is liable even if he does not embrace the political objectives of the foreign group or lacks the intent to further the group’s illicit activities. For example, a gun dealer who sells weapons to an FTO with the requisite knowledge is liable even if his actions were motivated solely to make a profit from the commercial transaction. Similarly, a person who makes a financial contribution to members of an FTO regardless of his or her purpose or intent, violates the material support statute.

Under the statute, “[w]hoever knowingly provides material support or resources to [an FTO], or attempts or conspires to do so,” can be convicted.<sup>132</sup> Thus, not only does § 2339B punish the actual provision of material support or resources to an FTO, but it also creates criminal liability for the inchoate offenses of attempt and conspiracy to do so. A person who attempts to provide support to an FTO, as well as someone who conspires to assist an FTO – but falls short –

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<sup>128</sup> JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 261 (2011). See also 18 U.S.C. § 2339B.

<sup>129</sup> 18 U.S.C. § 2339B.

<sup>130</sup> Holder v. Humanitarian Law Project, 561 U.S. 1, 16–17 (2010).

<sup>131</sup> 18 U.S.C. § 2339A(b)(1). The term “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” *Id.* § 2339A(b)(2). The term “expert advice or assistance” means “advice or assistance derived from scientific, technical or other specialized knowledge.” *Id.* § 2339A(b)(3).

<sup>132</sup> *Id.* § 2339B(b)(1).

is punishable under the statute. The material support statute does not require proof that the defendant facilitated a terrorist attack or even that the FTO received assistance from the defendant. The defendant is liable solely if he attempts or conspires to provide such assistance.

#### B. FTO DESIGNATION PROCESS

The authority to designate an entity a “foreign terrorist organization” resides with the Secretary of State.<sup>133</sup> Under 8 U.S.C. § 1189, the Secretary of State, in consultation with the Secretary of Treasury and Attorney General, may designate a foreign organization upon finding that:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22) or retains the capability and intent to engage in terrorist activity or terrorism; and
- (C) the terrorist activity or terrorism threatens national security or security of United States nationals.<sup>134</sup>

In making an FTO designation, the Secretary of State compiles an “administrative record” and makes “findings” based on this record.<sup>135</sup> The Secretary may base this designation on classified information. And the designated party is not entitled to notice prior to the designation.<sup>136</sup> Seven days before designating an organization as an FTO, the Secretary of State must submit to key congressional leaders a “classified communication” detailing the Secretary’s findings.<sup>137</sup> The State Department then publishes the designation in the Federal Register.<sup>138</sup> Once an entity has been designated an FTO, that designation may be revoked in three ways:

- (1) Congress blocks or revokes a designation, 8 U.S.C. § 1189(a)(5);
- (2) the Secretary revokes the designation based on a finding that changed circumstances or national security warrant a revocation, 8 U.S.C. § 1189(a)(6)A); or (3) the D.C. Circuit sets aside the designation under 8 U.S.C. § 1189(c)(3).<sup>139</sup>

The legal consequences of being designated an FTO are severe. First, financial institutions must freeze any and all FTO assets located within the jurisdiction of the U.S.<sup>140</sup> Second, representatives and members of the FTO are

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<sup>133</sup> 8 U.S.C. §§ 1189(a)(1), (d)(4). The Secretary of State has designated seventy-two organizations as FTOs. See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Feb. 4, 2021).

<sup>134</sup> 8 U.S.C. § 1189(a)(1).

<sup>135</sup> *Id.* § 1189(a)(3)(A).

<sup>136</sup> See *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 209 (D.C. Cir. 2001).

<sup>137</sup> 8 U.S.C. § 1189(a)(2)(A)(i).

<sup>138</sup> *Id.* § 1189(a)(2)(A)(ii).

<sup>139</sup> *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 163 n.8 (E.D.N.Y. 2008).

<sup>140</sup> See 18 U.S.C. § 2339B(a)(2).

prohibited from traveling to the U.S.<sup>141</sup> Finally, § 2339B imposes severe criminal sanctions for providing material support or resources to an FTO.<sup>142</sup>

#### IV. PROVIDING MATERIAL SUPPORT TO DOMESTIC TERRORIST ORGANIZATIONS

While federal law criminalizes the provision of material support to a foreign terrorist organization, there is no equivalent statute that criminalizes material support to domestic terrorist organizations. Furthermore, there is no legal mechanism for the FBI or other government agency to label groups as domestic terrorist organizations and impose economic sanctions against such entities. Thus, individuals can sell military-style weapons and explosives to violent right-wing extremist groups, provide their members military-style training, make generous monetary donations to support their cause, and provide other forms of material support with impunity. Absent evidence that the actor had the intent or knowledge that his or her material support would be used to commit a particular crime, such conduct is lawful. However, even the provision of material support with benign intent can promote acts of terrorism.

##### A. STATUTE OVERVIEW

To address this serious gap in the law, Congress should enact a domestic material support statute. The new statute would make it a crime to provide “material support or resources” to a “domestic terrorist organization” (“DTO”). The statute would adopt the same definition of “material support or resources” included in the federal material support statute, 18 U.S.C. § 2339A.<sup>143</sup> Furthermore, the statute would require proof that the accused acted with knowledge that the organization was designated a “domestic terrorist organization” or engages in, or has engaged in, acts of “domestic terrorism” as defined in 18 U.S.C. § 2331(5).<sup>144</sup> However, the government would not be required to prove that the defendant had the specific intent to further a domestic terrorist organization’s illicit activity.<sup>145</sup>

Under the proposed statute, any financial institution that knows it has possession of, or control over, any funds in which a DTO, or its agent, has an interest<sup>146</sup> would be required to freeze those funds. Financial institutions would also be required to report the existence of these funds to the Treasury Department. The statute that prohibits the provision of material support to an FTO has a similar provision.<sup>147</sup> Additionally, any financial institution that knowingly fails to comply with the blocking and reporting requirements would be subject to a civil penalty. Financial institutions that violate §2339B(2)(b) trigger a \$50,000 penalty per violation or a penalty worth twice the amount of funds the financial institution was

<sup>141</sup> 8 U.S.C. § 1182(a)(3)(B)(i).

<sup>142</sup> 18 U.S.C. § 2339B(a)(1). Upon conviction, § 2339B imposes a term of imprisonment of not more than twenty years and, if the death of any person results, incarceration for any term of years or for life. *Id.*

<sup>143</sup> 18 U.S.C. §2339A(b)(1).

<sup>144</sup> *Id.* §2331(5).

<sup>145</sup> See discussion *infra* Section V.

<sup>146</sup> See *Global Relief Found., Inc. v. O’Neil* 315 F. 3d 748 (7th Cir. 2002) (defining “beneficial interest”).

<sup>147</sup> 18 U.S.C. § 2339B(a)(2)(A).

required to retain control over.<sup>148</sup> A similar penalty should be imposed on banks for failing to block the assets of DTOs and report the existence of such funds to the Treasury Department.

Whoever violates this DTO statute should be subject to a term of imprisonment of not more than twenty years, and, if death of any person results, shall be imprisoned for any term of years or for life.<sup>149</sup> However, a lesser penalty should be provided for the provision of *de minimis* support to a DTO. *De minimis* determinations must be made on a case-by-case basis: aid and assistance that would not facilitate the illicit activities of a DTO in a significant manner should be prosecuted as a misdemeanor offense. These misdemeanor offenses should result in a maximum penalty of one-year imprisonment. For example, providing a single monetary donation of less than \$500 to a DTO on a GoFundMe site should subject the offender misdemeanor liability. Criminal prosecution for these lesser offenses would still have a deterrent effect and prevent sympathetic donors from providing monetary assistance to a DTO. On the other hand, the sale of military-style weapons or explosives to a DTO, with knowledge of the DTO's designation or knowledge of their terrorist activities should warrant felony prosecution. This type of material support is essential to facilitating the group's terrorist activities. While there is clearly no bright line on what constitutes *de minimis* support, the statute should distinguish between minor and major assistance to a DTO.

#### B. DTO DESIGNATION PROCESS

Not every group that engages in violent conduct should be designated a DTO under the proposed statute. Only groups that threaten national security should be given that designation. The government's decision to designate a group a DTO should be guided by objective factors, rather than a subjective determination. At least three factors are highly probative on the matter: (1) the ideology of the group; (2) organizational structure of the entity; and (3) its history of violent behavior. For example, a right-wing, extremist paramilitary group dedicated to overthrowing the U.S. government that uses violence to oppose government action poses a grave national security risk. On the other hand, a criminal organization may threaten public safety, but does not necessarily pose a national security threat. The Racketeer Influenced and Corrupt Organizations ("RICO") statute punishes enterprise criminality.<sup>150</sup> A RICO association-in-fact enterprise requires three structural features: "a purpose, relationships among [those associated with the enterprise], and longevity sufficient to permit [these] associates to pursue the enterprise's purpose."<sup>151</sup> However, not every association-in-fact enterprise engaged in criminal activity presents a threat to national security. For example, a RICO enterprise engaged in illicit drug trafficking, human trafficking or health care fraud would not constitute a national security threat. Ultimately, the purpose of these criminal groups is to make a profit by illicit means, not challenge government authority or policy by threats or acts of violence. Thus, the standard for making a DTO designation should be much higher.

<sup>148</sup> *Id.* § 2339B(2)(b).

<sup>149</sup> A similar penalty is authorized under 18 U.S.C. § 2339B(a)(1).

<sup>150</sup> 18 U.S.C. § 1963.

<sup>151</sup> *Boyle v. United States*, 556 U.S. 938, 946 (2009).

First, when considering whether to designate an entity a DTO, the government agency should consider the ideology of the group. Specifically, what is the avowed mission and purpose of the group? If a domestic entity is committed to overthrowing the government, challenging government policy by violent means, or killing members of ethnic, national, or religious groups, these organizations raise serious national security concerns. In fact, targeting someone for killing because of their nationality, ethnicity, race, or religion may constitute genocide. Genocide is defined as killing or causing serious bodily harm to members of a national, ethnical, racial, or religious group with the “intent to destroy, in whole or in part,” members of the group.<sup>152</sup> Certainly, white supremacist and other hate groups that commit acts dangerous to human life intended to intimidate, coerce, or destroy members of ethnic or religious groups should be designated a DTO.

Second, the organizational structure of the group is probative on the issue of national security. For example, a small, loosely organized, and dispersed group is unlikely to pose a danger to national security. On the other hand, domestic groups with a command structure and leadership control, and the ability to plan and execute violent attacks pose a greater security threat. Other probative factors include the size of the group, whether it governs by rules, its recruitment and fundraising capabilities, the existence of a communications infrastructure, whether it conducts military training, and its members possess military-style weapons. Another consideration is the complexity and sophistication of the acts of violence committed by the domestic organization.

Whether to designate an entity as a DTO should also focus on the violent behavior of the group. Designation should require proof that the group engages in acts of domestic terrorism as defined by 18 U.S.C. § 2331(5). Specific considerations include the number of terrorist attacks and acts of violence committed by the group. Other highly relevant factors include the number of casualties and extent of serious injuries caused by these attacks. The extent of the destruction of property is probative as well. The larger the number of terrorist attacks and resulting casualties, the greater the threat to national security posed by the entity. Another consideration is the complexity of these groups’ terror plots. Groups that are able to plan and execute complex terrorist attacks pose a greater danger to national security. Ultimately, there should be a direct correlation between the ideology, organizational structure, and violent history of the group and the threat to national security. Only groups that pose a serious risk to national security should be designated a DTO.

Applying these three factors, a compelling case can be made for designating the Oath Keepers as a DTO. First, the Oath Keepers is an anti-government militia. Their members believe that the government is going to impose martial law, suspend the Second Amendment and seize all privately owned guns, and place anti-government protestors in concentration camps. They are committed to taking back their country by violent means, which was demonstrated on January 6th, where the Oath Keepers stormed the U.S. Capitol and assaulted and injured dozens of Capitol

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<sup>152</sup> See Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

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Police and District of Columbia police officers. Ultimately, the ideology and avowed purpose of the Oath Keepers raise serious national security concerns.

Second, the organizational structure of the Oath Keepers supports designating them as a DTO. Stewart Rhodes is the leader of the organization exercising command and control over its members, including their activities in Washington, D.C. on January 6th. Media reports indicate that Rhodes was in regular cell phone communication with his subordinates during the January 6<sup>th</sup> attack on the U.S. Capitol, directing and coordinating the movement and activities of the Oath Keepers on the ground. The Oath Keepers also provide military-style training to their members. Additionally, the Oath Keepers have nationwide recruitment capabilities. They claim to have 30,000 members with chapters located in several states across the country.

Finally, the Oath Keepers have a history of threats and acts of violence. Their members have attended protests in Ferguson, Missouri, Portland, Oregon, and elsewhere heavily armed with military-style weapons. Several of their members engaged in violent confrontations with Black Live Matter demonstrators and members of Antifa. Their violent propensities were clearly demonstrated on January 6th where their members dressed for military battle entered the U.S. Capitol by force, attacking federal police officers with deadly force, and damaging government property in an effort to prevent the peaceful transfer of presidential power. Their actions constituted an attack on democracy which poses a serious threat to national security.<sup>153</sup>

#### V. THE ARGUMENTS AGAINST ENACTING A DOMESTIC MATERIAL-SUPPORT STATUTE

Two arguments have been raised against criminalizing the provision of material support to designated domestic terrorist organizations. First, opponents argue that the provision of material support to domestic terrorists is already prohibited by 18 U.S.C. § 2339A. Therefore, enacting a new domestic terrorism statute is unnecessary. Second, the anti-legislation crowd argues that a domestic material-support statute would violate freedom of speech guaranteed by the First Amendment. Both arguments must be rejected for several reasons. First, § 2339A imposes a heightened mens rea requirement. This higher state of mind requirement makes it difficult to convict secondary actors under that statute. Second, § 2339A is limited in scope and does not cover several of the crimes committed by the January 6th insurrectionists and perpetrators of the plot to kidnap Michigan Governor Whitmer. Next, in *Holder v. Humanitarian Law Project* the Supreme Court explicitly rejected a similar First Amendment claim involving § 2339B, providing material support to a foreign terrorist organization.<sup>154</sup>

#### A. 18 U.S.C. § 2339A

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<sup>153</sup> A similar analysis of the Proud Boys supports designating them as a DTO. The Proud Boys were designated a terrorist group by the Canadian government, placing them in the same category as al Qaeda and ISIS. See Coletta, *supra* note 113; see also *About Listing Process*, *supra* note 117.

<sup>154</sup> 561 U.S. 1 (2010).

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Under § 2339A, it is a federal crime to provide material support or resources “knowing or intending” that such support or resources are to be “used in preparation for, or in carrying out” one or more statutorily enumerated crimes.<sup>155</sup> The enumerated crimes are varied and include such offenses as bombing a place of public use, government facility, public transportation system, or infrastructure facility, § 2332f, killing an officer or employee of the United States while such person is engaged in or on account of the performance of official duties, § 1114, and hostage taking, § 1203. Section 2339A does not distinguish between foreign and domestic terrorist organizations. In fact, the statute does not require that the recipient of the material support be a member of any terrorist group. Instead, the intended beneficiary could be a lone wolf terrorist, or someone engaged in criminal activity unrelated to any political, religious, or racial ideology. Section 2339A does not focus on the status of the recipient (i.e., whether the accused is a member of a designated terrorist organization) but rather on the defendant’s mental state. The statute requires that the defendant act with knowledge or intent that the material support be used in preparation for or to commit a statutorily enumerated crime. The perpetrator’s scienter is essential to proving a violation of § 2339A. The accused is not liable under the statute unless he acts with the requisite mental state.

The heightened mens rea requirement imposes a significant legal obstacle for successful prosecution under the statute. For example, an individual could sell military-style weapons to members of a violent, extremist anti-government militia with knowledge of the militia group’s extremist ideology and violent propensities. However, unless the weapons dealer had knowledge that the members of the militia group were going to use the firearms to engage in criminal conduct prohibited in § 2339A or intended the guns to be used for such purpose, he would not be liable under the statute. Moreover, the statute requires actual, subjective knowledge. A violation of the statute could not be sustained on proof that the gun dealer “should have known” that the weapons were going to be used for a criminal purpose. The statute requires proof of actual knowledge or intent, not mere negligence. Thus, the gun dealer could likely avoid liability by merely claiming that he acted with a benign purpose such as making a profit from the sale of the weapons or lacked knowledge of the militia group’s purpose for acquiring the firearms. In the absence of additional incriminating evidence demonstrating the defendant’s knowledge or intent, the accused would likely escape prosecution under the statute.

Any proposed domestic terrorism statute should include a relaxed mens rea standard, similar to that required for a violation of § 2339B. Section 2339B requires that “a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.”<sup>156</sup> Any proposed domestic terrorism statute should require proof that the accused have knowledge that the organization is a designated “domestic terrorist organization” or has engaged or engages in acts of domestic terrorism as defined by § 2331(5). It would not require proof of the heightened “knowing or intending” standard in § 2339A.

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<sup>155</sup> 18 U.S.C. § 2339A.

<sup>156</sup> *Id.* § 2339B.



Prosecuting secondary actors under § 2339A is problematic for one other reason. The enumerated offenses included in the statute are limited in scope. To date, the most serious charge filed against the participants in the attack against the U.S. Capitol is obstruction of an official proceeding, a violation of 18 U.S.C. § 1512(a)(2)(A). The statute authorizes imprisonment of not more than twenty years.<sup>157</sup> However, the obstruction of justice statute is not a predicate crime enumerated in § 2339A. Therefore, even if the persons that provided material support and resources to the insurrectionists acted with the requisite mens rea, such individuals could not be prosecuted under 18 U.S.C. § 2339A. Another glaring omission from the list of enumerated offenses is seditious conspiracy, 18 U.S.C. § 2384. If people sympathetic to the cause of the Proud Boys or Oath Keepers gave them money or arranged their transportation to Washington, D.C. with knowledge of their plan to violently attack the U.S. Capitol, such individuals could not be prosecuted under 18 U.S.C. § 2339A. Seditious conspiracy is not a predicate offense under § 2339A.

Section 2339A does not prohibit the provision of military-style training to DTOs. A military veteran could provide weapons and explosives training to members of a DTO without violating § 2339A. Section 2339D prohibits the receipt of military-style training from an organization designated as an FTO.<sup>158</sup> This offense is included in the list of enumerated offenses under § 2339A. However, there is no equivalent statutory provision for the provision of military training to a DTO. In this scenario, neither the persons providing the military training nor the members of the DTO receiving the training are guilty of violating any federal statute. Thus, the secondary actors that provided material support or resources to the insurrectionists on January 6 are not going to face prosecution under § 2339A for their role in enabling the violent assault on the U.S. Capitol.

Finally, conspiracy to commit kidnaping, 18 U.S.C. § 1201(c), is not included as a predicate offense in 18 U.S.C. § 2339A. Therefore, any individuals that provided material support or resources to members of the violent militia group that conspired to kidnap Michigan Governor Whitmer could not be prosecuted under § 2339A. This is another glaring omission in the federal material support statute. Ultimately, 18 U.S.C. § 2339A has no meaningful application against the secondary actors that participated in either the January 6, 2021 attack on the U.S. Capitol or the conspiracy to kidnap the Michigan governor, two of the most egregious acts of domestic terrorism since the Oklahoma City bombing in 1995 that killed 168 innocent people, including nineteen children. Under the current legal regime, individuals can provide material support or resources to domestic right-wing extremists with knowledge of their anti-government and racist ideology and violent tendencies with impunity. The need for a federal statute criminalizing material support to DTOs is therefore urgent and compelling.

## B. FIRST AMENDMENT CONCERNS

The critics of a domestic material support statute maintain that it would violate freedom of speech guaranteed by the First Amendment. In *Holder v.*

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<sup>157</sup> *Id.* § 1512(3)(C).

<sup>158</sup> *Id.* § 2339D.

*Humanitarian Law Project*, the Supreme Court rejected a similar argument.<sup>159</sup> In *Humanitarian Law Project*, plaintiffs sought to provide support for the lawful, non-violent activities of the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). These groups had been designated FTOs under 18 U.S.C. § 2339B.<sup>160</sup> Plaintiffs challenged § 2339B's prohibition of four types of material support; "training," "expert advice or assistance," "service," and "personnel."<sup>161</sup> Plaintiffs claimed that § 2339B prohibited them from engaging in certain activity. With respect to the PKK, plaintiffs sought to (1) train members of the PKK on the use of humanitarian and international law to peacefully resolve disputes; (2) engage in political advocacy on behalf of the Kurds living in Turkey; and (3) teach PKK members how to petition various representative bodies such as the United Nations for relief.<sup>162</sup> With respect to the LTTE, plaintiffs intended to (1) train members of the LTTE to present claims for tsunami-related aid to mediators and international bodies; (2) provide legal assistance in negotiating peace agreements between the LTTE and the Sri Lankan government; and (3) participate in political advocacy on behalf of Tamils who live in Sri Lanka.<sup>163</sup>

Plaintiffs maintained that applying the material support statute to prevent them from engaging in these activities violated the Constitution. In particular, they claimed that the statute infringes on their rights to freedom of speech and association.<sup>164</sup> The Court rejected plaintiffs' First Amendment arguments, holding that the material support statute was constitutional as applied to plaintiffs' desired activities.<sup>165</sup>

The Court addressed the particular speech plaintiffs proposed to undertake. First, plaintiffs sought to train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes. The Court held that Congress can, consistent with the First Amendment, prohibit "training." The Court stated: "It is wholly foreseeable that the PKK would use the 'specific skill[s]' that plaintiffs proposed to impart, [§] 2339A(b)(2), as part of a broader strategy to promote terrorism."<sup>166</sup>

Second, plaintiffs proposed to teach PKK members how to petition various international organizations for relief and teach the LTTE how to present claims for tsunami-related aid to international bodies. The Court stated that the government may ban this type of speech because it teaches the FTO how to acquire "relief," which

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<sup>159</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>160</sup> *Id.* at 8. In 1997, the Secretary of State designated thirty groups as foreign terrorist organizations, including the PKK and LTTE. *Id.* at 9. The PKK was founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. *Id.* The LTTE was established in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. *Id.*

<sup>161</sup> *Id.* at 14.

<sup>162</sup> *Id.* at 14–15.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* at 14. Plaintiffs also argued that the material support statute was unconstitutionally vague, in violation of the Fifth Amendment. *Id.*

<sup>165</sup> *Id.* The Court also rejected plaintiffs' argument that the material support statute, when applied to speech, should be interpreted to require proof of specific intent to further a foreign terrorist organization's illegal activities. *Id.* at 16. The Court rejected plaintiffs' interpretation of § 2339B finding it inconsistent with the text of the statute. *Id.*

<sup>166</sup> *Id.* at 36–37.

could include monetary aid.<sup>167</sup> “Money is fungible,” the Court noted, and “Congress logically concluded that money a terrorist group . . . obtains using the techniques plaintiffs propose to teach could be redirected to funding the group’s violent activities.”<sup>168</sup>

Finally, plaintiffs proposed engaging in political advocacy on behalf of the Kurds living in Turkey and participating in political advocacy on behalf of the Tamils residing in Sri Lanka.<sup>169</sup> The Court held that the material support statute does not ban “pure political speech.”<sup>170</sup> Under the statute, according to the Court, “plaintiffs may say anything they wish on any topic[,]” “speak and write freely about the PKK and LTTE,” and “advocate” on their behalf.<sup>171</sup> The Court noted that “[t]he statute does not prohibit independent advocacy or expression of any kind.”<sup>172</sup> And the Court opined that “Congress has not . . . sought to suppress ideas or opinions in the form of ‘pure political speech.’”<sup>173</sup> Rather, the Court said that the statute prohibits “‘material support,’ which most often does not take the form of speech at all.”<sup>174</sup> “And when it does,” the Court clarified, “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”<sup>175</sup>

Applying a strict scrutiny standard of review, the Court found that the “Government’s interest in combating terrorism is an urgent objective of the highest order.”<sup>176</sup> Plaintiffs countered, arguing that the statute was not narrowly tailored to achieve that interest because their support would advance only the legitimate, non-violent activities of the designated terrorist organizations.<sup>177</sup> The Court dismissed this argument, noting that when Congress enacted § 2339B, it made specific findings regarding the serious threat posed by international terrorism. One of the findings, the Court observed, explicitly rejects plaintiffs’ contention that their support would not further the terrorist activities of the two FTOs. Congress found: “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct.”<sup>178</sup> The Court further declared that Congress’s reference to “any contribution” was not limited to monetary support but reflects “a determination that any form of material support furnished ‘to’ a foreign terrorist organization should be barred.”<sup>179</sup> Even material support meant to promote lawful conduct can further acts of terrorism by “free[ing] up other resources within the organization that may be put to violent ends.”<sup>180</sup> The Court observed, “[t]errorist organizations do not maintain *organizational* ‘firewalls’

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<sup>167</sup> *Id.* at 37.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 15.

<sup>170</sup> *Id.* at 25.

<sup>171</sup> *Id.* at 25–26.

<sup>172</sup> *Id.* at 26 (quoting Brief for Defendant at 13).

<sup>173</sup> *Id.* at 26.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 28.

<sup>177</sup> *Id.* at 29.

<sup>178</sup> *Id.* at 47.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 30. However, the Court left open the issue of whether “Congress could extend the same prohibition on material support at issue here to domestic organizations.” *Id.* at 39.

that would prevent or deter ... sharing and commingling of support and benefits.”<sup>181</sup> The Court stated that “money is fungible.”<sup>182</sup> Funds raised for charitable or non-violent purposes could be redirected to purchase arms and explosives. Thus, all contributions to FTOs further their illegal activities.

In response to vagueness concerns, Congress narrowed the statute and defined the terms “training,” “personnel,” and “expert advice or assistance.”<sup>183</sup> Furthermore, in an attempt to address First Amendment concerns, Congress created limited exceptions to the ban on material support, excluding, for example, medicine and religious materials, the Court observed.<sup>184</sup> Congress also avoided any restriction on “independent advocacy.”<sup>185</sup> Only conduct that is directed, coordinated with, or under the control of an FTO is prohibited under the statute. The Court declared: “Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”<sup>186</sup>

Finally, the Court rejected plaintiffs’ freedom of association argument. The statute does not penalize mere association with an FTO or the vigorous promotion of the political goals of the group, the Court stated.<sup>187</sup> Instead, what § 2339B prohibits is the act of giving material support to a designated FTO. The Court held that “in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.”<sup>188</sup>

The Court’s reasoning in *Humanitarian Law Project* applies with equal force to criminalizing material support to domestic terrorist organizations. First, the government’s interest in combating domestic terrorism is also “an urgent objective of the highest order.”<sup>189</sup> According to FBI Director Wray, violent anti-government militia groups pose a serious threat to national security.<sup>190</sup> Furthermore, right-wing militia groups played a central role in planning and leading the January 6th attack on the U.S. Capitol.<sup>191</sup> Thirteen members of the Oath Keepers have been charged with a variety of crimes stemming from the violent siege of the Capitol, most prominently conspiracy to break into the Capitol and interfere with Congress’s certification of the

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 31.

<sup>183</sup> *Id.* at 21. This is important because the proposed domestic material support statute would adopt the same definition of “material support and resources” used in the foreign material support statute, 18 U.S.C. § 2339B.

<sup>184</sup> *Id.* at 36.

<sup>185</sup> *Id.* at 23.

<sup>186</sup> *Id.* at 31–32.

<sup>187</sup> *Id.* at 39.

<sup>188</sup> *Id.* at 40.

<sup>189</sup> *Id.* at 28.

<sup>190</sup> *Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats, Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 3 (2021) (statement of Christopher A. Wray, Dir., Fed. Bureau of Investigation) (“It is important to note that we have recently seen an increase in lethal DVE attacks perpetrated by Anti-Government or Anti-Authority Violent Extremists, specifically Militia Violent Extremists and Anarchist Violent Extremists. Anti-Government or Anti-Authority Violent Extremists were responsible for three of the four lethal DVE attacks in 2020.”).

<sup>191</sup> See Alan Feuer et al., *Oath Keepers Founder Is Said to Be Investigated in Capitol Riot*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/us/politics/stewart-rhodes-oath-keepers-capitol-riot.html>

Electoral College votes.<sup>192</sup> And as of May 3rd, at least twelve members of the Proud Boys are facing federal criminal charges for their role in entering the U.S. Capitol by force and attempting to stop, delay, and hinder the congressional proceedings occurring that day.<sup>193</sup> This violent conduct resulted in killing five individuals and assaulting over 130 U.S. Capitol and D.C. Metropolitan police officers and injuring dozens of others.<sup>194</sup> The insurrectionists further threatened the lives of members of Congress, who had convened in a joint session to certify the Electoral College votes. Members of the pro-Trump mob also intended to kill Vice President Mike Pence, chanting “Hang Mike Pence” as they rampaged through the halls of the U.S. Capitol.<sup>195</sup>

Members of a Michigan-based anti-government militia group plotted to kidnap and kill Governor Gretchen Whitmer. The terrorist plot was thwarted after co-conspirators were arrested attempting to purchase deadly explosives from an undercover FBI agent. The explosives were going to be used to execute the kidnapping plot. Focusing on the January 6th siege of the U.S. Capitol and deadly scheme to kidnap the Michigan governor, the government clearly has a compelling interest in preventing domestic terrorism.

Second, banning material support to a designated DTO would further the government’s compelling interest. In enacting § 2339B, Congress found that foreign organizations that engage in terrorist activity are “so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>196</sup> The same can be said for the provision of material support to domestic terror groups, including financial assistance. Money is fungible and regardless of the intent of the donor, such funds “could be redirected to funding the group’s violent activities.”<sup>197</sup> Other forms of assistance such as military-style training and provision of weapons and explosives could also be used to promote terrorism and should be banned.<sup>198</sup>

Third, a domestic material support statute modeled after 18 U.S.C. § 2339B would not violate freedom of speech guaranteed by the First Amendment. The Supreme Court has consistently held that the First Amendment does not protect speech directed at overthrowing the government by force.<sup>199</sup> “These cases make clear that a line exists between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not.”<sup>200</sup> Furthermore, numerous federal crimes can be committed by speech alone. For example, 18 U.S.C.

<sup>192</sup> See Hymes & McDonald, *supra* note 43.

<sup>193</sup> Adam Goldman & Alan Feuer, *Proud Boys Leaders in Four States Are Charged in Capitol Riot*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/us/politics/proud-boys-charges-capitol-riot.html>.

<sup>194</sup> Rebecca Speare-Cole, *134 Police Officers Assaulted in Capitol Riots, Justice Department Says*, NEWSWEEK (Jan. 25, 2021), <https://www.newsweek.com/134-police-officers-injured-capitol-riots-court-filing-1564166>; see also Healy, *supra* note 25.

<sup>195</sup> Godfrey, *supra* note 30.

<sup>196</sup> *Humanitarian Law Project*, 561 U.S. at 29.

<sup>197</sup> *Id.* at 37.

<sup>198</sup> *Id.* at 36 (“Congress can, consistent with the First Amendment, prohibit this direct training.”).

<sup>199</sup> See *Dennis v. United States*, 341 U.S. 494, 502 (1951).

<sup>200</sup> *United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999). See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (“[T]hreats of violence are outside the First Amendment.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”); *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997) (upholding constitutionality of Freedom of Access to Clinic Entrances Act, prohibiting only use of force, physical obstruction, or threats of force); *Terry v. Reno*, 101 F.3d 1412, 1418–20 (D.C. Cir. 1996); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995).

§ 2 makes it unlawful to “counsel[], command[], induce[,] or procure[]” the commission of an offense against the United States.<sup>201</sup> Section 371 makes it a crime to “conspire . . . to commit any offense against the United States.”<sup>202</sup> Additionally, § 373 makes it a crime to “solicit[], command[], induce[], or otherwise endeavor[] to persuade” another person to commit a crime of violence.<sup>203</sup> All of these offenses are committed through speech. “[I]f the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible.”<sup>204</sup> In *United States v. Rahman*, the Second Circuit rejected the defendants’ First Amendment challenges to prosecution under the seditious conspiracy statute, 18 U.S.C. § 2384.<sup>205</sup> The court stated, “[n]otwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching.”<sup>206</sup>

A domestic material statute would not violate First Amendment freedom of speech because it does not prohibit independent advocacy or expression of any kind. A domestic material support statute should only cover a narrow category of speech “under the direction of, or in coordination with” domestic groups that the speaker knows to be domestic terrorist organizations.<sup>207</sup> Individuals that support and sympathize with the political ideology and racist views of these domestic organizations could speak and write freely about these groups. These individuals could engage in peaceful protests against the government and promote white supremacy and anti-Semitism. This conduct would not be banned by the statute. A proposed statute should not restrict or prohibit independent political advocacy of any kind.

Finally, the domestic material support statute would not violate freedom of association under the First Amendment. The statute should not penalize mere association with a domestic terrorist organization or prohibit vigorously promoting and supporting the political goals of the group.<sup>208</sup> Any burden on freedom of association is justified for the same reasons articulated for prohibiting speech intended to incite violence or promote terrorism.<sup>209</sup> Furthermore, any groups designated as a domestic terrorist organization could seek judicial review of the designation.

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<sup>201</sup> 18 U.S.C. § 2.

<sup>202</sup> *Id.* § 371.

<sup>203</sup> *Id.* § 373(a).

<sup>204</sup> *Rahman*, 189 F.3d at 117 (affirming the conviction of Sheik Omar Abdel Rahman, the so-called “Blind Sheik,” and others for seditious conspiracy, stemming from a terrorist plot to bomb buildings and tunnels in New York City, including the Lincoln Tunnel and United Nations building).

<sup>205</sup> *Id.* at 118.

<sup>206</sup> *Id.* at 117.

<sup>207</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010).

<sup>208</sup> *Id.* at 39.

<sup>209</sup> *Id.* at 37.

## CONCLUSION

Domestic violent, extremist groups motivated and inspired by “a mix of sociopolitical, ideological, and personal grievances against their targets” pose a clear and present danger to national security.<sup>210</sup> At least two right-wing, anti-government militia groups, the Proud Boys and Oath Keepers, assumed a prominent role in the attack on the U.S. Capitol. Members of a Michigan-based militia group allegedly conspired to kidnap the Michigan governor. Both incidents threatened national security. These violent, conspiratorial plots were aided and abetted by other individuals. Currently, federal laws are inadequate to hold the enablers and facilitators of these violent crimes accountable.

To address this serious gap in the law, Congress should enact a statute criminalizing material support to DTOs. The proposed statute should be modeled after 18 U.S.C. § 2339B, which prohibits the provision of material support to a foreign terrorist organization. Whoever knowingly provides material support for terrorism should be criminally prosecuted. The law should not distinguish between whether the group is a foreign or domestic terrorist organization. In either case, the provision of material support promotes terrorism.

In *Holder v. Humanitarian Law Project*, the Supreme Court upheld the constitutionality of § 2339B against a claim that it violated freedom of speech and association guaranteed by the First Amendment.<sup>211</sup> The Court held that the material support statute does not punish independent political advocacy, but only speech under the direction and control of an FTO. The reasoning of the Court has equal application to the proposed domestic material support and would therefore withstand a First Amendment challenge.

Furthermore, to address First Amendment concerns, the proposed statute should impose a more rigorous standard for designating a “domestic terrorist organization” than is currently required for designating a foreign terrorist organization. Not every criminal group that commits acts of violence should be designated a DTO. Only domestic groups that pose a grave threat to national security should be designated as such. Whether a group threatens national security should be based on three factors: (1) the professed ideology of the group; (2) its organizational structure; and (3) documented history of violence.

If the domestic organization’s mission is to overthrow the government, kill and kidnap elected officials, and use unlawful force to oppose government policy, the group poses a danger to national security. Violent hate groups that target individuals for killing based on their ethnicity, nationality, or religion pose a similar threat. Additionally, domestic groups with a chain-of-command structure and ability to plan and execute violent attacks pose a grave security threat. The other important designation factor is the group’s history of violent behavior and whether it engages in domestic terrorism. If a domestic group embraces a violent, extremist ideology, is well organized, and engages in acts of domestic terrorism, the group should be designated a DTO. The provision of material support and resources to such

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<sup>210</sup> *Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats, Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 4 (2021) (statement of Christopher A. Wray, Dir., Fed. Bureau of Investigation).

<sup>211</sup> *Humanitarian Law Project*, 561 U.S. at 7.

organizations should be banned and criminalized. Congress should immediately enact legislation prohibiting material support to domestic terrorists. Such legislation is needed to prevent acts of domestic terrorism and protect national security. Criminalizing material support to domestic terrorist organizations is a national security imperative.