

The Thinnest Place:

A Designation Architecture Without an Offense, and the Reasonableness of Fear

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Abstract

Federal law defines domestic terrorism but creates no offense of domestic terrorism. What the definition supports is a sentencing enhancement and a set of investigative authorities, which means the label attaches without ever being submitted to a jury and therefore without ever being subject to acquittal. Federal law likewise provides no mechanism for designating a domestic organization a terrorist organization, though an executive directive has instructed the Attorney General to propose such designations. This article traces where an architecture built on an unchargeable label operates first, and argues that the answer follows from Fourth Amendment geography: it operates at the border, because that is the point at which a citizen's protection against search is thinnest and the Eleventh Circuit requires no suspicion of any kind. A prosecution arising from an Atlanta airport encounter supplies the worked example. The article then identifies a second problem the same architecture creates. Whether a person was seized, whether an encounter was custodial, and whether consent was voluntary are each measured by what a reasonable person would believe, and each test assumes a background in which fear of federal officers is unreasonable absent particularized threat. Where a government has generated a documented record of lethal force against citizens and has publicly characterized political opposition as terrorism, that assumption fails, and a doctrine that continues to apply it transfers the cost of the government's own posture onto the individual who felt its effect.

Keywords: domestic terrorism designation; unchargeable label; border search exception; objective reasonableness; consent voluntariness; custody analysis; political association; Joint Terrorism Task Force; executive directive; reasonable person standard; state legitimacy baseline; associational surveillance.

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Contents

I	Introduction	3
II	A Label Without an Offense	4
	A Definition, Enhancement, Authority	4
	B Designation Without Designation Authority	4
	C Where the Label Is Chargeable	5
III	The Architecture Meets the Border	6
	A Why the Border Comes First	6
	B The Worked Example.	7
	C What the Sequence Requires	8
IV	The Reasonableness Assumption	8
	A Three Tests, One Hypothetical Person	8
	B The Assumed Background	9
	C A Court That Adjusted the Baseline	9
	D The Record	10
V	The Transfer.	11
VI	Conclusion	12

I. Introduction

A label that cannot be charged cannot be beaten. That is the structural fact this article begins from, and everything else follows from asking where such a label will be used first.

Federal law defines domestic terrorism.¹ It creates no crime by that name. A defendant is charged with arson, with conspiracy, with assault on a federal officer, and the terrorism characterization enters, if at all, at sentencing through an enhancement,² or before charging, through the investigative posture the characterization authorizes. The consequence is that no jury ever passes on the label. There is no verdict form on which a citizen can be found not to be a domestic terrorist.

Federal law also provides no mechanism for designating a domestic organization a terrorist organization. The designation apparatus that exists is directed outward, at foreign entities, and carries a statutory procedure and judicial review.³ No domestic analogue was enacted, and the omission was deliberate across successive Congresses that considered and declined domestic terrorism statutes.

In September 2025 the executive branch proceeded as though the authority existed. An order purported to designate a domestic movement as a domestic terrorist organization, and a national security presidential memorandum issued days later directed the Attorney General to propose further such designations, identified categories of political and religious viewpoint as indicators of domestic terrorism risk, and redirected federal counterterrorism investigative resources accordingly.⁴

1. 18 U.S.C. §2331(5) (defining domestic terrorism as acts dangerous to human life that violate criminal law and appear intended to intimidate a civilian population, influence government policy by intimidation or coercion, or affect government conduct by mass destruction, assassination, or kidnapping, occurring primarily within United States territorial jurisdiction).

2. U.S. SENTENCING GUIDELINES MANUAL §3A1.4 (U.S. SENTENCING COMM’N 2024) (providing an offense level increase and criminal history category adjustment where the offense involved or was intended to promote a federal crime of terrorism).

3. 8 U.S.C. §1189 (foreign terrorist organization designation, procedure, and judicial review in the D.C. Circuit).

4. National Security Presidential Memorandum No. 7, Countering Domestic Terrorism and Organized Political Violence (Sept. 25, 2025) [hereinafter NSPM-7]; see BRENNAN CTR. FOR JUSTICE, TRUMP’S ORDERS TARGETING ANTI-FASCISM AIM TO CRIMINALIZE OPPOSITION (2025), <https://www.brennancenter.org/>

Part II establishes the legal character of the label. Part III argues that an architecture of this kind operates first at the international border, because that is where the Fourth Amendment protection available to a citizen is at its minimum, and uses a pending Northern District of Georgia prosecution as the worked example. Part IV turns to a second and less obvious consequence: the objective reasonableness tests that govern seizure, custody, and consent each rest on an assumption about the background relationship between citizens and federal officers, and that assumption is not self-executing. Part V states the resulting transfer. Part VI concludes.

II. A Label Without an Offense

A. Definition, Enhancement, Authority

The definition in section 2331(5) is not idle. It supplies the predicate for investigative techniques, for the assignment of matters to joint terrorism task forces, for inclusion in watchlisting systems, and for the sentencing enhancement. What it does not supply is an element of any offense. A prosecutor does not prove domestic terrorism to a jury because there is nothing to prove it to a jury about.

The asymmetry this produces is the operative one. A characterization that carries substantial legal consequence, and greater practical consequence, is applied administratively and contested, if at all, collaterally. A citizen described in operational paperwork as a member of an anti-government violent extremist group has no forum in which to obtain a determination that he is not one.

B. Designation Without Designation Authority

The distinction between the foreign and domestic contexts is instructive. Congress built the foreign terrorist organization apparatus with a designation standard, a notice requirement, and

[our-work/research-reports/trumps-orders-targeting-antifascism-aim-criminalize-opposition](#) (last visited Aug. 2, 2026) (concluding that neither instrument is grounded in existing statutory authority).

a route to judicial review.⁵ It attached criminal liability to material support of a designated entity, and the Supreme Court sustained that provision against vagueness and First Amendment challenge on the strength of its limitation to coordinated conduct rather than independent advocacy.⁶

Nothing comparable exists domestically, and the First Amendment reasons are not obscure. Advocacy of force is protected short of incitement to imminent lawless action likely to produce it.⁷ Compelled exposure of membership in an association engaged in lawful advocacy is itself a cognizable restraint.⁸ A domestic designation regime would put the government in the position of labeling an association by reference to the views it holds, which is the configuration those cases foreclose.

C. Where the Label Is Chargeable

States filled the gap federal law left. Georgia's domestic terrorism article supplies both a definition and a chargeable offense.⁹ It was used against more than forty participants in the movement opposing construction of the Atlanta Public Safety Training Center.¹⁰ That is where the label meets a jury, and it is also the jurisdiction in which the encounter examined in Part III took place.

5. 8 U.S.C. §1189(a)–(c).

6. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24–26, 39 (2010).

7. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

8. *Nat'l Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

9. GA. CODE ANN. §§16-11-220 to -224 (2026). The definition at §16-11-220(2) reaches any felony violation, or attempt, that is intended to cause serious bodily harm, to kill, or to disable or destroy critical infrastructure or a state or government facility with major economic loss, and that is further intended to intimidate the civilian population, to coerce state policy, or to affect the conduct of government by destructive devices, assassination, or kidnapping. The offense carries a term of up to thirty-five years.

10. *See* AM. C.L. UNION, HOW OFFICIALS IN GEORGIA ARE SUPPRESSING POLITICAL PROTEST AS “DOMESTIC TERRORISM” (2023), <https://www.aclu.org/news/national-security/how-officials-in-georgia-are-suppressing-political-protest-as-domestic-terrorism> (last visited Aug. 2, 2026); HUMAN RIGHTS WATCH, LETTER CALLING FOR DROPPING OF DOMESTIC TERRORISM CHARGES AGAINST DEFEND THE ATLANTA FOREST ACTIVISTS (Mar. 3, 2023), <https://www.hrw.org/news/2023/03/03/letter-calling-dropping-domestic-terrorism-charges-against-defend-atlanta-forest> (last visited Aug. 2, 2026).

III. The Architecture Meets the Border

A. *Why the Border Comes First*

An investigative architecture premised on association rather than on conduct has an evidentiary problem: it needs to see what a person communicates and with whom, and the ordinary route to that material is a warrant supported by probable cause of a crime. Where the association is not itself a crime, that route is closed.

The border is the one place in the United States where it does not need to be open. A routine search of a traveler's effects at a port of entry requires no warrant, no probable cause, and no individualized suspicion.¹¹ The rule applies to a returning citizen.¹² And in the Eleventh Circuit, a forensic examination of an electronic device at the border requires no suspicion of any kind.¹³ Travelers do not expect this. Survey evidence indicates that an overwhelming majority believe individualized suspicion is required before a device may be searched at a crossing, and that they rate such a search as approaching a strip or body cavity search in intrusiveness.¹⁴

The Fourth Circuit has recognized the danger and drawn a limit. For a nonroutine forensic search of a digital device, the Government must have individualized suspicion of an offense bearing a nexus to the purposes of the exception, which the court enumerated as protecting national security, collecting duties, blocking the entry of unwanted persons, and interdicting contraband.¹⁵ The Government may not, that court held, invoke the exception on behalf of a generalized interest in law enforcement and combatting crime.¹⁶ The Ninth Circuit requires

11. *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

12. *Id.* at 619–20.

13. *United States v. Touset*, 890 F.3d 1227, 1233–34 (11th Cir. 2018) (holding that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border).

14. Kugler, M. B. (2014), *The Perceived Intrusiveness of Searching Electronic Devices at the Border: An Empirical Study*, <https://doi.org/10.2139/ssrn.2402244> (last visited Aug. 2, 2026).

15. *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (following *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)).

16. *Id.* The limitation is confined to nonroutine searches; *Aigbekaen* does not address whether routine border searches require a comparable nexus, and the conviction there was affirmed on good faith reliance on prior precedent.

reasonable suspicion and confines the forensic search to digital contraband.¹⁷ The Eleventh imposes neither limit. An international arrival in Atlanta is therefore the point of maximum exposure in the country for a device belonging to a citizen whose associations interest a domestic investigative body.

B. The Worked Example

On January 24, 2025, a citizen returning from the Dominican Republic was directed into secondary inspection at Hartsfield-Jackson.¹⁸ The encounter was not the product of random selection. An FBI Atlanta Joint Terrorism Task Force officer and an FBI special agent coordinated with Customs and Border Protection before his arrival, and the questioning was conducted by that agency’s Tactical Terrorism Response Team.¹⁹ Officers questioned him, searched his person and all his belongings, refused repeated requests for counsel, and insisted that he provide his passcode.²⁰ The federal paperwork characterized the movement he was associated with as an “Anti-Government, Anti-Authority Violent Extremist Group,” and the same filing states that the government has not put forward evidence of his involvement in criminal activity connected to it.²¹

He was charged with one count arising from the encounter itself, under a statute reaching the destruction of property to prevent its seizure.²² The statute reaches property destroyed to prevent a seizure by a person authorized to make one, which makes the lawfulness of the underlying authority an element rather than a background question,²³ and the officers entered the code themselves.

17. *United States v. Cano*, 934 F.3d 1002, 1016–18 (9th Cir. 2019).

18. Indictment at 1, *United States v. Tunick*, No. 1:25-cr-00499-ELR-CCB (N.D. Ga. filed Nov. 13, 2025) (ECF No. 1). The docket is available at <https://www.courtlistener.com/docket/72009158/united-states-v-tunick/> (last visited Aug. 2, 2026).

19. Motion to Suppress Evidence and Statements at 2–4, *United States v. Tunick*, No. 1:25-cr-00499-ELR-CCB (N.D. Ga. filed Mar. 17, 2026) (ECF No. 21) [hereinafter *Suppression Motion*].

20. *Id.* at 4.

21. *Id.* at 3–4.

22. 18 U.S.C. §2232(a); Indictment, *supra* note 18, at 1.

23. *Id.* (predicating liability on interference with a search or seizure by a person authorized to make it).

The structure worth attending to is not the merits of that count. It is the sequence. An association was characterized as extremism administratively. That characterization justified an advance alert. The alert routed the citizen to the one physical location where his device could be demanded without any predicate. The only offense charged arose from the demand.

C. What the Sequence Requires

Every step in that sequence is individually lawful under existing doctrine in the Eleventh Circuit, and that is the finding rather than an objection to it. No step required a magistrate. No step required a showing. The architecture does not need to defeat the Fourth Amendment; it needs only to be applied at the place where the Fourth Amendment has already been read to supply nothing.

IV. The Reasonableness Assumption

A. Three Tests, One Hypothetical Person

The doctrines that might otherwise constrain such an encounter are built on a single construct. Whether a person has been seized turns on whether a reasonable person would have believed he was free to leave.²⁴ Whether an encounter is consensual turns on whether a reasonable person would feel free to decline the officers' requests or terminate the encounter.²⁵ Whether an interrogation is custodial for *Miranda* purposes turns on whether a reasonable person in the suspect's position would understand his freedom of action to be curtailed to a degree associated with formal arrest.²⁶ And whether consent to a search was voluntary is a question of the totality of the circumstances that expressly takes account of the characteristics of the person consenting as well as the conditions under which consent was given.²⁷

24. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

25. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

26. *Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984).

27. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 229 (1973).

Each of these asks what a person would reasonably believe. None asks what the officer intended. That is ordinarily a protection for the citizen, because it does not require proof of a subjective purpose. It becomes something else when the content of reasonable belief is supplied by a background the courts treat as fixed.

B. The Assumed Background

The reasonable person of the Fourth Amendment is not afraid. He understands that officers may ask and that he may decline; he understands that the encounter carries administrative consequence rather than physical risk; and he calibrates his sense of freedom to leave against a baseline in which a citizen who declines a request is not thereby endangered. That baseline is not stated in the cases because it did not need to be. It was the water.

The assumption is empirical, and empirical assumptions can fail. Where they fail, the doctrine does not adjust on its own. It continues to ask what a person would reasonably believe while holding constant a background belief that the record no longer supports, and it resolves the resulting mismatch against the person who was there.

C. A Court That Adjusted the Baseline

There is precedent for adjustment. In *Commonwealth v. Warren*, the Supreme Judicial Court of Massachusetts held that where a suspect is under no obligation to respond to an officer's inquiry, flight to avoid that contact should be given little if any weight as a factor probative of reasonable suspicion, and that a documented finding of disproportionate and repeated targeting of Black men in Boston supplies a reason for flight unrelated to consciousness of guilt.²⁸ The evidentiary source was specific: a Boston Police Department report on field interrogation and observation encounters, which the court instructed judges to consider in appropriate cases when weighing flight.²⁹ The court did not abandon the objective standard. It corrected the content of

28. *Commonwealth v. Warren*, 475 Mass. 530, 539–40, 58 N.E.3d 333, 342 (2016).

29. *Id.* at 540 (directing that a judge should, in appropriate cases, consider the report's findings in weighing flight in the reasonable suspicion calculus).

the hypothetical person's knowledge to match the documented experience of the people to whom the standard would be applied.

Three features of *Warren* govern its usefulness here. It rested on a commissioned study with findings rather than on general awareness. It is state authority. And it addressed flight rather than consent. The method transfers; the holding does not.

The behavioral premise is not novel to that court. A substantial empirical literature documents that awareness of state monitoring produces measurable self restraint in lawful conduct, and distinguishes a speech paradigm, a privacy and autonomy paradigm, and a collectivist paradigm of the effect.³⁰ That literature also records the persistent skepticism of courts and scholars about whether such effects can be proved, which is the obstacle any *Warren* style showing must clear.³¹

D. The Record

The evidentiary predicate a court would require is of the kind that can be assembled. In January 2026, during a federal immigration enforcement surge in Minneapolis involving a large deployment of federal agents, agents shot three people in a single month, two of them fatally, and both of those killed were United States citizens.

On January 7, an officer fired through the window of a vehicle, killing a thirty-seven year old resident. The Department of Homeland Security stated that the driver had attempted to run over officers; the mayor of Minneapolis stated publicly that he had reviewed video of the incident and that the account was false.³² On January 14, agents shot and wounded a man in north Minneapolis; the Federal Bureau of Investigation subsequently attributed the pursuit to

30. Penney, J. (2019), *Chilling Effects and Transatlantic Privacy*, 25 EUR. L.J. 122, <https://doi.org/10.1111/eulj.12315> (last visited Aug. 2, 2026) (setting out the three paradigms and noting the long standing difficulty of documenting the effect empirically).

31. *Id.*

32. *See ICE Officer Fatally Shoots Driver Through Car Window in Minneapolis*, MINN. REFORMER (Jan. 7, 2026), <https://www.yahoo.com/news/articles/ice-officer-fatally-shoots-driver-183010640.html> (last visited Aug. 2, 2026).

mistaken identity.³³ On January 24, Border Patrol officers shot and killed a thirty-seven year old intensive care nurse employed by the Department of Veterans Affairs, who was lawfully carrying a firearm. The agency stated that he violently resisted and that an officer fired in fear for his life; subsequent reporting indicated that the Department was examining whether an unintentional discharge of the nurse's own weapon, then in an agent's hand, caused agents to believe they were under fire.³⁴ A senior White House official publicly characterized the decedent as a domestic terrorist.³⁵

That last fact returns the analysis to Part II. The characterization was applied to a person who was dead, who had not been charged, and who therefore could not contest it. It is the clearest available illustration of a label that operates without a forum.

V. The Transfer

Put the two halves together and the mechanism is visible.

A designation architecture generates a characterization that carries consequence and admits no contest. Applied at the border, it reaches a citizen's device without a magistrate, because the doctrine at that location supplies no requirement to be satisfied. Applied in the street, it accompanies a pattern of force that the reasonable person of Fourth Amendment law is presumed not to know about.

The citizen who responds to that combination with fear, and who therefore complies, or hesitates, or declines to assert a right he in fact possesses, is met by a doctrine holding that a

33. See Jeff Day, *FBI Reveals How Mistaken Identity by ICE Led to Chase, Shooting of Venezuelan Immigrant in North Minneapolis*, MINN. STAR TRIB. (Jan. 22, 2026), <https://www.startribune.com/fbi-reveals-how-mistaken-identity-by-ice-led-to-chase-shooting-of-venezuelan-immigrant-in-north-minneapolis/601567978> (last visited Aug. 2, 2026).

34. See *Man Shot Dead by Federal Immigration Officers in Minneapolis*, NPR (Jan. 24, 2026), <https://www.npr.org/2026/01/24/nx-s1-5687276/man-shot-dead-minneapolis> (last visited Aug. 2, 2026); Louis Casiano, *DHS Probes Whether Agents Killed VA Nurse Following Accidental Discharge During Minneapolis ICE Raid*, FOX NEWS (Jan. 26, 2026), <https://www.foxnews.com/us/dhs-probes-whether-agents-killed-va-nurse-accidental-discharge-minneapolis-ice-raid> (last visited Aug. 2, 2026).

35. See CNN, *January 24, 2026 Fatal Shooting of Minneapolis Man* (Jan. 24, 2026), <https://www.cnn.com/us/live-news/ice-minneapolis-shooting-01-24-26> (last visited Aug. 2, 2026).

reasonable person would have felt free to leave. The government obtains the compliance that the posture produces and bears none of the doctrinal cost, because the fear it generated is diffuse by construction and diffuse fear is the one thing the objective tests decline to count.

That is a transfer, and it is not a metaphor. It is a rule of decision assigning to the individual the consequences of a background condition the individual did not create.

VI. Conclusion

The narrow claim is doctrinal and modest. The objective reasonableness tests contain an empirical premise about the relationship between citizens and armed federal officers. Courts should treat that premise as a finding rather than as furniture, and *Warren* supplies a method for doing so on a proper evidentiary record.

The broader claim is about sequence. A label that no jury will ever review, generated by an instrument Congress did not pass, applied to associations rather than to acts, is not a rhetorical excess. It is an operating capability, and capabilities are deployed where resistance is lowest. In the American constitutional order, the place where resistance is lowest is the international arrival hall, where a citizen has landed and has not yet entered, and where the courts in at least one circuit have concluded that nothing at all need be shown before the contents of his life are opened and read.

That is the thinnest place. It is where this will be tested first, and it is where it is being tested now.

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