

— 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

The Thinnest Place

A designation architecture without an offense, and the reasonableness of fear

A label that cannot be charged cannot be beaten. Everything else follows from asking where such a label will be used first.

THE STRUCTURAL FACT

There is no verdict form on which a citizen can be found not to be a domestic terrorist.

Federal law defines domestic terrorism. 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, or before charging, through the investigative posture the characterization authorizes.

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.

DEFINITION, ENHANCEMENT, AUTHORITY

What the definition supplies, and the one thing it does not.

WHAT IT SUPPLIES

- The predicate for investigative techniques.
- The assignment of matters to joint terrorism task forces.
- Inclusion in watchlisting systems.
- The sentencing enhancement, which raises the offense level and adjusts the criminal history category.

WHAT IT DOES NOT SUPPLY

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. The label attaches without ever being submitted to a jury, and therefore without ever being subject to acquittal.

FOREIGN, DOMESTIC, AND THE GAP BETWEEN

Federal law provides no mechanism for designating a domestic organization a terrorist organization.

The foreign apparatus

Built with a designation standard, a notice requirement, and a route to judicial review in the D.C. Circuit. Criminal liability attaches 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.

Why no domestic twin

Advocacy of force is protected short of incitement to imminent lawless action likely to produce it. Compelled exposure of membership in an association engaged in lawful advocacy is itself a cognizable restraint. 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.

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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 risk, and redirected federal counterterrorism investigative resources accordingly.

No domestic analogue was enacted, and the omission was deliberate across successive Congresses that considered and declined domestic terrorism statutes.

SOURCES 8 U.S.C. § 1189(a)-(c); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24-26, 39 (2010); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958); National Security Presidential Memorandum No. 7, Countering Domestic Terrorism and Organized Political Violence (Sept. 25, 2025); Brennan Center for Justice (2025).

WHERE THE LABEL IS CHARGEABLE

40+

participants charged under Georgia's domestic terrorism article in the movement opposing construction of the Atlanta Public Safety Training Center.

35

years, the maximum term the state offense carries.

States filled the gap federal law left.

Georgia's article supplies both a definition and a chargeable offense. The definition reaches any felony violation, or attempt, intended to cause serious bodily harm, to kill, or to disable or destroy critical infrastructure or a government facility with major economic loss, and further intended to intimidate the civilian population, to coerce state policy, or to affect the conduct of government by destructive devices, assassination, or kidnapping.

That is where the label meets a jury. It is also the jurisdiction in which the encounter examined next took place.



The Architecture Meets the Border

Capabilities are deployed where resistance is lowest

The architecture does not need to defeat the Fourth Amendment. It needs only to be applied where the Fourth Amendment has already been read to supply nothing.

WHY THE BORDER COMES FIRST

The ordinary route to a person's communications is a warrant. Where the association is not itself a crime, that route is closed.

THE EVIDENTIARY PROBLEM

An architecture premised on association rather than on conduct needs to see what a person communicates and with whom. Probable cause of a crime is unavailable where the association is the whole of the interest.

THE ONE PLACE IT IS NOT NEEDED

A routine search of a traveler's effects at a port of entry requires no warrant, no probable cause, and no individualized suspicion. The rule applies to a returning citizen.

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.

WHAT A FORENSIC DEVICE SEARCH REQUIRES

Three circuits, three answers, and one arrival hall where the answer is nothing.

CIRCUIT	WHAT MUST BE SHOWN	THE REASONING
Fourth	Individualized suspicion of an offense bearing a nexus to the purposes of the exception, for a nonroutine forensic search.	Those purposes are protecting national security, collecting duties, blocking the entry of unwanted persons, and interdicting contraband. The Government may not invoke the exception on behalf of a generalized interest in law enforcement and combatting crime.
Ninth	Reasonable suspicion, with the forensic search confined to digital contraband.	A limit on both the predicate and the scope.
Eleventh	Nothing. No suspicion of any kind.	The Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border.

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.

SOURCES *United States v. Touse*, 890 F.3d 1227, 1233–34 (11th Cir. 2018); *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (following *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)); *United States v. Cano*, 934 F.3d 1002, 1016–18 (9th Cir. 2019).

THE WORKED EXAMPLE · ATLANTA, JANUARY 24, 2025

The encounter was not the product of random selection.

BEFORE ARRIVAL

A Joint Terrorism Task Force officer and a special agent coordinated with Customs and Border Protection.

**AT THE HALL**

Directed into secondary inspection. Questioning conducted by the agency's Tactical Terrorism Response Team.

**THE DEMAND**

Person and all belongings searched, repeated requests for counsel refused, and insistence that he provide his passcode.

**THE CHARGE**

One count, under a statute reaching the destruction of property to prevent its seizure by a person authorized to make one.

The federal paperwork characterized the movement he was associated with as an anti-government, anti-authority violent extremist group. The same filing states that the government has not put forward evidence of his involvement in criminal activity connected to it.

Because the statute reaches property destroyed to prevent a seizure by a person authorized to make one, the lawfulness of the underlying authority is an element rather than a background question. The officers entered the code themselves.

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.

WHAT THE SEQUENCE REQUIRES

Every step is individually lawful, 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

Three tests, one hypothetical person

The baseline is not stated in the cases because it did not need to be. It was the water.

FOUR DOCTRINES, ONE CONSTRUCT

Each asks what a person would reasonably believe. None asks what the officer intended.

Seizure

Whether a reasonable person would have believed he was free to leave.

Consensual encounter

Whether a reasonable person would feel free to decline the officers' requests or terminate the encounter.

Custody

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.

Voluntary consent

A totality of the circumstances question that expressly takes account of the characteristics of the person consenting as well as the conditions under which consent was given.

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.

SOURCES *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.); *Florida v. Bostick*, 501 U.S. 429, 436 (1991); *Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 229 (1973).

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.

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.

A COURT THAT ADJUSTED THE BASELINE

It did not abandon the objective standard. It corrected the content of the hypothetical person's knowledge.

WHAT THE COURT HELD

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, because a documented finding of disproportionate and repeated targeting of Black men in Boston supplies a reason for flight unrelated to consciousness of guilt.

The evidentiary source was specific: a police department report on field interrogation and observation encounters, which the court instructed judges to consider in appropriate cases when weighing flight.

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. That literature also records the persistent skepticism of courts and scholars about whether such effects can be proved, which is the obstacle any showing of this kind must clear.

THREE FEATURES THAT GOVERN ITS USE

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 RECORD · MINNEAPOLIS, JANUARY 2026

During a federal enforcement surge involving a large deployment of agents, agents shot three people in a single month. Two died. Both of those killed were United States citizens.

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- January 7** An officer shot and killed a thirty-seven year old resident during a vehicle encounter. 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.
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- January 14** Agents shot and wounded a man in north Minneapolis. The Federal Bureau of Investigation subsequently attributed the pursuit to mistaken identity.
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- 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 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.
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That last fact returns the analysis to the label. 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.

SOURCES ICE Officer Fatally Shoots Driver Through Car Window in Minneapolis, Minn. Reformer (Jan. 7, 2026); 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); Man Shot Dead by Federal Immigration Officers in Minneapolis, NPR (Jan. 24, 2026); Louis Casiano, DHS Probes Whether Agents Killed VA Nurse Following Accidental Discharge During Minneapolis ICE Raid, Fox News (Jan. 26, 2026).



The Transfer

A rule of decision assigning to the individual the consequences of a background he did not create

Diffuse fear is the one thing the objective tests decline to count.

PUT THE TWO HALVES TOGETHER

The government obtains the compliance that the posture produces and bears none of the doctrinal cost.

The characterization

A designation architecture generates a characterization that carries consequence and admits no contest.

At the border

It reaches a citizen's device without a magistrate, because the doctrine at that location supplies no requirement to be satisfied.

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 reasonable person would have felt free to leave. The fear the government 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.

TWO CLAIMS, NARROW AND BROAD

Courts should treat the premise as a finding rather than as furniture.

The narrow claim is doctrinal and modest. The objective reasonableness tests contain an empirical premise about the relationship between citizens and armed federal officers, and *Warren* supplies a method for testing it 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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