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## Discretion Without Oversight: The Federal Government's Powers to Investigate and Prosecute Domestic Terrorism

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# DISCRETION WITHOUT OVERSIGHT: THE FEDERAL GOVERNMENT'S POWERS TO INVESTIGATE AND PROSECUTE DOMESTIC TERRORISM

*Rachael Hanna & Eric Halliday\**

*Following the Jan. 6, 2021, attack on the U.S. Capitol, elected officials and terrorism experts renewed calls for Congress to pass a domestic terrorism statute to empower the federal government to pursue white supremacists and other domestic terrorists. But, the debate over whether the federal government needs additional powers to investigate domestic terrorism has been hampered by the absence of a full account of the federal government's existing authorities in this area.*

*To that end, this Article has two purposes. First, it provides a comprehensive summary of the federal government's powers over the chronological lifespan of a domestic terrorism case, as well as an account of how the government has used these powers in the past. This summary demonstrates that the executive branch has significant discretion to define and pursue domestic terrorists with limited oversight from the judiciary or Congress. Second, this Article urges a reconsideration of the debate surrounding a domestic terrorism statute. Rather than addressing whether the government's existing powers are sufficient, this Article contends that these authorities give the government too much latitude to pursue domestic terrorists. Given the federal government's history of surveilling, harassing, and prosecuting dissident groups, the current political moment is ripe for civil liberties infringements, as diffuse protest movements across the political spectrum risk being labeled and prosecuted as domestic terrorists. The federal government's discretionary use of its authorities against ill-defined political groups creates the potential*

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*for it to classify political speech and acts of protest as domestic terrorism.*

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## INTRODUCTION

In the days following the January 6, 2021 attack on the U.S. Capitol, elected officials and many outside commentators denounced the members of the Capitol mob as domestic terrorists.<sup>1</sup> Going even further, an array of actors renewed previous calls for a domestic terrorism statute that would empower the federal government to pursue white supremacists and other domestic violent extremists.<sup>2</sup> The public debate regarding domestic terrorism largely revolves around whether the federal government needs additional powers to pursue actors such as the Capitol attackers and prevent similar violence in the future. This debate cannot be viewed in isolation. Rather, it builds on years of similar public discussions over the adequacy of the federal government's existing powers to pursue (i.e., investigate and prosecute) domestic

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1. See Melissa Quinn, *Senate Democrats Unveil Resolution Denouncing Capitol Assault, Calling for Review of Domestic Terror Threat*, CBS NEWS (Feb. 2, 2021, 12:32 PM), <https://www.cbsnews.com/news/capitol-riot-resolution-senate-democrats-domestic-terrorist-threat/> [https://perma.cc/X27T-F7S4]; see also Adam Edelman, *Biden Slams Capitol Rioters as 'Domestic Terrorists': 'Don't Dare Call Them Protestors'*, NBC NEWS (Jan. 7, 2021, 1:37 PM), <https://www.nbcnews.com/politics/white-house/biden-slams-capitol-rioters-domestic-terrorists-don-t-dare-call-n1253335> [https://perma.cc/6QK7-YNDY] (quoting President-elect Biden condemning Capitol rioters as "domestic terrorists"); Jennifer Williams, *Was the US Capitol Attack "Domestic Terrorism"?*, VOX (Jan. 7, 2021, 5:05 PM), <https://www.vox.com/policy-and-politics/22219233/us-capitol-attack-domestic-terrorism-definition> [https://perma.cc/5CDT-ZDYB] (quoting Senator Ted Cruz (R-TX) calling the attack "a despicable act of terrorism").

2. See, e.g., Richard B. Zabel, Opinion, *Domestic Terrorism Is a National Problem. It Should Also Be a Federal Crime*, WASH. POST (Feb. 2, 2021, 9:16 AM), <https://www.washingtonpost.com/opinions/2021/02/02/domestic-terrorism-federal-crime/> [https://perma.cc/US8B-THZV]. The most recent round of calls for a new domestic terrorism statute echo those made in recent years, often after high-profile mass shootings. See Stefanie Dazio & Eric Tucker, *Experts Push for Domestic Terrorism Law After Attacks*, AP NEWS (Aug. 8, 2019), <https://apnews.com/article/1ec915794dba475bad0fc2a6f1df889a> [https://perma.cc/2ZKA-ZEZ2]; see also Brian Pascus, *U.S. Laws Fall Short in Confronting Domestic Terrorism, Former DOJ Official Says*, CBS NEWS (Aug. 6, 2019, 1:23 PM), <https://www.cbsnews.com/news/domestic-terrorism-definition-department-of-justice-official-el-paso-mass-shooting-white-supremacy/> [https://perma.cc/BC88-UZVC] (discussing calls by current and former government officials to create a federal crime of domestic terrorism in the wake of the El Paso, Texas mass shooting).

terrorism<sup>3</sup>—however that term is defined.<sup>4</sup> But that conversation has been hampered by the absence of comprehensive accounts of the federal government’s powers in this area; it is difficult to assess the adequacy of existing law enforcement capabilities without first understanding what the government can do when pursuing domestic terrorism and how it has historically used those powers.

To that end, this Article has two purposes. First, it provides a comprehensive summary of the powers available to the federal government when investigating and prosecuting domestic terrorism, as well as an account of how the government has used these powers in the past. It does so by documenting the existing authorities available to the federal government throughout the chronological lifespan of a domestic terrorism case. These authorities come from various sources and how they interact with each other is not always straightforward. To provide a clearer picture, this Article compiles and synthesizes government manuals and policy directives, federal statutes, sentencing guidelines, and relevant court cases. These primary sources explain what the government can do when pursuing domestic terrorists yet are silent on how it has done so in the past. To provide historical context that illuminates what these different authorities look like in practice, this Article also relies on newspaper accounts, government reports, and secondary literature. Together, these disparate sources demonstrate the full scope of the federal government’s abilities when pursuing domestic terrorism.

Second, this Article urges a reconsideration of the debate surrounding a domestic terrorism statute. Rather than asking whether the government’s existing powers are sufficient, this Article contends that the government has too much discretion when pursuing domestic terrorists. Because that discretion stems from authorities created by congressional statutes, executive branch policy, and judicially-created

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3. See Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019, 8:00 AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism> [<https://perma.cc/F8B5-UCYD>]; see also Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously> [<https://perma.cc/9EXX-UMUD>] (arguing that Congress’s current tools are sufficient to allow the federal government to respond to acts of domestic terrorism and to address far-right violence); Greg Myre, *What Is, and Isn't, Considered Domestic Terrorism*, NPR (Oct. 2, 2017, 4:51 PM), <https://www.npr.org/2017/10/02/555170250/what-is-and-isnt-considered-domestic-terrorism> [<https://perma.cc/9S6R-8C7S>].

4. As discussed in Section I, *infra*, neither government officials nor public experts can agree on a uniform definition of domestic terrorism.

law, it is unlikely that Congress and the public realize the full scope of the government's power vis-à-vis domestic groups and individuals. Viewed in light of the federal government's history of surveilling, harassing, and prosecuting dissident groups, the current political moment is ripe for civil liberties infringements, as diffuse protest movements on the right and left sides of the political spectrum are at risk of being pursued for domestic terrorism. Ultimately, this Article argues that the government discretionarily wielding these authorities against ill-defined political groups creates the potential for the government to classify political speech and acts of protest as domestic terrorism.

The existing literature on the government's abilities to prosecute domestic terrorism is fragmented into explorations of specific types of government authority. Many pieces discuss the government's statutory options when bringing criminal charges against domestic terrorists.<sup>5</sup> Other authors have focused on specific investigatory powers, like the use of criminal informants<sup>6</sup> or the public safety exception to *Miranda* rights,<sup>7</sup> that have implications for domestic terrorism cases, though often with international terrorism as the primary lens.<sup>8</sup> Finally, examinations of the government's unequal treatment of accused international and domestic terrorists have included summaries of the government's counterterrorism authorities, but not with a focus on domestic terrorism.<sup>9</sup> This Article contributes to the literature by providing a comprehensive account of the government's major authorities at all stages of a domestic terrorism prosecution case, proceeding in

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5. See, e.g., Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, 1064 (2020); Robert Chesney, *Should We Create a Federal Crime of 'Domestic Terrorism'?*, LAWFARE (Aug. 8, 2019, 11:31 AM), <https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism> [<https://perma.cc/6XMQ-WRDP>]; MARY MCCORD, GEO. WASH. UNIV. PROGRAM ON EXTREMISM, FILLING THE GAP IN OUR TERRORISM STATUTES 3 (2019).

6. See Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, 19 NEW CRIM. L. REV. 236, 241 (2016); see also Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 173 (2013) (discussing the public debate around entrapment and the FBI's use of informants in domestic terrorism investigations); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 688 (2010).

7. See Brian Gallini, *The Languishing Public Safety Doctrine*, 68 RUTGERS U. L. REV. 957, 963 (2016); see also Joanna Wright, Note, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296, 1296 (2011) (concluding that the public safety exception is a "fact-sensitive, capacious device equipped to properly handle the unique nature of terrorist interrogations, due largely to its malleability in the hands of the courts").

8. See Elizabeth Nielsen, *The Quarles Public Safety Exception in Terrorism Cases: Reviving the Marshall Dissent*, AM. U. CRIM. L. BRIEF, Spring 2012, at 19, 20.

9. See Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1343 (2019).

chronological order from investigation through charging and sentencing.<sup>10</sup> No one piece of scholarship provides a holistic perspective on the government's domestic terrorism powers.

This Article proceeds in five parts. Section I explains how federal law defines domestic terrorism and how that affects the federal government's ability to pursue domestic terrorists. Although a federal statute defines domestic terrorism, that statute does not create any criminal liability, and government agencies have introduced their own, divergent definitions. Given that confusion, this Article uses its own definition. This section also outlines critiques of the existing domestic terrorism legal framework, which largely focus on the lack of criminal penalties attached to the statutory definition. Section II examines the government's major authorities to investigate potential domestic terrorism suspects and defendants: warrantless surveillance, criminal informants and undercover agents, and the public safety exception to *Miranda* rights.

Section III catalogs the statutes that the Department of Justice (DOJ) can use to prosecute domestic terrorism defendants. Some statutes prohibit very specific conduct, like destroying federal government property or using weapons of mass destruction, while others broadly prohibit material support of terrorist activity. Causing some confusion, certain statutes designate specific offenses as federal crimes of terrorism, while other non-terrorism offenses are still regularly used to charge suspected domestic terrorists. Section IV summarizes the government's ability to seek a sentencing enhancement against defendants whom it argues have committed acts of domestic terrorism, even if their conduct did not violate a specific federal crime of terrorism. Section V argues that the discretion imbued in all of these investigative and prosecutorial powers creates significant potential for civil liberties violations or undesirable policy outcomes. Such outcomes are especially likely if the government wields its discretionary powers against actors engaged in political activity adjacent, or even nominally linked, to potential criminal conduct.

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10. To do so, we reviewed the existing literature, *supra* notes 5–9, as well as relevant policy documents, caselaw, sentencing guidelines, and over sixty different federal statutes. We also conducted interviews with current and former government officials, terrorism experts, and scholars in adjacent fields.

## I. THE LEGAL LANDSCAPE OF DOMESTIC TERRORISM

Legally defining terrorism, international or domestic, has long been problematic.<sup>11</sup> It is difficult to capture the motivations, be they political, ideological, religious, or otherwise, that inspire terrorists and the breadth of criminal conduct in which terrorists engage to achieve their aims. There is also a frequent mismatch between how the labels of “terrorism” or “terrorist” are used in political discourse and the legal definitions of terrorist activity.<sup>12</sup> Indeed, the federal government has struggled both in its attempts to define terrorism and in its application of those definitions to criminal conduct. This section explains the following: (A) how the government defines domestic terrorism and the challenges associated with that definition; (B) how the authors define domestic terrorism for the purposes of this Article; and (C) critiques of the current legal framework, including the statutory definition, as well as the most common proposals for reform.

### *A. The Federal Government’s Various Definitions of Domestic Terrorism*

Existing federal law creates significant confusion over the meaning of domestic terrorism. Domestic terrorism is defined at 18 U.S.C. § 2331(5) as actions that:

- A) involve acts dangerous to human life that are a violation of the 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 kidnapping; and

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11. See, e.g., Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494, 495 (2013); Alan Greene, *Defining Terrorism: One Size Fits All?*, 66 INT’L & COMPAR. L.Q. 411, 413 (2017); Sami Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, 29 HASTINGS INT’L & COMP. L. REV. 215, 217 (2006).

12. See, e.g., Daniel L. Byman, *Who Is a Terrorist, Actually?*, BROOKINGS (Sept. 22, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/09/22/who-is-a-terrorist-actually/> [<https://perma.cc/XQ6W-64SU>].

C) occur primarily within the territorial jurisdiction of the United States[.]<sup>13</sup>

However, this statute does not end the debates over both the definition of domestic terrorism and whether another statute is needed to criminalize it.

First, § 2331(5) is a statutory oddity that generates confusion over what criminal acts are domestic terrorism. The provision is solely a definition; there are no criminal penalties attached to it.<sup>14</sup> The definition's only functional impact is that it denotes criminal conduct that is eligible for a terrorism sentencing enhancement.<sup>15</sup> Because § 2331(5) carries no criminal penalties, acts that meet its definition must be prosecuted under other criminal statutes.<sup>16</sup> This means that there is no single federal crime of domestic terrorism. As a starting point, another federal criminal statute—18 U.S.C. § 2332b(g)(5)(B)—classifies certain criminal acts as “federal crimes of terrorism,” most of which apply to acts of both international and domestic terrorism.<sup>17</sup>

But even § 2332b(g)(5)(B) does not exhaustively define what criminal conduct constitutes domestic terrorism. Some acts that satisfy § 2331(5)—illegally carrying a firearm across state lines with the intent to commit a racially-motivated shooting, for example—cannot be charged as one of the specific federal crimes of terrorism listed at

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13. 18 U.S.C. § 2331(5) (2018). In contrast, international terrorism is defined as covering essentially the same conduct with the requirement that the specific acts must “transcend national boundaries in terms of the means by which they are accomplished.” *Id.* § 2331(1).

14. See CHARLES DOYLE, CONG. RSCH. SERV., LSB10340, DOMESTIC TERRORISM: SOME CONSIDERATIONS 1 (2019), <https://fas.org/sgp/crs/terror/LSB10340.pdf> [<https://perma.cc/A2KW-379D>].

15. See U.S. SENT’G COMM’N GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2007).

16. See 18 U.S.C. § 2331(5). Of note, § 2331(5) makes explicit that domestic terrorism includes violations of state criminal laws, and indeed, many states have laws that specifically criminalize acts of domestic terrorism. See Margot Williams & Trevor Aaronson, *How Individual States Have Criminalized Terrorism*, THE INTERCEPT (Mar. 23, 2019, 5:30 AM), <https://theintercept.com/2019/03/23/state-domestic-terrorism-laws/> [<https://perma.cc/JYT2-TEYA>]. However, this Article examines the powers of the federal government, and therefore will focus on the relevant federal criminal laws.

17. 18 U.S.C. § 2332b(g)(5)(B); see MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., WRONG PRIORITIES ON FIGHTING TERRORISM 5 (2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Wrong\\_Priorities\\_Terrorism.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf) [<https://perma.cc/5PSC-WQWA>]; see also NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE 47–49 (Mar. 2013) (providing examples of terrorism that may include intimidating or coercive conduct intended to influence civilians or governmental policies). Out of the total 57 offenses listed as federal crimes of terrorism, 51 can be brought in both international and domestic terrorism cases (the remaining six are applicable only to international terrorism). Importantly, not all violations of criminal laws that specifically qualify as “federal crimes of terrorism,” will amount to domestic terrorism under § 2331(5); only those violations that were politically motivated and intended to intimidate or coerce civilians or the government will meet that threshold. See 18 U.S.C. § 2331(5).

§ 2332b(g)(5)(B). Rather, such acts are chargeable only as ordinary criminal conduct. Consequently, these two statutes do not overlap perfectly in the conduct they classify as domestic terrorism. To dispel the confusion created by this framework,<sup>18</sup> this Article outlines the range of criminal conduct that qualifies as domestic terrorism under § 2331(5) and § 2332b(g)(5)(B). Part III analyzes the charges listed at § 2332b(g)(5)(B) and other non-federal crimes of terrorism offenses most frequently brought in domestic terrorism cases. Part IV discusses in greater detail the federal government's use of terrorism sentencing enhancements for criminal conduct that satisfies § 2331(5).

Second, the executive branch, including DOJ and the Federal Bureau of Investigation (FBI), has not consistently defined domestic terrorism in terms of § 2331(5). Importantly, it distinguishes international and domestic terrorism differently than does § 2331(5). The executive branch considers terrorist acts inspired by foreign groups or ideologies to be international terrorism, even if committed within the United States, while acts of domestic terrorism are inspired by domestic groups or ideologies.<sup>19</sup> Thus, the Fort Hood shooting was an act of international terrorism because the shooter was motivated by Islamic extremism,<sup>20</sup> while attacks by white supremacists and neo-Nazis are classified as domestic terrorism.<sup>21</sup> This distinction between domestic and international terrorism is more than semantic—it affects the investigative and prosecutorial authorities that the federal government may use, as certain tools and statutes can be deployed in only the

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18. See, e.g., Jon Lewis & Seamus Hughes, Opinion, *Our Laws Have a Problem Calling Domestic Terrorism What It Is*, THE HILL (Feb. 6, 2020, 9:30 AM), <https://thehill.com/opinion/national-security/481166-our-laws-have-a-problem-calling-domestic-terrorism-what-it-is> [<https://perma.cc/L3UG-M8EY>]; Karma Allen, *Why Domestic Terror Designation in El Paso Shooting Likely Won't Result in Terrorism Charges*, ABC NEWS (Aug. 6, 2019, 5:49 PM), <https://abcnews.go.com/Politics/domestic-terror-designation-el-paso-shooting-result-terrorism/story?id=64777184> [<https://perma.cc/S7ER-BF3J>].

19. See *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong. 8 (2019) (statement of Michael McGarrity, Assistant Director, Counterterrorism Division, Fed. Bureau of Investigation). This distinction has drawn criticism insofar as it contributes to the disparate federal treatment of Muslim and non-Muslim terrorism suspects. See Sinnar, *supra* note 9, at 1367.

20. See KATHARINE POPPE, GEO. WASH. UNIV. PROGRAM ON EXTREMISM, NIDAL HASSAN: A CASE STUDY IN LONE-ACTOR TERRORISM 16 (2018).

21. See ANDREW GUMBEL, GEO. WASH. PROGRAM ON EXTREMISM, THE DOMESTIC TERRORISM THREAT IN THE UNITED STATES: A PRIMER 3 (2015), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/Gumbel.pdf> [<https://perma.cc/W9S3-7UMS>].

international context.<sup>22</sup> In this way, the executive branch's definitions are narrower than § 2331(5).

Yet the executive branch's domestic terrorism definitions are also broader than § 2331(5), as they do not require a level of violence that endangers human life. The FBI defines domestic terrorism as “[v]iolent, criminal acts committed by individuals and/or groups to further ideological goals stemming from domestic influences, such as those of a political, religious, social, racial, or environmental nature.”<sup>23</sup> The Department of Homeland Security (DHS) similarly defines domestic terrorists or “domestic violent extremists” (DVEs) without regard to the level of violence used.<sup>24</sup> These more expansive definitions can include lower-level criminal conduct, like property offenses, as acts of domestic terrorism. As a result, the federal government has significant discretion in deciding first, whether or not to treat an investigation as a domestic terrorism matter, regardless of the charges ultimately brought and second, whether or not to label a defendant as a domestic terrorist or an act as domestic terrorism.

### *B. This Article's Definition of Domestic Terrorism*

Domestic terrorism lacks a universally accepted definition. For the sake of clarity, this Article uses the following definition for domestic terrorism: violence or related preparatory conduct committed in the United States by citizens or lawful permanent residents (i.e., “U.S. persons”<sup>25</sup>) who are inspired by U.S.-based ideologies or groups and wield violence for political or ideological aims. The U.S.-based ideologies label excludes ideas or schools of thought that have a primarily international locus. Under this definition, violent white supremacists who commit attacks on U.S. soil are domestic terrorists, while violent Islamic extremists who commit attacks on U.S. soil are international terrorists. Although the authors agree that acts of violence committed in the United States by U.S. persons who are inspired

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22. Part II discusses the investigative authorities and Part III discusses the statutory authorities that are only available to the federal government in its pursuit of international terrorists in greater detail.

23. *What We Investigate: Terrorism*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/terrorism> [<https://perma.cc/7G8J-CDJ3>].

24. DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 17 (2020), [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf) [<https://perma.cc/EX3F-LCJG>].

25. 22 U.S.C. § 6010 (2018) (defining U.S. persons in part as “any United States citizen or alien admitted for permanent residence in the United States”).

by Islamic extremism meet the definition of domestic terrorism under § 2331(5),<sup>26</sup> they are excluded from this Article's definition. Including those actors would cause confusion when discussing the federal government's statistics, rhetoric, and policies, all of which treat U.S.-based Islamic terrorism as international, rather than domestic, terrorism.

### C. Criticisms of the Existing Legal Framework

While many commentators and experts maintain that the framework constructed from § 2331(5), § 2332b(g)(5(B), and other criminal statutes is adequate to address the threat of domestic terrorism,<sup>27</sup> an array of experts,<sup>28</sup> law enforcement agents,<sup>29</sup> and members of Congress<sup>30</sup> have criticized it as inadequate and have called for new domestic terrorism statutes. Broadly put, their critiques fall along two principle lines. First, advocates contend that the current regime does not declare that domestic terrorism, especially crimes committed by white supremacists, is morally<sup>31</sup> and legally<sup>32</sup> equivalent to acts of international terrorism, particularly those committed by Islamic extremists. They point to the fact that not all domestic terrorists can be charged with a federal crime of terrorism under § 2332b(g)(5(B), usually because their conduct does not meet the requirements of a specific statute, whereas the federal government has more statutory options when charging international terrorists.<sup>33</sup>

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26. See Sinnar, *supra* note 9, at 1343.

27. See, e.g., Editorial, *Domestic Terrorists Can Be Prosecuted Without a New Federal Law*, L.A. TIMES (Aug. 10, 2019, 4:00 AM), <https://www.latimes.com/opinion/story/2019-08-09/editorial-domestic-terrorists-can-be-prosecuted-without-a-new-federal-law>; Chesney, *supra* note 5.

28. See McCord & Blazakis, *supra* note 3.

29. See Brian O'Hare, *Statement on Bipartisan Domestic Terrorism Legislation*, FBI AGENTS ASS'N (Aug. 15, 2019), <https://www.fbiaa.org/fbiaa-press-releases-list/fbi-agents-association-statement-bipartisan-domestic-terrorism-legislation> [https://perma.cc/42EZ-L46T].

30. See Rachel Oswald, *Lawmakers Divided Over Need for New Domestic Terrorism Law*, ROLL CALL (Apr. 19, 2021, 9:01 AM), <https://www.rollcall.com/2021/04/19/lawmakers-divided-over-need-for-new-domestic-terrorism-law/> [https://perma.cc/TK8W-6K3W].

31. Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), <https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism> [https://perma.cc/CXA7-DBDN].

32. See Jason Blazakis, Opinion, *Domestic Terrorism Is Fueled by Paranoid Delusions. Here's How We Fight Them*, PHILA. INQUIRER (Aug. 18, 2019), <https://www.inquirer.com/opinion/commentary/domestic-terrorism-white-supremacy-us-government-strategy-20190818.html> [https://perma.cc/88LG-EDAA].

33. See McCord, *supra* note 31.

Second, they contend that the current regime contains “gaps”<sup>34</sup> through which certain conduct related to domestic terrorism falls unprosecuted, under-prosecuted, or not investigated at all. Though experts and lawmakers vary on what gaps exist, their importance, and how they should be closed, a few consistent themes emerge. The most significant gap identified by advocates of a domestic terrorism statute is the federal government’s limited ability to pursue domestic terrorists for pre-attack acts, such as stockpiling weapons in preparation for a mass shooting.<sup>35</sup> In support of that position, advocates point to the case of Christopher Hasson, a Coast Guard lieutenant who was arrested in 2019 after federal authorities caught wind of his plot to embark on a mass murder spree.<sup>36</sup> Though Hasson documented his plans and hateful beliefs and stockpiled weapons and ammunition in preparation, federal officials did not charge him with a terrorism offense and instead fell back on comparatively minor weapons charges.<sup>37</sup> Critics of the current framework argue that individuals like Hasson can escape prosecution if their pre-attack preparations do not violate a standalone statute.<sup>38</sup>

#### D. Proposals for A New Domestic Terrorism Statute

Such critiques have prompted the introduction of several bills in both the House<sup>39</sup> and the Senate,<sup>40</sup> as advocates—including elected officials—argue that such laws will address both concerns. The two most prominent bills, proposed by Representative Adam Schiff (D-CA) in the House and then-Senator Martha McSally (R-AZ) in the Senate, would criminalize the conduct included in the definition of

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34. *Id.*

35. See Audrey Alexander & Kristina Hummel, *A View from the CT Foxhole: Mary McCord, Executive Director, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center*, CTC SENTINEL, Mar. 2021, at 16, 20.

36. See *id.*; see also Lewis & Hughes, *supra* note 18 (asserting that there is prodigious proof that Hasson’s activity was done in furtherance of an act of terrorism, and the current legal framework needs to evolve to reflect such acts now considered to be domestic terrorism). However, as discussed in Part IV, Hasson received a terrorism enhancement at sentencing that more than tripled the prison sentence he would have otherwise received. See *infra* Part IV.

37. See Paul Duggan, *Coast Guard Lt. Christopher Hasson Sentenced to 13 Years in Alleged Terror Plot*, WASH. POST (Jan. 31, 2020), [https://www.washingtonpost.com/local/public-safety/coast-guard-lt-christopher-hasson-set-to-be-sentenced-in-alleged-terror-plot/2020/01/31/d01b048a-43ce-11ea-aa6a-083d01b3ed18\\_story.html](https://www.washingtonpost.com/local/public-safety/coast-guard-lt-christopher-hasson-set-to-be-sentenced-in-alleged-terror-plot/2020/01/31/d01b048a-43ce-11ea-aa6a-083d01b3ed18_story.html) [<https://perma.cc/R9AM-AH77>].

38. See Alexander & Hummel, *supra* note 35, at 20–21.

39. See *Confronting the Threat of Domestic Terrorism Act*, H.R. 4192, 116th Cong. (2019).

40. See *To Penalize Acts of Domestic Terrorism, and for Other Purposes*, 116th Cong. (Discussion Draft 2019) [<https://perma.cc/4CQL-JAWZ>].

domestic terrorism under § 2331(5), as well as attempts or conspiracy to commit such conduct.<sup>41</sup> Advocates argue that such a statute would serve a “symbolic benefit” by eliminating the false divide between the seriousness of domestic and international terrorism.<sup>42</sup> They also contend that a domestic terrorism statute would fill the “gap[s]” in the existing legal regime that allow dangerous actors to avoid detection or arrest.<sup>43</sup>

Mary McCord, a former Acting Assistant Attorney General for National Security, argues that creating a single crime of domestic terrorism and then connecting it to other statutes—like 18 U.S.C. § 2339A, which prohibits providing material support for a federal crime of terrorism<sup>44</sup>—would allow the government to properly prosecute individuals like Hasson, rather than hoping that such suspects violate other, non-terrorism statutes.<sup>45</sup> Relatedly, McCord and others contend that creating a federal statute would provide federal law enforcement agencies with a straightforward criminal predicate with which they can begin investigations of suspected domestic terrorists.<sup>46</sup> They argue that such a predicate would enable the FBI to forego finding another federal criminal law, like a hate crime statute, that would serve as the official justification for opening an inquiry.<sup>47</sup> According to that line of argument, the need for a stand-alone criminal predicate is important because hate crimes and other available investigatory justifications are not typically handled by counterterrorism agents with expertise in preventing, as opposed to responding to, violent attacks.<sup>48</sup> Beyond those basic positions, advocates differ on what a domestic terrorism statute should cover, most prominently whether it should include property crimes.<sup>49</sup> Evaluating the merits of these arguments first

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41. *See id.*; *see also* H.R. 4192 (listing the prohibited offenses and conspiracies that are considered domestic terrorism within the United States).

42. Blazakis, *supra* note 32; *see also* Barbara McQuade, *Proposed Bills Would Help Combat Domestic Terrorism*, LAWFARE (Aug. 20, 2019, 8:49 AM), <https://www.lawfareblog.com/proposed-bills-would-help-combat-domestic-terrorism> [<https://perma.cc/ZB5J-CFN5>] (discussing proposed legislation that would create a new federal crime of domestic terrorism, which among other conduct would criminalize “material support for terrorism” in the domestic context).

43. *See, e.g.*, MCCORD, *supra* note 5, at 3.

44. Part III discusses 18 U.S.C. § 2339A at much greater length.

45. *See* Alexander & Hummel, *supra* note 35, at 20.

46. *Id.*

47. *See id.*

48. *See id.*

49. *See* *Confronting the Threat of Domestic Terrorism Act*, H.R. 4192, 116th Cong. (2019) (including property crimes in its definition of domestic terrorism); *cf.* Lewis & Hughes, *supra* note 18 (calling for a domestic terrorism statute but criticizing Rep. Schiff’s bill for including property

requires a foundational understanding of the federal government's powers in the domestic terrorism context.

## II. AUTHORITIES AVAILABLE TO THE FEDERAL GOVERNMENT TO INVESTIGATE DOMESTIC TERRORISM

This part outlines the critical investigatory powers that the federal government uses in domestic, as opposed to international, terrorism cases: warrantless investigation and surveillance; the use of undercover officers and confidential informants; and the public safety exception to immediately providing suspects their *Miranda* rights.<sup>50</sup> While these powers are available in all criminal investigations, DOJ turns to them especially frequently in domestic terrorism cases, where there are often specialized guidelines for their use.

### A. Surveillance Powers Exclusive to Investigating International Terrorism

The authority of the federal government to investigate international terrorism is broader than its authority to investigate domestic terrorism. In *United States v. U.S. District Court (Keith)*,<sup>51</sup> the Supreme Court delineated the outer limits of the government's power in the domestic context by holding that the 1968 Wiretap Act's warrant requirement applies to investigations of domestic threats.<sup>52</sup> However, the Court refrained from extending that holding to the "activities of foreign powers or their agents."<sup>53</sup> Thus, although the Fourth Amendment does not apply fully when the government conducts surveillance in national security cases involving international terrorism, the government must obtain a warrant before electronically monitoring suspects in analogous cases involving domestic threats.<sup>54</sup>

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crimes and arguing that a domestic terrorism statute should be limited to "acts of violence against persons").

50. *See* *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

51. 407 U.S. 297 (1972).

52. *Id.* at 321–22. In support of its holding, the Court noted "the inherent vagueness of the domestic security concept," as well as "the temptation to utilize such surveillances to oversee political dissent." *Id.* at 320. Both concerns are exceptionally relevant to the modern issue of domestic terrorism and Part V, *infra*, discusses them in depth.

53. *Id.* at 321–22.

54. The deliberate cabining of *Keith* to domestic national security cases and the subsequent confusion in the lower courts about whether surveillance in foreign national security cases prompted Congress to ultimately pass the Foreign Intelligence Surveillance Act (FISA) of 1978. *See* *Sinnar*, *supra* note 9, at 1374. The 2004 Intelligence Reform and Terrorism Prevention Act amended FISA to include international terrorists not explicitly tied to foreign governments or organizations. *See* EDWARD C. LIU, CONG. RSCH. SERV., R40138, ORIGINS AND IMPACT OF THE

Second, the federal government cannot use national security letters—written commands, akin to administrative subpoenas, requiring that third parties like communications providers and financial institutions provide information regarding customers who could pose a threat to national security—in domestic terrorism investigations.<sup>55</sup> Five different federal statutes empower the government to issue national security letters in foreign intelligence and international terrorism investigations,<sup>56</sup> but that power does not extend to domestic terrorism cases.

Third, whereas the federal government may designate certain foreign groups as terrorist organizations for the purpose of imposing sanctions, no similar authority exists as to domestic groups. Title 8 U.S.C. § 1189 allows the State Department to designate groups as Foreign Terrorist Organizations (FTOs) if they are based abroad and engage in terrorist activity that threatens U.S. citizens or national security.<sup>57</sup> Designating a group as an FTO allows the Treasury Department to levy sanctions against the organization and its members<sup>58</sup> and enables DOJ to charge its members and supporters with certain terrorism-specific statutes, such as 18 U.S.C. § 2339B, which prohibits providing material support to an FTO.<sup>59</sup> Largely due to concerns about infringing upon the First Amendment rights of political organizations or prohibiting certain classes of speech or association,<sup>60</sup> no comparable mechanism exists for designating domestic organizations. The Treasury Department cannot therefore sanction them, and DOJ cannot use charges that are predicated on an official terrorist designation.

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FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) PROVISIONS THAT EXPIRED ON MARCH 15, 2020, at 1 (2021), <https://fas.org/sgp/crs/intel/R40138.pdf> [<https://perma.cc/GXY8-3P26>].

55. See *Frequently Asked Questions: National Security Letters*, FED’N OF AM. SCIENTISTS: INTEL. RES. PROGRAM, <https://fas.org/irp/news/2007/03/nsi-faq.html> [<https://perma.cc/3965-BKZY>].

56. CHARLES DOYLE, CONG. RSCH. SERV., RL33320, NATIONAL SECURITY LETTERS IN FOREIGN INTELLIGENCE INVESTIGATIONS: LEGAL BACKGROUND 1–3 (2015), <https://fas.org/sgp/crs/intel/RL33320.pdf> [<https://perma.cc/6JRS-9TJ7>] (identifying the five statutes as 18 U.S.C. § 2709 (2018); 12 U.S.C. § 3414; 15 U.S.C. §§ 1681v, 1681u; 50 U.S.C. § 3162).

57. See 8 U.S.C. § 1189(a)(1).

58. See 31 C.F.R. § 597.201 (2021).

59. See 18 U.S.C. § 2339B(a)(1). Part II, *infra*, discusses the full range of DOJ’s charging capabilities.

60. See Laguardia, *supra* note 5, at 235–41 (discussing the First Amendment issues raised by the Supreme Court’s ruling in *Scales v. United States*, 367 U.S. 203 (1961), and “political will as a practical hurdle” to expanding the federal government’s designation powers).

### B. Warrantless Investigation and Surveillance

Despite the above constraints, the federal government has a host of warrantless digital and physical investigatory tools at its disposal to pursue domestic terrorism. Some of these tools are available at any time, even without the predicate of an official inquiry. Others, under DOJ and FBI policy, are available only after an inquiry has been opened. Several of the federal government's core investigative manuals—promulgated by DOJ and the FBI—spell out in great detail the importance of digital surveillance and the methods that federal law enforcement officers may employ during the different stages of an inquiry. These manuals build off of each other, creating a lattice of policies and guidelines that inform how federal law enforcement agencies conduct investigations into people allegedly connected to domestic terrorism. At the foundation of that framework lies the Attorney General's Guidelines for Domestic FBI Operations (the Guidelines).<sup>61</sup> The Guidelines articulate the contours of when and how the FBI may conduct domestic investigations, while several FBI manuals and policy documents color between those lines with greater clarity.<sup>62</sup> The Guidelines lay out three levels of inquiries that the FBI can conduct, each of which escalates in both scope and intensity: assessments, predicated investigations, and enterprise investigations.<sup>63</sup>

#### i. Tools Available to the Federal Government Outside of Investigative Inquiries

Before agents even begin an official inquiry into an individual, they may search and access several different types of digital information about that person, such as public online information, data

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61. See U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 5 (2008) [hereinafter ATT'Y GEN.'S GUIDELINES].

62. The three FBI documents that are particularly relevant to this topic are the Domestic Investigation and Operations Guide, colloquially known as "The DIOG," see generally FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2016) [hereinafter DIOG], <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29> [<https://perma.cc/B2B7-WKG5>] (defining the investigative methods and procedures for undercover operations and the use of informants, including in domestic terrorism cases); the Baseline Collection Plan, see generally COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, BASELINE COLLECTION PLAN (2009) [hereinafter BASELINE COLLECTION PLAN] (establishing best practices for both domestic and international terrorism investigations); and the Counterterrorism Policy Guide, see FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 13 (2015) [hereinafter COUNTERTERRORISM POLICY GUIDE], <https://theintercept.com/document/2017/01/31/counterterrorism-policy-guide/#page-1> [<https://perma.cc/6MBH-PC9W>].

63. ATT'Y GEN.'S GUIDELINES, *supra* note 61, at 17–18.

found in chat rooms, and information in law enforcement databases.<sup>64</sup> They also may nominate individuals for inclusion on the Terrorism Screening Database (TSDB), an expansive list of individuals deemed to be potential terrorists or threats to national security by federal law enforcement agencies.<sup>65</sup> Law enforcement agencies need only reasonable suspicion that a person poses a threat to national security and rudimentary biographic information about that individual, like their name and birthdate.<sup>66</sup> Once placed on the TSDB, an individual can then be added to the Transportation Security Administration's No-Fly list, which bars them from any commercial flight within U.S. airspace.<sup>67</sup> Although only 4,600 of the 1,160,000 individuals on the TSDB are American citizens,<sup>68</sup> the Biden administration has reportedly explored adding more domestic extremists to the list.<sup>69</sup>

## ii. Assessments

Agents may initiate assessments, the first official investigative tier, to seek information “proactively” or in pursuit of “investigative leads” regarding any potential national security threats or violation of federal criminal law.<sup>70</sup> No particular “factual predication” is required,<sup>71</sup> and agents can look into “the involvement or role of individuals, groups, or organizations in such activities.”<sup>72</sup> They can do so to gather intelligence for later investigations or to better understand the individuals or group in question.<sup>73</sup> The FBI's Counterterrorism

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64. See DIOG, *supra* note 62, at app. L. It is worth noting that the cited section of the DIOG was contradicted by Jill Sanborn, the Assistant Director of the FBI's Counterterrorism Division, who testified before the Senate that the FBI “cannot collect First Amendment protected activities without . . . the intent [that would trigger an official inquiry].” CBS News, *Senate Committees Hold Hearing Examining January 6 Capitol Assault*, YOUTUBE (Mar. 3, 2021, 10:00 AM) <https://www.youtube.com/watch?v=w2kqBDJ2O3o> [<https://perma.cc/SC52-WNXT>] (statement of Jill Sanborn, Assistant Dir., Counterterrorism Div., Fed. Bureau of Investigation).

65. See JEROME BJELOPERA ET AL., CONG. RSCH. SERV. R44678, THE TERRORIST SCREENING DATABASE AND PREVENTING TERRORIST TRAVEL 1–2 (2015), <https://sgp.fas.org/crs/terror/R44678.pdf> [<https://perma.cc/SGR3-VXLW>].

66. See *id.* at 5–6.

67. See *id.* at 7.

68. See *Kable v. Elhady*, 993 F.3d 208, 213–14 (4th Cir. 2021).

69. See Betsy Woodruff Swan, *DHS Looking at Tracking Travel of Domestic Extremists*, POLITICO (Mar. 23, 2021, 5:47 PM), <https://www.politico.com/news/2021/03/23/homeland-security-domestic-extremists-477658> [<https://perma.cc/U86P-GAGC>].

70. ATT'Y GEN.'S GUIDELINES, *supra* note 61, at 19.

71. *Id.* at 17.

72. *Id.* at 19. Additionally, they may also “[seek] information to identify potential human sources” relating to the assessment, an investigative technique that Section II.C. discusses in greater detail. *Id.*

73. See DIOG, *supra* note 62, at § 5.2.

Program Guidance Baseline Collection Plan (the Collection Plan)<sup>74</sup> instructs agents that assessments of potential domestic terrorism may proceed until they develop enough information to open a higher tier of inquiry or until they decide that the target is not going to engage in any criminal or terrorist activity.<sup>75</sup>

The Guidelines list a host of potential methods that agents can use in assessments, including reviewing information stored in federal, state, and local law enforcement records; exploring nonprofit or commercial online databases;<sup>76</sup> recruiting human sources;<sup>77</sup> performing surveillance that does not require a court order; and using grand jury subpoenas for telephone or email “subscriber information.”<sup>78</sup> Agents may employ these methods as they see fit in order to build out a comprehensive profile on the assessment’s subject.<sup>79</sup> A separate FBI manual instructs agents to investigate whether the subject’s life and activities demonstrate presumptive counterterrorism red flags, such as criminal history, contact with subjects of other FBI investigations,

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74. This policy guideline was “established to develop programmatic standards in terms of quality and thoroughness of assessments and predicated investigations.” BASELINE COLLECTION PLAN, *supra* note 62, at 2.

75. *Id.* at 3. There are six different “types” of assessments in the DIOG, escalating in scope and intensity from Type 1 to Type 6. DIOG, *supra* note 62, at § 5.4.1. Types 1 and 2 may be opened by an agent without approval from a supervisor, while supervisor approval is necessary for Types 3–6. *Id.* Additionally, Types 1 and 2 may be continued indefinitely while Types 3–6 require supervisor re-approval every 30 days. *Id.*

76. There are few legal limits on the federal government’s ability to request or purchase data from commercial vendors. See James X. Dempsey & Lara M. Flint, *Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1476 (2004) (explaining that “the analysis of rules concerning commercial data must start with a presumption of access—so long as no law prohibits it, the government can purchase or request voluntary disclosure of any commercially held records”). In recent years, for example, the FBI has agreed to a series of contracts with the data aggregators Venntel and Dataminr, giving the bureau access to the location information and other sensitive data of millions of people. See Lee Fang, *FBI Expands Ability to Collect Cellphone Location Data, Monitor Social Media, Recent Contracts Show*, THE INTERCEPT (Jun. 24, 2020, 11:56 AM), <https://theintercept.com/2020/06/24/fbi-surveillance-social-media-cellphone-dataminr-venntel/> [<https://perma.cc/WM2R-PJ9D>].

77. Section II.C, *infra*, discusses the use of human sources in depth.

78. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 20. Under the Federal Rule of Criminal Procedure 6(e)(3)(D), federal prosecutors “also have additional authority to share grand-jury matter, including with appropriate federal, State, local, or foreign officials, when disclosing information to prevent or respond to a threat of terrorism, including domestic terrorism.” *Violent Extremism and Domestic Terrorism in America: The Role and Response of the Department of Justice: Hearing Before the Subcomm. on Com., Just., Sci., & Related Agencies of the H. Comm. on Appropriations*, 117th Cong. (2021) (statement of Brad Wiegmann, Deputy Assistant Att’y Gen. of the Dep’t of Just.) [hereinafter *Violent Extremism and Domestic Terrorism in America*].

79. The Baseline Collection Plan also instructs agents to ascertain personal information about the subject. This includes their date of birth, Social Security Number, driver’s license number, telephone number, email address, “other internet communication media” accounts, and employment information. See BASELINE COLLECTION PLAN, *supra* note 62, at 3–5.

living with adults who could be involved in criminal conduct, legally owning firearms, and experience with military or law enforcement tactics or firearms training.<sup>80</sup>

### iii. Predicated Investigations

The Guidelines divide the second investigative tier—predicated investigations—into two sub-levels: preliminary investigations and full investigations.<sup>81</sup> Agents may open preliminary investigations “on the basis of any ‘allegation or information’” indicating a national security threat or possible criminal conduct.<sup>82</sup> In preliminary investigations, agents may use the investigative methods available to them during assessments.<sup>83</sup> They may also perform searches of a subject’s property that do not require a warrant (like searching a subject’s garbage on public property<sup>84</sup>), conduct polygraph examinations<sup>85</sup> and mail covers,<sup>86</sup> deploy undercover agents,<sup>87</sup> and review a subject’s “electronic communications and transactional records.”<sup>88</sup> Furthermore, the Collection Plan instructs agents to dig into the subject’s background and social networks.<sup>89</sup> This includes identifying the subject’s “close associates” and determining whether any have been “a subject of or referenced in an FBI investigation”; determining whether the subject can access funds outside of their employment; investigating if the subject has made statements indicating “a desire to commit

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80. *Id.* at 5–6.

81. See ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 21.

82. DIOG, *supra* note 62, at 6.1. Agents must conclude a preliminary investigation within six months, although the Special Agent in Charge of their field office has discretion to extend it for an additional six months. Extensions “beyond a year must be approved by FBI Headquarters.” ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 21.

83. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 21.

84. *Id.* at 31.

85. *Id.*

86. In a longstanding partnership between the U.S. Postal Service and federal law enforcement agencies, U.S.P.S. workers will record the information from the exteriors of letters and parcels before delivery and forward that information to the requesting agency. See Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html> [<https://perma.cc/NDB4-QEAL>].

87. In relations pertaining to domestic terrorism and national security, any undercover operations “involving religious or political organizations” must be approved by FBI Headquarters in a process that includes the National Security Division of DOJ. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 31.

88. Under 18 U.S.C. § 2702(b)(7), providers of electronic communication services to the public may disclose “the contents of a communication” to law enforcement agencies if the contents “(i) were inadvertently obtained by the service provider; and (ii) appear to pertain to the commission of a crime.” 18 U.S.C. § 2702(b)(7)(A) (2018).

89. BASELINE COLLECTION PLAN, *supra* note 62, at 7–10.

terrorist acts”); and exploring whether the subject could be a confidential human source.<sup>90</sup> As in assessments, any combination of these traits and background facts constitute red flags warranting further inquiry.<sup>91</sup>

Unlike assessments and preliminary investigations, full investigations require an “articulable factual basis” reasonably indicating the occurrence or future danger of criminal conduct or a national security threat.<sup>92</sup> Agents may also begin a full investigation if it would lead to information that could help prevent a federal crime or national security threat.<sup>93</sup> During full investigations, agents may use all of the investigative methods available during assessments and preliminary investigations, as well as electronic surveillance<sup>94</sup> and “physical searches, including mail openings.”<sup>95</sup> The Collection Plan indicates that subjects of full investigations warrant the highest level of scrutiny, especially if they are affiliated with groups deemed to be terrorist organizations.<sup>96</sup> Agents should determine whether the subject is associated with a terrorist organization and whether that person has “any present intent to engage in acts of violence.”<sup>97</sup>

They must also ensure that the FBI has a “strategy to disrupt” any plans by the subject or their affiliated terrorist organization to carry out violent attacks or criminal conduct.<sup>98</sup>

#### iv. Enterprise Investigations

A type of full investigations, the FBI uses enterprise investigations to examine the “structure, scope, and nature” of a target group; that includes investigating the identities of its members and their connections to each other, its financial resources, its geographic range, and its objectives and activities.<sup>99</sup> Agents may use all of the same

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90. *Id.*

91. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 21–22.

92. *Id.*

93. *See id.* Additionally, FBI field offices must notify the FBI Headquarters and the National Security Division (NSD) of DOJ when opening a full investigation into suspected domestic terrorism. *See id.* at 22.

94. In accordance with the requirements contained in Chapter 119 of Section 18 of the U.S. code, which lays out the restraints which govern federal law enforcement’s interception of electronic communications. *See* 18 U.S.C. §§ 2510–2523 (2018).

95. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 32.

96. The lack of a designation apparatus for domestic terrorist groups, and the subsequent latitude granted to the federal government in applying the label of “domestic terrorism” to actors and organizations, creates civil liberties concerns that this Article explores further in Part V, *infra*.

97. BASELINE COLLECTION PLAN, *supra* note 62, at 10.

98. *Id.* at 10–11.

99. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 18, 23.

investigative techniques and resources available during full investigations.<sup>100</sup> To justify a domestic terrorism enterprise investigation, agents must have an “articulable factual basis” reasonably indicating that the group has engaged in, or might engage in, conduct that meets § 2331(5)’s definition of domestic terrorism.<sup>101</sup>

Both the Collection Plan<sup>102</sup> and the FBI’s Counterterrorism Policy Guide (the Policy Guide)<sup>103</sup> allow agents to employ a “disruption strategy” at the end of a domestic terrorism assessment or investigation. According to the Collection Plan, if “the risk to public safety is too great, or if all significant intelligence has been collected, and/or the threat is otherwise resolved,”<sup>104</sup> agents may initiate a disruption strategy, which the Policy Guide defines as actions that “neutralize[] the threat” posed by a subject.<sup>105</sup> The Policy Guide lists a range of options available during a disruption strategy, including arrests, deportations, interviews, seizing financial assets, or “source-directed operations to effectively disrupt [a] subject’s activities.”<sup>106</sup> There is some statistical confusion as to how frequently the FBI engages in disruptions,<sup>107</sup> but defense attorneys have confirmed that their clients were the target of disruption techniques, particularly immigration penalties, during international terrorism inquiries.<sup>108</sup>

### C. Criminal Informants, Stings, and the Potential for Entrapment

Once the FBI turns its attention to a subject or group, one of its most effective and controversial tools is the use of confidential

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100. *See id.*

101. *Id.* at 23. An FBI field office must notify FBI headquarters upon initiating an enterprise investigation, which in turn must notify NSD. *See id.* at 23–24.

102. BASELINE COLLECTION PLAN, *supra* note 62, at 11.

103. COUNTERTERRORISM POLICY GUIDE, *supra* note 62, at 23.

104. BASELINE COLLECTION PLAN, *supra* note 62, at 11.

105. COUNTERTERRORISM POLICY GUIDE, *supra* note 62, at 23.

106. BASELINE COLLECTION PLAN, *supra* note 62, at 12. Source-directed operations are not fully defined, although the Guide lists “providing disinformation” as an example.

107. *See* Jenna McLaughlin, *FBI Won’t Explain Its Bizarre New Way of Measuring Its Success Fighting Terror*, THE INTERCEPT (Feb. 18, 2016, 3:18 PM), <https://theintercept.com/2016/02/18/fbi-wont-explain-its-bizarre-new-way-of-measuring-its-success-fighting-terror/> [<https://perma.cc/7LFY-T3NF>]. The FBI’s 2015 budget request reported that it had achieved 440 disruptions in the previous year, but that statistic is complicated by the fact that multiple offices can claim credit if they played a role in one disruption. *Id.*

108. *See* Cora Currier, *Disruptions: How the FBI Handles People Without Bringing Them to Court*, THE INTERCEPT (Jan. 31, 2017), <https://theintercept.com/document/2017/01/31/counterterrorism-policy-guide/disruptions-how-the-fbi-upends-peoples-lives-without-bringing-them-to-court/#page-1> [<https://perma.cc/T6SW-FJRL>]. These techniques are equally available in domestic terrorism investigations, but the extent of their use is not yet publicly known.

informants (CIs) and undercover agents (UCAs). Agents are permitted to “[u]se and recruit” CIs during assessments,<sup>109</sup> while UCAs may be deployed during preliminary, full, and enterprise investigations.<sup>110</sup> Like almost all other physical and electronic investigative methods available to the FBI during assessments and investigations, the use of CIs and UCAs does not require a warrant, only internal supervision and approval.<sup>111</sup> FBI agents may first investigate potential CIs, officially termed “confidential human sources,” to determine their suitability for providing information to the Bureau.<sup>112</sup> After recording the CI’s identifying information and documenting the reasons for opening the investigation, the operating agent(s) may begin to use them to collect evidence and engage with the investigation’s target.<sup>113</sup>

Upon opening a predicated investigation, the FBI may deploy UCAs.<sup>114</sup> The Special Agent in Charge (SAC) of a field office must approve all proposed undercover operations.<sup>115</sup> Some “sensitive circumstances,” such as the undercover investigation of religious and political organizations, must be approved by “appropriate supervisory personnel” at FBI headquarters.<sup>116</sup> After an undercover operation has been approved, the SAC must “approve all undercover operations and activities”—such as relevant illegal activity and “the making of false representations to third parties”—and review the conduct of the UCA “from time to time” to ensure that they are not engaging in impermissible conduct.<sup>117</sup>

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109. ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 20.

110. *Id.* at 31.

111. The recruitment and use of CIs is governed by the DIOG, the Attorney General’s Guidelines Regarding the Use of FBI Confidential Sources, see U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 1 (2007) [hereinafter CONFIDENTIAL SOURCES GUIDELINES], and the FED. BUREAU OF INVESTIGATION, CONFIDENTIAL HUMAN SOURCE POLICY GUIDE (2015), <https://theintercept.com/document/2017/01/31/confidential-human-source-policy-guide/#page-2> [<https://perma.cc/9UHG-GHZX>] (re-leased Jan. 31, 2017) [hereinafter CONFIDENTIAL HUMAN SOURCE POLICY GUIDE].

112. CONFIDENTIAL HUMAN SOURCE POLICY GUIDE, *supra* note 111, at 16.

113. *See id.* at 35–39. If the FBI uses the CI for more than five years, the agents must seek approval for any “continued use.” CONFIDENTIAL SOURCE GUIDELINES, *supra* note 111, at 18–19. In standard criminal investigations, the approving body is the Human Source Review Committee, which is composed of FBI agents and attorneys from U.S. Attorney’s Offices and Main Justice. In national security investigations, the agents must receive the approval of NSD. *See id.* at 19.

114. *See* ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 22.

115. *See* U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS 3 (2013) [hereinafter ATT’Y GEN.’S GUIDELINES ON FBI UNDERCOVER OPERATIONS].

116. *Id.* at 6.

117. *Id.* at 13, 17. The SAC must also “consult on a continuing basis” with the federal prosecutor on the case.

UCAs and particularly CIs have proven to be essential tools in penetrating white supremacist groups and foiling lethal plots, but their broader use in terrorism investigations has long been the subject of fierce criticism by defense attorneys and civil liberties groups who maintain that CIs coerce and entrap hapless defendants who would otherwise never commit the crimes they allegedly plotted.<sup>118</sup> In 1932, *Sorrells v. United States*<sup>119</sup> recognized entrapment as a complete defense to a criminal charge<sup>120</sup> if the defendant can prove: (1) that the government induced them to commit the crime and (2) that they had a lack of predisposition to commit the crime on their own.<sup>121</sup> In the two decades since 9/11, entrapment has become the subject of heated debate as the FBI increased its reliance on CIs to prevent attacks by Islamic extremists.<sup>122</sup> Detecting and disrupting terrorist plots “left of the boom”<sup>123</sup> requires insider knowledge as plans develop: “critical intelligence and information” that the FBI cannot usually “obtain in other ways.”<sup>124</sup> The left-of-boom mindset is emblematic of a larger

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118. *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, HUM. RTS. WATCH 45–48 (July 21, 2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [<https://perma.cc/RYJ6-TEW5>]; see also Eric Lichtblau, *F.B.I. Steps Up Use of Stings in ISIS Cases*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html> [<https://perma.cc/TRK6-TKPR>] (describing the rise in terrorism prosecutions based on evidence gathered through undercover operations that led to criticisms of entrapment).

119. 287 U.S. 435 (1932).

120. See *id.* at 252.

121. See *Mathews v. United States*, 485 U.S. 58, 63 (1988). As the Court explained in *Mathews*, the law of entrapment is designed to protect against the possibility that “Government agents [do] not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.” *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

122. See Jon Sherman, “*A Person Otherwise Innocent*”: *Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1476–78 (2009); see also Jessica Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979, 979 (2014) (arguing the federal entrapment defense represents a doctrinal anomaly that straddles the line between criminal procedure and criminal substance).

123. *Global Approach to Rooting Out Terrorism*, FBI NEWS (Aug. 2, 2018), <https://www.fbi.gov/news/stories/ilea-training-rooting-out-terrorism-080218> [<https://perma.cc/PC5B-5CGM>] (explaining the FBI’s emphasis on preventing the execution of terrorist plots, rather than investigating them ex post or “right of the boom”).

124. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., *THE FEDERAL BUREAU OF INVESTIGATION’S COMPLIANCE WITH THE ATTORNEY GENERAL’S INVESTIGATIVE GUIDELINES 65* (2005) [hereinafter *FED. BUREAU OF INVESTIGATION’S COMPLIANCE WITH INVESTIGATIVE GUIDELINES*], <https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf> [<https://perma.cc/7SUT-2XNN>] (quoting then-FBI Director Robert Mueller); see also Malia Wollan & Charlie Savage, *Holder Calls Terrorism Sting Operations ‘Essential’*, N.Y. TIMES (Dec. 11, 2010), <https://www.nytimes.com/2010/12/12/us/politics/12holder-1.html> [<https://perma.cc/9MMK-EJMG>] (describing the California Attorney General’s defense of the use of sting operations because they are an “essential law enforcement tool in uncovering and preventing terror attacks”).

emphasis within DOJ on “anticipatory prosecution” of terrorism plots in the years following 9/11.<sup>125</sup>

The Attorney General’s Guidelines on Undercover FBI Operations emphasize the importance of avoiding entrapment in undercover operations. Specifically, they prohibit:

undercover activity involving an inducement to an individual to engage in crime . . . unless the approving official is satisfied that:

1. The illegal nature of the activity is reasonably clear to potential subjects; and
2. The nature of any inducement is offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
3. There is a reasonable expectation that offering the inducement will reveal illegal activity; and
4. One of the two following limitations is met:
  - i. There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or
  - ii. The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.<sup>126</sup>

Particularly relevant in domestic terrorism investigations, the FBI has specific rules about when CIs or UCAs may infiltrate political groups. The DIOG explains that the approval procedures for “undisclosed participation”—in which a CI or UCA participates in the activity of a targeted group or organization—depend on the nature of the target.<sup>127</sup> During assessments, CIs may engage in undisclosed participation, but UCAs cannot.<sup>128</sup> If the organization is “legitimate,” meaning it was “formed for a lawful purpose and its activities are primarily

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125. See Chesney, *supra* note 5, at 425–27; see also Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 616–24 (2005) (discussing law enforcement’s strategy of pretextual prosecution as a tool to prevent terrorist attacks before they occur).

126. ATT’Y GEN.’S GUIDELINES ON FBI UNDERCOVER OPERATIONS, *supra* note 115, at 16.

127. See DIOG, *supra* note 62, at 16.2.3.1.

128. *Id.*

lawful,”<sup>129</sup> agents must first seek approval from their FBI supervisors, unless the undisclosed participation consists of attending fewer than five public meetings of the organization.<sup>130</sup> Agents must obtain further approval if, during a predicate investigation, they wish to have the CI or an UCA influence the activities of a legitimate organization, and that process’s rigor increases if the FBI seeks to influence the exercise of First Amendment rights.<sup>131</sup> If, however, the agents determine that the organization is not legitimate, meaning its primary purpose is to engage in “destruction of property as a means to bring public attention” to a political protest,<sup>132</sup> then they do not need to obtain any supervisory approval.<sup>133</sup> Thus, if agents determine that a targeted group has a primary purpose of criminal activity, CIs can participate in its activities without supervisory approval.

The FBI’s reliance on CIs to disrupt terrorist plots is reflected in the available statistics on terrorism prosecutions brought by DOJ in the years after 9/11. Between September 11, 2001 and December 31, 2011, roughly half of the 494 terrorism-related convictions achieved by DOJ resulted from “informant-based cases”;<sup>134</sup> almost 30 percent of those cases were predicated on “sting operations in which the informant played an active role in the underlying plot.”<sup>135</sup> Two other studies confirmed those findings.<sup>136</sup> One analyzed the cases of 508 defendants prosecuted on terrorism or terrorism-related charges.<sup>137</sup> Two hundred and forty-three of those defendants were targeted via an informant, 158 were arrested after a sting operation, and forty-nine

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129. *Id.* at 16.2.2. Organizations that engage in civil disobedience in order to serve the primary purpose of “lawful protest or advocacy” are considered legitimate, while groups that have the primary purpose of engaging in “destruction of property as a means to bring public attention” to a political protest are not legitimate, because their “primary purpose is to engage in criminal conduct.” *Id.*

130. *See id.* at 16.2.3, 16.3.1.

131. The DIOG defines influencing the activities of an organization at 16.2.3.2 and influencing the exercise of First Amendment rights at 16.2.3.3. The approval process is described at 16.3.1.4.2.

132. *See* DIOG, *supra* note 62, at 16.2.2.

133. *See id.* at 16.2.2 and 16.4. Such groups are not legitimate because their “primary purpose is to engage in criminal conduct.”

134. *See Illusion of Justice, supra* note 118, at 11, 21.

135. *Id.* at 21.

136. *See* Trevor Aaronson, *The Informants*, MOTHER JONES, <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/> (last visited May. 8, 2022); N.Y.U. CTR. ON L. & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at 46 (2010), [https://www.lawandsecurity.org/wp-content/uploads/2011/09/02\\_TTRCFinalJan1422009.pdf](https://www.lawandsecurity.org/wp-content/uploads/2011/09/02_TTRCFinalJan1422009.pdf) [<https://perma.cc/U9WH-2GEV>].

137. *See* Aaronson, *supra* note 136.

defendants were guided by the informant in forming the plan that was the basis of their prosecution.<sup>138</sup>

Not surprisingly, DOJ's reliance on CIs in its terrorism prosecutions has prompted defense attorneys,<sup>139</sup> academics,<sup>140</sup> and civil liberties groups<sup>141</sup> to vigorously maintain that many of these defendants were innocent victims of law enforcement entrapment. Professors Jesse Norris and Hanna Grol-Prokopczyk have conducted the most comprehensive research on the prevalence of entrapment in terrorism cases.<sup>142</sup> They developed an analytical framework to "estimate the scale of potential entrapment or outrageous government conduct" in 264 post-9/11 terrorism cases in which a government informant played a substantial role.<sup>143</sup> Applying their framework, they determined that the average number of entrapment indicators per case was 5.3, which the authors concluded was evidence of "widespread" potential

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138. *Id.*; *Illusion of Justice*, *supra* note 118, at 21 n.31. These defendants were largely inspired by radical Islam, with about half connected to Al-Qaeda or other extremist Islamist groups. See Aaronson, *supra* note 136. The Human Rights Watch report did not include exact figures as to how many of the defendants in its study were somehow connected to radical Islam, but the report is largely concerned with civil liberties violations by the FBI in its pursuit of Islamic extremists. See *Illusion of Justice*, *supra* note 118, at 17.

139. See Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES (Nov. 29, 2010), <https://www.nytimes.com/2010/11/30/us/politics/30fbi.html>; see also Rick Perlstein, *How FBI Entrapment Is Inventing 'Terrorists'—And Letting Bad Guys off the Hook*, ROLLING STONE (May 15, 2012, 7:10 PM), <https://www.rollingstone.com/politics/politics-news/how-fbi-entrapment-is-inventing-terrorists-and-letting-bad-guys-off-the-hook-244905/> [<https://perma.cc/D7RH-4N2B>] (arguing for substantive changes to the entrapment defense's application).

140. See Laguardia, *supra* note 6, at 171; see also Said, *supra* note 6 (arguing that the government should cease its current practice of using informants to generate terrorism prosecutions). See generally MARC SAGEMAN, *MISUNDERSTANDING TERRORISM* (2017) (focusing specifically on the scope and nature of the global neo-jihad threat to the West). Not all legal observers share that opinion. See Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008) (arguing it is unlikely the government could induce informants to support terrorism unless they are predisposed to do so).

141. See *Illusion of Justice*, *supra* note 118, at 55 (arguing that FBI investigation tactics "raise serious human rights concerns, including . . . [the] violation of the right to fair trial due to criminal entrapment"); see also ACLU, *UNLEASHED AND UNACCOUNTABLE: THE FBI'S UNCHECKED ABUSE OF AUTHORITY* 40 (2013), [https://www.aclu.org/sites/default/files/field\\_document/unleashed-and-unaccountable-fbi-report.pdf](https://www.aclu.org/sites/default/files/field_document/unleashed-and-unaccountable-fbi-report.pdf) [<https://perma.cc/352J-GTCR>] (discussing the FBI's frequent use of CIs when investigating Muslim communities).

142. Several other studies focus on this topic, but focus on a few select cases. See Laguardia, *supra* note 6, at 193–203; Said, *supra* note 6; SAGEMAN, *supra* note 140, at 715–32.

143. Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 614, 622–29 (2015). Using twenty different qualitative "indicators of potential entrapment" derived from entrapment case law and recurrent fact patterns in controversial terrorism cases, Norris and Grol-Prokopczyk scrutinized all 580 terrorism prosecutions involving CIs that occurred between September 12, 2001, and September 11, 2014. *Id.* at 610. Of 580 total cases, 317 involved an informant, and the informant played a substantial role in 264.

entrapment across those terrorism prosecutions,<sup>144</sup> not only in the most high-profile cases like the Newburgh Four.<sup>145</sup> Moreover, the “most serious cases,” when defendants were accused of plotting specific attacks, averaged 8.1 indicators.<sup>146</sup> The government proposed the crime to the defendant in 50 percent of the studied cases, while the CI pressured or persuaded the defendant in 39 percent.<sup>147</sup>

When controlling for the ideological backgrounds of terrorism defendants, Norris and Grol-Prokopczyk found substantial deviation in the federal government’s conduct. Cases against defendants motivated by Islamic extremism averaged 6.3 indicators; cases against defendants motivated by right-wing beliefs and white supremacy averaged 2.8 indicators; that number skyrocketed to 10.2 in prosecutions against left-wing defendants.<sup>148</sup> One likely explanation for this discrepancy is the federal government’s relative emphasis on prosecuting certain classes of defendants over others. In its determination to prevent another 9/11,<sup>149</sup> the federal government has focused its resources on Islamic extremism.<sup>150</sup> In contrast, its pursuit of right-wing extremism has been less consistent, with political pressure sometimes

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144. *Id.* at 655–57.

145. The case of the Newburgh Four is frequently cited by critics of the FBI as one of the most egregious examples of entrapment. *See* Laguardia, *supra* note 6, at 193–99; *see also* Aaronson, *supra* note 136, at 2 (discussing the Newburgh Four); N.Y.U. CTR. ON L. & SEC., *supra* note 136, at 46 (noting the potential for entrapment when informants are used in terrorism prosecutions). An FBI informant spent over ten months with a group of men in Newburgh, NY, who had expressed a desire to commit an act of terrorism, attempting to convince them to follow through on a variety of plots. At one point, he even offered the leader James Cromitie \$250,000 to carry out the plot after Cromitie expressed reluctance. Eventually the six men accepted fake explosive devices from an undercover FBI agent and placed them outside synagogues in the Bronx, NY. *See* Kareem Fahim, *Informer in Synagogue Plot Is Accused of Bullying Defendant*, N.Y. TIMES (Sept. 21, 2010), <https://www.nytimes.com/2010/09/22/nyregion/22plot.html>. Even the district court in the case was skeptical that Mr. Cromitie posed a legitimate danger to the public, writing that “[O]nly the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery is positively Shakespearean in its scope.” Benjamin Weiser, *3 Men Draw 25-Year Terms in Synagogue Bomb Plot*, N.Y. TIMES (June 29, 2011), <https://www.nytimes.com/2011/06/30/nyregion/3-men-get-25-years-in-plot-to-bomb-bronx-synagogues.html> [<https://perma.cc/6BUR-JEUZ>]. Nevertheless, the court denied Mr. Cromitie’s motion for an acquittal on the basis of entrapment. *See id.*

146. Norris & Grol-Prokopczyk, *supra* note 143, at 610, 655.

147. *See id.* at 656.

148. *See id.* at 655.

149. *See* LOIS M. DAVIS ET AL., LONG TERM EFFECTS OF LAW ENFORCEMENT’S POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY 1 (2010).

150. *See* U.S. DEP’T OF JUST., CONFRONTING DISCRIMINATION IN THE POST-9/11 ERA: CHALLENGES AND OPPORTUNITIES TEN YEARS LATER (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911submit\\_report\\_2012-04.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911submit_report_2012-04.pdf) [<https://perma.cc/VYM6-HCCP>] (promising “new beginning” in DOJ’s relations with Muslim communities).

pushing law enforcement to focus its resources elsewhere.<sup>151</sup> Not surprisingly, most cases surveyed in the current literature involved defendants motivated by Islamic extremism,<sup>152</sup> where the “pressure to generate convictions” led to a greater willingness to use informants on a larger scale.<sup>153</sup>

Still, prosecutions of left-wing defendants stand out with the highest number of indicators, even though they composed only eight percent of all relevant cases.<sup>154</sup> In explaining that discrepancy, Norris and Grol-Prokopczyk point to a broader pattern of politicians and federal law enforcement agencies “fixating” on left-wing activists, particularly environmental advocates, and elevating their low-level property crimes into terrorism offenses.<sup>155</sup> For example, Congress passed Animal Enterprise Protection Act in 2006, which created the crime of “animal enterprise terrorism,” after lobbying by the pharmaceutical and agriculture industries.<sup>156</sup> DOJ’s Inspector General has released

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151. See Daryl Johnson, *I Warned of Right-Wing Violence in 2009. Republicans Objected. I Was Right*, WASH. POST (Aug. 21, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/i-warned-of-right-wing-violence-in-2009-it-caused-an-uproar-i-was-right/> [<https://perma.cc/5LEQ-P455>]; see also Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/D27G-7GSM>] (arguing that current domestic counterterrorism strategy of ignoring far-right extremism has led to the growth and escalation of the far-right movement). Academics and journalists have chronicled the pressure that the FBI and other federal agencies felt to pursue Islamic terrorism, often at the expense of right-wing terrorism. See JOHN MUELLER & MARK G. STEWART, *CHASING GHOSTS: THE POLICING OF TERRORISM* (2016); see also Jesse J. Norris, *Explaining the Emergence of Entrapment in Post-9/11 Terrorism Investigations*, 27 *CRITICAL CRIMINOLOGY* 467, 469 (2019) (proposing that the rise in terrorism funding incentivized terrorism convictions and encouraged the entrapment of Muslims but not right-wing extremists).

152. See Norris & Grol-Prokopczyk, *supra* note 143, at 654 (58 percent of the 580 federal terrorism prosecutions in their database were against defendants inspired by Islamic extremism).

153. Norris, *supra* note 151, at 469.

154. See Norris & Grol-Prokopczyk, *supra* note 143, at 654. In contrast, fifty-eight percent of cases concerned “jihadi”-motivated defendants, while right-wing cases counted for twenty-six percent. See *id.*

155. Norris, *supra* note 6, at 266–67 (citing the FBI’s 2011 recommendation that activists who film animal cruelty at commercial farms be prosecuted as terrorists and repeated instances of counterterrorism authorities conducting training exercises against hypothetical eco-terrorists). Other sources confirm that environmental activists, animal-rights activists, and other left-wing groups have long been the target of federal prosecutions. See *FBI Surprise on Top Domestic Terror Threat*, NBC NEWS (May 19, 2005, 6:53 AM), <https://www.nbcnews.com/id/wbna7908466> [<https://perma.cc/S5LY-AWSP>] (reporting that, in 2005, the FBI told lawmakers that environmental and animal rights activists were the foremost domestic terrorism threat); see also MIKE GERMAN, *DISRUPT, DISCREDIT, AND DIVIDE: HOW THE NEW FBI DAMAGES DEMOCRACY* 198–213 (2019) (discussing the FBI’s investigation of the conduct of animal rights activists as eco-terrorism).

156. See Alleen Brown, *The Green Scare: How a Movement that Never Killed Anyone Became the FBI’s No. 1 Domestic Terrorism Threat*, THE INTERCEPT (Mar. 23, 2019, 5:32 AM), <https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/> [<https://perma.cc/9AM5-CXAV>]

two different reports criticizing the FBI for over-emphasizing the threat posed by left-wing advocacy groups.<sup>157</sup> In short, there is convincing evidence that the danger of entrapment in individual prosecutions rises if the defendant's alleged conduct matches an enforcement priority of the federal government.

Regardless of their ideological convictions, terrorism defendants' entrapment defenses almost always fail. With one notable exception, no terrorism defendant has convinced either a judge or a jury to acquit them based on only entrapment grounds,<sup>158</sup> although a "few post-9/11 terrorism cases" ended with favorable outcomes for the defendants—short sentences or partial acquittals—due to entrapment-related arguments.<sup>159</sup> That sole exception occurred in the prosecution of four white supremacists indicted in 2020 for allegedly plotting to kidnap Michigan Governor Gretchen Whitmer. The complaint asserted that two Confidential Informants ("CIs") infiltrated the group,<sup>160</sup> but

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(reporting on lobbying efforts by affected industries to convince Congress and DOJ to treat environmental activism as terrorism). The lynchpin of the Act prohibits using interstate commerce in order to damage or interfere with "the operations of an animal enterprise" or to place a person connected with such an enterprise in fear of death or bodily injury. *See* 18 U.S.C. § 43 (2018).

157. *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 1 (2010) [hereinafter REVIEW OF THE FBI'S INVESTIGATIONS], <https://www.oversight.gov/sites/default/files/oig-reports/s1009r.pdf> [https://perma.cc/EG2D-7S58]; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF INVESTIGATION'S EFFORTS TO IMPROVE THE SHARING OF INTELLIGENCE AND OTHER INFORMATION 1 (2003) [hereinafter FED. BUREAU OF INVESTIGATION'S EFFORTS TO IMPROVE INTELLIGENCE SHARING], <https://oig.justice.gov/reports/FBI/a0410/final.pdf> [https://perma.cc/2DX8-QR6G]; Norris & Grol-Prokopczyk, *supra* note 143, at 643 n.185.

158. *See* Laguardia, *supra* note 6, at 205 & n.174.

159. Jesse J. Norris, *Accounting for the (Almost Complete) Failure of the Entrapment Defense in Post-9/11 US Terrorism Cases*, 45 L. & SOC. INQUIRY 194, 195 (2020); *see also* Jesse J. Norris & Hanna Grol-Prokopczyk, *Entrapment Allegations in Right-Wing Terrorism Cases: A Mixed-Methods Analysis*, 53 INT'L J.L., CRIME & JUST. 77, 78 (2018) (arguing that three defendants—one in a militia case and two others in an international terrorism case—received partial acquittals on the basis of entrapment-related arguments). High profile examples of government prosecutions that have failed due to judicial skepticism of CIs' methods include that against the Hutaree militia members in Michigan, whose sedition charges were dismissed by a federal judge despite a year-long investigation featuring an undercover FBI agent and paid informant, *see* Nick Bunkley, *U.S. Judge in Michigan Acquits Militia Members of Sedition*, N.Y. TIMES (Mar. 27, 2012), <https://www.nytimes.com/2012/03/28/us/hutaree-militia-members-acquitted-of-sedition.html> [https://perma.cc/4ETA-SUZC], and the case against Eric McDavid, an environmental extremist who was released decades early due to concerns about the conduct of an undercover FBI informant whom he claims seduced him, *see* Colin Moynihan, *Man Convicted of Environmental Terrorism Is Freed*, N.Y. TIMES (Jan. 8, 2015), <https://www.nytimes.com/2015/01/09/us/man-convicted-of-environmental-terrorism-wins-early-release.html> [https://perma.cc/VJ2D-XGVN].

160. *See* Criminal Complaint at 2, United States v. Fox, No. 20-MJ-416 (W.D. Mich. Oct. 6, 2020), <https://www.justice.gov/opa/press-release/file/1326171/download> [https://perma.cc/2UF5-3CBF].

subsequent reporting questioned the conduct of both the CIs and the FBI agents running them; the FBI used at least twelve CIs and two undercover agents to infiltrate the group, plan and shape the kidnapping plot, and provide military training, all of which the defendants argued at trial was evidence of entrapment.<sup>161</sup> That argument was largely successful, as the jury acquitted two of the defendants in April 2022 and could not reach a decision regarding the charges facing the other two.<sup>162</sup> This partial acquittal is the only instance in which a terrorism defendant – domestic or international – has successfully convinced a jury to acquit based on an entrapment defense.<sup>163</sup> Though it could potentially signal new skepticism from the public, and by extension, juries, of FBI tactics, the Whitmer verdict stands as the exception that proves the rule. The broader reality remains that terrorism defendants arguing entrapment face very slim odds, at best, of success.

Academics and legal observers have suggested the near-certain failure of the entrapment defense in terrorism cases can be explained by the difficulty for any defendant to prove entrapment<sup>164</sup> and the deference shown by both juries and the federal judiciary to DOJ in matters of national security.<sup>165</sup> That deference could also explain the severity of the sentences imposed by federal judges on terrorism defendants; defendants who are arrested in “pre-crime terrorism offenses” often receive notably harsh sentences when compared to defendants sentenced for “many completed crimes of [non-terrorism] violence.”<sup>166</sup>

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161. See, e.g., Ken Bensinger & Jessica Garrison, *The FBI Investigation into the Alleged Plot to Kidnap Michigan Gov. Gretchen Whitmer Has Gotten Very Complicated*, BUZZFEED NEWS (Dec. 16, 2021, 4:03 PM), <https://www.buzzfeednews.com/article/kenbensinger/fbi-michigan-kidnap-whitmer> [<https://perma.cc/8ZNB-ATQE>].

162. See Mitch Smith, *Two Men Acquitted of Plotting to Kidnap Michigan Governor in High-Profile Trial*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/us/verdict-whitmer-kidnapping-case.html>.

163. See Odette Yousef, *Verdicts in Michigan governor kidnapping plot fuels questions on white extremism*, NPR (April 12, 2022) <https://www.npr.org/2022/04/12/1092414606/the-wolverine-watchmen-verdicts-spark-questions-over-how-white-extremists-are-se>.

164. See Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 20–21 (2005).

165. See Norris, *supra* note 159, at 218.

166. Norris, *supra* note 151, at 480. Some defendants in cases “regarded as egregious examples of entrapment” have received “extreme sentences” including Cromitie, who received a 25-year sentence, and the Duka brothers, three brothers who agreed to attack the Fort Dix military base in New Jersey after months of pressure from a government informant and were sentenced to life in prison, see *Life Sentences Upheld for Brothers Convicted in Terror Plot*, AP NEWS (June 1, 2016), <https://apnews.com/article/c8dede1a91b4225a809b723190e7df0> [<https://perma.cc/D8YE-6Z6Z>]. Norris, *supra* note 151, at 480.

Thus, three patterns emerge on the use of informants and entrapment defenses in terrorism cases: DOJ and the FBI have relied on CIs to achieve many terrorism convictions in the past two decades, terrorism defendants have little chance of proving entrapment in court, and the federal government's emphasis on pursuing certain types of terrorism likely increases the danger of entrapment in the corresponding investigations. Moreover, these cases typically end in convictions—either through plea agreements or guilty verdicts at trial—with little chance of success on appeal,<sup>167</sup> so the ostensible oversight provided by juries and the judiciary has offered scant protection to terrorism defendants arguing an entrapment defense. Absent meaningful extrinsic constraints on the executive branch, only federal law enforcement's self-imposed restraints remain. As the above statistics illustrated, the federal government's internal policy priorities are strongly predictive of how aggressively it pursues different types of defendants.<sup>168</sup>

#### D. Quarles and the Public Safety Exception to Miranda

In the past decade, the FBI has pushed the boundaries of a fundamental tenet of criminal law by delaying *Miranda* warnings to terrorism suspects before some interrogations.<sup>169</sup> The Supreme Court has carved out numerous exceptions to *Miranda*,<sup>170</sup> including *New York v. Quarles*,<sup>171</sup> which created a “public safety exception” to *Miranda*.<sup>172</sup> Following an arrest, law enforcement officials may delay reciting *Miranda* warnings and interrogate a suspect about a situation that poses a threat to the public before providing the warnings prior to a full interrogation.<sup>173</sup> While *Quarles* is applicable in every criminal case, it

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167. See Norris, *supra* note 159, at 210.

168. See Norris & Grol-Prokopczyk, *supra* note 143, at 655–56.

169. See *Miranda v. Arizona*, 384 U.S. 436, 471–76, 479 (1966). *Miranda* requires arresting officers to promptly inform a suspect before interrogation that they have the right to remain silent and to have an attorney, that anything they say can be used against them in court, and that they will be provided with an attorney if they cannot afford one. If a suspect makes any statement in a custodial interrogation before receiving those warnings, the government may not introduce that statement in court. See *id.*

170. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 16–25 (2010) (listing several Supreme Court cases that “dismantl[ed]” much of *Miranda*'s holdings).

171. 467 U.S. 649 (1984).

172. *Id.* at 655.

173. *Id.* at 655–56. The Court did not provide temporal constraints on that holding beyond describing the situation facing the officer in question—who asked a suspect about the location of a missing gun—as an “immediate necessity.” *Id.* at 657.

has particular significance in terrorism prosecutions, where the government is more apt to push the exception to its limits.

In the decades following the Court's ruling, most courts—state and federal—upheld pre-*Miranda* interrogations under *Quarles* when the officers had “in one or two questions, asked a suspect about the location of a weapon, an accomplice, and/or more generally whether anything on the suspect could be used to hurt the arresting officer.”<sup>174</sup> Indeed, from 1984 to 2010, prosecutors had an 80 percent success rate of securing admittance of *Quarles* evidence in federal courts.<sup>175</sup> This generally permissive judicial attitude takes on increasing importance in light of the FBI's 2010 memorandum endorsing an aggressive use of *Quarles* in terrorism cases.

Authored by DOJ and circulated within the FBI, the memo—“Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States”—relied exclusively on *Quarles* in laying out DOJ's approved approach to interrogating “suspected terrorists.”<sup>176</sup> It instructed:

1. If applicable, agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights.
2. After all applicable public safety questions have been exhausted, agents should advise the arrestee of his *Miranda* rights and seek a waiver of those rights before any further interrogation occurs, absent exceptional circumstances described below.
3. There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is

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174. Gallini, *supra* note 7, at 981 (footnotes omitted). Notwithstanding a “few outliers,” the majority of courts upheld statements under *Quarles* if they were given during short interrogations focused on an imminent threat. *Id.*

175. See Wright, *supra* note 7, at 1315. This data-set includes cases in which courts' holdings rested on issues both related to and separate from *Quarles*, but all the cases in the latter category contained dicta indicating “how the court would have ruled if it had reached the issue of admissibility based on the [public safety exception].” *Id.* at 1313. This finding rebuts the doctrinal divide proposed by some observers, who have noted that one camp of circuit courts endorse the use of *Quarles* in “inherently dangerous situations” even when officers do not have actual knowledge of a threat, while another cluster of courts have chosen a narrower approach predicated on the officers having “specific reliable information” of a threat. See Nielsen, *supra* note 8, at 23–24.

176. See *F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), <https://www.nytimes.com/2011/03/25/us/25miranda-text.html> [<https://perma.cc/MM2Y-WNTN>].

necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.<sup>177</sup>

The memo went on to note that “the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case.”<sup>178</sup>

The FBI memo represents the culmination of over a decade of law enforcement agencies increasingly pushing the boundaries of *Quarles* when interrogating terrorists, a strategy that preceded 9/11.<sup>179</sup> In 1997, New York City Police Department (NYPD) officers interrogated Gazi Ibrahim Abu Mezer, whom they suspected of plotting a bombing, for an unspecified period of time before providing *Miranda* warnings. Both the district court and the Second Circuit ruled that his pre-warning statements were admissible, citing *Quarles*.<sup>180</sup> After 9/11, the FBI took the same approach in investigating a series of terrorist attacks, repeatedly delaying *Miranda* warnings to suspected terrorists during prolonged interrogations.<sup>181</sup>

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177. *Id.*

178. *Id.* It defined an “an operational terrorist” as “an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation.” *Id.*

179. Gallini, *supra* note 7, at 976–80.

180. *See* United States v. Khalil, 214 F.3d 111, 121, 126 (2d Cir. 2000).

181. In 2009, agents interrogated Umar Farouk Abdulmutallab for over fifty minutes after he attempted to detonate an explosive device hidden in his clothing on a flight from Amsterdam to Detroit. *See* United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at \*1 (E.D. Mich. Sept. 16, 2011). The district court in Abdulmutallab's case denied his motion to suppress incriminating statements that he made during that un-warned interrogation, citing *Quarles* and *Khalil* (the case against Abu Mezer). *Id.* In May 2010, just prior to the release of the *Quarles* memo, an FBI team interrogated Faisal Shahzad for roughly three hours without providing *Miranda* warnings after he attempted to drive a car bomb into Times Square. *See* Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL ST. J. (Mar. 24, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704050204576218970652119898>; *see also* Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. TIMES (May 4, 2010), <https://www.nytimes.com/2010/05/05/nyregion/05arr est.html> [<https://perma.cc/3Q5Z-U8L5>] (noting Shahzad “was interrogated without initially being read his *Miranda* rights”). Shahzad continued to confess after eventually receiving the warnings, so there was no subsequent litigation surrounding that un-warned interrogation. *See* Perez, *supra* note 181 (noting Shahzad was interrogated for roughly three hours following his attempted car bombing). Most famously, the FBI interrogated Dzhokar Tsarnaev, one of the Boston Marathon bombers, in 2013 for sixteen hours without *Mirandizing* him, pre-emptively pointing to *Quarles* and FBI policy as justification. *See* Brian Beutler, *DOJ Official: No Miranda Rights for Boston Bombing Suspect Yet*, TALKING POINTS MEMO (Apr. 19, 2013, 6:18 PM), <https://talkingpointsmemo.com/li vewire/doj-official-no-miranda-rights-for-boston-bombing-suspect-yet> [<https://perma.cc/HLF3-K34J>]. That interrogation ended only when a federal judge intervened and read Tsarnaev his rights

But the FBI memo has not only affected a limited number of high-profile cases. Federal and state courts have notably increased admissibility of statements made after arrest during extended, *Miranda*-less interrogations since 2010.<sup>182</sup> From 1984 to 2010, courts allowed such statements in 3.4 percent of cases surveyed, while that number jumped to 12 percent from 2010 to 2016.<sup>183</sup> Of course, there is no proof that courts' increasing tolerance of law enforcement pushing the boundaries of *Quarles* is connected to the FBI memo. Moreover, these cases concerned a variety of crimes—some terrorism-related, some not, and the courts obviously did not cite the memo when explaining their rationales.<sup>184</sup> Rather, separate studies support a simple proposition: as a general rule, courts are likely to admit statements obtained under the public safety exception, even when law enforcement agencies invoke it to justify increasingly lengthy, unwarned interrogations, especially though not exclusively in terrorism cases.<sup>185</sup>

This trend persists in recent domestic terrorism cases. In 2013, the FBI learned of Buford Rogers' and other Minnesota militia members' plot to raid a National Guard armory and blow up a local police station and radio tower.<sup>186</sup> FBI agents arrested Rogers, invoked the public safety exception, and interrogated him for forty minutes about his "potential collaborators and associates," details about the group's explosives stockpile, and whether other plotters could access those weapons.<sup>187</sup> The district court largely denied Rogers's motion to suppress all of the statements he made during that interrogation, pointing to the "dangerous nature of the suspected plot" and the explosives found during the search, though it did suppress statements that Rogers made about owning a weapon as a convicted felon, as that line of questioning lacked a "nexus between the questions and the exigent circumstances."<sup>188</sup>

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through the phone. See Devlin Barrett et al., *Judge Made Call to Advise Suspect of Rights*, WALL ST. J. (Apr. 25, 2013, 7:40 PM), <https://www.wsj.com/articles/SB10001424127887323789704578444940173125374> [<https://perma.cc/6R27-4VZU>].

182. See Gallini, *supra* note 7, at 986 n.235 (listing seven cases—all involving possible explosions—in which courts admitted statements made in extended, unwarned interrogations).

183. See *id.* at 988.

184. See *id.* at 989–90.

185. See *id.* at 981; see also Wright, *supra* note 7, at 1305 (discussing the creation of the public safety exception to *Miranda* warnings).

186. *United States v. Rogers*, No. 13-cr-130, 2013 WL 6388459, at \*2 (D. Minn. Aug. 29, 2013).

187. *Id.* at \*9.

188. *Id.* at \*10–11; *United States v. Rogers*, No. 13-cr-130, 2013 WL 6388457, at \*5–6.

A year later, the district court in *United States v. Peace*<sup>189</sup> also denied a domestic terrorism suspect's motion to suppress statements he made during a prolonged, unwarned interrogation. Planning to attack government targets with two accomplices, Terry Peace asked an acquaintance to provide him with explosive devices.<sup>190</sup> The acquaintance was in fact a CI and Peace was arrested.<sup>191</sup> As with Rogers, FBI agents decided that the potential danger of the plot warranted questioning Peace without providing *Miranda* warnings and did so for nearly an hour.<sup>192</sup> The district court denied Peace's motion to suppress incriminating statements that he made during that interrogation, referencing *Quarles* and citing the district court that denied Abdulmutallab's motion to dismiss on similar grounds.<sup>193</sup> These are just two examples. Extended, unwarned interrogations like those of Rogers and Peace are difficult to identify and track, as they are discussed in court filings only if defendants file motions to suppress. There are almost certainly more instances in which FBI agents delayed providing *Miranda* warnings to domestic terrorism suspects in accordance with the 2010 memo.<sup>194</sup>

Given the federal judiciary's general tolerance of interrogations conducted under the shield of *Quarles*, the discretion of the FBI and DOJ in deciding to conduct lengthy interrogations of domestic terrorism suspects before administering *Miranda* warnings becomes a crucial limitation. In the unwarned interrogation of Rogers, the FBI agent asked him at length about his potential conspirators, and the district judge denied his motion to suppress his responses to those questions.<sup>195</sup> If courts regularly allow unwarned statements about co-conspirators under *Quarles*, particularly in domestic terrorism investigations, unwarned questioning can be a backdoor into a broader interrogation of a group that has come under FBI suspicion. One

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189. No. 14-CR-11, 2014 WL 6908394 (N.D. Ga. Sept. 25, 2014).

190. *See id.* at \*2. The district court adopted the factual findings and legal recommendations of a magistrate court virtually in their entirety. *See United States v. Peace*, 14-CR-011-01, 2014 WL 6908412, at \*4–5.

191. *See Peace*, 2014 WL 6908394, at \*3.

192. *See id.*

193. *See id.* at \*13–18.

194. Jay Skebba, *Attorney for Domestic Terrorism Suspect Says Agents Violated Miranda Rights*, THE BLADE (June 7, 2019, 7:36 AM), <https://www.toledoblade.com/local/courts/2019/06/07/domestic-terrorist-attorney-says-miranda-rights-violated-by-federal-agents/stories/20190605011> [<https://perma.cc/555J-ETQA>].

195. *United States v. Rogers*, No. 13-cr-130, 2013 WL 6388459, at \*5, \*10 (D. Minn. Aug. 29, 2013).

weapon, or even the threat of a weapon, can be the basis for an unwarned interrogation that collects evidence against multiple suspects with discretionary FBI policy serving as an enabler rather than a restraint.

The government's leeway in invoking *Quarles* provides little predictability in how it will approach individual cases. Often, if the FBI even decides to invoke *Quarles*, agents ask a few questions directly related to immediate safety concerns;<sup>196</sup> other times, agents conduct lengthier interrogations that touch on topics beyond immediate threats to themselves and to the public.<sup>197</sup> Still, federal courts' increasing acceptance of *Quarles* evidence from lengthy interrogations and the federal government's current focus on domestic terrorism could result in the 2010 FBI memo—or a similar policy specific to domestic terrorism—affecting hundreds of cases.

While the preceding sections on investigative inquiries and CI describe important powers, it is important to remember that the FBI cannot employ every investigative technique in its arsenal solely on its own initiative. It needs judicial approval to install wiretaps, to secure and execute search and arrest warrants,<sup>198</sup> and to introduce evidence obtained during prewarned investigations, all of which are essential to the FBI's ability to carry out its mission. This section does not dismiss the importance of those tools, nor their necessity in investigating potential domestic terrorists. Rather, it compiles all of the ways that the Bureau can forge its own investigative path vis-à-vis domestic terrorism, free of external oversight.

The discretion of the federal government to investigate domestic terrorism can be characterized in one of two ways: on one hand, there is little judicial or congressional oversight in this area, with the exception of judicial scrutiny of warrants and the admissibility of statements

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196. See Garrett M. Graff, *The Furious Hunt for the MAGA Bomber*, WIRED (Aug. 12, 2020, 6:00 AM), <https://www.wired.com/story/furious-hunt-maga-mail-bomber/> [<https://perma.cc/3GC6-4DE2>].

197. See *Rogers*, 2013 WL 6388459, at \*9.

198. Title 8 U.S.C. §§ 2516 through 2518 (2018) lay out the full requirements for obtaining judicial approval for a wiretap. Importantly, under 18 U.S.C. § 2517(8), federal law enforcement has “additional authority to share intercepted communications and derivative evidence, including with appropriate federal, State, local, or foreign officials, when disclosing information revealing a threat of terrorism, including domestic terrorism.” *Violent Extremism and Domestic Terrorism in America*, *supra* note 78, at 7 (statement of Brad Wiegmann, Deputy Assistant Att’y Gen. of the Dep’t of Just.). In domestic terrorism matters, judges also have expanded authority under Fed. R. Crim. P. 41(b)(3) to issue nationwide search warrants, which are normally limited to their district. *See id.*

made during interrogations. On the other, DOJ and the FBI have instituted layers of approval mechanisms across close to ten different manuals, some of which, like the DIOG, run for hundreds of pages. But that internal oversight does not have the force of law and can, of course, be changed at any time. Regardless of whether it takes a maximalist approach, like invoking *Quarles* to initially deny suspects their *Miranda* warnings or using disruption tactics against suspected groups, the executive branch marches to the beat of its own drum when investigating domestic terrorists. That discretion largely carries over to the second stage in a domestic terrorism prosecution: the choice of statutes used in charging the defendants.

### III. FEDERAL CHARGING AUTHORITIES IN DOMESTIC TERRORISM CASES

Following the investigation of a potential domestic terrorist, DOJ must decide whether it has sufficient evidence to support charging a defendant with violations of specific statutes. As discussed above, there is no federal criminal domestic terrorism statute,<sup>199</sup> and, consequently, no single federal crime of domestic terrorism.<sup>200</sup>

Because domestic terrorism is predicated on the violation of some federal or state criminal law, there is no shortage of charges available to address the conduct of domestic terrorists.<sup>201</sup> To the contrary, the federal government has yet to unleash its authority to charge domestic terrorism offenses to the fullest extent. Historically, the restraint exercised by the federal government in declining to bring domestic terrorism charges, even when they are available, is a matter of policy discretion;<sup>202</sup> DOJ must be notified of any terrorism charges brought by federal prosecutors across the country,<sup>203</sup> but DOJ approval is not

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199. See *supra* Section I.A.

200. See *id.*; see also Anna Meier, *What Does a "Terrorist" Designation Mean?*, LAWFARE (July 19, 2020, 10:01 AM), <https://www.lawfareblog.com/what-does-terrorist-designation-mean> [<https://perma.cc/R3N8-VKZM>] (explaining the process, consequences, and effects of being labeled a terrorist organization by the U.S. government).

201. See Chesney, *supra* note 5; Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [<https://perma.cc/3K3Q-3V2W>].

202. See, e.g., Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT. SEC. L. & POL'Y 5, 29 (2005); CHRIS SHIELDS ET AL., AN ASSESSMENT OF DEFENSE AND PROSECUTORIAL STRATEGIES IN TERRORISM TRIALS: IMPLICATIONS FOR STATE AND FEDERAL PROSECUTORS v, xiii (2008), <https://www.ojp.gov/pdffiles1/nij/grants/228276.pdf> [<https://perma.cc/F2KC-9FZV>].

203. See U.S. Dep't of Just., Just. Manual § 9-2.137 (2007).

required for certain domestic terrorism offenses.<sup>204</sup> The discretion to approve or disapprove domestic terror charges can be influenced by political appetite rather than a strictly evidence-based assessment.<sup>205</sup> Thus, this part demonstrates that the federal government has substantial unchecked power to charge acts of domestic terrorism.

This part proceeds in two parts. First, it provides an overview of the most commonly used and other relevant federal charges brought in domestic terrorism cases, how federal prosecutors have typically used these charges, and how they could be further leveraged in the future. A brief discussion of non-terrorism related federal charges brought against terrorist suspects follows. Second, this part addresses how charging decisions are made in domestic terrorism cases. It explains which federal charges require approval from DOJ and the considerations that influence whether DOJ decides to classify an act as domestic terrorism. It concludes with an examination of the discretion DOJ exercises, through its rhetoric, charging, and sentencing powers, in shaping the public narrative surrounding domestic terrorism—specifically whether certain classes of cases, committed by certain classes of defendants, are acts of domestic terrorism, hate crimes, or something else entirely.

### A. Charging “Domestic Terrorism”

Any violation of a federal criminal law that satisfies § 2331(5)’s definition can constitute an act of domestic terrorism.<sup>206</sup> Additionally, § 2332b(g)(5)(B) lists 51 “federal crimes of terrorism” that can be acts of domestic terrorism.<sup>207</sup> This Article does not examine every possible domestic terrorism offense; instead, it focuses on those charges most frequently brought in connection with incidents of domestic terrorism,

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204. *See id.*

205. *See, e.g.,* Johnson, *supra* note 151; Annie-Rose Strasser, *Republicans Blasted Obama Administration For Warning About Right-Wing Domestic Terrorism*, THINK PROGRESS (Aug. 7, 2012, 2:25 PM), [https://thinkprogress.org/republicans-blasted-obama-administration-for-warning-about-right-wing-domestic-terrorism-de556496606c/\[https://perma.cc/E7TM-FX8H\]](https://thinkprogress.org/republicans-blasted-obama-administration-for-warning-about-right-wing-domestic-terrorism-de556496606c/[https://perma.cc/E7TM-FX8H]); Michael Loadenthal, *The “Green Scare” and “Eco-Terrorism”: The Development of U.S. “Counterterrorism” Strategy Targeting Direct Action Activists*, in *THE TERRORIZATION OF DISSENT: CORPORATE REPRESSION, LEGAL CORRUPTION, AND THE ANIMAL ENTERPRISE TERRORISM ACT 91*, 92 (Jason Del Gandio & Anthony J. Nocella II eds., 2014); Brown, *supra* note 156.

206. 18 U.S.C. § 2331(5) (2018).

207. Out of the total fifty-seven offenses listed at 18 U.S.C. § 2332b(g)(5)(B), fifty-one can be brought in both international and domestic terrorism cases (the remaining six are applicable only to international terrorism). *See* German & Robinson, *supra* note 17, at 5.

including acts listed as “federal crimes of terrorism” and acts that meet § 2331(5)’s definition but are charged under non-terrorism statutes.

It is important to note that the charges discussed here are not exclusive of international terrorism. That is, these charges have also been brought against defendants whose conduct occurred primarily in the United States but who were motivated by a foreign ideology, most commonly Islamic jihadism.<sup>208</sup> This Article, however, discusses only acts of domestic terrorism motivated by domestic ideologies that have no link to foreign terrorist ideologies or organizations, as that is how the federal government distinguishes domestic terrorism from international terrorism.<sup>209</sup>

#### i. 18 U.S.C. § 2332a

Section 2332a concerns the use of weapons of mass destruction. Importantly, “weapon of mass destruction” means any “destructive device,” as defined at 18 U.S.C. § 921(a)(4), which includes explosive or incendiary bombs or grenades.<sup>210</sup> Thus, for purposes of § 921(a)(4) and § 2332a, a weapon of mass destruction could be a chemical or biological weapon, but it could also be something much simpler, like a pressure cooker bomb<sup>211</sup> or a Molotov cocktail.<sup>212</sup> Section 2332a criminalizes the unlawful use of and the threat, attempt, or conspiracy to use such a weapon of mass destruction “against any person or property within the United States,” and:

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208. See, e.g., *United States v. Mehanna*, 735 F.3d 32, 43, 46 (1st Cir. 2013); *United States v. Yousef*, 327 F.3d 56, 84, 173 (2d Cir. 2003). “The federal government characterizes American Muslims acting in the U.S. with no direct connection to foreign terrorist groups not as ‘domestic’ terrorists but as ‘homegrown violent extremists’ (HVEs). This nomenclature has no connection to any statutory definition but is treated in practice as a form of ‘international’ terrorism due to their purported ‘inspiration’ from designated foreign terrorist groups.” German & Robinson, *supra* note 17, at 4.

209. See *supra* Part I; see also *Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 14–15 (2020) [hereinafter *Worldwide Threats to the Homeland*] (distinguishing international terrorists like al Qaeda and ISIS from domestic terrorists “inspired by one or more extremist ideologies to commit violent acts”); DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT, *supra* note 24, at 17 n.7.

210. “The term ‘destructive device’ means—(A) any explosive, incendiary, or poison gas—(i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses.” 18 U.S.C. § 921(a)(4) (2018).

211. See *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 68 (D. Mass. 2016).

212. See Lisa Miller, *The Making of a Molotov Cocktail: Two Lawyers, a Summer of Unrest, and a Bud Light*, N.Y. MAG.: INTELLIGENCER (Aug. 4, 2020), <https://nymag.com/intelligencer/article/lawyers-arrested-molotov-cocktail-nyc-protest.html>.

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense; (B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce; (C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or (D) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce.<sup>213</sup>

That provision further criminalizes the unlawful use of or threat, attempt, or conspiracy to use a weapon of mass destruction “against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States.”<sup>214</sup> Although § 2332a is a “federal crime of terrorism,” not all conduct charged under this provision automatically qualifies as terrorism; the act must have also been intended to intimidate or coerce a civilian population or the government.<sup>215</sup>

The deadliest and most well-known domestic terrorism attack in the United States featured § 2332a charges. The 1995 Oklahoma City bombing, carried out by avowed white supremacists Timothy McVeigh and Terry Nichols, killed 168 people<sup>216</sup> and injured another 759.<sup>217</sup> Among a litany of other charges, McVeigh and Nichols were charged with violating § 2332a for using an ammonium nitrate bomb to carry out the attack.<sup>218</sup> Federal prosecutors have also used § 2332a against other domestic terrorists: Steven Parr, who planned to destroy the Reuss Federal Plaza in Milwaukee, Wisconsin;<sup>219</sup> David Ansberry, who placed a bomb outside of the Nederland, Colorado police station to avenge a friend killed by local law enforcement;<sup>220</sup> and Glendon Scott Crawford, a member of the Ku Klux Klan, who conspired to use “a radiation dispersal device” against Muslim Americans and had

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213. 18 U.S.C. § 2332a(a)(2).

214. *Id.* § 2332a(a)(3).

215. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 860–66 (2014).

216. *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998).

217. *Sue Mallonee et al., Physical Injuries and Fatalities Resulting from the Oklahoma City Bombing*, 276 J. AM. MED. ASS’N 382, 382–87 (1996).

218. *See McVeigh*, 153 F.3d at 1176–77.

219. *See United States v. Parr*, 545 F.3d 491, 495 (7th Cir. 2008).

220. *See United States v. Ansberry*, 976 F.3d 1108, 1113 (10th Cir. 2020).

“scouted mosques . . . as possible target locations.”<sup>221</sup> Most recently, DOJ has charged three defendants who plotted to kidnap Michigan Governor Gretchen Whitmer with conspiring to use improvised explosive devices to prevent “the Governor’s security detail and any responding law enforcement officers” from disrupting their plan.<sup>222</sup> Together, these cases illustrate that the federal government can and has charged defendants with violating § 2332a in domestic terrorism cases, both before and after 9/11.

ii. 18 U.S.C. § 844(f)

Section 844(f)(1) criminalizes maliciously damaging or destroying, by means of fire or explosive, any property that is either owned by the United States or receives federal funding.<sup>223</sup> A violation of § 844(f)(1) alone is not a federal crime of terrorism under § 2332b(g)(5)(B); the violation must also directly or proximately cause either “personal injury” or a substantial risk of personal injury,<sup>224</sup> or “the death of any person.”<sup>225</sup> For example, McVeigh and Nichols were also convicted of violating § 844(f) in the Oklahoma City bombing by using an explosive to damage a federal government building.<sup>226</sup> Because the bombing resulted in death and injury to hundreds of people, their violation of § 844(f) constituted a federal crime of terrorism.

Recent events have created a new context in which DOJ has brought § 844(f) charges. As of May 31, 2022 seven defendants in five separate cases from the BLM protests and counter-protests during the summer of 2020 have been charged with violations of § 844(f)(2).<sup>227</sup>

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221. *Saratoga County Man Sentenced to 30 Years for Plot to Kill Muslims*, U.S. ATT’Y’S OFF., N.D. OF N.Y. (Dec. 19, 2016), <https://www.justice.gov/usao-ndny/pr/saratoga-county-man-sentenced-30-years-plot-kill-muslims> [<https://perma.cc/8GWT-BWEE>]; *United States v. Crawford*, 714 F. App’x 27 (2d Cir. 2017). Crawford was also convicted of another domestic terrorism offense: 18 U.S.C. § 2332h(a), which criminalizes the production, construction, acquisition, direct or indirect transfer, receipt, possession, importation, exportation, or use or the possession and threatened use of “any weapon that is designed or intended to release radiation or radioactivity at a level dangerous to human life.” 18 U.S.C. § 2332h(a) (2018).

222. Superseding Indictment at 7, *United States v. Fox*, No. 20-CR-00183 (W.D. Mich. Apr. 28, 2021).

223. *See* 18 U.S.C. § 844(f)(1).

224. *Id.* § 844(f)(2).

225. *Id.* § 844(f)(3).

226. *See United States v. McVeigh*, 153 F.3d 1166, 1176, 1179 (10th Cir. 1998).

227. *See Michael Loadenthal, Tracking Federal and Non-Federal Cases Related to Summer-Fall Protests, Riots, & Uprisings*, THE PROSECUTION PROJECT (Oct. 5, 2021), <https://theprosecutionproject.org/2020/12/22/tracking-federal-cases-related-to-summer-protests-riots-uprisings/>

Those defendants included Andrew Salvarani Garcia-Smith and Charles Anthony Pittman, who were charged with violating § 844(f)(2) after allegedly burning Fayetteville, North Carolina's Market House, which receives federal aid, with a flammable liquid that they spilled in the building during BLM protests.<sup>228</sup> Additionally, during BLM protests in Philadelphia, Lore-Elisabeth Blumenthal allegedly destroyed two Philadelphia Police Department vehicles by using a flaming piece of wood from a police barricade to set the vehicles on fire, again causing substantial risk of injury to persons in violation of § 844(f)(2).<sup>229</sup>

iii. 18 U.S.C. § 844(i)

Section 844(i) criminalizes the malicious damage or destruction, by means of fire or explosive, any building, vehicle, or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," or the attempt thereof.<sup>230</sup> The federal government has prosecuted environmental activists, militia members, white supremacists, and anti-police protestors under § 844(i) for everything from pipe bombs to arson.

On the right end of the political spectrum, Randy Graham, who belonged to a militia dedicated to overthrowing the U.S. government, conspired to violate § 844(i) by planning attacks on multiple federal, utility, and commercial targets,<sup>231</sup> among other offenses.<sup>232</sup> In 2004, Dennis Mahon, an avowed white supremacist, was convicted under § 844(i) for delivering a pipe bomb to the City of Scottsdale's Diversity Office; the bomb exploded injuring three employees and damaging the government building.<sup>233</sup>

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[<https://perma.cc/KLC4-VTMB>] (referring to a spreadsheet of hundred of cases accessible via the cited link that The Prosecution Project has collected regarding arrests involving protests, riots, etc.).

228. *See id.* Pittman has a guilty plea pending on unspecified charges.

229. *See id.* The other cases include: Martino Jamel Andrews in Cleveland, Ohio, who was charged with allegedly setting a Cuyahoga County van on fire; Shawn Jenkins in New York City, who was charged with allegedly throwing a Molotov cocktail at an NYPD vehicle; Carlos A. Matchett, Khalif Miller, and Anthony David Ale Smith in Philadelphia, who were charged with allegedly destroying a Philadelphia Police Department vehicle by placing flammable materials in the vehicle after a fire had already started; and Ayoub Tabri also in Philadelphia, who was charged with allegedly throwing a lit road flare into a Pennsylvania State Police vehicle—all during BLM protests and all creating a substantial risk of injury to persons in violation of § 844(f)(2). *See id.*

230. 18 U.S.C. § 844(i).

231. *See United States v. Graham*, 275 F.3d 490, 498 (6th Cir. 2001).

232. *See id.* at 497, 499.

233. *See Mahon v. United States*, No. CV-17-2031, 2018 WL 8188212, at \*1–2 (D. Ariz. Nov. 5, 2018).

On the left side of the political spectrum, Animal Liberation Front (ALF) and the Earth Liberation Front (ELF) defendants in *United States v. Thurston*<sup>234</sup> pled guilty to § 844(i) charges for committing acts of arson against federal government agencies and private parties, such as meat packing companies, they thought were responsible for destroying the environment and hurting animals.<sup>235</sup> More recently, DOJ has brought a slew of § 844(i) charges in connection with BLM protests.<sup>236</sup> While the vast majority of protestors were peaceful, some—as well as some counter-protestors—resorted to violence, often involving incendiary devices thrown at law enforcement vehicles or storefronts.<sup>237</sup> In total, The Prosecution Project has, as of May 31, 2022 documented seventy-nine defendants in forty-eight separate cases from the summer 2020 BLM and counter protests facing § 844(i) charges.<sup>238</sup> The most well-known of those cases is that of Urooj Rahman and Colinford Mattis, two attorneys who allegedly threw a Molotov cocktail at an empty New York City Police Department vehicle in May 2020, leading to a federal indictment that included two counts of violating § 844(i);<sup>239</sup> in October 2021, they each pled guilty to one count of making and possessing an explosive device in violation of 26 U.S.C. § 5861(d).<sup>240</sup>

#### iv. 18 U.S.C. § 1361

Section 1361 criminalizes attacking any property of the United States.<sup>241</sup> For example, ELF members Katherine Christianson and Bryan Rivera were charged in 2008 with violating § 1361 for destroying or damaging hundreds of trees and several vehicles owned by the U.S. Forest Service in furtherance of their anti-industrialist political

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234. No. CR 06–60069, 2007 WL 1500176 (D. Or. May 21, 2007).

235. *See id.* at \*3–5.

236. *See* Eric Halliday, *The Federal Government's Aggressive Prosecution of Protestors*, LAWFARE (July 13, 2020, 12:22 PM), <https://www.lawfareblog.com/federal-governments-aggressive-prosecution-protestors> [<https://perma.cc/7AWR-Y2ES>].

237. *See* Colleen Long et al., *Summer of Protest: Chance for Change, but Obstacles Exposed*, AP NEWS (Sept. 6, 2020), <https://apnews.com/article/9035ecd58d5dba755185666ac0ed6d> [<https://perma.cc/ZW5D-QYTE>].

238. Loadenthal, *supra* note 227.

239. *See* Grand Jury Indictment at \*1–3, *United States v. Mattis*, No. 20-CR-203 (E.D.N.Y. Jun. 11, 2020).

240. *See* David Thomas, *New York Lawyers Plead Guilty in Molotov Cocktail Case*, REUTERS (Oct. 20, 2021, 2:37 PM), <https://www.reuters.com/legal/litigation/new-york-lawyers-plead-guilty-molotov-cocktail-case-2021-10-20/>.

241. *See* 18 U.S.C. § 1361 (2018).

agenda.<sup>242</sup> More recently, multiple defendants have been charged with attempting to violate § 1361 for their actions in forcibly storming the Capitol on January 6, 2021.<sup>243</sup> The FBI believes that one defendant is a leader within the Oath Keepers, a loose collection of anti-government militias,<sup>244</sup> while other defendants are believed to be members of the Ohio State Regular Militia and the Oath Keepers.<sup>245</sup> Others who engaged in similar conduct during the events of January 6 could face similar charges.

### v. 18 U.S.C. § 2339A

Section 2339A bans providing material support to terrorists.<sup>246</sup> The statute criminalizes providing “material support or resources or conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out,” any federal crime of terrorism listed under § 2332b(g)(5)(B), including violations of §§ 844(f) or (i), 2332a, and 2332f.<sup>247</sup> With regard to the intent element,

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242. See *United States v. Christianson*, 586 F.3d 532, 534 (7th Cir. 2009).

243. See, e.g., Grand Jury Indictment at 36, *United States v. Rhodes* (D.D.C. Jan. 12, 2022), <https://s3.documentcloud.org/documents/21178554/charges.pdf> [https://perma.cc/E3GR-SZM7]; First Superseding Indictment at 19, *United States v. Caldwell*, No. 21-cr-28 (D.D.C. Feb. 19, 2021); Criminal Complaint at 14, *United States v. Alam*, No. 21-mj-00165 (D.D.C. Jan. 25, 2021); Criminal Complaint at 23, *United States v. Antonio*, No. 21-mj-00375 (D.D.C. Apr. 14, 2021).

244. See First Superseding Indictment at 4, *United States v. Caldwell*, No. 21-cr-28-APM (D.D.C. Feb. 19, 2021).

245. See *id.* at 7.

246. 18 U.S.C. § 2339A must also be distinguished from 18 U.S.C. § 2339B, which criminalizes the knowing material support of foreign terrorist organizations (FTOs), which are formally designated as such by the State Department. See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> [https://perma.cc/FDV9-WR4Q].

247. 18 U.S.C. § 2339A (2018). Initially enacted in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022, § 2339A has been expanded several times since then. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended § 2339A’s list of predicate offenses to include, among others, § 842(m) and (n) (plastic explosives) and § 2332a (weapons of mass destruction). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1286–87. Another amendment later in 1996 added, among others, § 930(c) (use of a firearm during a murderous attack on a federal facility) to § 2339A’s predicate offenses. See Economic Espionage Act of 1996, Pub. L. No. 104-294, § 601(b)(2), 110 Stat. 3488, 3502. The USA PATRIOT Act of 2001 made attempts and conspiracies to violate § 2339A subject to the same maximum penalties as a substantive violation and increased the maximum penalty for violating § 2339A from 10 to 15 years imprisonment or, if death resulted, to life imprisonment. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, §§ 810(c), 811(d), 115 Stat. 272, 380–81. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPR) expanded the definition of “material support or resources” to a more general definition of “any property, tangible or intangible, or service.” See Pub. L. No. 108-458, § 6604, 118 Stat. 3638, 3762. The act also clarified definitions

DOJ's position is that § 2339A "requires only that the supplier of the material support have knowledge of its intended use. Section 2339A, unlike the aiding and abetting statute (18 U.S.C. § 2), does not require that the supplier also have whatever specific intent the perpetrator of the actual terrorist act must have to commit one of the [predicate] offenses."<sup>248</sup> Thus, material support serves as a broader catch-all, allowing prosecutors to charge defendants even when they cannot prove the defendant's specific intent to aid an act of terrorism.

After 9/11, § 2339A became a mainstay of terrorism prosecutions in federal courts.<sup>249</sup> The vast majority of § 2339A charges have been brought against defendants in international terrorism cases, but five domestic terrorism defendants have also faced § 2339A charges.<sup>250</sup> In 1996, Floyd Raymond Looker, a commander of the Mountaineer Militia in West Virginia, pled guilty to providing material support to terrorists under § 2339A.<sup>251</sup> Under his leadership, the militia manufactured thousands of explosive devices and planned to destroy an FBI building as part of a war with the federal government.<sup>252</sup> One of Looker's co-conspirators, James R. Rogers, was also charged with violating § 2339A for his role in supplying the militia with photographs of blueprints for the FBI facility.<sup>253</sup> In February 2001, Connor Cash, the leader of an ELF cell in Suffolk County, New York, was charged with violating § 2339A for his role in the arson of five homes under construction and for plotting to burn down a farm to free animals, but a jury acquitted him of all charges.<sup>254</sup> In 2014, Eric Feight pled guilty to violating § 2339A for helping Crawford (discussed above) modify

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of "training" and "expert advice or assistance" as examples of material support. *Id.* Finally, IRTPR broadened § 2339A's predicate offenses to include all fifty-seven federal crimes of terrorism listed at § 2332b(g)(5)(B). *Id.*

248. U.S. Dep't of Just., Just. Manual § 15 (2020).

249. See CHARLES DOYLE, CONG. RSCH. SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. §2339A AND §2339B, at 4 (2016), <https://fas.org/sgp/crs/natsec/R41333.pdf> [<https://perma.cc/HDE3-CTX5>] [hereinafter DOYLE, TERRORIST MATERIAL SUPPORT].

250. See German & Robinson, *supra* note 17, at 8.

251. See *United States v. Looker*, No. 98-4291, 1998 WL 911715, at \*1 (4th Cir. 1998).

252. See *id.* at \*1-2.

253. See *United States v. Rogers*, No. 1:96-mj-00031 (N.D. W. Va. Oct. 9, 1996); see also Richard A. Serrano, *7 Militiamen Held in Plot to Blow Up FBI Facility*, L.A. TIMES (Oct. 12, 1996, 12:00 AM) <https://www.latimes.com/archives/la-xpm-1996-10-12-mn-53161-story.html> [<https://perma.cc/EFN2-ASES>] (detailing and explaining the reasons behind the West Virginia militia groups' plan to blow up an FBI facility).

254. See *United States v. Cash*, No. 2:01-cr-00169 (E.D.N.Y. 2001); see also Robert E. Kessler, *Acquittal in Environmental Terrorism Case*, NEWSDAY LONG ISLAND (May 21, 2004), <https://www.brewingtonlaw.com/sites/default/files/pressclips2004/Acquittal-in-Terrorism-Case-Newsday-052104.pdf> [<https://perma.cc/QXY3-GHTS>] (detailing the acquittal of Connor Cash).

a radiation device to kill Muslim Americans.<sup>255</sup> Finally, in 2019, Elizabeth Lecron pled guilty to a § 2339A charge for her role in planning a mass shooter attack in Toledo, Ohio.<sup>256</sup> Inspired by a mix of anti-government hatred with admiration for infamous mass shooters, Lecron and her boyfriend Vincent Armstrong had planned to attack a Toledo bar and an interstate pipeline in Georgia with bombs and guns.<sup>257</sup>

Oddly, the FBI's official press release about Lecron's case stated that "Lecron's prosecution is believed to be the first time a material support charge—a very serious charge usually brought against international terrorism suspects—has been used in a domestic terrorism case."<sup>258</sup> As catalogued above, Lecron is not the first domestic terrorist to have been charged with violating § 2339A.<sup>259</sup> This erroneous statement by the FBI may suggest that FBI field offices around the country are not aware that § 2339A charges can be and are brought against suspected domestic terrorists.<sup>260</sup> Despite its limited use in the domestic context, there are no legal barriers to § 2339A being used in a greater number of domestic terrorism cases.

#### vi. Additional federal crimes of domestic terrorism

Three additional federal crimes of terrorism could be brought against domestic terrorists, though they have not been to date. First, 18 U.S.C. § 2332f prohibits unlawfully delivering, placing, or detonating an explosive or other lethal device that can release toxic chemicals, biological agents, or radiation "with the intent to cause death or

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255. See *Upstate New York Man Sentenced to Over Eight Years in Prison for Providing Material Support to Terrorists*, DEP'T OF JUST. OFF. OF PUB. AFF. (Dec. 16, 2015), <https://www.justice.gov/opa/pr/upstate-new-york-man-sentenced-over-eight-years-prison-providing-material-support-terrorists> [<https://perma.cc/2J75-T6EC>].

256. See *Would-Be Mass Shooters Sentenced*, FED. BUREAU OF INVESTIGATION NEWS (Jan. 31, 2020), <https://www.fbi.gov/news/stories/couple-sentenced-for-planning-mass-shooting-013120> [<https://perma.cc/944Y-6SNL>].

257. See *Toledo Woman Sentenced for Planning Two Terrorist Attacks*, U.S. DEPT. OF JUST., U.S. ATT'Y OFF. FOR THE N. DIST. OF OHIO (Nov. 20, 2019), <https://www.justice.gov/usao-ndoh/pr/toledo-woman-sentenced-planning-two-terrorist-attacks> [<https://perma.cc/3MRV-QR3K>]; see also *id.* (discussing how Lecron's boyfriend also helped plan the attack and pled guilty to a lower charge).

258. *Would-Be Mass Shooters Sentenced*, *supra* note 256.

259. To the authors' knowledge, these five individuals are the only defendants who have faced § 2339A charges for acts of domestic terrorism.

260. It should be noted that DOJ frequently brings § 2339A charges in international terrorism cases. See DOYLE, TERRORIST MATERIAL SUPPORT, *supra* note 249, at 10. Coordination between the FBI, USAOs, and Main Justice is more robust in international, as compared to domestic, terrorism cases. See U.S. Dep't of Just., Just. Manual § 9-2.136 (2018).

serious bodily injury, or . . . with the intent to cause extensive destruction of such a [public] place, facility or system” that “results in or is likely to result in major economic loss.”<sup>261</sup> While numerous international terrorism cases have involved § 2332f charges, the authors could not find any domestic terrorism cases in which the statute was used. Second, 18 U.S.C. § 2339(a) criminalizes the harboring or concealing of “any person who [the defendant] knows, or has reasonable grounds to believe, has committed, or is about to commit” certain federal crimes of terrorism, including violations of § 844(f)(2) or (3) and § 2332a.<sup>262</sup> Though DOJ has not yet invoked it,<sup>263</sup> § 2339(a) could be applicable to anyone who harbors or conceals a suspect who violated § 844(f)(2) or (3) or § 2332a, like several of the defendants discussed above.

Third, 18 U.S.C. § 2339C bans the direct or indirect unlawful and willful provision or collection of funds with the intention or knowledge that the funds will be used to carry out any act “intended to cause death or serious bodily injury” to intimidate or coerce a civilian population or government.<sup>264</sup> Furthermore, a person can violate § 2339C by knowingly concealing or disguising any funds knowing or intending that such funds were or would be collected in a terrorism act.<sup>265</sup> While the authors could find no domestic terrorism cases where a § 2339C charge was brought, the charge is available to federal prosecutors.

#### vii. Other Federal Charges Relevant to Domestic Terrorism

As previously noted, § 2331(5) provides that the violation of any federal criminal law that endangers human life and appears intended “to intimidate or coerce a civilian population” or influence or affect government policy or conduct can be the basis of a domestic terrorism offense. In fact, charges in domestic terrorism prosecutions are often not federal crimes of terrorism (i.e., are not listed at § 2332b(g)(5)(B)). Instead, the most frequent charges filed against domestic terrorists

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261. 18 U.S.C. § 2332f (2018).

262. *Id.* § 2339(a).

263. The authors could find no domestic or international terrorism cases in which § 2339(a) charges were filed.

264. 18 U.S.C. § 2339C(a)(1)(B), (b)(5).

265. *Id.* § 2339C(c).

involve a wide array of conduct, from transmitting threats in interstate commerce to unlicensed dealing of firearms or even wire fraud.<sup>266</sup>

For example, instead of bringing domestic terrorism charges that are more difficult to prove, prosecutors can easily use federal firearms charges against a defendant who possessed a firearm in the commission of a violent crime. The Justice Manual even describes firearms violations as “generally simple and quick to prove,” and explains that “mandatory and enhanced punishments for many firearms violations can be used as leverage to gain plea bargaining and cooperation from offenders.”<sup>267</sup> Discussed in greater detail below, such enhanced punishment could include a terrorism sentencing enhancement if the defendant’s conduct satisfies § 2331(5)’s definition of domestic terrorism.<sup>268</sup>

Another non-federal crime of terrorism charge has surfaced in recent domestic terrorism cases in which criminal conduct may meet § 2331(5)’s definition: 18 U.S.C. § 2101, which concerns rioting. Specifically, § 2101 prohibits traveling in or using facilities of interstate or foreign commerce with the intent to (1) “incite a riot”; (2) “organize, promote, encourage, participate in, or carry on a riot”; (3) “commit any act of violence in furtherance of a riot”; or (4) “aid or abet any person in inciting or participating” in a riot or “committing any act of violence in furtherance or a riot.”<sup>269</sup> Passed as part of the 1968 Civil Rights Act, § 2101 had not been challenged since the early 1970s until two recent cases—one in Virginia and one in California—both involving defendants associated with the Rise Above Movement (RAM).<sup>270</sup>

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266. See German and Robinson, *supra* note 17, at 10.

267. U.S. Dep’t of Just., Just. Manual: Criminal Resources Manual § 112 (2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-112-firearms-charges> [<https://perma.cc/3R7D-54GN>].

268. See *infra* Part IV.

269. 18 U.S.C. § 2101(a). “Riot” is defined as

a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.

*Id.* § 2102(a).

270. See *United States v. Miselis*, 972 F.3d 518, 526, 528 (4th Cir. 2020); *United States v. Rundo*, 990 F.3d 709, 713–14 (9th Cir. 2021).

RAM describes itself as a “combat-ready, militant group of a new nationalist white identity movement,” whose purpose is to “attend ‘purported “political” rallies’ (typically organized by other groups)” to engage “in violent attacks on counter-protestors.”<sup>271</sup> The defendants in the Virginia case, Michael Paul Miselis and Benjamin Drake Daley, both pled guilty to conspiracy to violate §§ 2101–2102 for their “violent participation in three white supremacist rallies” in 2017—two in California and the “‘Unite the Right’ rally in Charlottesville, Virginia.”<sup>272</sup>

As part of their guilty plea, the defendants stipulated to assaulting—punching, kicking and stomping on—several counter-protestors at rallies in California.<sup>273</sup> At the “Unite the Right” rally, Daley “attacked multiple counter-protestors with [a tiki torch]” and both defendants “pushed, punched, kicked, choked, head-butted, and otherwise assaulted” counter-protestors, “not in self-defense.”<sup>274</sup> There is no question that the defendants’ admitted acts endangered human life. Given RAM’s goals and the context in which these members violated §§ 2101–2102, their actions arguably appeared intended “to intimidate or coerce a civilian population,” which would satisfy § 2331(5)’s definition of domestic terrorism. Section 2101 charges have also been brought against defendants in eleven separate cases stemming from the summer 2020 BLM protests.<sup>275</sup> If any of their conduct endangered human life, those defendants’ actions, in the context of protests against police brutality, could appear intended to influence government policy through intimidation or coercion, and thus satisfy the § 2331(5) definition of domestic terrorism.

How do these non-terrorism charges factor into the federal government’s existing powers to prosecute domestic terrorism? The

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271. *Miselis*, 972 F.3d at 526.

272. *Id.* at 525. In pleading guilty, the defendants preserved their right to challenge the constitutionality of the statute on appeal. In upholding their convictions, the Fourth Circuit did hold part of § 2101(a)(2) and part of § 2102(b) unconstitutionally overbroad for criminalizing speech that is “protected advocacy under *Brandenburg*.” *Id.* at 529. The Fourth Circuit severed those unconstitutional portions, upholding the remainder of the statutes, including the sections on which the defendants’ convictions were based. *See id.* at 529. In the California case, the district court initially dismissed the indictment, ruling that §§ 2101–2102 are facially overbroad and thus unconstitutional. *See id.* at 548. However, the Ninth Circuit, in a very similar ruling to that of the Fourth Circuit, held that the Anti-Riot Act was not overbroad except for the severable portions it likewise found unconstitutional. Leaving the rest of the act intact, the court reversed the dismissal of the indictment and remanded back to the district court. *See Rundo*, 990 F.3d at 720–21.

273. *See Miselis*, 972 F.3d at 526.

274. *Id.* at 527.

275. Loadenthal, *supra* note 227.

ultimate charge brought in any criminal case may not, on its own, capture who the defendant is and what they may have done. Famously, Al Capone was charged with tax evasion, but he is more accurately remembered as a gangster and organized-crime boss. A criminal charge is not the only way to define and characterize domestic terrorists or acts of domestic terrorism. Defendants charged and convicted of non-terrorism offenses can still be labeled—in rhetoric and at sentencing—as domestic terrorists.

### *B. But Is It Really “Domestic Terrorism”?*

Because there is no single federal domestic terrorism crime, but rather a list of factually-specific offenses that may qualify as act of domestic terrorism, two statements are equally true: not every violation of the offenses listed at § 2332(b)(g)(5)(B), including those detailed above, will constitute an act of domestic terrorism. At the same time, many other acts that violate laws not listed as federal crimes of terrorism may in fact be acts of domestic terrorism. This raises three distinct questions: (1) How does the government decide when to bring federal crimes of terrorism charges against domestic terrorists? (2) How well is the government tracking and coordinating domestic terrorism cases? (3) How does the government shape the narrative around acts that may constitute domestic terrorism?

The decision to charge defendants with domestic terrorism offenses is largely a matter of discretion exercised by DOJ. As the previous section demonstrated, there are numerous cases in which terrorism charges could have been brought based on the facts of specific cases and yet none were. First, DOJ has been reluctant to allow federal prosecutors to charge § 2339A in the domestic context, despite the fact that it could be brought in nearly every domestic terrorism case that involves a conspiracy charge for a § 2339A predicate offense.<sup>276</sup> Second, DOJ and FBI tend to classify racially motivated crimes as “hate crimes” even when the offense meets § 2331(5)’s definition of domestic terrorism.<sup>277</sup> These calculations by the federal government are a

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276. See Abrams, *supra* note 202, at 5, 29.

277. See, e.g., United States v. Roof, 225 F. Supp. 3d 438, 441 (D.S.C. 2016); *Texas Man Charged with Federal Hate Crimes and Firearm Offenses Related to August 3, 2019, Mass-Shooting in El Paso*, DEP’T OF JUST. OFF. OF PUB. AFF. (Feb. 6, 2020), <https://www.justice.gov/opa/pr/texas-man-charged-federal-hate-crimes-and-firearm-offenses-related-august-3-2019-mass> [<https://perma.cc/379T-PHPT>]; *Pennsylvania Man Charged with Federal Hate Crimes for Tree of Life Synagogue Shooting*, DEP’T OF JUST. OFF. OF PUB. AFFS. (Oct. 31, 2018), <https://www>.

matter of executive branch policy; there are no legal barriers to DOJ from bringing federal crime of terrorism charges or from classifying a greater number of federal crimes as acts of domestic terrorism under § 2331(5).

i. What Does It Take to Bring a Federal Terrorism Charge?

DOJ has a detailed set of internal policies and procedures that provide guidance for United States Attorneys' Offices (USAOs) on the required coordination between USAOs and DOJ headquarters in DC (Main Justice) on domestic terrorism cases. There are two possible oversight requirements that a domestic terrorism investigation can trigger: notification to DOJ's National Security Division (NSD) and/or prior approval from NSD for certain actions in court.

As a starting point, a USAO must notify the Counterterrorism Section (CTS) of NSD "of the initiation and significant developments in domestic terrorism investigations."<sup>278</sup> This is to enable coordination, "enhance opportunities to recognize overlap with international terrorism matters, and allow CTS to track developments in the FBI [Terrorism Enterprise Investigations] that CTS reviews."<sup>279</sup> Generally, NSD "approval is not required for the initiation, investigation, or prosecution of domestic terrorism matters," but there are significant exceptions to that rule.<sup>280</sup>

Weapons of mass destruction (WMD) cases have a different set of notification and approval guidelines; for domestic terrorism cases that involve WMD charges, such as §§ 2332a and 2332h, the WMD Justice Manual guidelines govern. Those guidelines provide that a USAO must "promptly notify CTS" when it opens any WMD matter and subsequently "notify CTS of any significant development in the investigation and prosecution of the matter."<sup>281</sup> Additionally, the "prior, express approval of the Assistant Attorney General (AAG)" of NSD is required to file an application for a search warrant or material

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justice.gov/opa/pr/pennsylvania-man-charged-federal-hate-crimes-tree-life-synagogue-shooting [https://perma.cc/5Q2G-A2SS].

278. U.S. Dep't of Just., Just. Manual § 9-2.137 (2018).

279. *Id.*

280. *Id.* Importantly, under 18 U.S.C. § 3142(e)(3)(C) (2018), there is a rebuttable presumption of pretrial detention for defendants charged with any federal crime of terrorism listed under § 2332b(g)(5)(B).

281. U.S. Dep't of Just., Just. Manual § 9-2.138 (2018). Significant developments include: filing a search warrant or material witness warrant; applying for electronic surveillance; declining to file charges; filing and dismissing criminal or immigration charges; entering a plea agreement; initiating trials and their results; and results of sentencings and appeals. *See id.*

witness warrant, file a criminal or superseding complaint, seek the return of an indictment or superseding indictment, or dismiss any charge “for which AAG approval was initially required.”<sup>282</sup>

Certain other domestic terrorism charges also require prior approval by the NSD AAG. In the international terrorism section of the Justice Manual, charges are split into two categories: Category 1 presumptively requires approval for significant court actions—search warrants, criminal complaints, indictments, and the dismissal of charges or a plea agreement—while Category 2 charges presumptively do not require prior approval.<sup>283</sup> Category 1 charges include: §§ 2339A, 2339, 2339C, and 2332f.<sup>284</sup> Category 2 charges include: § 842(m) and (n), § 844(f) and (i), and § 930(c).<sup>285</sup> Because Category 1 charges are rarely brought in domestic terrorism cases, NSD will presumptively require prior approval, just as it would in an international terrorism case.<sup>286</sup> Conversely, NSD is less likely to require prior approval for Category 2 charges in domestic terrorism cases.<sup>287</sup>

Finally, domestic terrorism cases can trigger the notification and prior approval requirements if they are deemed to be “matters of national significance”—a broader threshold that can include domestic terrorism.<sup>288</sup> The DOJ Criminal Division AAG makes the determination that a matter is one of national significance. Factors that contribute to that assessment include:

1. “important public policy considerations or novel issues of law;”
2. “particular facts and circumstances that may set precedent or be related to other investigations or prosecutions;”
3. “international or foreign policy implications;”
4. urgency or sensitivity of the case; or

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282. *Id.* § 9-2.138(E). In seeking NSD’s approval, the USAO must provide CTS with the “final draft of any proposed charge . . . before final AAG approval will be given.” *Id.* Similarly, “The USAO must seek the prior concurrence of the AAG before entering into a plea agreement in a WMD matter.” *Id.* § 9-2.138(F).

283. *See id.* § 9-2.136(B).

284. *See id.*

285. *See id.*

286. As with WMD charges, prior approval for international terrorism charges requires a USAO to provide CTS with the “final draft of the proposed charge . . . before final AAG approval will be sought.” *Id.* § 9-2.136(H).

287. *Id.* § 9-2.137 (“Department approval is not required for the initiation, investigation, or prosecution of domestic terrorism matters.”).

288. U.S. Dep’t of Just., Just. Manual: Crim. § 9-142.000(B) (2018).

5. desirability of “uniform application of the law.”<sup>289</sup>

For example, cases stemming from the summer 2020 BLM protests<sup>290</sup> and the January 6 Capitol attack are being coordinated through Main Justice as matters of national significance.<sup>291</sup>

These notification and approval requirements result in USAOs being far less likely to report domestic terrorism investigations predicated on non-federal crimes of terrorism up to NSD.<sup>292</sup> Essentially, a USAO is required to obtain Main Justice permission when it brings charges under § 2339A or a similar terrorism statute, but is able and likely to bring low-level weapons charges against domestic terrorists without prior notification or approval. The exception to that pattern is domestic terrorism investigations predicated on federal hate crime charges.<sup>293</sup>

## ii. Domestic Terrorism or Hate Crime?

Again, conduct that violates any federal criminal law *and* meets the requirements of § 2331(5) can be defined as an act of domestic terrorism. DOJ has classified and prosecuted several high-profile racially, politically, or religiously-motivated crimes as federal hate crimes but the facts of those cases also met § 2331(5)’s definition of domestic terrorism. Indeed, even when DOJ brought no federal crimes of terrorism charges in those cases (because the evidence would not have supported such a charge), the federal government has publicly called some of the crimes acts of domestic terrorism. This illustrates how conduct that meets § 2331(5)’s domestic terrorism definition may not also support a federal crimes of terrorism charge.

Most prominently, on June 17, 2015, white supremacist Dylann Roof attacked the African-American parishioners of Emanuel African

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289. *Id.*

290. *See Over 300 People Facing Federal Charges for Crimes Committed During Nationwide Demonstrations*, DEP’T OF JUST. OFF. OF PUB. AFFS. (Sept. 24, 2020), <https://www.justice.gov/opa/pr/over-300-people-facing-federal-charges-crimes-committed-during-nationwide-demonstrations> [<https://perma.cc/S6GD-C5DM>] (listing charges which include damages to courthouses and police precincts occurring during the summer of 2020).

291. In an internal memo to USAOs, Acting Attorney General Jeffrey A. Rosen informed federal prosecutors “that all investigations should be run out of the U.S. attorney’s office in Washington and the main Justice Department there, which would take the lead on all prosecutions. Any efforts to charge suspects in their home states needed to be run by officials in Washington first for approval.” Katie Benner & Adam Goldman, *Justice Dept. Pursues at Least 150 Suspects in Capitol Riot*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/11/us/politics/capitol-riot-justice-department-investigation.html> [<https://perma.cc/UG64-7SZ6>].

292. *See* U.S. Dep’t of Just., Just. Manual § 9-2.137 (2007).

293. *Id.* § 8-3.100 (2009).

Methodist Episcopal (AME) Church in Charleston, South Carolina, killing nine and wounding three.<sup>294</sup> A federal grand jury returned a 33-count indictment, twelve of which alleged “racially motivated hate crimes,” and he was convicted on all counts at trial.<sup>295</sup> At the time of Roof’s indictment, Attorney General Loretta Lynch called his crimes “racially motivated violence” and “the original type of domestic terrorism,” while going on to say that DOJ believed “this is exactly the type of case that the federal hate crimes statutes were, in fact, conceived of to cover.”<sup>296</sup>

The 2019 mass shooting in El Paso, Texas followed a similar pattern. Patrick Crusius murdered twenty-two people and attempted to murder twenty-three others at an El Paso Walmart.<sup>297</sup> He chose the Walmart because it is located in a predominately Hispanic area; his intent was to kill “Mexicans” he perceived as invading Texas.<sup>298</sup> In addition to state charges, Crusius was indicted by a federal grand jury on ninety hate crime counts.<sup>299</sup> Federal authorities, including the U.S. Attorney for the Western District of Texas and officials at Main Justice, characterized the shooting as domestic terrorism, even though the facts did not support bringing terrorism charges.<sup>300</sup>

Yet, in another mass shooting that again followed a similar pattern, the federal government did not characterize the attack as an act of domestic terrorism. In 2018, Robert Bowers was indicted on federal hate crime charges for killing eleven members of the Tree of Life synagogue in Pittsburgh, Pennsylvania.<sup>301</sup> During the shooting, Bowers stated his intention to “kill Jews,” and his social media contained

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294. See *United States v. Roof*, 225 F. Supp. 3d 438, 441, 455 (D.D.C. 2016).

295. *Id.*; Rebecca Hersher, *Jury Finds Dylann Roof Guilty in S.C. Church Shooting*, NPR (Dec. 15, 2016, 3:33 PM), <https://www.npr.org/sec1thetwo-way/2016/12/15/505723552/jury-finds-dylann-roof-guilty-in-s-c-church-shooting> [<https://perma.cc/S228-GUGN>].

296. Halimah Abdullah, *AG Lynch: Dylann Roof Indicted on 33 Counts, Hate Crime Charges*, NBC NEWS (July 22, 2015, 2:12 PM), <https://www.nbcnews.com/storyline/charleston-church-shooting/ag-lynch-dylann-roof-indicted-33-counts-hate-crime-charges-n396681> [<https://perma.cc/7ZE6-5GXH>].

297. *Texas Man Charged with Federal Hate Crimes*, *supra* note 277.

298. See Merrit Kennedy & Barbara Campbell, *U.S. Charges Suspect in El Paso Walmart Shootings with Hate Crimes*, NPR (Feb. 6, 2020, 7:29 PM), <https://www.npr.org/2020/02/06/803503292/u-s-charges-walmart-gunman-in-el-paso-with-hate-crimes> [<https://perma.cc/6VXQ-GXX9>]; *Texas Man Charged with Federal Hate Crimes*, *supra* note 277.

299. See *Texas Man Charged with Federal Hate Crimes*, *supra* note 277.

300. See Allen, *supra* note 18.

301. See *Pennsylvania Man Charged with Federal Hate Crimes*, *supra* note 277.

numerous anti-Semitic statements.<sup>302</sup> Bowers's conduct certainly met the § 2331(5) definition of domestic terrorism, but the federal government did not characterize the shooting as such.<sup>303</sup> As in the El Paso and Emanuel AME Church shootings, there was no factual basis to bring federal crime of terrorism charges against Bowers.<sup>304</sup> But that had not prevented the federal government in previous mass shootings—and did not prevent it in later ones—from labeling those acts as domestic terrorism.<sup>305</sup> The federal government's inconsistent rhetoric regarding these three very similar cases demonstrates its discretionary ability to control the narrative around what constitutes domestic terrorism and who is a domestic terrorist.

#### IV. THE TERRORISM SENTENCING ENHANCEMENT

The federal government has discretion in how it deploys its investigative powers against suspected domestic terrorists, in the charges it may ultimately bring against them, and in the rhetoric it uses to define such defendants and their alleged crimes. That discretion persists through the final stage of a prosecution: sentencing. As previously mentioned, the federal statutory definition of domestic terrorism at § 2331(5) does not have criminal penalties attached to it. And as several of the above cases demonstrate, there is a significant range of criminal behavior that meets the § 2331(5) definition but is prosecuted under non-terrorism charges. However, whether criminal conduct satisfies § 2331(5) can have a major impact at the sentencing phase of a prosecution.

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302. *Id.*; *Additional Charges Filed in Tree of Life Synagogue Shooting*, U.S. DEP'T OF JUST. (Jan. 29, 2019), <https://www.justice.gov/opa/pr/additional-charges-filed-tree-life-synagogue-shooting> [https://perma.cc/D7U8-BJQV].

303. See Eric Tucker & Michael Balsamo, *Attacks Renew Debate: Should US Have Domestic Terrorism Law?*, YAHOO! NEWS (Oct. 30, 2018), <https://news.yahoo.com/attacks-renew-debate-us-domestic-terrorism-law-045612092.html> [https://perma.cc/N2DB-WG7R].

304. See 18 U.S.C. § 2332b(g)(5)(B) (2018) (using a firearm to kill civilians on non-government property does not constitute conduct that violates any of the federal crimes of terrorism listed).

305. In addition to the El Paso and Emanuel AME Church shootings, other recent mass shootings also meet the § 2331(5) definition of domestic terrorism and have been characterized as such acts by the federal government even though terrorism charges could not be brought. See, e.g., Eric Levenson & Cheri Mossburg, *Gilroy Festival Shooter Had a 'Target List' with Religious and Political Groups*, CNN (Aug. 6, 2019), <https://www.cnn.com/2019/08/06/us/gilroy-festival-shooting/index.html> [https://perma.cc/HZ9N-K92H] (explaining that though the suspect died at the scene, but the FBI opened a domestic terrorism investigation after finding a list of potential targets that included "religious, government and political organizations" and references to a white supremacist text in the suspect's digital media).

The U.S. Sentencing Guidelines (the Guidelines) § 3A1.4 provides a sentencing enhancement for terrorism offenses.<sup>306</sup> The enhancement can be applied to federal crimes of terrorism, as listed at § 2332b(g)(5)(B).<sup>307</sup> More importantly, it can also be applied to non-terrorism offenses where the offense was intended to influence government conduct by intimidation or coercion or was intended to promote a federal crime of terrorism with the intention of intimidating or coercing a civilian population.<sup>308</sup> While not mandatory, federal judges are required to take the Guidelines into account when sentencing defendants.<sup>309</sup> The effect of § 3A1.4 is such that even less serious offenses that meet § 2331(5) can result in lengthy prison sentences.<sup>310</sup> Federal courts have applied this enhancement to a wide range of domestic terrorists, both those who have been convicted of federal crimes of terrorism and those who have been convicted of non-terrorism offenses. The following examples are illustrative.

In 2003, Stephen John Jordi pled guilty to attempted arson in violation of § 844(i) for planning to bomb abortion clinics in Florida.<sup>311</sup> On appeal, the Eleventh Circuit held that his conduct satisfied the requirements of § 3A1.4—Jordi intended to intimidate or coerce a civilian population—and therefore could receive a terrorism sentencing enhancement under § 3A1.4<sup>312</sup> Without the terrorism sentencing enhancement, Jordi was originally sentenced to sixty months in prison.<sup>313</sup> Finding that Jordi's conduct met the requirements of § 3A1.4 made him eligible for a sentence of 121–151 months in prison

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306. U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2007).

307. *See id.* Furthermore, defendants convicted of federal crimes of terrorism offenses listed at § 2332b(g)(5)(B) are subject to lifetime supervised release upon completion of their sentence. *See* 18 U.S.C. § 3583(j) (2018).

308. U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2007). It is important to note that the § 3A1.4 sentencing enhancement does not parrot the § 2331(5) definition exactly. While § 2331(5) considers non-federal crimes of terrorism that are intended to intimidate or coerce a civilian population to be terrorism, § 3A1.4 qualifies that the offense must have intended to promote a federal crime of terrorism with the intent of intimidating or coercing a civilian population. Thus, not all non-federal crimes of terrorism committed with the intent to intimidate or coerce a civilian population will be eligible for a terrorism sentencing enhancement. Notably, “[s]ome statutes, particularly ones relating to conduct that impedes [federal law enforcement’s] investigations,” such as 18 U.S.C. § 1001 (material false statements), 18 U.S.C. § 1505 (obstruction of justice), and 18 U.S.C. § 1028 (fraudulent identification), “carry enhanced statutory maximums if the offense involves or is intended to facilitate domestic or international terrorism.” *Violent Extremism and Domestic Terrorism in America*, *supra* note 78, at 7.

309. *See* 18 U.S.C. § 3553 (2018).

310. Sinnar, *supra* note 9, at 1358–59.

311. *See* United States v. Jordi, 418 F.3d 1212, 1213–14 (11th Cir. 2005).

312. *See id.* at 1217.

313. *See id.* at 1214.

under the Guidelines—more than double his original sentence.<sup>314</sup> Graham, the anti-government militia member discussed earlier convicted of violating § 844(i) for conspiring to attack various government and interstate commerce targets, also received a terrorism sentencing enhancement under § 3A1.4.<sup>315</sup> Three Occupy movement members pled guilty to violating § 2332a and § 844(i) and received terrorism sentencing enhancements under § 3A1.4 for their roles in a plot to blow up a bridge used in interstate commerce in order to intimidate or coerce the government over economic inequality.<sup>316</sup> Even though the district court ultimately departed downward from the maximum sentence the defendants could have received under the guidelines, the application of the terrorism enhancement still resulted in these defendants receiving sentences roughly twice as long as what the Guidelines would have suggested without the enhancement.<sup>317</sup> Most notably, Hasson, the white-supremacist Coast Guard lieutenant caught planning a mass murder who pled guilty to non-federal crimes of terrorisms, received a terrorism sentencing enhancement under § 3A1.4.<sup>318</sup> The enhancement roughly tripled Hasson’s sentencing range under the Guidelines from just 41–51 months to 151–188 months, and the district court sentenced him to 160 months.<sup>319</sup>

A defendant need not personally commit, or plan to commit, an act of violence, let alone a federal crime of terrorism, in order to receive the § 3A1.4 enhancement. Despite being convicted of multiple counts of fraud and interfering with Internal Revenue Service officials, James Wells received a terrorism sentencing enhancement under § 3A1.4 because he committed his crimes as part of a scheme by the Montana Freeman Organization to kidnap and execute government officials.<sup>320</sup> Matthew Hale, the leader of a white supremacist

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314. See U.S. SENT’G GUIDELINES MANUAL § 3A1.4 ch. 5, pt. A, sent’g tbl. (U.S. SENT’G COMM’N 2007). Under § 3A1.4, a terrorism sentencing enhancement increases the defendant’s total offense level by either 12 levels or to at least level 32, whichever is higher. See *id.* § 3A1.4. Here, Jordi’s original total offense level was 20 with a criminal history in Category I, see *Jordi*, 418 F.3d at 1214, which means that, at the least, his total offense level increased to 32, which corresponding to a 121–151 month sentence. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 ch. 5, pt. A, sent’g tbl. (U.S. SENT’G COMM’N 2007).

315. See *United States v. Graham*, 275 F.3d 490, 518–19 (6th Cir. 2001).

316. See *United States v. Wright*, 747 F.3d 399, 404 (6th Cir. 2014).

317. See *id.* at 407.

318. See *United States v. Hasson*, No. 20-4126, slip op. at 9 (4th Cir. 2022), <https://www.ca4.uscourts.gov/opinions/204126.P.pdf> [<https://perma.cc/58RD-SR6N>].

319. See *id.* In February 2022, the Fourth Circuit upheld the district court’s application of the terrorism sentencing enhancement. *Id.* at 30–31.

320. See *United States v. Wells*, 163 F.3d 889, 894, 899–900 (4th Cir. 1998).

organization, was convicted of obstructing justice and soliciting a crime of violence for plotting the murder of a federal judge who ruled against his organization.<sup>321</sup> The Seventh Circuit affirmed that Hale’s solicitation of a murderer for hire “was to promote a federal crime of terrorism—the murder of a federal officer,” so the § 3A1.4 terrorism sentencing enhancement applied.<sup>322</sup>

DOJ has discretion to decide whether it will seek a terrorism sentencing enhancement against a defendant.<sup>323</sup> Notably, although Dylann Roof’s conduct met the § 2331(5) definition of terrorism, DOJ declined to seek a terrorism sentencing enhancement under § 3A1.4, even though it could have been applied; on the other hand, DOJ has indicated that it will seek the enhancement against Mattis and Rahman, the lawyers who threw the Molotov cocktail at an NYPD cruiser.<sup>324</sup> If Patrick Crusius, the El Paso shooter, is convicted of hate crimes, he would likely also qualify for a § 3A1.4 terrorism sentencing enhancement. Yet, it remains to be seen if DOJ will eschew such an enhancement in a mass shooting hate crime, as it did with Dylann Roof. Finally, while federal investigations into those involved in the Capitol riot on January 6 have resulted in few terrorism charges,<sup>325</sup> § 3A1.4 could apply in many of those cases. There is significant evidence already publicly available to support a claim that some of those involved in the Capitol riot intended to influence government conduct—by preventing Congress from certifying the Electoral vote—through intimidation or coercion.<sup>326</sup>

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321. See *United States v. Hale*, 448 F.3d 971, 974 (7th Cir. 2006).

322. *Id.* at 988–89 (emphasis omitted).

323. See U.S. Dep’t of Just., Just. Manual §§ 9-2.136, 9-2.137, 9-2.138 (2007).

324. Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. LEGIS. 259, 273, 278–80 (2017); see Rebecca Davis O’Brien & Jonah E. Bromwich, *Brooklyn Lawyers Plead Guilty in Firebomb Case*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/20/nyregion/george-floyd-protests-lawyers-plea-deal.html> [<https://perma.cc/Z9VZ-JSPN>].

325. See *Capitol Hill Siege: Federal Cases*, GW PROGRAM ON EXTREMISM, <https://extremism.gwu.edu/Capitol-Hill-Cases> [<https://perma.cc/ZNJ2-Y8X2>] (referring to a spreadsheet of hundreds of cases accessible via the cited link that GW Program on Extremism has collected regarding arrests related to the Capitol riot).

326. See, e.g., *Mob Attack, Incited by Trump, Delays Election Certification*, N.Y. TIMES (July 25, 2021), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote> [<https://perma.cc/E2SE-GQF9>]; Criminal Complaint at 6, *United States v. Ayres*, No. 1:21-mj-00154 (D.D.C. Jan. 22, 2021); Criminal Complaint at 7, *United States v. Allan*, No. 1:21-mj-00137 (D.D.C. Jan. 20, 2021); Criminal Complaint, *United States v. Beckley* at 5, No. 1:21-mj-00060 (D.D.C. Jan. 14, 2021); Criminal Complaint at 5, *United States v. Black*, No. 1:21-mj-00049 (D.D.C. Jan. 13, 2021).

## V. THE DANGERS OF A NEW STATUTORY REGIME FOR DOMESTIC TERRORISM

The preceding overview of the federal government's existing powers to pursue domestic terrorism illuminates four points. First, stepping back and looking at the interplay between federal law enforcement's investigatory authorities, internal policy manuals, charging authorities, internal approval guidelines, and sentencing authorities reveals that the executive branch has broad discretion to pursue domestic terrorism as it sees fit. Such discretion may pose a threat against protest movements, other domestic groups that oppose the government, and lone individuals engaged in protected First Amendment activities. Second, that danger comes into sharper focus when viewed against the backdrop of the federal law enforcement's decades-long history of investigatory abuses and prosecutorial overreach against dissident political advocacy groups. Third, the current debate over the need for a new domestic terrorism statute is centered on whether Congress should prohibit certain ordinary criminal conduct and acts of terrorism under a unified statutory regime. Advocates for a new statute marshal both symbolic and functional, gap-filling arguments. However, this debate is too narrowly focused on criminal charges and overlooks the full range of the federal government's powers in this area. Consequently, fourth, a new criminal domestic terrorism statute would only contribute to the danger posed by the executive branch's existing discretion. Nonetheless, a domestic terrorism statute focused on intra-executive branch coordination and increased reporting to and oversight by Congress could help the federal government better combat domestic terrorism while guarding against the potential for abuses of discretion. This part addresses each point in turn.

### *A. The Federal Government Has Broad Discretion to Pursue Domestic Terrorism and Could Wield its Powers Against Disfavored Protest Movements and Political Actors*

This Article has outlined the federal government's existing powers to pursue domestic terrorism and described how the federal government has chosen to use them. Because these broad powers come from disparate sources<sup>327</sup> and are used on a largely discretionary

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327. See generally DIOG, *supra* note 62; ATT'Y GEN.'S GUIDELINES, *supra* note 61; BASELINE COLLECTION PLAN, *supra* note 62; U.S. Dep't of Just., Just. Manual §§ 9-2.136, 9-2.137, 9-2.138; 18 U.S.C. 2332b(g)(5)(B) (2018); U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G

basis,<sup>328</sup> Congress and the public are not necessarily aware of the extent of executive discretion in the domestic terrorism context and have not consciously signed off on it. As a result of that expansive discretion, the full use of these powers could threaten civil and political liberties. To that point, concerns over prosecutorial discretion<sup>329</sup> have greater salience in the domestic terrorism context because it can lead to the delegitimization of political speech and conduct.

Therefore, the current national debate about how to address the threat of domestic terrorism must be grounded in a full understanding of the federal government's existing powers. Parts II–IV attempted to do just that, outlining what conduct is currently classified as domestic terrorism and what the government can do under the existing domestic terrorism framework at the investigative, charging, and sentencing phases. In light of these considerations, the amount of executive power in this context should be a thoughtful, deliberate allocation with guardrails to cabin executive discretion and prevent overzealous investigations and prosecutions that could delegitimize legitimate political conduct. The federal government already exercises its discretionary powers in notably expansive ways against domestic terrorism.

The investigatory stages raise several issues of concern. The FBI can initiate an assessment—an initial inquiry—into possible domestic terrorism by individuals or groups without a factual predicate,<sup>330</sup> and the investigation can continue until the Bureau decides that no terrorism or criminal threat exists.<sup>331</sup> Furthermore, it can deploy CIs or UCAs to infiltrate and even influence the activities of political groups.<sup>332</sup> Heightened approval requirements exist if the organization is “legitimate,” meaning that it engages in civil disobedience for the primary purpose of “lawful protest or advocacy.”<sup>333</sup> But groups whose primary purpose is to destroy property or engage in other criminal

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COMM’N 2007) (explaining the various powers, policies, and procedures of the federal government in pursuing domestic terrorism).

328. See *Mob Attack*, *supra* note 326; Criminal Complaint at 6, *United States v. Ayres*, No. 1:21-mj-00154 (D.D.C. Jan. 22, 2021); Criminal Complaint, *United States v. Allan* at 7, No. 1:21-mj-00137 (D.D.C. Jan. 20, 2021); Criminal Complaint, *United States v. Beckley* at 5, No. 1:21-mj-00060 (D.D.C. Jan. 14, 2021); Criminal Complaint at 5, *United States v. Black*, No. 1:21-mj-00049 (D.D.C. Jan. 13, 2021).

329. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535–39, 542–47 (2001) (explaining how an increase in prosecutorial discretion, as a result of a broad legal code, has expanded the criminal justice system).

330. See ATT’Y GEN.’S GUIDELINES, *supra* note 61, at 17.

331. BASELINE COLLECTION PLAN, *supra* note 62, at 3.

332. See DIOG, *supra* note 62, at 16.2.3.2 and 16.3.1.4.2.

333. See *id.* at 16.2.2.

conduct “to bring public attention” to a political protest are not “legitimate.”<sup>334</sup> How should that line be drawn? How has the federal government drawn that line in practice?

In the last several years, the landscape of actors and groups that politicians and law enforcement officials have called domestic terrorists or linked to domestic terrorism has ballooned. Antifa,<sup>335</sup> BLM,<sup>336</sup> the Proud Boys,<sup>337</sup> the Boogaloo Bois,<sup>338</sup> QAnon,<sup>339</sup> Incels,<sup>340</sup> Neo Nazi groups like The Base and Atomwaffen,<sup>341</sup> and various anti-government militias<sup>342</sup> have all come within the federal government’s renewed focus on domestic terrorism. These groups represent a vast array of ideologies, from left-wing to right-wing to anarchist and

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334. *See id.*

335. See Angela Dewan, *Trump Is Calling Protesters Who Disagree with Him Terrorists. That Puts Him in the Company of the World’s Autocrats*, CNN (July 26, 2020, 10:19 PM), <https://www.cnn.com/2020/07/25/politics/us-protests-trump-terrorists-intl/index.html> [<https://perma.cc/6YDA-L5PR>].

336. See Ryan J. Foley, *Police Guide That Calls BLM a Terrorist Group Draws Outrage*, AP NEWS (Dec. 2, 2020), <https://apnews.com/article/police-guide-calls-blm-terrorist-group-8dc0afce2ce6b60dbaa0d1d9c53ce1e3>; *Trump Visits Kenosha, Wisconsin, Calls Violence ‘Domestic Terrorism,’* EURO NEWS (Feb. 9, 2020), <https://www.euronews.com/2020/09/02/trump-visits-kenosha-wisconsin-calls-violence-domestic-terrorism-> [<https://perma.cc/T96K-4Z8D>].

337. See Aris Folley, *Canadian Lawmakers Vote to Label Proud Boys a Terrorist Organization*, THE HILL (Jan. 25, 2021, 8:16 PM), <https://thehill.com/policy/international/535795-canadian-lawmakers-vote-to-have-proud-boys-labeled-a-terrorist> [<https://perma.cc/TY2F-ZJTA>].

338. See Michael J. Mooney, *The Boogaloo Bois Prepare for Civil War*, THE ATLANTIC (Jan. 15, 2021, 8:47 AM), <https://www.theatlantic.com/politics/archive/2021/01/boogaloo-prepare-civil-war/617683/> [<https://perma.cc/H5Q6-X3DS>]. Two members of the Boogaloo Bois have pled guilty to conspiracy to provide material support to an FTO (Hamas), but the group and its ideology are domestic to the United States, and that case appears to be an outlier. See *Member of “Boogaloo Bois” Pleads Guilty to Conspiracy to Provide Material Support to Hamas*, U.S. ATT’Y’S OFF. DIST. OF MINN. (Dec. 16, 2020), <https://www.justice.gov/usao-mn/pr/member-boogaloo-bois-pleads-guilty-conspiracy-provide-material-support-hamas> [<https://perma.cc/KKZ9-W7YE>].

339. See Jana Winter, *Exclusive: FBI Document Warns Conspiracy Theories Are a New Domestic Terrorism Threat*, YAHOO! NEWS (Aug. 1, 2019), <https://www.yahoo.com/now/fbi-documents-conspiracy-theories-terrorism-160000507.html> [<https://perma.cc/5R2E-YG5L>].

340. See Bruce Hoffman & Jacob Ware, *Incels: America’s Newest Domestic Terrorism Threat*, LAWFARE (Jan. 12, 2020, 10:00 AM), <https://www.lawfareblog.com/incels-americas-newest-domestic-terrorism-threat> [<https://perma.cc/N9G2-AHTA>].

341. See Samantha Springer, *Secret Tapes Show Neo-Nazi Group the Base Recruiting Former Members of the Military*, NBC NEWS (Oct. 15, 2020, 2:00 AM), <https://www.nbcnews.com/news/us-news/secret-tapes-show-neo-nazi-group-base-recruiting-former-members-n1243395> [<https://perma.cc/54PV-G7UJ>]; Jacob Ware, *Fighting Back: The Atomwaffen Division, Countering Violent Extremism, and the Evolving Crackdown on Far-Right Terrorism in America*, 25 J. FOR DERADICALIZATION 74, 81–83 (2020).

342. See Hannah Allam, *Michigan Domestic Terror Plot Sends Shockwaves Through Militia World*, NPR (Oct. 9, 2020, 5:21 PM), <https://www.npr.org/2020/10/09/922319136/michigan-domestic-terror-plot-sends-shockwaves-through-militia-world> [<https://perma.cc/69RA-FYMD>]; Seth G. Jones et al., *The Escalating Terrorism Problem in the United States*, CTR. FOR STRATEGIC & INT’L STUD. (June 17, 2020), <https://www.csis.org/analysis/escalating-terrorism-problem-united-states> [<https://perma.cc/B4T9-9Y8A>].

everything in between. To be clear, these groups do not necessarily present the same level of threat, engage in the same tactics, or receive the same levels of mainstream political support (contrast BLM with the Boogaloo Bois, for example).<sup>343</sup> However, they generally share two characteristics: (1) they advocate for a political ideology that their opponents would like to delegitimize, as opposed to simply refute or reject; and (2) they tend to have loose organizational structures with undefined membership and some, like BLM or QAnon,<sup>344</sup> are best described as a set of beliefs more than a unified collective of individuals.

The proliferation of the above-mentioned groups, their growing ties to mainstream political discourse,<sup>345</sup> and their loose membership come together to set the stage for serious First Amendment concerns. As previously explained, no process currently exists to designate groups as domestic terrorist organizations, and any attempt to create such a process would likely run afoul of the First Amendment right to freedom of association, pursuant to *Scales v. United States*.<sup>346</sup> Such a proposal to create a domestic equivalent to the FTO regime has not been seriously made,<sup>347</sup> and that is for the best in light of the manifold

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343. We are in no way asserting that these groups are equivalents of each other; we are simply noting that the label of domestic terrorism has been used to describe each of these groups in the public discourse.

344. Bruce Hoffman & Colin Clarke, *The Next American Terrorist*, CIPHER BRIEF (July 2, 2020), <https://www.thecipherbrief.com/the-next-american-terrorist> [<https://perma.cc/5K7T-JWZB>].

345. *Scales v. United States*, 367 U.S. 203, 203–04, 224–28 (1961); see also Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES: THE UPSHOT (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> [<https://perma.cc/DVZ6-MBFR>] (explaining the probable long-term trend of mainstream support for the BLM movement following the election of President Trump); Sean Illing, *How Conspiracy Theories Like QAnon Spilled into the Mainstream*, VOX (Oct. 22, 2020, 11:00 AM), <https://www.vox.com/policy-and-politics/21502877/qanon-online-extremism-facebook-andrew-marantz> (explaining through interview of Andrew Marantz how online extremism “hijacked the American conversation,” including QAnon members running in and winning congressional races); Michelle Mark & Connor Perrett, *Trump Said He Intends to Declare Antifa as a Terrorist Organization. Here’s What We Know About the Decades-Old, Leaderless Group.*, BUS. INSIDER (June 2, 2020, 10:45 AM), <https://www.businessinsider.com/what-is-antifa-movement-charlottesville-vatump-news-2017-8> [<https://perma.cc/3CJ2-6WTD>] (explaining how Antifa’s name entered the mainstream following a white supremacist rally and counterprotest clashes in Charlottesville, Virginia in 2017).

346. 367 U.S. 203 (1961); see Chesney, *supra* note 5, at 3. Canada has recently designated the Proud Boys as a terrorist organization as a result of the role certain members played in the storming of the U.S. Capitol on January 6, 2021. See Jason M. Blazakis, *Can We Call the Proud Boys Terrorists?*, SLATE (Feb. 4, 2021, 2:17 PM), <https://slate.com/news-and-politics/2021/02/proud-boys-terrorists-canada.html> [<https://perma.cc/QDW3-YN2X>].

347. During FBI Director Christopher Wray’s congressional testimony on March 2, 2021, Senator Lindsey Graham suggested that it might be time to think about whether the federal government should have a process to designate domestic terrorist groups as such. See *Oversight of the Federal*

civil and political liberties issues such a designation process would entail.<sup>348</sup> But a world in which no domestic groups can be designated as terrorist organizations brings its own challenging set of civil and political liberties concerns. The federal government has significant discretion to label, investigate, and prosecute domestic terrorists. If no group can be designated a domestic terrorist organization, meaning that no one can be a member of such a designated group, then the federal government will cast the widest possible net in its search for domestic terrorists.<sup>349</sup>

More broadly, anyone with links to the above-mentioned groups could be caught up in a federal investigation, especially if they are connected, however tangentially, to someone who is already on law enforcement's radar. An estimated 26 million people participated in the thousands of BLM protests that occurred around the country in 2020.<sup>350</sup> Accurate tallies of QAnon adherents are difficult to come by, especially considering the wide range of beliefs attributed to the conspiracy theory.<sup>351</sup> Still, supporters may number in the millions as well.<sup>352</sup> Concerns about overbroad investigations are amplified in light of the fact that federal law enforcement agencies can purchase social media and other kinds of personal data collected by private companies.<sup>353</sup> For example, the FBI has contracts with data aggregators Venntel and Dataminr that give it access to the location information and other sensitive data of millions of people.<sup>354</sup> This is not to say that

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*Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats: Hearing Before the S. Comm. on the Judiciary*, 117th Cong., at 6 (2021) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation) [hereinafter *Oversight of the Fed. Bureau of Investigation*]. However, no serious proposal outlining a domestic designation process similar to the FTO regime has been made to date.

348. See Chesney, *supra* note 5, at 3.

349. See Bridget Johnson, *Counsel: Without Statute, DOJ 'Leveraging Every Tool' Against Metastasizing Domestic Terror*, HOMELAND SEC. TODAY (Jan. 17, 2020), <https://www.hstoday.us/subject-matter-areas/counterterrorism/counsel-without-statute-doj-leveraging-every-tool-against-metastasizing-domestic-terror/> [<https://perma.cc/BT7Z-WNAM>].

350. See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/J9RU-GL38>].

351. See Gilad Edelman, *QAnon Supporters Aren't Quite Who You Think They Are*, WIRED (Oct. 6, 2020, 9:00 AM), <https://www.wired.com/story/qanon-supporters-arent-quite-who-you-think-they-are/> [<https://perma.cc/4LLP-V6DV>].

352. See Joel Rose, *Even If It's 'Bonkers,' Poll Finds Many Believe QAnon and Other Conspiracy Theories*, NPR (Dec. 30, 2020, 5:00 AM), <https://www.npr.org/2020/12/30/951095644/even-if-its-bonkers-poll-finds-many-believe-qanon-and-other-conspiracy-theories> [<https://perma.cc/ZKY7-GR98>].

353. See Dempsey & Flint, *supra* note 76, at 1466.

354. See Fang, *supra* note 76.

every supporter of QAnon or BLM will become the subject of an FBI inquiry, but rather to emphasize that the Bureau has the capacity to open an inquiry against any individual based on only a potential hint of illegal conduct and that supporters of a swath of political movements are at increased risk of scrutiny. Given the diversity of ideologies and growing mainstream appeal of at least some of these groups, federal domestic terrorism investigations could sweep up an incredible number of people across the country.<sup>355</sup>

In contrast to the wide net that domestic terrorism investigations may cast, the severity of charges that DOJ has brought against defendants who could be (or who have been) labeled as domestic terrorists has largely reflected the gravity of the defendants' conduct.<sup>356</sup> Most notably, DOJ has been very restrained in using material support and harboring charges against defendants involved in domestic terrorism, despite the fact that §§ 2339A, 2339, and 2339C potentially reach conduct far removed from any planned attack or actual violence.<sup>357</sup>

Recently, though, the government has started shifting away from that restraint. The summer 2020 BLM protests saw prosecutors across the country bring disproportionately serious charges for lower-level criminal conduct.<sup>358</sup> Additionally, DOJ is now revitalizing charges that once lay dormant to prosecute domestic terrorism.<sup>359</sup> In light of this change, it is crucial to remember that the overall use of appropriate charges in the past has been entirely a matter of discretion. There are no legal barriers to the government bringing at least some domestic

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355. We do not suggest that all or even the vast majority of BLM supporters or QAnon adherents are at risk of being arrested in connection with domestic terrorism investigations, now or in a subsequent administration. However, the excesses of power, especially at the investigatory stage, that we have described above caution that political activists can be swept up in assessments or investigations due to their proximity to political violence, simply by being part of targeted network or having links to another person who is part of a targeted network.

356. See, e.g., *United States v. Crawford*, 714 F. App'x 27, 29 (2d Cir. 2017); *United States v. McVeigh*, 153 F.3d 1166, 1176–77 (10th Cir. 1998); see also Byron Tau & Sadie Gurman, *Legal Constraints Hobble FBI's Fight Against Domestic Terror*, WALL ST. J. (Aug. 22, 2019, 9:00 AM), <https://www.wsj.com/articles/legal-constraints-hobble-fbis-fight-against-domestic-terror-11566478801> [<https://perma.cc/9BZ7-YAKU>] (explaining the significant legal constraints on what the FBI can do in domestic terrorism cases).

357. See *infra* Sections III.A.iv, III.A.v; 18 U.S.C. § 2339A. Charges have only been brought in connection with five domestic terrorism cases; no § 2339 or § 2339C charges have been brought in connection with domestic terrorism cases.

358. Loadenthal, *supra* note 227.

359. See *United States v. Rundo*, 990 F.3d 709, 713 (9th Cir. 2021); *United States v. Miselis*, 972 F.3d 518, 526, 528 (4th Cir. 2020) (defendants charged with violating the Anti-Riot Act (18 U.S.C. § 2101) for violent acts during political protests).

terrorism charges with severe penalties in a greater number of less serious cases.

*B. The Modern Relevance of the Church Committee and Subsequent History*

During the summer 2020 BLM protests, politicians on the right, including President Trump, called members of Antifa and some BLM protestors terrorists.<sup>360</sup> In the wake of the storming of the Capitol, politicians on the left, including President Biden, applied the label to members of that mob.<sup>361</sup> Highlighting today's political divide over who is a terrorist, Representative Steve Scalise called the storming of the Capitol "domestic terrorism" while also criticizing Democrats who condemned the events of January 6 but were "noticeably silent over the summer as Americans watched cities go up in flames."<sup>362</sup> The same charge of hypocrisy has been lobbed back at Republicans for "exaggerating the unrest" during the summer BLM protests and downplaying the seriousness of Capitol riot or deflecting blame away from right-wing groups involved.<sup>363</sup> The current debate about domestic terrorism is not about fringe environmental groups or small, isolated anti-government militias; it is about groups at the forefront of mainstream political discourse. It is also truly a bipartisan issue; protest groups on both the left and the right are equally vulnerable to sweeping domestic terrorism inquiries, depending on the political valence of the presidential administration in office. Individuals associated with Antifa, BLM, the Proud Boys, and others have or are alleged to have committed acts

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360. See Dewan, *supra* note 335; Heather J. Williams, *The Dangers of Designating Antifa as a Terrorist Organization Now*, RAND: THE RAND BLOG (June 22, 2020), <https://www.rand.org/blog/2020/06/the-dangers-of-designating-antifa-as-a-terrorist-organization.html> [<https://perma.cc/DS97-HQXR>]; Foley, *supra* note 336; *Trump Visits Kenosha, Wisconsin*, *supra* note 336.

361. Ken Thomas & Sabrina Siddiqui, *Biden Says Rioters Who Stormed Capitol Were Domestic Terrorists*, WALL ST. J. (Jan. 7, 2021, 8:40 PM), <https://www.wsj.com/articles/biden-says-mob-th-at-stormed-capitol-were-domestic-terrorists-11610046962> [<https://perma.cc/FMD7-2DUH>]; Dick Durbin, Opinion, *After the Violence of the Capitol Riots, It's Time to Fight Domestic Terrorism*, USA TODAY (Feb. 5, 2021, 2:55 PM), <https://www.usatoday.com/story/opinion/2021/02/05/fighing-domestic-terrorism-after-violence-capitol-riots-column/4372366001/> [<https://perma.cc/5DMB-3DKQ>]; Simon Shuster, *'Everyone Thinks I'm a Terrorist': Capitol Riot Fuels Calls for Domestic War on Terror*, TIME (Jan. 18, 2021, 1:39 PM), <https://time.com/5930592/everyone-thinks-im-a-terrorist-capitol-riot-fuels-calls-for-domestic-war-on-terror/>.

362. Tal Axelrod, *Scalise Labels Capitol Rioting 'Domestic Terrorism'*, THE HILL (Jan. 13, 2021, 10:25 AM), <https://thehill.com/homenews/house/534001-scalise-labels-capitol-rioting-domestic-terrorism> [<https://perma.cc/A7RU-GM8C>].

363. Astead W. Herndon, *How Republicans Are Warping Reality Around the Capitol Attack*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/01/17/us/politics/Capitol-conspiracy-theories-blm-antifa.html> [<https://perma.cc/26D4-4DRH>].

that can be characterized as domestic terrorism.<sup>364</sup> While this in no way indicates that every person directly or loosely affiliated with these groups poses a terrorism threat, widespread protests and the Capitol attack have expanded federal law enforcement's pursuit of these groups.

This recent shift toward a more aggressive use of the federal government's powers to pursue domestic terrorism is more concerning when viewed in the proper historical context. The last seventy years demonstrate that federal government is susceptible to political pressure over its law enforcement priorities and how aggressively it pursues them.

From the 1956 to 1971, under its Counter Intelligence Program (COINTELPRO), the FBI illegally surveilled and employed covert operations against a wide array of left-wing organizations and actors, including Dr. Martin Luther King Jr., other leaders of the civil rights movement, the Black Panther Party, feminist activists, the American Indian Movement, anti-Vietnam War organizers, and environmental organizations.<sup>365</sup> COINTELPRO aimed to “‘disrupt’ groups and ‘neutralize’ individuals deemed to be threats to domestic security.”<sup>366</sup> The revelation of COINTELPRO and other surveillance abuses by the federal government led Congress to create the Church Committee, which released its famous report documenting these abuses in 1976.<sup>367</sup> Lessons from the report remain relevant as to federal law enforcement's current pursuit of domestic terrorism at both the investigatory and prosecutorial stages. Even though the FBI has changed substantially since the Church Committee's investigation, it retains significant investigative authorities that it can—and does—wield against dissident

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364. This means acts that are either federal crimes of terrorism or may be eligible for a § 3A1.4 terrorism sentencing enhancement. *See, e.g.,* Loadenthal, *supra* note 227; *Capitol Hill Siege, supra* note 325.

365. *See generally* WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DOMESTIC DISSENT* xiv, 95, 172 (1990) (discussing the history of FBI efforts to disrupt and destabilize dissident individuals and political groups in the United States).

366. S. REP. NO. 94-755, at 10 (1976) (discussing FBI efforts to disrupt and discredit peaceful protest groups that members of the Communist Party had “infiltrated”).

367. The Committee's formal title was the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. *See generally id.* at iii (In a letter that preceded the report, the Committee wrote, “The Committee's findings and conclusions concerning abuses in intelligence activity and weaknesses in the system of accountability and control are amply documented.”).

groups.<sup>368</sup> At the assessment stage, the FBI can rely on factually unsubstantiated allegations and suspicions.<sup>369</sup> It can do so to collect intelligence for later investigations or to better understand the individual or group under scrutiny.<sup>370</sup> Such discretion can lead to serious civil liberties intrusions.

Of course, the policies set forth in the DOJ and FBI internal manuals are not unique to terrorism investigations and the FBI employs them in general criminal inquiries as well. But data obtained from the FBI by the *New York Times* in 2011 showed that the FBI pursues roughly an equal number of national security and general criminal inquiries; from March 2009 to March 2011, the Bureau conducted 42,888 national security assessments and 39,437 general criminal assessments.<sup>371</sup> Of the assessments, 1,986 national security assessments triggered preliminary or full investigations, roughly equaling the 1,329 opened criminal investigations.<sup>372</sup> When considering the amount of information collected during an assessment, let alone a preliminary or full investigation, the full scope of the FBI's domestic surveillance capacity and intake comes into focus.

In the two decades since the 9/11 terrorist attacks, outside critics and government officials have charged the FBI with overstepping its investigative authority in the domestic context, especially vis-à-vis domestic advocacy groups that oppose policies of the federal government.<sup>373</sup> A 2010 report by DOJ's Inspector General documented multiple instances in which the FBI opened assessments and

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368. See DIOG, *supra* note 62, at 16.2.2. In September 2020 testimony before the House Homeland Security Committee, FBI Director Christopher Wray stated, "Regardless of the specific ideology involved, the FBI requires that all domestic terrorism investigations be predicated based on activity intended to further a political or social goal, wholly or in part involving force, coercion, or violence, in violation of federal law." *Worldwide Threats to the Homeland*, *supra* note 209, at 17.

369. ATT'Y GEN.'S GUIDELINES, *supra* note 61, at 21–22.

370. See DIOG, *supra* note 62, at 5.2.

371. See Charlie Savage, *F.B.I. Focusing on Security Over Ordinary Crime*, N.Y. TIMES (Aug. 23, 2011), <https://www.nytimes.com/2011/08/24/us/24fbi.html> [<https://perma.cc/FEJ7-FARS>].

372. See *id.*

373. See generally ACLU, UNLEASHED AND UNACCOUNTABLE, *supra* note 141, at i (discussing the history of major changes in law and policy that led to civil liberties violations by the FBI in pursuit of its domestic security mission). See also Patrick G. Eddington, *How Extensive Is FBI Domestic Spying? We're Trying to Find Out*, CATO INST. (Jan. 7, 2020, 3:39 PM), <https://www.cato.org/blog/how-extensive-fbi-domestic-spying-were-trying-find-out> [<https://perma.cc/2P5F-PEVH>] (raising concerns about the FBI's claimed exemptions in response to multiple FOIA requests related to the Bureau's possible investigations of media organizations); *Countering Domestic Terrorism: Examining the Evolving Threat: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 116th Cong. (2019) (questioning experts about law enforcement investigations of individuals and groups believed to be planning terrorist attacks).

investigations against progressive advocacy groups—including People for the Ethical Treatment of Animals (PETA), Greenpeace, and the Catholic Worker—for potential domestic terrorism.<sup>374</sup> In investigations of individuals associated with these groups, the FBI “classified some investigations relating to nonviolent civil disobedience under its ‘Acts of Terrorism’ classification.”<sup>375</sup> The report noted that the Bureau’s justifications for these actions did not exceed the “broad definitions of domestic terrorism in federal law,” as well as those contained in DOJ and FBI manuals, but nevertheless urged DOJ to “consider and provide further guidance on when such cases involving First Amendment issues should be classified as Acts of Terrorism matters.”<sup>376</sup> In another troubling pattern, the FBI repeatedly “extended the duration of investigations involving advocacy groups or their members without adequate basis.”<sup>377</sup> The incidents covered in the report are but a handful of the tens of thousands of inquiries that the FBI conducts each year, but they illustrate the danger of giving the Bureau wide-ranging latitude to investigate targets that it considers potential domestic terrorists.

As with its surveillance of civil rights leaders and the Black Panther Party chronicled by the Church Committee, the FBI has faced scrutiny for its recent focus on “Black Extremism,” which its internal reports highlighted as a potential domestic terrorism threat for years,<sup>378</sup> despite never linking a terrorism incident to the supposed movement.<sup>379</sup> Such criticism increased following the release of a 2017 FBI report, prepared by the Bureau’s Domestic Terrorism Analysis Unit, that warned of “Black Identity Extremists” plotting to attack law

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374. See REVIEW OF THE FBI’S INVESTIGATIONS, *supra* note 157, at 188.

375. *Id.* at 190.

376. *Id.* at 188–90. This recommendation takes on particular urgency when placed against the absence of any FBI definition for a “domestic terrorist group.” The report demonstrates the danger of the FBI investigating criminal behavior that could meet the broadest definitions of domestic terror and leveraging that possibility into full-blown investigations of domestic advocacy groups. See *id.* at 168.

377. *Id.* at 190.

378. See, e.g., FED. BUREAU OF INVESTIGATION, BLACK SEPARATIST EXTREMISTS, <https://www.aclu.org/files/fbimappingfoia/20120518/ACLURM026655.pdf> [<https://perma.cc/6FVY-8DPF>].

379. See Michael German, *Manufacturing a “Black Separatist” Threat and Other Dubious Claims: Bias in Newly Released FBI Terrorism Training Materials*, ACLU (May 29, 2012, 1:31 PM), <https://www.aclu.org/blog/national-security/discriminatory-profiling/manufacturing-black-separatist-threat-and-other> [<https://perma.cc/Q6B3-PPH9>].

enforcement officers around the country.<sup>380</sup> Critics charged that the FBI's focus on Black Extremism is an attempt to manufacture a domestic terror threat in order to "undermine" the BLM movement.<sup>381</sup>

But even public criticism may be insufficient to reign in discretionary abuses. Forty-five years ago, the Church Committee Report emphasized, "Congress has often declined to exercise meaningful oversight, and on occasion has passed laws or made statements which were taken by intelligence agencies as supporting overly-broad investigations."<sup>382</sup> That trend continues today: neither the FBI nor DOJ submit regular reports to any congressional oversight committees about the landscape of domestic terrorism.<sup>383</sup>

Furthermore, the FBI's suspicion of certain advocacy groups is reflected in its own internal training materials on domestic terrorism. In 2012, the American Civil Liberties Union (ACLU) obtained FBI domestic terrorism training presentations on "Black Separatist Extremists" that treated "racial grievances with the U.S government" as an indication of sympathy or allegiance to advocates of racially

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380. See Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'* FOREIGN POL'Y (Oct. 6, 2017, 11:42 AM), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/> [<https://perma.cc/P2X4-ATBF>].

381. Alice Speri, *Fear of a Black Homeland,* THE INTERCEPT (Mar. 23, 2019, 5:31 AM), <https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/> [<https://perma.cc/9ZAP-QH4J>].

382. S. REP. NO. 94-755, at 14 (1976).

383. Regular reports from federal law enforcement are submitted to congressional oversight committees on international terrorism and hate crimes, but not domestic terrorism. See, e.g., National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 5602, 133 Stat. 1198, 2156 (2019); U.S. COMM'N ON C.R., IN THE NAME OF HATE: EXAMINING THE FEDERAL GOVERNMENT'S ROLE IN RESPONDING TO HATE CRIMES 53 (2019), <https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf> [<https://perma.cc/AP2P-H8XB>]. NDAAs have long included reporting requirements to Congress on international terrorism. Fiscal Year 2020 was the first time such reports were required on domestic terrorism, but no report has been submitted to Congress yet. See Simon Clark et al., *4 First Steps for Congress to Address White Supremacist Terrorism,* CTR. FOR AM. PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/issues/security/report/2020/10/30/492095/4-first-steps-congress-address-white-supremacist-terrorism/> [<https://perma.cc/33PR-R3JB>]. In response to Senator Dick Durbin's proposed domestic terrorism statute, see Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong. (2019), DOJ wrote an internal response pushing back on the bill's domestic terrorism reporting requirements, going so far as to suggest that such reports could be unconstitutional, though there does not seem to be any legal basis for such a conclusion. See Betsy Woodruff Swan, *Memo Reveals DOJ Pushback on Domestic Terrorism Bill,* POLITICO (Apr. 7, 2021, 6:46 PM), <https://www.politico.com/news/2021/04/07/doj-memo-durbin-domestic-terrorism-479711> [<https://perma.cc/L7Y3-4HAU>] (containing an unpublished memorandum from the Department of Justice, titled *Informal, Not-Officially Cleared Comments of the Department of Justice on H.R. 5602, the "Domestic Terrorism Prevention Act of 2020"*).

motivated violence on behalf of the Black population.<sup>384</sup> Another training presentation on “Abortion Extremism” was even more explicit: “Many tactics alone constitute protected activity under the First Amendment. However, when considered in the context of the abortion extremism movement, these tactics may indicate a resurgence of extremist activity.”<sup>385</sup> Other training documents obtained by the ACLU also identified “passive civil disobedience”<sup>386</sup> and targeted Freedom of Information Act requests<sup>387</sup> as potential behavior of violent extremists.

Perhaps most concerning is the history and continued practices around the use of informants to infiltrate individuals and groups that come under FBI suspicion, in part, because of their political beliefs or activities. The Church Committee Report highlighted the FBI’s “pervasive” use of informants against “peaceful, law-abiding groups” in order to collect information about their “personal and political views and activities.”<sup>388</sup> The FBI continues to have authority to disrupt the activities of groups suspected of domestic terrorism by using CIs and disinformation,<sup>389</sup> even if the inquiry is concluded without bringing criminal charges.<sup>390</sup> Indeed, the FBI uses these powers to surveil those affiliated with today’s diverse political movements, including BLM<sup>391</sup> and anti-government militias.<sup>392</sup>

Deliberately copying their international counterterrorism strategies, federal law enforcement agencies are currently “using undercover stings and charges not directly related to terrorism . . . to arrest suspected domestic extremists as part of an aggressive effort to head off potential attacks.”<sup>393</sup> In a telling statement, retired FBI agent

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384. FED. BUREAU OF INVESTIGATION, BLACK SEPARATIST EXTREMISTS, *supra* note 378.

385. FED. BUREAU OF INVESTIGATION, ABORTION EXTREMISM 026023, <https://www.aclu.org/files/fbimappingfoia/20120518/ACLURM026311.pdf> [<https://perma.cc/XNX2-HKKT>].

386. FED. BUREAU OF INVESTIGATION, ANARCHIST EXTREMISM OVERVIEW 026197 (2011), <https://www.aclu.org/files/fbimappingfoia/20120518/ACLURM026485.pdf> [<https://perma.cc/6XUJ-8W5Y>] (released Jan. 31, 2012).

387. See FED. BUREAU OF INVESTIGATION, ANIMAL RIGHTS/ENVIRONMENTAL EXTREMISM 026411, 7 (2011), <https://www.aclu.org/files/fbimappingfoia/20120518/ACLURM026701.pdf> [<https://perma.cc/SFT8-TA4N>] (released Jan. 31, 2012).

388. S. Rep. No. 94-755, *supra* note 366, at 13.

389. See COUNTERTERRORISM POLICY GUIDE, *supra* note 62, at 31.

390. See BASELINE COLLECTION PLAN, *supra* note 62, at 11.

391. Winter & Weinberger, *supra* note 380; Speri, *supra* note 381.

392. Dan Frosch & Zusha Elinson, *After Capitol Riot, Law Enforcement Steps Up Efforts Against Domestic Extremism*, WALL ST. J. (Mar. 3, 2021, 12:27 PM), <https://www.wsj.com/articles/law-enforcement-steps-up-efforts-against-domestic-extremism-11614767400> [<https://perma.cc/R89S-WCPV>].

393. See *id.*

Gregory Rogers, who had gone undercover in militia and white supremacist groups, has said “he would often spend months undercover just to find out if any criminal activity was occurring.”<sup>394</sup> After the 2017 “Unite the Right Rally” violence and other white supremacist motivated mass-casualty attacks, the FBI in 2019 began “developing strategies for addressing the domestic threat by analyzing how they successfully targeted international terrorists through undercover work and sting operations.”<sup>395</sup>

It is important to remember that COINTELPRO and subsequent abuses did not happen in a vacuum. In those instances, political pressure influenced the focus and zeal of federal law enforcement’s priorities. Nor was that dynamic unique to the 1960s. In the 1990s and early 2000s, political pressure contributed to an outsized focus on the threat of eco-terrorism posed by environmental and animal rights activists. In response to aggressive corporate lobbying by the pharmaceutical and agriculture industries,<sup>396</sup> Congress created the crime of “animal enterprise terrorism” in 2006.<sup>397</sup> In the following years, the FBI reported to Congress that environmental and animal rights activists were the most serious domestic terrorism threat<sup>398</sup> and recommended that activists filming animal cruelty at commercial farms be prosecuted as terrorists.<sup>399</sup> All this was despite the fact that no fatal attacks were linked to the movement and the vast majority of acts of eco-terrorism prosecuted by DOJ were—and are today—non-violent property offenses.<sup>400</sup>

Political pressure can swing the opposite way too, pushing law enforcement to downplay certain domestic terrorism threats. A 2009 DHS report on the danger of right-wing extremism drew such intense criticism from Republicans, veterans groups, and other politically influential organizations that DHS apologized and withdrew the

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394. *Id.*

395. Tau & Gurman, *supra* note 356.

396. See generally DONALD R. LIDDICK, *ECO-TERRORISM: RADICAL ENVIRONMENTAL AND ANIMAL LIBERATION MOVEMENTS* (2006) (describing intense lobbying pressure to criminalize acts of property destruction by radical eco-groups as terrorism). See also Brown, *supra* note 156 (explaining efforts by affected industries to persuade Congress and DOJ to criminalize certain environmental activism as terrorism).

397. See 18 U.S.C. § 43 (2018); see also Brown, *supra* note 156.

398. *FBI Surprise on Top Domestic Terror Threat*, *supra* note 155; see also GERMAN, *supra* note at 155, at 198–213 (discussing the FBI’s investigation of environmental groups “despite the fact that not a single death is attributable to the U.S. environmental rights movement”).

399. Norris, *supra* note 6, at 265.

400. See Brown, *supra* note 156.

report.<sup>401</sup> In fact, in the past two decades, two different Justice Department Inspector General reports have criticized the FBI for its outsized focus on domestic terrorism threats posed by left-wing groups in contrast to the domestic terrorism threat posed by right-wing groups.<sup>402</sup>

Most recently during the summer of 2020, DOJ aggressively pursued participants in the nationwide protests against the killing of George Floyd, despite the fact that the vast majority of defendants had committed crimes typically handled by state and local authorities.<sup>403</sup> The federal government's effort to prosecute protestors for relatively minor crimes<sup>404</sup> primarily affected defendants with left-wing motivations, which many commentators attributed to President Trump and Attorney General William Barr's vocal opposition to BLM and Antifa.<sup>405</sup> Many of those cases involve charges of federal crimes of terrorism,<sup>406</sup> demonstrating how DOJ can spring into action against an administration's perceived political enemies. With the investigation of the Capitol riot focusing on involved right-wing groups, political pressure over domestic terrorism priorities continues. During FBI Director Christopher Wray's testimony to the Senate Judiciary Committee on the Capitol Riot, Senator Chuck Grassley asked how the FBI intends to make its "left-wing anarchist extremism program as robust as [its] white supremacy and militia extremism program."<sup>407</sup> The question

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401. See Johnson, *supra* note 151; see also Reitman, *supra* note 151 ("A few weeks after the report was released, [DHS] formally apologized to veterans, and after intense pressure from veterans' groups, the department withdrew the report.")

402. See, e.g., REVIEW OF THE FBI'S INVESTIGATIONS, *supra* note 157, at 188; FED. BUREAU OF INVESTIGATION'S EFFORTS TO IMPROVE INTELLIGENCE SHARING, *supra* note 157, at 50, 63, 94; Norris & Grol-Prokopczyk, *supra* note 143, at 643 n.185.

403. See, e.g., Josh Gerstein, *Broken Windows and a Molotov Cocktail: DOJ Finds Creative Ways into Local Rioting Cases*, POLITICO (June 20, 2020, 7:00 AM), <https://www.politico.com/news/2020/06/20/doj-local-rioting-cases-329735> [<https://perma.cc/ZSR9-WXM6>].

404. Loadenthal, *supra* note 227 (documenting over 300 federal cases against defendants who were arrested in connection to their actions during protests during the summer of 2020).

405. See, e.g., Sam Levin & Maanvi Singh, *America's Protest Crackdown: Five Months After George Floyd, Hundreds Face Trials and Prison*, THE GUARDIAN (Oct. 27, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/oct/27/americas-protest-crackdown-five-months-after-george-floyd-hundreds-face-trials-and-prison>; Jaclyn Peiser, *'Their Tactics Are Fascistic': Barr Slams Black Lives Matter, Accuses the Left of 'Tearing Down the System.'* WASH. POST (Aug. 10, 2020), <https://www.washingtonpost.com/nation/2020/08/10/barr-fox-antifa-blm/> [<https://perma.cc/2E4B-4259>].

406. See Loadenthal, *supra* note 227.

407. *Oversight of the Fed. Bureau of Investigation*, *supra* note 347 (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation); Dana Milbank, *Opinion, On Jan. 6 Came the White Supremacists. Now Comes the Whitewash.*, WASH. POST (Mar. 2, 2021), <https://www.washingtonpost.com/opinions/2021/03/02/jan-6-came-white-supremacists-now-comes-whitewash/> [<https://perma.cc/4VHN-44Y6>].

suggested political pressure to treat these threats equally, irrespective of the FBI's data that white supremacist violence represents the greater domestic threat.

The contrasting excesses and lack of focus on various domestic groups that may pose a terrorism threat demonstrate the danger of allowing political winds to dictate who is a terrorist and what is a terrorism offense, as well as the risk of allowing the federal government to pursue those actors and offenses at their considerable discretion.

### C. *The Two Main Arguments for a New Domestic Terrorism Statute*

In light of the foregoing context, the proposals for a new domestic terrorism statute currently circulating in Congress deserve critical attention. As explained above, advocates for a domestic terrorism statute make two arguments.<sup>408</sup> They contend that a statute would symbolically “raise domestic terrorism to the moral equivalent of international terrorism,” which is necessary because the current legal regime creates an artificial but inequitable divide between the two.<sup>409</sup> Second, they maintain that it would close dangerous “gaps” in the current framework that allow domestic terrorists to evade the grasp of federal law enforcement unless they violate a separate federal law.<sup>410</sup> A standalone statute would enable more effective left-of-boom pursuit of domestic terrorists, thereby preventing more violence by a broad range of actors.

Despite the weight of these arguments, such proposals overlook the federal government's existing powers to both symbolically elevate and fully pursue domestic terrorism. This Article is hardly the first to raise concerns about an overreaction to the threat of domestic terrorism that gives the federal government even greater powers.<sup>411</sup> After the Capitol riot, numerous lawmakers, counterterrorism experts, and civil liberties groups argued that new statutes or importing the counterterrorism powers and framework used in the fight against Islamist terrorism could degrade civil and political liberties without improving

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408. *See supra* Sections I.C, I.D.

409. McQuade, *supra* note 42.

410. *See, e.g.,* MCCORD, *supra* note 5, at 3.

411. *See, e.g.,* Sinnar, *supra* note 9, at 1358; Andrew Exum, *Counterinsurgency Isn't the Answer*, THE ATLANTIC (Feb. 5, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/counterinsurgency-isnt-answer/617935/> [<https://perma.cc/ZH3Z-PQV5>]; Alex Emmons, *Capitol Hill Assault Revives Calls For Domestic Terrorism Law, But Civil Liberties Groups Are Wary*, THE INTERCEPT (Jan. 10, 2021, 2:15 PM), <https://theintercept.com/2021/01/10/capitol-hill-riot-domestic-terrorism-legislation/> [<https://perma.cc/8J2H-MCUM>].

public safety.<sup>412</sup> But this framing of the debate—does the United States need new laws to better equip law enforcement to fight domestic terrorism or not?—misses a critical point: how the existing powers of the federal government can be used against domestic terrorism at the discretion of the executive branch with little oversight from Congress.

#### *D. Symbolism Alone Does Not Justify a New Domestic Terrorism Statute*

Proponents of the symbolic weight of a new statute focus primarily on prosecution; that is, their proposals suggest that the best, if not the only, way to symbolically equate domestic and international terrorism is to charge acts of domestic terrorism as such. Thus, a guilty verdict or plea that legally recognizes an act as domestic terrorism carries symbolic significance for victims, their families, and the public. Yet this narrow view overlooks other meaningful ways to symbolically equate domestic and international terrorism without enacting a new statute.

As a starting point, federal law enforcement can use consistent rhetoric. If defendants engage in conduct that meets § 2331(5)'s definition and were motivated by a U.S.-based ideology or group, federal law enforcement can label such defendants as domestic terrorists regardless of the charges ultimately brought against them.

Additionally, federal law enforcement can deploy resources commensurate with the threat posed by domestic terrorism. Currently, the threat of international terrorism occupies the majority of counterterrorism resources despite the federal government's repeated statements that domestic terrorism poses the greater threat.<sup>413</sup> At the charging

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412. Rachel Oswald, *A Month After Capitol Riot, a Look at Domestic Terrorism Laws*, ROLL CALL (Feb. 4, 2021, 7:08 PM), <https://www.rollcall.com/2021/02/04/a-month-after-capitol-riot-a-look-at-domestic-terrorism-laws/> [<https://perma.cc/2XQD-DRBW>] (reporting that Representative Elissa Slotkin, a former counterterrorism expert at the Pentagon and CIA, commented that an overreaction to the Capitol riot could produce counterproductive policies akin to some of the counterproductive policies adopted as an “emotional response” to the 9/11 attacks); Exum, *supra* note 411 (Former Deputy Assistant Secretary of Defense for Middle East policy, Andrew Exum, emphasizing that the United States should not use a counterinsurgency strategy like those used in Afghanistan and Iraq “to defeat right-wing extremism,” nor does the United States need “to pass new legislation that further empowers law enforcement to take action against domestic terrorists”); Shuster, *supra* note 361.

413. See Laura Strickler et al., *‘We Have a Problem’: Federal Agencies Scramble to Fight Domestic Terror with Limited Resources*, NBC NEWS (Aug. 5, 2019, 4:19 PM), <https://www.nbcnews.com/politics/national-security/we-have-problem-federal-agencies-scramble-fight-domestic-terror-limited-n1039441> [<https://perma.cc/LRS2-MCU2>].

phase, DOJ can use available statutes equally in domestic and international terrorism cases. To those who argue that there is no substitute for the emotional weight of terrorism charges, the answer need not be a new criminal statute. Rather, DOJ can use terrorism charges more consistently in the domestic context. For example, § 2339A charges are frequently brought in international terrorism cases but rarely in domestic ones, despite there being no legal barrier to bringing § 2339A charges in a greater number of domestic terrorism cases where the facts support such a charge.<sup>414</sup> DOJ can also engage in even-handed use of the terrorism sentencing enhancement. If a defendant is convicted of conduct that meets the requirements of § 3A1.4, the enhancement can be applied regardless of whether the conduct is considered international or domestic terrorism.<sup>415</sup> The federal government already has the discretion to do all of the above, and that would be symbolically significant.

Importantly, many acts of domestic terrorism can be and are charged as hate crimes. Of all domestic terrorism activity tracked by the federal government, the majority is racially-motivated violence.<sup>416</sup> Although some advocates argue that hate crime charges do not carry the same symbolic heft as terrorism charges,<sup>417</sup> it is not obvious that charging such conduct as a hate crime is in fact less symbolically significant than charging it as domestic terrorism, especially when hate crimes and terrorism charges result in equally serious penalties.<sup>418</sup>

Finally, a criminal domestic terrorism statute would neither force the federal government to use these powers in symbolically significant ways nor limit its ability to deploy them according to shifting conceptions of who is a domestic terrorist. There is no guarantee that a new statute would actually result in the symbolic equivalence of domestic

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414. See *infra* Section III.A.v. While the § 2339B material support statute is broader than § 2339A and can only be used in the international context, as there is no domestic equivalent of the FTO regime, attempts to create a domestic equivalent of § 2339B would likely face serious First Amendment hurdles.

415. See *supra* Section IV.

416. See *Oversight of the Fed. Bureau of Investigation*, *supra* note 347, at 396 (statement of Christopher A. Wray, Dir. of the Fed. Bureau of Investigation); DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT, *supra* note 24, at 17 & n.7; *Worldwide Threats to the Homeland*, *supra* note 209, at 17 (statement of Christopher Wray, Dir. of the Fed. Bureau of Investigation).

417. See McCord, *supra* note 201.

418. Compare *United States v. McVeigh*, 153 F.3d 1166, 1176–77 (10th Cir. 1998) (finding defendant guilty on terrorism charges), with *United States v. Roof*, 225 F. Supp. 3d 438, 441 (D.S.C. 2016) (finding defendant guilty on hate crime charges).

and international terrorism that advocates seek.<sup>419</sup> Moreover, elevating lower-level conduct at the edges of protected First Amendment activity—i.e., property damage in the course of a protest—to acts of terrorism is not necessary to send the signal that domestic and international terrorism are equally serious.

### *E. More Criminal Penalties for Domestic Terrorism Will Have Little Practical Effect*

There also is no practical need to create a new statute to prosecute conduct that is already criminalized. Most proposals stem from the premise that the federal government does not have the “the best tools” to pursue domestic terrorism.<sup>420</sup> As discussed earlier, advocates point to the case of Christopher Hasson, the white supremacist Coast Guard lieutenant, as emblematic of the legal loopholes that hamstringing the FBI and Justice Department in this area.<sup>421</sup>

While this Article does not contest the danger that suspects like Hasson pose, and it recognizes that creating a federal crime of “domestic terrorism” could assist DOJ in similar cases, it questions whether calls for a domestic terrorism statute accurately consider the extent of the government’s existing powers. The federal government has significant powers to pursue domestic terrorists, including broad authorities to open inquiries and surveil, infiltrate, and disrupt domestic terror plots.<sup>422</sup> When the facts and evidence support a federal crime of terrorism, DOJ has brought serious terrorism charges against the most dangerous domestic terrorists.<sup>423</sup> Defendants who commit violent acts of domestic terrorism that cannot be charged as such have

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419. The existence of federal crimes of terrorism does not currently force federal law enforcement to bring such charges in all applicable cases. A new criminal statute could likewise be underenforced.

420. *FBI Agents Association Statement on Bipartisan Domestic Terrorism Legislation*, FBI AGENTS ASS’N (Aug. 15, 2019), <https://www.fbiaa.org/fbiaa-press-releases-list/fbi-agents-association-statement-bipartisan-domestic-terrorism-legislation> [<https://perma.cc/SUC9-K2MZ>].

421. See Lewis & Hughes, *supra* note 18.

422. See generally DIOG, *supra* note 62 (outlining powers the FBI has for pursuing terrorism); ATT’Y GENERAL’S GUIDELINES, *supra* note 61 (outlining powers the Attorney General has for pursuing terrorism); BASELINE COLLECTION PLAN, *supra* note 62 (outlining the powers of the Counterterrorism Division); Bennett Clifford et al., *An Abridged History of America’s Terrorism Prevention Programs: Opposition Grows, Supporters Adapt*, LAWFARE (Dec. 30, 2020, 10:17 AM), <https://www.lawfareblog.com/abridged-history-americas-terrorism-prevention-programs-opposition-grows-supporters-adapt> [<https://perma.cc/6P8T-2GS8>] (overviewing DOJ’s Disruption and Early Engagement Project (DEEP), which aims to “identify and assess individuals who appear to be on the path towards violent extremism”).

423. See, e.g., *United States v. Crawford*, 714 F. App’x 27, 29–32 (2d Cir. 2017); *United States v. Parr*, 545 F.3d 491, 496 (7th Cir. 2008); *McVeigh*, 153 F.3d at 1176–77.

faced hate crimes charges that incur equally serious penalties.<sup>424</sup> A slew of non-terrorism charges remain available for less serious acts or less developed plots of domestic terrorism.<sup>425</sup> Finally, domestic terrorists who cannot be charged as such may still be labeled domestic terrorists by federal law enforcement and may still face a terrorism sentencing enhancement under § 3A1.4.<sup>426</sup> As for Hasson, he could have avoided arrest before an attack only if he had lawfully stockpiled firearms. Even if the preparatory provisions of a new domestic terrorism statute could reach that otherwise lawful conduct, there would be significant Second Amendment challenges to that prosecution.<sup>427</sup>

#### *F. Proposals to Combat Domestic Terrorism with Less Risk of Abuse of Discretion*

Others have argued that gaps in the pursuit of domestic terrorism generally do not result from insufficient investigative or charging powers.<sup>428</sup> Rather, they result from insufficient coordination among the FBI, USAOs, and Main Justice<sup>429</sup> and from a lack of or misplaced political willpower to pursue particular strands of domestic terrorism.<sup>430</sup> That coordination gap can likely be remedied within the confines of existing authorities. DOJ began improving coordination efforts on domestic terrorism with the creation of the Counsel for Domestic Terrorism in CTS in 2015.<sup>431</sup> Additionally, Main Justice

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424. See, e.g., *United States v. Roof*, 225 F. Supp. 3d 438, 441 (D.S.C. 2016); *Texas Man Charged with Federal Hate Crimes*, *supra* note 277; *Pennsylvania Man Charged with Federal Hate Crimes for Tree of Life Synagogue Shooting*, *supra* note 277.

425. GERMAN & ROBINSON, *supra* note 17, at 6–7.

426. See, e.g., *United States v. Wright*, 747 F.3d 399, 410 (6th Cir. 2014); *United States v. Jordi*, 418 F.3d 1212, 1217 (11th Cir. 2005); *United States v. Graham*, 275 F.3d 490, 518–19 (6th Cir. 2001); *United States v. Wells*, 163 F.3d 889, 899–900 (4th Cir. 1998).

427. Others have noted the potential Second Amendment implications of a domestic terrorism statute, see Greg Myre, *An Old Debate Renewed: Does the U.S. Now Need a Domestic Terrorism Law?*, NPR (Mar. 16, 2021, 5:05 AM), <https://www.npr.org/2021/03/16/976430540/an-old-debate-renewed-does-the-u-s-now-need-a-domestic-terrorism-law> [<https://perma.cc/W2C4-4SME>], but that is beyond the scope of this Article. Nevertheless, it is possible Hasson could have been charged with violating § 2339A, as federal law enforcement had evidence of his plans and preparations to commit a terrorist attack.

428. See German, *supra* note 3.

429. See *id.*

430. See *id.*; Adam Goldman et al., *How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/01/30/us/politics/trump-right-wing-domestic-terrorism.html> [<https://perma.cc/G9LG-LR43>].

431. GUMBEL, *supra* note 21, at 3.

could expand the list of charges that trigger notification or approval requirements in a domestic terrorism investigation.<sup>432</sup>

What is more difficult to address within existing authorities is the degree of discretion the federal government has to (1) choose how to focus its resources and authorities on different strands of domestic terrorism—e.g., white supremacy, anti-government, eco-terrorism, or other ideologies; (2) to shape the narrative around who is a domestic terrorist through public messaging, charging, and sentencing; and (3) consequently, to delegitimize the speech and conduct of political actors.

Some will respond to this concern by noting that actors within the federal government understand that their agencies' discretion could lead to civil liberties violations and are therefore reluctant to use the full weight of their powers. The most recent example of this dynamic is the reported refusal of Main Justice and FBI officials to aggressively investigate individuals who had potential ties to participants in the January 6 Capitol riot, including people who had paid for rioters' travel and other members of groups to which rioters belonged.<sup>433</sup> The officials were apparently concerned that such an approach would violate the targets' First Amendment rights and rebuffed the urging of line prosecutors to expand the existing inquiry.<sup>434</sup> But such incidents in fact demonstrate the fundamental flaw of the current apportionment of power: civil liberties abuses are vulnerable to the discretionary decisions of individual executive branch officials. If individuals less

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432. In fact, DOJ has begun to do this. A new memo, "Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism," circulated to federal prosecutors across the country on March 8 will now require USAOs to get approval from CTS for "any charges and associated court filings that link a case to domestic violent extremism." Jana Winter, *Exclusive: Attorney General to Detail New Guidelines for Domestic Terrorism Investigations and Cases*, YAHOO! NEWS (May 11, 2021), <https://news.yahoo.com/exclusive-attorney-general-to-detail-new-guidelines-for-domestic-terrorism-investigations-and-cases-200923496.html> [<https://perma.cc/2SCQ-ZAPK>]. The memo also requires federal law enforcement to notify CTS "as soon as practicable" of criminal investigations related to domestic violent extremism, including any cases involving conduct that meets § 2331(5)'s definition of domestic terrorism. Memorandum from the Acting Deputy Att'y Gen. to All Fed. Prosecutors 2 (Mar. 8, 2021). Critically, the memo acknowledges that "how [DOJ] defines 'domestic terrorism' raise[s] important legal and policy considerations," while also advising that "'domestic violent extremism' should be interpreted broadly and include all violent criminal acts in furtherance of ideological goals stemming from domestic influences, such as racial bias and anti-government sentiment." *Id.* at 1. It is important to note, however, that these changes have not been fully implemented or tested yet and are being made at DOJ's discretion, subject to changes or rescission at any time.

433. See Katie Benner, *Prosecutors Are Said to Have Sought Aggressive Approach to Capitol Riot Inquiry*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/04/27/us/politics/justice-department-capitol-riot-investigation.html> [<https://perma.cc/8E9V-65PH>].

434. See *id.*

concerned about the prospect of civil liberties violations ascend to key roles within federal law enforcement, there are few legal barriers or external constraints to check abuses of discretion. This Article does not purport to address exactly how executive discretion should be cabined in the domestic terrorism context, but proposals for a statute that would mandate increased coordination between federal agencies on domestic terrorism matters and require reporting to relevant congressional committees<sup>435</sup> are sensible places to start.

### CONCLUSION

The significant discretionary powers of the federal government to define and pursue domestic terrorism as it sees fit—based on its assessment of security threats and, sometimes, political pressure from elected officials—creates a significant risk for the delegitimization of political speech and conduct.<sup>436</sup> The federal government can use anything up to and including the full weight of its powers to pursue anyone who could be remotely involved with political ideologies that oppose the government if there is even a suggestion of potential violence. In light of this reality, and in the midst of a call for the federal government to pursue domestic terrorism more vigorously, serious consideration needs to be given limiting the executive branch's expansive discretion to define, identify, and pursue domestic terrorists.

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435. See, e.g., McCord & Blazakis, *supra* note 3.

436. See, e.g., Dewan, *supra* note 335; Williams, *supra* note 360; Foley, *supra* note 336; *Trump Visits Kenosha*, *supra* note 336; Shereen Marisol Meraji, *What Does It Mean to Call the Capitol Rioters 'Terrorists'?*, NPR (Jan. 14, 2021, 3:20 PM) <https://www.npr.org/sections/codeswitch/2021/01/14/956881738/what-does-it-mean-to-call-the-capitol-rioters-terrorists> [<https://perma.cc/UXG6-RD9C>]; Farah Pandith et al., *Female Extremists in QAnon and ISIS Are on the Rise. We Need a New Strategy to Combat Them*, NBC NEWS (Dec. 11, 2020, 1:30 AM), <https://www.nbcnews.com/think/opinion/female-extremists-qanon-isis-are-rise-we-need-new-strategy-ncna1250619> [<https://perma.cc/3RCG-4CTL>].

