



Program on Extremism

THE GEORGE WASHINGTON UNIVERSITY

# THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM

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## About the Program on Extremism

The Program on Extremism at George Washington University provides analysis on issues related to violent and non-violent extremism. The Program spearheads innovative and thoughtful academic inquiry, producing empirical work that strengthens extremism research as a distinct field of study. The Program aims to develop pragmatic policy solutions that resonate with policymakers, civic leaders, and the general public.

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*The views expressed in this paper are solely those of the author, and not necessarily those of the Program on Extremism or the George Washington University.*

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## I. INTRODUCTION

Although the United States has taken a powerful stance in fighting the War on Terror, and attempts have been made to define domestic terrorism alongside international terrorism within federal legislation, there is a “considerable amount of ambiguity over domestic terrorism, what it means precisely, [and] how it’s charged.”<sup>1</sup> This ambiguity arises from the lack of a standalone criminal offense outlawing domestic terrorism. In light of this ambiguity and the rise in domestic terrorism within the United States since September 11, 2001, the United States needs to enact a law specifically outlawing domestic terrorism but has clear bounds to its application.<sup>2</sup> Accordingly, this paper recommends that Congress enacts the law set forth here, which outlaws actual, threatened, attempted, or conspiracy to violate a criminal law of the United States or any state, where the person does not act pursuant to a Foreign Terrorist Organization (FTO), an act takes place in within the jurisdiction of the United States, and the acts appear to be intended to (i) intimidate or coerce a civilian population, or (ii) influence the policy or conduct of a government by intimidation, coercion, or violent means. The statute announced here is roughly based on the definitions of domestic terrorism set forth in Section 802 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, codified by 18 U.S.C. § 2331(5) (2012) and employed by the Federal Bureau of Investigation (FBI), the jurisdictional language of 18 U.S.C. § 956(a)(1)-(b), the penalties provided in 18 U.S.C. § 2332(b), the civil remedies provided in 18 U.S.C. § 2333, the statute of limitations afforded to the federal crimes of terrorism (listed in 18 U.S.C. § 2332b(g)(2)), the investigative authority discussed in 28 C.F.R. § 0.85(l) (1969), and the domestic terrorism laws of other nations that provide for charging threats of terrorist acts.<sup>3</sup> The goal of this law would be to ensure language classifying domestic terrorism is not over- or under-inclusive so that innocent or protected conduct is not punished and that terrorist conduct (e.g., conduct aimed at intimidating or coercing a civilian population, influencing the policy of a government by intimidation or coercion, or affecting the conduct of a government through violent means) can be investigated and prosecuted with proper process and national uniformity.<sup>4</sup>

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<sup>1</sup> James Cullum, *No Domestic Terror Charge? Lack of Law Reflects ‘Considerable Ambiguity,’ Says DOJ Official*, HOMELAND SECURITY TODAY (Dec. 9, 2018) (citations omitted), <https://www.hstoday.us/subject-matter-areas/counterterrorism/no-domestic-terror-charge-for-domestic-terrorism-lack-of-law-reflects-considerable-ambiguity-says-doj-official/> [hereinafter Cullum, *No Domestic Terror Charge*].

<sup>2</sup> See, e.g., Natasha Bach, *Domestic Terrorism Is on the Rise: But How Prepared Is the U.S. to Counter It?*, FORTUNE (April 4, 2019), <http://fortune.com/2019/04/04/dhs-domestic-terrorism/> [hereinafter Bach, *Domestic Terrorism Is on the Rise*].

<sup>3</sup> See, e.g., Pub. L. No. 107-56, H.R. 3162, 107th Cong.; *Terrorism*, FBI, <https://www.fbi.gov/investigate/terrorism>; Elena Chachko, *Israel’s New Counterterrorism Law*, LAWFARE (July 13, 2016, 9:42 AM), <https://www.lawfareblog.com/israels-new-counterterrorism-law> [hereinafter Chachko, *Israel’s New Counterterrorism Law*].

<sup>4</sup> See 18 U.S.C. § 2331(5); USA PATRIOT Act § 802.

## II. THE GROWING PROBLEM OF DOMESTIC TERRORISM

The FBI and other federal agencies that handle terrorism matters divide investigations into two categories: international terrorism and domestic terrorism.<sup>5</sup> While international terrorism is often regarded as pertaining to, *inter alia*, members of designated Foreign Terrorist Organizations (FTOs), state sponsors of terrorism, and homegrown violent extremists (HVEs) (i.e., U.S.-based terrorists motivated by the ideologies of FTOs), according to some definitions, domestic terrorism pertains to violent acts committed “in furtherance of ideological goals stemming from domestic influences.”<sup>6</sup>

Although international terrorism by jihadist extremists has been the focus of counterterrorism policy and legislation following September 11, 2001, within the last decade, U.S. leadership has started to reconceptualize the terrorist threats that the nation faces as the nature of threat has evolved.<sup>7</sup> For instance, in June 2019, the FBI issued a statement asserting that there have been “more domestic terrorism subjects disrupted by arrest and more deaths caused by domestic terrorists than international terrorists in recent years.”<sup>8</sup> With the notable increase in incidents of domestic terrorism over the past decade,<sup>9</sup> the urgency to address domestic terrorism, a threat which has accounted for tragic killings of American citizens and damaged property across the country in a manner far exceeding that of international terrorism, has become ever apparent to the U.S. government.<sup>10</sup> While this reality is not readily ascertainable from U.S. government action and policy—particularly following September 11, 2001—, as somewhat aforementioned, since at least the 1970s, domestic terrorism has been the most prominent and lethal form of terrorism affecting the United States, even if the nature of the ideological motivation has varied over the years.<sup>11</sup> Despite the domestic

<sup>5</sup> See Michael C. McGarrity et al., *Confronting White Supremacy*, FBI (June 4, 2019), <https://www.fbi.gov/news/testimony/confronting-white-supremacy> [hereinafter McGarrity, *Confronting White Supremacy*].

<sup>6</sup> See JEROME P. BJELOPERA, CONG. RESEARCH SERV., IN10299, SIFTING DOMESTIC TERRORISM FROM HATE CRIME AND HOMEGROWN VIOLENT EXTREMISM (2017) [hereinafter BJELOPERA, SIFTING DOMESTIC TERRORISM]; McGarrity, *Confronting White Supremacy*, *supra* note 5.

<sup>7</sup> See *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Sheila Jackson Lee).

<sup>8</sup> *National Strategy for Counterterrorism*, *supra*; see also McGarrity, *Confronting White Supremacy*, *supra* note 5.

<sup>9</sup> See *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Sheila Jackson Lee); Ron Nixon, *Homeland Security Looked Past Antigovernment Movement, Ex-Analyst Says*, NY TIMES (Jan. 8, 2016), [https://www.nytimes.com/2016/01/09/us/politics/homeland-security-looked-past-militia-movement-ex-analyst-says.html?smid=tw-nytimes&smtyp=cur&referer=&\\_r=0](https://www.nytimes.com/2016/01/09/us/politics/homeland-security-looked-past-militia-movement-ex-analyst-says.html?smid=tw-nytimes&smtyp=cur&referer=&_r=0).

<sup>10</sup> See Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020); *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Sheila Jackson Lee); JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS (2013) [hereinafter BJELOPERA, THE DOMESTIC TERRORIST THREAT].

<sup>11</sup> See, e.g., Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020) (stating findings from a joint report from 2017 by the FBI and DHS that “white supremacist extremism poses [a] persistent threat of lethal violence,” accounting for “49 homicides in 26 attacks from 2000 to 2016 . . . more than

source of influence, eradicating and prosecuting domestic terrorism in the United States requires similar attention and resources and as equally viable of a legal infrastructure as international terrorism.

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any other domestic extremist movement”); JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW (2017) (citations omitted) [hereinafter BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW] (citing Federal Bureau of Investigation, *Terrorism in the United States: 30 Years of Terrorism—A Special Retrospective Edition* (2000)) (reporting that in at least the past thirty years, the “vast majority . . . of deadly terrorist attacks . . . in the United States have been perpetrated by domestic extremists”); Erin Miller, *Patterns of Terrorism in the United States, 1970-2013: Final Report to Resilient Systems Division, DHS Science and Technology Directorate*, NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (Oct. 2014) [hereinafter Miller, *Patterns of Terrorism in the United States, 1970-2013*]; James B. Motley, *U.S. Strategy to Counter Domestic Political Terrorism. National Security Affairs Monograph Series 83-2*, NAT’L DEFENSE U. PRESS (1983). For instance, in the 1970s, terrorist attacks were predominately carried out by left-wing extremists (e.g., Weather Underground) and Puerto Rican nationalists (e.g., Armed Forces of Puerto Rican National Liberation); however, by the 1990s, attacks by these perpetrators became extremely rare. See Miller, *Patterns of Terrorism in the United States, 1970-2013*, *supra* note 11. In recent years, white identity extremism has emerged as the most pressing domestic terrorist threat in the United States. See Alexander Guittard et al., *Terror By Another Name*, THE HILL (April 9, 2019, 8:45 AM), <https://thehill.com/opinion/national-security/437978-terror-by-any-other-name> (stating that all murders by extremists in 2018 had a nexus to far-right extremism); see also McGarrity, *Confronting White Supremacy*, *supra* note 5; FBI Oversight: Hearing Before the H. Judiciary Comm. (Feb. 5, 2020) (statement of Christopher Wray, Director, Federal Bureau of Investigation); *Attacks on the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 113th Cong. (2013) (statement of Michael E. Leiter, former Director, National Counterterrorism Center); BJELOPERA, THE DOMESTIC TERRORIST THREAT, *supra* note 10; *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, DEP’T OF HOMELAND SEC. (Sept. 19, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0920\\_plcy\\_strategic-framework-countering-terrorism-targeted-violence.pdf](https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf) (“White supremacist violent extremism . . . is one of the most potent forces driving domestic terrorism. Lone attackers . . . generally perpetrate these kinds of attacks. But they are also part of a broader movement.”); see also 165 Cong. Rec. H8028 (daily ed. Sept. 26, 2019) (letter from the Anti-Defamation League, July 12, 2019); *Rise of Radicalization: Is the U.S. Gov’t Failing to Counter Int’l and Domestic Terrorism: Hearing Before the H. Comm. on Homeland Sec.*, 114th Cong. (2016) (statement of J. Richard Cohen, President, Southern Poverty Law Center) (“[A]s has been widely reported, more persons have been killed since 9/11 by radical right terrorists than by Islamic extremists.”); *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the H. Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight and Reform*, 116th Cong. (2019); Domestic and International Terrorism Documentation and Analysis of Threats in America Act, H.R. 3106, 116th Cong. (2019); Sarah Ruiz-Grossman, *Most of America’s Terrorists Are White, And Not Muslim*, HUFFPOST (June 23, 2017, 1:39 PM) (citations omitted), [https://www.huffpost.com/entry/domestic-terrorism-white-supremacists-islamist-extremists\\_n\\_594c46e4e4b0da2c731a84df](https://www.huffpost.com/entry/domestic-terrorism-white-supremacists-islamist-extremists_n_594c46e4e4b0da2c731a84df) [hereinafter Ruiz-Grossman, *Most of America’s Terrorists Are White, And Not Muslim*]. While the open-source statistical data utilized here supports these claims, the actual numbers vary depending on the source’s criteria for assessment, terminology used, and scope of the study. The U.S. Department of Justice compiles hate crime and terrorism data based on statutory charges and sentencing enhancements, but the hate crime statistics are not broken down by specific ideological motivation (instead, it is broken down broadly, such as race-based, LGBTQ, etc.) and the terrorism data does not necessarily provide the full picture because it functions on a charge- and sentence-based approach and the U.S. government has typically relied on hate crime charges as opposed to terrorism-related charges when it comes to issues related to white identity extremism given the lack of appropriate statutory alternatives (e.g., no federal domestic terrorism statute, no FTO designation of foreign white identity extremist groups), among other factors.

### III. PROBLEMS WITH DOMESTIC TERRORISM'S CURRENT STATUTORY FRAMEWORK

#### A. OVERVIEW

At present, there is no federal crime of “domestic terrorism”; this means that, while federal statute provides a definition of domestic terrorism, this definition is not a chargeable criminal offense carrying penalties.<sup>12</sup> The absence of a federal crime of domestic terrorism has proven problematic in several regards. This section discusses some of these problems, including the various definitions of domestic terrorism which create confusion across the board, the inability to accurately understand and respond to the domestic terrorist threat given the lack of mandatory oversight and reporting mechanism and the various statutes used by prosecutors to fill the statutory void, the lack of access for victims of domestic terrorism to the possibility of treble damages afforded to victims of international terrorism under 18 U.S.C. § 2333, and the procedural problems that arise and the aggravation of societal tensions when prosecutors cannot call an act domestic terrorism.

#### B. DEFINING DOMESTIC TERRORISM

“Domestic terrorism” might mean something different depending on who you ask.<sup>13</sup> Indeed, it might even mean many different things to one person. The use of different definitions among the different law enforcement entities creates confusion—Members of Congress and other government officials even confuse the different definitions.<sup>14</sup> A crime of domestic terrorism would help create a “common vocabulary.”<sup>15</sup>

<sup>12</sup> Ryan J. Reilly et al., *Americans are Surprised Domestic Terrorism Isn't a Federal Crime. Most Think It Should Be.*, HUFFPOST (April 12, 2018, 4:54 PM), [https://www.huffpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi\\_n\\_5acd1c78e4b09212968c8907](https://www.huffpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi_n_5acd1c78e4b09212968c8907) [hereinafter Reilly, *Americans are Surprised Domestic Terrorism Isn't a Crime*]; Charlie Dunlap, *Shane Stansbury on “Domestic Terrorism: It's Time for a Meaningful Debate”*, LAWFIRE (March 18, 2019), <https://sites.duke.edu/lawfire/2019/03/18/guest-post-shane-stansbury-on-domestic-terrorism-its-time-for-a-meaningful-debate/> [hereinafter Dunlap, *Shane Stansbury on Shane Stansbury on “Domestic Terrorism: It's Time for a Meaningful Debate”*]; Kristen Mitchell, *Hate Crimes, Domestic Terrorism Not ‘Mutually Exclusive’*, GW TODAY (Jan. 10, 2018), <https://gwtoday.gwu.edu/hate-crimes-domestic-terrorism-not-mutually-exclusive/> [hereinafter Mitchell, *Hate Crimes, Domestic Terrorism*].

<sup>13</sup> See, e.g., BJELOPERA, *THE DOMESTIC TERRORIST THREAT* (citations omitted), *supra* note 10 (DHS utilizes the “Americans attacking Americans based on U.S.-based extremist ideologies” formulation of domestic terrorism; federal district courts, NSD, DHS, FBI, and federal prosecutors rely on different criteria to determine whether an act is domestic terrorism); Tay Wiles, *Defense Wants ‘Domestic Terrorism’ Out of Bundy Case*, HIGH COUNTY NEWS (Oct. 26, 2017) (“Nearly every agency that deals with the issue has its own definition.”); *Domestic Terrorism in the Post-9/11 Era*, FBI (Sept. 7, 2009), [https://archives.fbi.gov/archives/news/stories/2009/september/domterror\\_090709](https://archives.fbi.gov/archives/news/stories/2009/september/domterror_090709).

<sup>14</sup> *See Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Daryl Johnson, Founder and Owner, DT Analytics, LLC, Washington, DC).

<sup>15</sup> *Domestic Terrorism Conference Series: Combatting Domestic Terrorism with Thomas Brzozowski*, STATE OF NJ OFFICE OF HOMELAND SEC. AND PREPAREDNESS (Aug. 7, 2017), <https://www.njhomelandsecurity.gov/media/podcast-combating-domestic-terrorism-with-thomas-brzozowski>.

Section 802 of the USA PATRIOT Act, codified by 18 U.S.C. § 2331(5), defines domestic terrorism as committing “an act dangerous to human life” violative of the criminal laws of a state or the United States, if the act occurs primarily within the territorial jurisdiction of the United States, and appears to be intended to: (i) intimidate or coerce a civilian population; (ii) 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.<sup>16</sup> This statutory definition provides a solid starting point for defining domestic terrorism, but it is not without its faults.

The language of § 2331(5) is both over- and under-inclusive. The definition is over-inclusive to where “even some social media or protester comments might appear to fall under this definition.”<sup>17</sup> Thus, in instances such as the Vieques Island protests, this definition poses a potential danger to otherwise protected activity. To this point, there has been at least one case where this language has been challenged as being unconstitutionally vague or violative of the First Amendment.<sup>18</sup> It is therefore important to clarify the limitations of this or similar language going forward.

To ensure *only* terrorists are being labeled under this definition and to exclude “conduct of organizations and individuals that engage in minor acts of property damage or violence,” the American Civil Liberties Union has proposed to limit the scope of the definition to “acts which cause serious physical injury or death” rather than all acts that are “dangerous to human life.”<sup>19</sup> However, this alternative definition has its own shortcomings: (1) some terrorist acts are aimed at damaging sacred spaces and cultural relics as opposed to killing or injuring persons; (2) this language focuses on the outcome, or resulting harm, rather than the conduct itself, which would limit its application only to where such acts were successfully executed; (3) this language has proven problematic in other contexts, such as the CIA’s use of enhanced interrogation techniques following September 11, 2001.<sup>20</sup>

<sup>16</sup> See 18 U.S.C. § 2331(5); USA PATRIOT Act § 802. As will be discussed in greater detail below, some statutes do provide for charges regardless of whether a terrorist act was committed domestically or internationally, but these are limited in scope (e.g., terrorist attacks and other acts of violence against public transportation systems, terrorism related hoaxes).

<sup>17</sup> See BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 11; Cullum, *No Domestic Terror Charge, supra* note 1; *Would Domestic Terrorism Law Help Prevent Extremist Shootings?*, RICHMOND FREE PRESS (Nov. 8, 2018, 6:00 AM), <http://richmondfreepress.com/news/2018/nov/08/would-domestic-terrorism-law-help-prevent-extremis/?page=2> (discussing the Vieques Island protests, where several people illegally entered a military base and tried to obstruct the military’s bombing exercise, as conduct that would fall within the definition of domestic terrorism because the protesters broke federal law by unlawfully entering the airbase, they acted with the purpose of influencing a government policy by intimidation or coercion, and the act of trying to disrupt bombing exercises arguably created a danger to their own lives and those of military personnel). *But see Davis v. FBI*, No. 17-cv-00701-BAS-AGS, 2017 U.S. Dist. LEXIS 160269 (S.D. Cal. Sep. 27, 2017) (finding no cause of action where not brought under a chargeable offense).

<sup>18</sup> See, e.g., *People v. Pimentel*, 2017 NY Slip Op 02891, 149 A.D.3d 505, 53 N.Y.S.3d 262 (App. Div.) (finding state law with the same language as not constitutionally violative).

<sup>19</sup> *How the USA PATRIOT Act Redefines “Domestic Terrorism”*, ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> [hereinafter *How the USA PATRIOT Act Redefines “Domestic Terrorism”*]

<sup>20</sup> See, e.g., ANNE DAUGHERTY MILES, CONG. RESEARCH SERV., R43906, PERSPECTIVES ON ENHANCED INTERROGATION TECHNIQUES (2016).

While § 2331(5) provides a broad definition of domestic terrorism, its language is also under-inclusive in some regards. First, subsection (iii) is limited to mass destruction, assassination, and kidnapping—acts which are all accounted for in other U.S. Code provisions, and are not limited to the context of terrorism.<sup>21</sup> Second, by requiring that the act be “dangerous to human life,” § 2331(5) excludes some of the most common forms of domestic terrorism, including *nonviolent but criminal* activities, like damage to property that does not amount to mass destruction (e.g., cybercrimes, stealing nonpublic information) and “paper terrorism” (e.g., forging government documents).<sup>22</sup> The current language of § 2331(5) ignores the fact that using any form of influence in lieu of the democratic process is a threat to individual liberties and government legitimacy. The domestic terrorism framework would therefore benefit from extending the current definition to violent acts generally as well as criminal activities that harm property or pose another security threat.

As aforementioned, there is another definition commonly used by entities such as the Federal Bureau of Investigation: violent acts committed “in furtherance of ideological goals stemming from domestic influences.”<sup>23</sup> This definition fairly creates a distinction based on the permissible investigative authorities for solely domestic law enforcement activities, but it falls short in other ways. For instance, this distinction is theoretical at best given the extent to which American society is globalized. Further, the definition’s application is limited to crimes of violence, which, as discussed above, does not encompass the full scope of domestic terrorist acts.

The FBI generally relies on a second definition of domestic terrorism: the Code of Federal Regulations, which characterizes terrorism as including “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>24</sup> Although this definition is less commonly referred to, it is more helpful, as it clarifies that the nature of the activity must be unlawful and also accounts for activity other than that which is “dangerous to human life.”<sup>25</sup> However, as with the previous definition, it does not take into account *nonviolent but criminal activities*, which are often central to the commission of terrorist acts.<sup>26</sup>

<sup>21</sup> See 18 U.S.C. § 2331(5); USA PATRIOT Act § 802.

<sup>22</sup> See, e.g., BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 11 (asserting that many domestic terrorists do not intend to physically harm people but rather rely on alternative tactics such as theft, trespassing, destruction of property, and burdening U.S. courts with retaliatory legal filings); Ruiz-Grossman, *Most of America’s Terrorists Are White, And Not Muslim*, *supra* note 11; Miller, *Patterns of Terrorism in the United States, 1970-2013*, *supra* note 11 (asserting that businesses were the most common target between 1970 and 2013 and that the amount of property damage caused by non-lethal attacks totaled over \$227 million, with each attack accounting for \$45 to \$50 million).

<sup>23</sup> See BJELOPERA, SIFTING DOMESTIC TERRORISM, *supra* note 6; McGarrity, *Confronting White Supremacy*, *supra* note 5.

<sup>24</sup> 28 C.F.R. § 0.85(l).

<sup>25</sup> See *id.*; see also 18 U.S.C. § 2331(5); USA PATRIOT Act § 802.

<sup>26</sup> See, e.g., BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 11.

### C. CHARGING A DOMESTIC TERRORIST

Because there is no federal domestic terrorism statute, those prosecuting cases involving acts of domestic terrorism have had to rely on hate crimes, terrorism-related sentencing enhancements, and comparatively menial charges in order to rectify many of these incidents. As discussed in detail below, relying on these various gap-fillers is problematic for a number of reasons, including fostering confusion among the American people regarding the scope of the threat and the government's attitude towards and response to the threat.

#### 1. *STATE CHARGES*

##### a. DOMESTIC TERRORISM CHARGES

State domestic terrorism charges are commonly utilized in prosecuting individuals alleged to have committed acts of domestic terrorism. However, many states have adopted language that tracks that of 18 U.S.C. § 2331(5) and therefore face the problems previously enunciated.<sup>27</sup> But even when states do not adopt this controversial statutory language, their language has still become far too over-inclusive.<sup>28</sup>

Even beyond the issue of their written text, state domestic terrorism statutes are no substitute for a comprehensive federal law, particularly when domestic terrorism matters are matters of national security. Such state laws not only undermine the sincere national interest in a uniform definition and prosecution of domestic terrorism, but they also lose relevance in cases where the crime in question crosses state boundaries or implicates federal agencies.<sup>29</sup> Moreover, as described below, state domestic terrorism prosecutions are deprived of the same investigative and prosecutorial resources that elevate federal prosecutions.

##### b. MURDER, ASSAULT, AND BATTERY

Common non-terrorism related state charges utilized to prosecute perpetrators of domestic terrorist acts include murder, assault, and battery.<sup>30</sup> While there are some

<sup>27</sup> See, e.g., *Pimentel*, 2017 NY Slip Op 02891, 149 A.D.3d 505, 53 N.Y.S.3d 262 (App. Div.); see also Ga. Code Ann., § 16-11-220; 13 V.S.A. § 1703.

<sup>28</sup> See Natalie Holland, *The Implications of the Federal Definition of Domestic Terrorism*, AM. U. NAT'L SEC. L. BRIEF (Nov. 19, 2016) (citing a terrorism case where a mentally impaired individual was prosecuted under state terrorism charges), <http://nationalsecuritylawbrief.com/2016/11/19/the-implications-of-the-federal-definition-of-domestic-terrorism>.

<sup>29</sup> See Stephen Tankel, *If the Mail Bomber Had Worn an ISIS Hat*, ATLANTIC (Oct. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/mail-bomber-cesar-sayoc-wasnt-charged-terrorism/574147/>.

<sup>30</sup> See, e.g., CVE Task Force, *Reference Aid: U.S. Violent White Supremacist Extremists*, DEP'T OF HOMELAND SEC., [https://www.dhs.gov/sites/default/files/publications/US%20White%20Supremacist%20Extremists\\_CVE%20Task%20Force\\_Final.pdf](https://www.dhs.gov/sites/default/files/publications/US%20White%20Supremacist%20Extremists_CVE%20Task%20Force_Final.pdf) ("On April 13, 2014, Frazier Glenn Miller killed three people who were outside two Jewish facilities in Kansas. He was sentenced to death in November 2015 after being found guilty of capital murder, aggravated assault, and discharging a firearm into an occupied building.").

benefits to charging these crimes, the benefits do not outweigh the opportunity cost of charging under a comprehensive federal domestic terrorism statute.<sup>31</sup>

### c. OVERLAPPING STATE AND FEDERAL CHARGES

States also have other charges at their disposal that often overlap with those available at the federal level (e.g., hate crimes, incitement). In the District of Columbia, federal prosecutors can bring both state and federal charges through a process analogous to pendant jurisdiction.<sup>32</sup> However, this is not always the case. Typically, where a crime is in violation of both state and federal law, the defendant can be charged and prosecuted in each jurisdiction, but this happens infrequently.<sup>33</sup> However, in the absence of a federal domestic terrorism law, where prosecution is unsuccessful at the state level, there is no remedy to pursue at the federal level. Further, while state law can ensure just punishment in certain cases, this is not always true.<sup>34</sup>

## 2. FEDERAL CHARGES

As aforementioned, the lack of a federal domestic terrorism statute<sup>35</sup> has forced the U.S. government to rely primarily on hate crimes, terrorism-related sentencing enhancements, and comparatively menial charges to rectify many of these incidents.<sup>36</sup> This is problematic for the some of the same reasons it is problematic to charge domestic terrorists under state law, among others, such as the infrequency of successful requests for terrorism-related sentencing enhancements.<sup>37</sup>

<sup>31</sup> See, e.g., BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 12 (asserting that between 2007 and 2009, assault was involved in most acts of violence committed by “white supremacist extremists”); Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM) (asserting that murder is a crime in all fifty states and is often punishable by death or life imprisonment), <https://www.lawfareblog.com/criminal-law-should-treat-domesticterrorism-moral-equivalent-international-terrorism> [hereinafter McCord, *Domestic Terrorism as the Moral Equivalent of International Terrorism*].

<sup>32</sup> See *Federal and Local Jurisdiction in the District of Columbia* 92 YALE L. J. 292, 294 (citations omitted), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6779&context=ylj>.

<sup>33</sup> See *Charlottesville Car Crash Attack: Possibility of Federal Criminal Prosecution*, CRS LEGAL SIDEBAR (Aug. 15, 2017); *Steps in the Federal Criminal Process*, DEP’T OF JUSTICE, <https://www.justice.gov/usao/justice-101/steps-federal-criminal-process>.

<sup>34</sup> See McCord, *Domestic Terrorism as the Moral Equivalent of International Terrorism*, *supra* note 31.

<sup>35</sup> Although there is not a separate federal domestic terrorism offense, domestic terrorism, as defined by statute, is an element or aggravating factor for several federal crimes, such as port security bribery in furtherance of domestic terrorism or false statements for purposes of domestic terrorism. See CHARLES DOYLE, CONG. RESEARCH SERV., LSB10340, DOMESTIC TERRORISM: SOME CONSIDERATIONS (2019); *Charlottesville Car Crash Attack: Possibility of Federal Criminal Prosecution*, CRS LEGAL SIDEBAR (Aug. 15, 2017).

<sup>36</sup> *Id.*; see also hereinafter Dunlap, *Shane Stansbury on “Domestic Terrorism: It’s Time for a Meaningful Debate”*, *supra* note 12. For instance, neo-Nazi Jeffrey Clark, who marched in the recent white nationalist rallies and predicated that pipe bombs being sent to prominent Democrats was “a dry run for things to come,” faces possessing a firearm while using or being addicted to a controlled substance. See Reilly, *Americans are Surprised Domestic Terrorism Isn’t a Crime*, *supra* note 12.

<sup>37</sup> See Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism* 117 MICH. L. REV. 1333, 1360 (2019).

### a. HATE CRIMES

Federal hate crimes (18 U.S.C. §§ 247, *et al.*) are a common substitute for a domestic terrorism charge. However, while hate crimes and acts of domestic terrorism can certainly overlap, hate crimes “generally involve acts of personal malice directed at individuals” and are therefore “missing the broader [political] motivations driving acts of domestic terrorism.”<sup>38</sup> In certain cases, it can be difficult for investigators and prosecutors to make this distinction, especially early on and in cases where the extremist motivation is based in racist beliefs.<sup>39</sup> Though, sometimes this distinction can be made much more easily, because “as part of their involvement in ideological movements,” domestic terrorists “can exhibit additional traits that distinguish them from other offenders,” including more exposure to tactical training.<sup>40</sup> However, even though charging domestic terrorists with a hate crime is effective in some cases,<sup>41</sup> to continue to rely on hate crimes for these prosecutions misses the larger picture when it comes to counterterrorism enforcement.<sup>42</sup>

### b. FIREARMS-RELATED CHARGES

Firearms are the weapon of choice for many violent extremists in the United States given the accessibility, ease, and affordability.<sup>43</sup> Accordingly, prosecutors handling cases involving domestic terrorism will accordingly employ firearms charges such as carrying a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c)(1)). However, as with other charges, many of the same problems arise. Thus, while firearms charges are a nice supplement to a domestic terrorism charge, they are insufficient to adequately fill the void.

<sup>38</sup> BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 11 (internal marks omitted) (statement of John. E. Lewis, Deputy Assistance Director, Federal Bureau of Investigation).

<sup>39</sup> See JEROME P. BJELOPERA, CONG. RESEARCH SERV., IN10299, SIFTING DOMESTIC TERRORISM FROM OTHER ILLEGAL ACTIVITY (2015).

<sup>40</sup> BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 11 (citations omitted).

<sup>41</sup> See, e.g., *United States v. Harpham* No. CR-11-0042-JLQ (E.D. Wash. 2011) (parties agreed a 3-level sentencing increase would apply “because the intended victims were selected based on the actual or perceived race, color, religion[,] national origin, or ethnicity of any person”). In many cases, despite the fact that both hate crimes and terrorism crimes allow for use of the death penalty and sentencing enhancements, perpetrators of hate crimes receive harsher sentences than those who commit acts of terrorism. Indeed, it is not usual for the perpetrator of a hate crime to receive the death penalty. For example, Dylan Roof was convicted of 33 counts of federal hate crimes and sentenced to death for killing nine black parishioners at Emanuel African Methodist Episcopal Church in South Carolina on July 17, 2015. See McCord, *Domestic Terrorism as the Moral Equivalent of International Terrorism*, *supra* note 31.

<sup>42</sup> See McCord, *Domestic Terrorism as the Moral Equivalent of International Terrorism*, *supra* note 31.

<sup>43</sup> See *Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Daryl Johnson, Founder and Owner, DT Analytics, LLC, Washington, DC). Statistics show that individuals with racist or militant antigovernment beliefs, two characteristics common among white identity extremists, are more likely to perpetrate violent acts using firearms than any other extremist typology. See *id.*

### c. TREASON AND SEDITION CONSPIRACY

The federal crime of treason (18 U.S.C. § 2381) is a potential means of prosecuting domestic terrorists so long as the person owes allegiance to the United States and “levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere.”<sup>44</sup> However, the DOJ advises against using this charge in domestic terrorism matters due to political and practical hurdles—and for good reason. For instance, under treason, the United States must be at war.<sup>45</sup> Such a requirement is antiquated or ambiguous in the context of terrorism, as the War on Terror is rather constant compared to conventional war.<sup>46</sup> The ambiguity of war’s temporal scope pertaining to terrorism has caused many issues in the recent application of similar statutes that rely on war having a distinct beginning and end—such as the War Powers Resolution.<sup>47</sup> Treason is further limited to individuals who owe an allegiance to the United States.<sup>48</sup> Thus, treason cannot be used to charge a non-U.S. citizen who commits a terrorist act, even when his ideological motive was domestically derived and the act occurred on U.S. soil.

Seditious conspiracy, a crime similar to treason, also has its limitations. Seditious conspiracy (18 U.S.C. § 2384) provides a criminal penalty where “two or more persons” in any state, territory, or place subject to U.S. jurisdiction “conspire to overthrow, put down, or to destroy by force” the U.S. government, “or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any [U.S. law], or by force to seize, take, or possess any property of the United States contrary to the authority thereof.” While seditious conspiracy is useful to prosecute individuals involved in these few applicable instances, such as in the case of World Trade Center bomber Omar Abdel-Rahman, this statute does not cover the most prominent type of domestic terrorist: the lone actor. The shortcomings of the seditious conspiracy statute led to the creation of the material support statutes.

### d. THE FEDERAL CRIMES OF TERRORISM

Some acts of domestic terrorism are covered by the “[f]ederal crimes of terrorism” listed in 18 U.S.C. § 2332b(g)(2). The federal crimes of terrorism apply regardless of the source of motivation, meaning there need not be any terrorist intent. However, because the federal crimes of terrorism only apply to hyper-specific factual scenarios such as assassinating a government official, using a weapon of mass destruction or chemical or biological weapons, and airplane hijackings, only fifty-one of these crimes are applicable in the context of domestic terrorism, thirty-one of which allow prosecution of conspiracy to commit the respective crime. Indeed, the majority of domestic terrorists do not necessarily use traditional terrorist tactics.<sup>49</sup> To this point,

<sup>44</sup> See 18 U.S.C. § 2381.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See War Powers Act, H.R. 4858, 93rd Cong. (1973); see also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942); *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

<sup>48</sup> See 18 U.S.C. § 2381.

<sup>49</sup> See BJELOPERA, THE DOMESTIC TERRORIST THREAT, *supra* note 10.

excluded from the list of federal crimes of terrorism are acts such as stabbings, shootings, and driving an automobile into a crowd—the three most prominent means in which individuals commit acts of domestic terrorism within the United States.<sup>50</sup> Although there is certainly merit to not labeling any stabbing, shooting, or killing via automobile as a federal crime of terrorism, these omissions expose a problematic void in the United States’ current federal counterterrorism framework.

#### e. MATERIAL SUPPORT TO TERRORISTS

Under 18 U.S.C. § 2339A(a) (2012), “[w]hoever provides material support or resources or conceals or disguises 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, [one of the listed federal crimes of terrorism (as defined in 2332b(g)(5)(b)),] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, may be prosecuted for providing material support to terrorists.” Although material support to terrorism under 18 U.S.C. § 2339A has been utilized most often in the context of international terrorism cases, § 2339A was intended to be a tool for prosecutions of domestic terrorists as well. While this may seem curious, it makes sense in practice, as a charge of § 2339A requires one of the federal crimes of terrorism to serve as the predicate offense. However, use of this statute falls short in the same ways as with the charges that constitute federal crimes of terrorism. Accordingly, a domestic terrorism statute must be enacted to fill this void.

### D. PROPOSED STATUTES AND AMENDMENTS

In addition to the attempts to redefine domestic terrorism, some individuals have proposed other amendments as well as entirely new statutes.

#### 1. DOMESTIC TERRORIST ORGANIZATION (DTO) DESIGNATIONS

Some individuals have introduced domestic terrorism statutes relying on designations of certain groups as domestic terrorism organizations (DTOs).<sup>51</sup> While Canada, Germany, and the United Kingdom have added domestic groups to their terrorist organization lists, the United States is limited in its ability to implement a domestic terrorist organization framework, especially one that attaches civil or criminal liability.<sup>52</sup> More specifically, the First Amendment of the U.S. Constitution, historical

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Domestic Terrorism Prevention Act of 2018, H.R. 4918, 115th Cong. (2d Sess. 2018); Domestic Terrorism Prevention Act of 2017, S. 2148, 115th Cong. (2017); S. Res. 279 (Sen. Cassidy); H. Res. 525 (Rep. Fitzpatrick); H. Res. 536 (Rep. Mark Green); Daryl Johnson, *State of Virginia Proposes Domestic Terrorism Law*, SPLC (Feb. 16, 2018), <https://www.splcenter.org/hatewatch/2018/02/16/state-virginia-proposes-domestic-terrorism-law>.

<sup>52</sup> See *European Ethno-Nationalist and White Supremacy Groups*, COUNTEREXTREMISM PROJECT, <https://www.counterextremism.com/european-white-supremacy-groups>; Masood Farivar, *Some U.S. Lawmakers Consider Designating White Supremacists as Terrorists*, VOICE OF AMERICA NEWS (Sept. 16, 2019, 5:35 PM), <https://www.voanews.com/usa/some-us-lawmakers-consider-designating-white-supremacists-terrorists>; Harmeet Kaur, *For the First Time, Canada Adds White Supremacists and Neo-*

context, and statutory authorities limit counterterrorism enforcement, particularly as it relates to domestic terrorism.

The freedom of speech protections under the First Amendment drastically limit the U.S. government’s ability to regulate content and viewpoints in a domestic setting,<sup>53</sup> particularly as compared to its more expansive authority over foreign affairs.<sup>54</sup> For example, in upholding 18 U.S.C. § 2339B, the Supreme Court in *Holder v. Humanitarian Law Project* emphasized the unique nature of international relations and asserted that in giving executive authority over matters of foreign affairs, Congress “must necessarily paint with a brush broader than that it customarily wields in domestic areas.”<sup>55</sup> The Court further asserted that its holding “does not suggest that Congress could extend the same prohibition on material support . . . to domestic organizations.”<sup>56</sup> Accordingly, unlike international terrorism, counterterror efforts and tools to combat domestic terrorism cannot be precisely on par.

In general, as well as in the context of the First Amendment, history is a meaningful guide regarding what actions can be taken by the federal government in the context of domestic law enforcement. In January 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) was formed to investigate allegations of the U.S. government spying on U.S. citizens.<sup>57</sup> Among the many projects that the Church Committee reviewed was the FBI’s covert counterintelligence program known as COINTELPRO, which was designed to “expose,” “disrupt,” “discredit,” and “otherwise neutralize” the activities of “subversive” domestic groups and their leaders, members, and supporters.<sup>58</sup> By way of techniques

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*Nazi Groups to Its Terror Organization List*, CNN (June 28, 2019, 5:24 PM),

<https://www.cnn.com/2019/06/27/americas/canada-neo-nazi-terror-organization-list-trnd/index.html>.

<sup>53</sup> See, e.g., *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Brad Wiegmann, Deputy Assistant Attorney General for National Security, U.S. Department of Justice) (“We probably would not want . . . something that is similar to what we have on the international side, which is designating [FTOs] . . . for good policy reasons that I think the committee on both sides of the aisle would share. Designating domestic groups as [DTOs] and picking out particular groups that you say you disagree with their views and so forth is going to be highly problematic in a way that is not when you are designating . . . an international terrorist organization. So[,] there is not going to be a precise analog on the domestic side, but that is not to say that there aren’t other ways [to improve our legal authorities for purposes of combatting domestic terrorism]”).

<sup>54</sup> See *United States v. Curtiss-Wright Export Corporation et al.*, 299 U.S. 304, 319 (1936) (asserting that the federal power over external affairs is different in origin and essential character, but also in the exercise of the power, as the president is the “sole organ of the nation in its external relations, and its sole representative with foreign nations”) (citations omitted).

<sup>55</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010).

<sup>56</sup> *Id.* at 34.

<sup>57</sup> See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>; S. REP. NO. 94-755, pt. 1 (1976) (citations omitted).

<sup>58</sup> See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>; S. REP. NO. 94-755, pt. 1 (1976) (citations omitted). Subversive groups consisted of “White Hate” groups (e.g., Ku Klux Klan, American Nazi Party), “Black Nationalists” (e.g., Black Panthers), and the “New Left” (e.g.,

previously developed to combat Communists and persons who associated with Communists, through COINTELPRO, the FBI collected domestic intelligence of these “subversive” organizations, which included Weather Underground,<sup>59</sup> the Ku Klux Klan, and the Black Panthers.<sup>60</sup>

Following its review of the various programs, the Church Committee concluded that “[i]ntelligence agencies . . . undermined the constitutional rights of citizens.”<sup>61</sup> Under COINTELPRO, instead of collecting domestic intelligence solely in service of protecting national security, this intelligence activity was abused as a method of disrupting political opponents and groups with “subversive” messages.<sup>62</sup> In addition to chilling First Amendment protections, such abuse inherently threatens democracy itself.<sup>63</sup> Accordingly, to conform government intelligence activities to the “[U.S.] Constitution and the laws of the United States,” the Church Committee recommended (1) the limiting of the FBI “to investigating conduct rather than ideas or associations,”<sup>64</sup> and (2) the continuance of “intelligence investigations of hostile foreign intelligence activity.”<sup>65</sup> The Church Committee recommendations materialized in several ways in the direct wake of the Committee’s final report and in the years that followed, including the enactment of the Foreign Intelligence Surveillance Act (FISA), which split surveillance procedures into two parts to distinguish between domestic and foreign surveillance,<sup>66</sup> set stricter standards for surveillance of U.S. persons, and carved out activities protected under the First Amendment,<sup>67</sup> the establishment of the Attorney General’s Guidelines,

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Weather Underground, Students for a Democratic Society, anti-Vietnam War groups). S. REP. NO. 94-755, pt. 1, § 2 (1976) (citations omitted).

<sup>59</sup> The Weather Underground Organization (WUO) was an offshoot of the Students for a Democratic Society that committed acts of political violence in the late-1900s. See *Bomb Explodes in Capitol Building*, HISTORY (Feb. 27, 2020), <https://www.history.com/this-day-in-history/bomb-explodes-in-capitol-building>. Such acts of violence included the bombing of the U.S. Capitol building on March 1, 1971, which caused hundreds of thousands of dollars in property damage. See *id.*

<sup>60</sup> S. REP. NO. 94-755, pt. 1, § 2 (1976) (citations omitted); David Cunningham & Barb Browning, *The Emergence of Worthy Targets: Official Frames and Deviance Narratives within the FBI*, 19 SOCIOLOGICAL FORUM 347, 347-69 (2004), [www.jstor.org/stable/4148816](http://www.jstor.org/stable/4148816); See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. Plus descriptions

<sup>61</sup> See *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. The Church Committee followed the same logic as the Supreme Court in *United States v. Curtiss-Wright Export Corporation et al.*, 299 U.S. 304 (1936), emphasizing that the pattern of checks and balances relating to foreign intelligence activity is reflected in the constitutional provisions addressing foreign affairs and national defense. See S. REP. NO. 94-755, pt. 1, § 3 (1976).

<sup>62</sup> Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1317, 1320 (2004) [hereinafter Swire, *System of Foreign Intelligence Surveillance Law*].

<sup>63</sup> See *id.* at 1320.

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

<sup>65</sup> S. REP. NO. 94-755, pt. 2 (1976) (citations omitted).

<sup>66</sup> See 18 U.S.C. § 2511(2)(f) (2000) (setting out that Title III and FISA “shall be the exclusive means by which electronic surveillance... and the interception of domestic wire and oral communications may be conducted”).

<sup>67</sup> See 50 U.S.C. § 1801 *et seq.* FISA was created from two legal traditions: Supreme Court jurisprudence requiring judicial supervision for wiretaps and the national security imperative for allowing some foreign

which limited the scope of techniques permitted in domestic security investigations and distinguished three types of domestic security investigations,<sup>68</sup> and Congress explicitly distinguishing between domestic and international terrorism via statute.<sup>69</sup>

Consistent with the legacy of the Church Committee and First Amendment jurisprudence, the designation framework under the respective Immigration and Nationality Act and Executive Order 13224 provisions only provides for the designation of *foreign* entities. Thus, there is no official grant of authority to designate DTOs unless a sufficient foreign nexus exists.<sup>70</sup> In the absence of a sufficient foreign nexus, the U.S. government treats investigations of domestic terrorism under the purview of standard domestic law enforcement. Accordingly, instead of officially and publicly listing domestic groups, the U.S. government conceptualizes domestic terrorism in terms of “threats,”<sup>71</sup> including extremism related to animal rights, environmental rights, anarchism and anti-government ideals, white supremacy, black separatism, and anti-abortion beliefs.<sup>72</sup>

Because Congress is unable to target certain groups through DTO designations, minorities and other susceptible groups have a framework for justice if they find their rights infringed upon. For example, in September 2019, San Francisco’s Board of Supervisors approved a resolution classifying the National Rifle Association (NRA) as a DTO.<sup>73</sup> Fearful that this action was violative of First and Second Amendment rights, city

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intelligence wiretaps. See Swire, *System of Foreign Intelligence Surveillance Law*, *supra* note 70, at 1321.  
<sup>68</sup> See Immigration and Nationality Act § 219(a)(1) (codified as amended at 8 U.S.C. § 1189(a)(1) (2018)), § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii); Exec. Order No. 13224, as amended by Exec. Order No. 13886, Modernizing Sanctions to Combat Terrorism, 84 Fed. Reg. 48,041 (Sept. 9, 2019). The first set of A.G. Guidelines (effective April 6, 1976) were issued by Attorney General Levi. See Office of the Inspector General, *Special Rep. on FBI’s Compliance with A.G.’s Investigative Guidelines* (Sept. 2005), <https://oig.justice.gov/special/0509/chapter2.htm> [hereinafter Office of the Inspector General, *Special Rep. FBI’s Compliance with A.G.’s Guidelines*]; see also *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>. Other Attorney Generals have issued A.G. Guidelines since. See Office of the Inspector General, *Special Rep. FBI’s Compliance with A.G.’s Guidelines*, *supra*. Because the A.G. Guidelines are only *guidelines*, there is no external enforcement mechanism. See *More About FBI Spying*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/more-about-fbi-spying> (describing the deficiencies in implementing the A.G. Guidelines).

<sup>69</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001* § 802, Pub. L. 107-56, 18 U.S.C. §2331(5).

<sup>70</sup> Senators Ted Cruz and Bill Cassidy have advocated for the designation of Antifa, an anarchist group with foreign ties, as a DTO. See *A Resolution Calling for the Designation of Antifa as a Domestic Terrorist Organization*, S. Res. 279, 116th Cong. (2019); LISA N. SACCO, CONG. RESEARCH SERV., IF10839, *ANTIFA—BACKGROUND* (2018). While designation as a DTO is impracticable for the foregoing reasons, because of Antifa’s foreign links, the State Department could certainly consider whether Antifa would qualify for designation as an FTO.

<sup>71</sup> BJELOPERA, *SIFTING DOMESTIC TERRORISM*, *supra* note 10.

<sup>72</sup> *Id.*

<sup>73</sup> See Mariel Padilla, *San Francisco Declares the N.R.A. a ‘Domestic Terrorist Organization’*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/04/us/san-francisco-nra-terrorist.html>; *San Francisco Backs Down: Facing a Lawsuit by the NRA, Mayor Breed Declares – We Won’t Blacklist NRA Contractors*, NRA INSTITUTE FOR LEGAL ACTION (Oct. 1, 2019), <https://www.nraia.org/articles/20191001/san-francisco-backs-down-facing-a-lawsuit-by-the-nra->

officials quickly retreated, declaring that city policies and processes would not change as a result of this resolution.<sup>74</sup>

## 2. ALTERNATIVE PROPOSALS

Another proposed statute combines language from 18 U.S.C. § 2332b(a) and 18 U.S.C. § 2331(5). Under this statute, it would be a chargeable criminal offense to actually, attempt, or conspire to (1) kill, kidnap, maim, commit an assault resulting in serious bodily injury or an assault with a dangerous weapon, or (2) destroy property causing significant risk of serious bodily injury, intending (a) to intimidate or coerce a civilian population, (b) to influence the policy of government by intimidation or coercion, or (c) to affect the conduct of a government.<sup>75</sup> This statute is quite similar to the statute proposed by Rep. Martha McSally. Both statutes, like many other proposals and current statutes, do not embrace many of the main ways in which acts of domestic terrorism are committed, such as white paper terrorism. This statute also uses the language “creates a substantial risk of serious bodily injury to any other person by intentionally destroying or damaging any structure, conveyance, or other real or personal property.” While it channels some of the “left of boom” qualities of the material support statutes, which also might be problematic in the domestic terrorism setting since these acts need not be criminal in themselves, this language is problematic because of its ambiguity and potential over-inclusivity. It is unclear what exactly constitutes creating a substantial risk of something; and it would be unconstitutional to charge someone under the statute for activity protected by the First Amendment.

In addition to the various proposed statutes relying on a DTO framework, at least one individual has proposed creating a generalized terrorism statute, or alternatively eradicating the predicate offenses for 18 U.S.C. § 2339A.<sup>76</sup> This proposal makes sense in light of the fact that some commonly used statutes to prosecute terrorists are not included in the § 2339A scheme. However, creating a generalized terrorism statute to charge both international and domestic terrorists not only muddies the boundaries for those investigating these cases, but it also derails the tried and true material support to terrorist organizations framework under § 2339B.<sup>77</sup>

Some have also proposed to criminalize the stockpiling of weapons and include this crime in the list of predicate offenses for 18 U.S.C. § 2339A.<sup>78</sup> While this approach

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mayor-breed-declares-we-won-t-blacklist-nra-contractors.

<sup>74</sup> See *id.*

<sup>75</sup> See Mary B. McCord & Jason M. Blazakis, A Roadmap for Congress to Address Domestic Terrorism, *LAWFARE* (Feb. 27, 2019, 8:00 AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism>.

<sup>76</sup> See Laguardia, *Considering A Domestic Terrorism Statute and Its Alternatives* 114 NW. U. L. R. 215 (2020).

<sup>77</sup> See *National Internal Security/Terrorism Convictions for 2019*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 26, 2019); Jeff Breinholt, *Material Support: An Indispensable Counterterrorism Tool Turns 20*, *WAR ON THE ROCKS* (April 19, 2016), <https://warontherocks.com/2016/04/material-support-an-indispensable-counterterrorism-tool-turns-20/>.

<sup>78</sup> See Jon Lewis & Seamus Hughes, *Our Laws Have a Problem Calling Domestic Terrorism What It Is*, *HILL* (Feb. 6, 2020, 9:30 AM), <https://thehill.com/opinion/national-security/481166-our-laws-have-a->

would likely run afoul of the Second Amendment, this approach is promising if it were to criminalize the stockpiling of weapons illegally obtained. Indeed, with this tweak, it would be an asset particularly as it relates to the U.S. government’s fight against white identity extremism.<sup>79</sup>

#### E. RESOURCES, OVERSIGHT, TRACKING, AND REPORTING

The lack of a federal domestic terrorism charge has broad implications for the government’s actual and perceived ability to respond to acts of domestic terrorism. Currently, in the absence of a domestic terrorism statute, cases that meet the existing statutory definition of domestic terrorism are often deprived of crucial federal investigative and prosecutorial resources and oversight from the nation’s leading legal minds on terrorism and there is no vigorous official mandated process of tracking and reporting—it’s all discretionary. In order to adequately and appropriately confront the domestic terrorist threat that is on the rise in the United States, the U.S. government and the American people must comprehensively understand and have the appropriate tools to overcome the threat.

When prosecuting a domestic terrorist under a menial, state, or other non-terrorism-specific charge, prosecutors are deprived of crucial federal resources that accompany federal terrorism-related crimes, such as oversight and guidance by the U.S. Department of Justice’s National Security Division and the Federal Bureau of Investigation’s personnel, leadership, and investigative resources. Because primary oversight of a case depends on the nature of the charge, when using these menial, state, or other non-terrorism-specific charges, there is no oversight mechanism to ensure sound and uniform prosecutorial practices. Unlike with international terrorism, the U.S. Department of Justice’s Criminal Division does not require its approval for the initiation, investigation, or prosecution of domestic terrorism matters. In fact, the U.S. Department of Justice requires a unified national approach to domestic terrorism matters *only* when they involve weapons of mass destruction (18 U.S.C. §§ 175, 175(b), 229, 831, and 2332(a)), torture (18 U.S.C. § 2340(A)), war crimes (18 U.S.C. § 2441), or genocide (18 U.S.C. § 1091) or implicate an international terrorism network.<sup>80</sup> Thus, in all other cases, state and federal prosecutors, many of whom did not all take a counterterrorism course in law school that helped spell out the framework of prosecuting terrorist cases and do not possess a clearance allowing them to review classified information, are missing vital oversight from individuals who are experts in prosecuting terrorism.

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problem-calling-domestic-terrorism-what-it-is; Haroro J. Ingram & Jon Lewis, *How to Act Against Domestic Terrorists – And Their Foreign Supporters*, HILL (Sept. 15, 2019, 7:00 AM), <https://thehill.com/opinion/criminal-justice/460955-how-to-act-against-domestic-terrorists-and-their-foreign-supporters>.

<sup>79</sup> See *Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Daryl Johnson, Founder and Owner, DT Analytics, LLC, Washington, DC) (“White supremacist, militia members, sovereign citizens and other antigovernment extremists have been known to possess a wide range of firearms, both semi-automatic and fully automatic, and engage in stockpiling activity.”).

<sup>80</sup> Per the U.S. Department of Justice’s policy.

As alluded to above, federal terrorism cases carry significant investigatory resources, even compared to other federal crimes. For instance, because the type of charge affects how the FBI allocates resources, including how it staffs its agents, more resources are afforded to federal crimes of terrorism (the FBI's top priority) than those allocated for civil rights violations (the FBI's fifth-ranking priority out of eight mission priorities).<sup>81</sup> Similarly, where an individual is charged in state court, less resources are available. Indeed, in addition to the geographic limitations in prosecuting and investigating state cases, state law enforcement agencies often lack adequate resources "to conduct the type of long-term, proactive investigations that can detect and disrupt terror plots before they occur."<sup>82</sup> In contrast, the FBI routinely engages in lengthy and complicated investigations and has agents in every state, a network of intelligence analysts, and a national search and arrest authority.<sup>83</sup> Because 18 U.S.C. § 2332b(e) gives the Attorney General (i.e., the FBI) primary investigative authority for all federal crimes of terrorism, as defined in § 2332b(f). Thus, through enacting a domestic terrorism statute, all investigations of domestic terrorism would be FBI-led (contrary to how it is now) and implicate the same federal resources as those dedicated to other federal terrorism crimes.<sup>84</sup>

The lack of resources currently afforded to domestic terrorism investigations and prosecutions is further perpetuated by the absence of a clear picture of the scope of the domestic terrorism threat.<sup>85</sup> Under the current framework, no state or federal entity is mandated to track or report instances of domestic terrorism.<sup>86</sup> Thus, the U.S. government and the American people's understanding of the scope of the domestic terrorist threat is somewhat reliant on the discretion of state and federal law enforcement entities to report and the availability of open sources such as media outlets, which are becoming increasingly politically polarized.<sup>87</sup>

Due to the fact that there is no federal crime of domestic terrorism, it is nearly impossible to assess the scope and the intricacies of domestic terrorism within the United States.<sup>88</sup> The seemingly impossible task of tracking trends in domestic terrorism

<sup>81</sup> See Harsha Panduranga & Faiza Patel, "Domestic Terrorism" Bills Create More Problems Than They Solve, JUST SEC. (Aug. 28, 2019), <https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/>.

<sup>82</sup> 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>.

<sup>83</sup> See *id.*

<sup>84</sup> See Jim Axelrod, *Why is There No Criminal Statute for Domestic Terrorism?*, CBS News (Oct. 6, 2017, 7:10 PM), <https://www.cbsnews.com/news/las-vegas-shooting-domestic-terrorism-not-clear/>.

<sup>85</sup> See BJELOPERA, THE DOMESTIC TERRORIST THREAT, *supra* note 10.

<sup>86</sup> Unlike the National Counterterrorism Center and U.S. Department of State's annual report of global incidents of terrorism provided to law enforcement, there is no equivalent report of incidents of domestic terrorism occurring in the United States. See *Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Daryl Johnson, Founder and Owner, DT Analytics, LLC, Washington, DC). The Federal Bureau of Investigation released a public report, *Terrorism in the United States*, each year from 1980 to 2005, which included statistics of domestic terrorism incidents, attempts, and preventions as well as analysis and legislative and policy recommendations and information. See *id.*

<sup>87</sup> See BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW, *supra* note 10.

<sup>88</sup> See BJELOPERA, THE DOMESTIC TERRORIST THREAT, *supra* note 11; Colleen Long, *FBI: 850 Open*

is exacerbated by the use of the various definitions and criteria used to describe domestic terrorism and the various crimes that acts of domestic terrorism are being charged under (both at the state and federal level), many of which are not limited to the context of terrorism (e.g., firearms charges).<sup>89</sup> To this point, while the open-source statistical data shows consistent trends, the actual number of incidents, among other variables, differ depending on the source’s criteria for assessment, terminology used, and scope of the study.<sup>90</sup>

#### E. VICTIMS OF TERRORISM

Unlike victims of international terrorism, victims of domestic terrorism cannot obtain status as a victim of terrorism. While this distinction might just seem like mere semantics, obtaining status as a victim of terrorism comes with the protentional of receiving treble damages and payment of attorney’s fees under 18 U.S.C. § 2333.<sup>91</sup>

#### G. CALLING DOMESTIC TERRORISM WHAT IT IS

While state murder charges and federal hate crimes involving death can be punishable by death or life in prison and often substitute for the lack of a domestic terrorism statute, the justice system does not treat acts of domestic terrorism as what they are—terrorism—and there are significant consequences as a result, even beyond the aforementioned logistical problems plaguing the United States’ current counterterrorism framework.

Because the statutes often used by federal prosecutors to charge individuals who meet the statutory definition of domestic terrorism do not include the word “terrorism,” the U.S. Department of Justice is more reluctant to come forth and name the respective individual as a “domestic terrorist.”<sup>92</sup> This reluctance stems from the fact that using the

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*Investigations into Domestic Terrorism*, PHILA. INQUIRER (May 8, 2019), <https://www.inquirer.com/news/nation-world/fbi-says-eight-hundred-and-fifty-open-investigations-into-domestic-terrorism-20190508.html>; Ryan J. Reilly, *FBI Agents and the Internet Agree: The Feds Should Call Terrorism What It Is*, HUFFPOST (March 22, 2018, 9:08 AM) (citations omitted), [https://www.huffpost.com/entry/domestic-terrorism-austin-bombing-fbi\\_n\\_5ab2da83e4b0decad04689fc](https://www.huffpost.com/entry/domestic-terrorism-austin-bombing-fbi_n_5ab2da83e4b0decad04689fc) [hereinafter Reilly, *FBI Agents and the Internet Agree*].

<sup>89</sup> *Would Domestic Terrorism Law Help Prevent Extremist Shootings?*, RICHMOND FREE PRESS (Nov. 8, 2018, 6:00 AM), <http://richmondfreepress.com/news/2018/nov/08/would-domestic-terrorism-law-help-prevent-extremis/?page=2> [hereinafter *Would Domestic Terrorism Law Help*].

<sup>90</sup> For example, the U.S. Department of Justice compiles federal hate crime and terrorism data based on statutory charges and sentencing enhancements. However, the hate crime statistics are not broken down by specific ideological motivation (instead, the data is broken down broadly, such as by race) and the terrorism data provides a limited picture of the threat because it functions on a charge- and sentence-based approach and the U.S. government has typically relied on a variety of charges such as hate crime charges as opposed to terrorism-related charges when it comes to instances of domestic terrorism given the lack of appropriate statutory alternatives (e.g., no federal domestic terrorism statute, no FTO designation of foreign white identity extremist groups), among other factors.

<sup>91</sup> See, e.g., *Boim v. Holy Land Foundation for Relief and Development (Boim III)*, 549 F.3d 685 (7<sup>th</sup> Cir. 2008).

<sup>92</sup> Ryan J. Reilly, *There’s a Good Reason Feds Don’t Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFPOST (Jan. 11, 2018, 9:32 AM) (quoting Thomas E. Brzozowski, Counsel for Domestic Terrorism, U.S. Department of Justice, National Security Division, Counterterrorism Section),

term “terrorism” or “terrorist” could actually damage the prosecution (by muddying the narrative, etc.) or be deemed prejudicial to the defendant.<sup>93</sup> Thus, in the main, only after the public view of the incident is shaped and the defendant is found guilty will federal prosecutors bring up terrorism where appropriate.<sup>94</sup>

The example of Christopher Hasson illustrates the procedural problems that stem from not being able to call someone a terrorist in accordance with a statutory charge.<sup>95</sup> Hasson, who stockpiled an arsenal of weapons and equipment, threatened Democratic politicians and a number of media figures, and articulated that his intent was to “kill almost every last person on earth” in order to create a “white homeland,” was released by a federal judge because there was no statute under which he could be held as a potential terrorist, regardless of the fact that the prosecution labeled him as a domestic terrorist in the memorandum arguing for his detention.<sup>96</sup> Had Hasson expressed his allegiance to a designated FTO such as Hamas or the Islamic State, he would have been detained on the basis of at least one of the numerous terrorism-related statutes.

The current counterterrorism framework treats the same acts of violence differently based solely on the source of inspiration. While there is certainly some merit in making this distinction regarding the way in which the U.S. government investigates and prosecutes these criminal acts, the U.S. government should not place the two forms of terrorism on a wholly unequal legal playing field, particularly when the domestic threat is in fact more prominent and lethal than the international threat.<sup>97</sup> Indeed, this framework creates confusion and public dismay by implicitly suggesting that international terrorism—which has typically carried certain racial or religious overtones leading up to and following September 11, 2001—is worthy of condemnation by way of the “terrorism label” while the domestic terrorism is not; a suggestion which is not accurate, but is also fair to assume in light of inaction, pushback, and rhetoric from all levels of government in the United States.<sup>98</sup> Indeed, instances such as those where the

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[https://www.huffpost.com/entry/white-terrorists-domestic-extremists\\_n\\_5a550158e4b003133ecceb74](https://www.huffpost.com/entry/white-terrorists-domestic-extremists_n_5a550158e4b003133ecceb74) [hereinafter Reilly, *There’s a Good Reason Feds Don’t Call White Guys Terrorists*].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (discussing the Kevin Harpham case where, although Harpham’s acts met the statutory definition of terrorism, the prosecution waited until sentencing to bring “terrorism” into the narrative by petitioning a terrorism sentencing enhancement because the hate crime charge essentially determined how the public understood the crime).

<sup>95</sup> See Charles P. Pierce, *Congress Still Has No Domestic Terrorism Statute on the Books. Still.*, Esquire (June 4, 2019), <https://www.esquire.com/news-politics/politics/a27733112/domestic-terrorism-law-congress-white-supremacists/>. As a note, prosecutors are trained to avoid labeling people as terrorists unless they’re facing terrorism-related charges, as this could otherwise cause procedural issues with prosecuting the individual. See Ryan J. Reilly et al., *The Fight Over Treating Neo-Nazi Terrorists Differently from Muslim Ones*, HUFFPOST, <https://www.huffpost.com/entry/domestic-terrorism-federal-law-white-supremacists> [hereinafter Reilly, *Treating Neo-Nazi Terrorists Differently*].

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., BJELOPERA, DOMESTIC TERRORISM: AN OVERVIEW (citing Federal Bureau of Investigation, *Terrorism in the United States: 30 Years of Terrorism—A Special Retrospective Edition* (2000)), *supra* note 11.

<sup>98</sup> See, e.g., *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Sheila Jackson Lee) (“There seems to be an implied if not expressed belief that violent acts carried out against certain persons living within the United States can be carried out without fear of a Justice Department led by Jeff Sessions or a White House with

same violent act was committed, but a Muslim is prosecuted for international terrorism due to his ties to Hamas while a white supremacist is charged with what appears to be a less serious crime (e.g., hate crime),<sup>99</sup> play rather nicely into the critique that non-Muslims escape the terrorist label even when they engage in violence intended to terrorize and provoke political change. This dichotomy of preference for one type of terrorist actor over the other is further evinced by the U.S. government shying away from employing FTO and SDGT designations in the context of foreign white identity extremism.<sup>100</sup> In confronting terrorist threats, the U.S. government must stand firm in the notion that any form of terrorism menaces the lives, livelihood, and rights of the American people, the nation, the government and its legitimacy, and the democratic process and embrace a domestic terrorism statute with a chargeable offense.<sup>101</sup>

As discussed above, the lack of a federal domestic terrorism charge “has broad implications for how the American public thinks about the threat of domestic terrorism.”<sup>102</sup> When it gets called something else, an act of domestic terrorism skews public awareness, therefore hindering informed democratic politics.<sup>103</sup> Indeed, terrorism “is in the eye of the beholder.”<sup>104</sup> When there is a lack of transparency starting with U.S. leadership, perceptions of the gravity of the threat are, by default, “determined by spectator acts,” which is significant given that not all domestic terrorists incidents in the United States “have qualified as national media events.”<sup>105</sup>

In sum, the nature of the charges often drives how the public perceives the government response to acts of terrorism and the severity of the threat, and “the current legal framework is missing some of the most egregious acts of domestic terrorism that

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senior staff known to hold bias views toward minorities, immigrants, and others.”); *Rise of Radicalization: Is the U.S. Gov’t Failing to Counter Int’l and Domestic Terrorism: Hearing Before the H. Comm. on Homeland Sec.*, 114th Cong. (2016) (statement of Richard Cohen, President, Southern Poverty Law Center) (citations omitted) (following the release of a 2009 DHS report entitled *Right-wing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment*, the then-DHS Secretary withdrew it in the wake of “an outcry by those who claimed . . . that the report tarred conservatives as potential domestic terrorists” and the DHS unit responsible for the report “was allowed to wither”); Reilly, *FBI Agents and the Internet Agree*, *supra* note 86 (describing the backlash a police chief received for describing a tape recorded by Austin bomber, Mark Conditt, as an “outcry by a very challenged young man” and adding that the tape “does not at all mention anything about terrorism, nor does [Conditt] mention anything about hate,” despite the fact that Conditt would have been able to be charged with a federal crime of terrorism had he lived).

<sup>99</sup> See Mitchell, *Hate Crimes, Domestic Terrorism*, *supra* note 12.

<sup>100</sup> The U.S. Department of State has designated only one foreign white identity extremist group as an SDGT—the Russian Imperial Movement—when there is ample evidence that this group meets the requisite criteria for designation as an FTO as well and that other groups might also be qualify for both of these categories of designations.

<sup>101</sup> *Combatting Domestic Terrorism: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. (1995) (prepared statement of Louis J. Freeh, Director, Federal Bureau of Investigation).

<sup>102</sup> Reilly, *FBI Agents and the Internet Agree*, *supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> James B. Motley, *U.S. Strategy to Counter Domestic Political Terrorism. National Security Affairs Monograph Series 83-2*, NAT’L DEFENSE U. PRESS (1983).

<sup>105</sup> *Id.*

have occurred in our country in recent times.”<sup>106</sup> A domestic terrorism statute that includes a chargeable offense would alleviate some of the racial and religious undertones that have infiltrated and confused the War on Terror, combat the notion that the federal government views international terrorism as more pressing than domestic terrorism, illuminate the severity of the threat, and allow the government to respond appropriately and call these acts terrorism.

#### IV. A VIABLE SOLUTION

I propose a federal domestic terrorism statute outlawing actual, threatened, attempted, or conspiracy to violate a criminal law of the United States or any state, where the person does not act pursuant to a Foreign Terrorist Organization (FTO), an act takes place within the jurisdiction of the United States, and the acts appear to be intended to (i) intimidate or coerce a civilian population, or (ii) influence the policy or conduct of a government by intimidation, coercion, or violent means. This statute pulls from many different principles and provisions in domestic and foreign counterterrorism enforcement. More specifically, this statute is roughly based on the definitions of domestic terrorism set forth in Section 802 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, codified by 18 U.S.C. § 2331(5) (2012) and employed by the Federal Bureau of Investigation (FBI), the jurisdictional language of 18 U.S.C. § 956(a)(1)-(b), the penalties provided in 18 U.S.C. § 2332(b), the civil remedies provided in 18 U.S.C. § 2333, the statute of limitations afforded to the federal crimes of terrorism (listed in 18 U.S.C. § 2332b(g)(2)), the investigative authority discussed in 28 C.F.R. § 0.85(l) (1969), and the domestic terrorism laws of other nations that provide for charging threats of terrorist acts.<sup>107</sup>

The proposed statute is as follows:

#### **2339E. Domestic Terrorism.**

##### **(a) Prohibited Acts.**

**(1) Offenses.** A person shall be punished as proscribed in subsection (b) for committing the crime of domestic terrorism if—

- (A)** the person violates a criminal law of the United States or any State;
- (B)** the person does not act pursuant to a Foreign Terrorist Organization (FTO);
- (C)** an act takes place within the jurisdiction of the United States; and

<sup>106</sup> *Id.* (internal marks omitted).

<sup>107</sup> *See, e.g.*, Pub. L. No. 107-56, H.R. 3162, 107th Cong.; *Terrorism*, FBI, <https://www.fbi.gov/investigate/terrorism>; Elena Chachko, *Israel's New Counterterrorism Law*, LAWFARE (July 13, 2016, 9:42 AM), <https://www.lawfareblog.com/israels-new-counterterrorism-law> [hereinafter Chachko, *Israel's New Counterterrorism Law*].

(D) the acts appear to be intended to—

- (i) intimidate or coerce a civilian population; or
- (ii) intimidate the policy or conduct of a government by intimidation, coercion, or violent means.

**(2) Treatment of Threats, Attempts, and Conspiracies.**

Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (b).

**(b) Penalties.**

**(1) Penalties.** Whoever violates this section shall be punished—

- (A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;
- (B) for kidnapping, by imprisonment for any term of years or for life;
- (C) for maiming, by imprisonment for not more than 35 years;
- (D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;
- (E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;
- (F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and
- (G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

**(2) Consecutive Sentence.** Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

**(3) Enhancements.** Sentencing enhancements will be provided for instances where weapons of mass destruction or firearms are used to commit the offense(s).

**(4) Statute of Limitations.** Prosecution of an offense under this section is subject to an eight-year statute of limitations.

**(c) Civil Remedies.**

**(1) Action and Jurisdiction.** Any national of the United States injured in his or her person, property, or business by reason of an act of

domestic terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

**(d) Conforming Amendments.**

**(1) Federal Crime of Terrorism.** Section 2332b(g)(5) of title 18, United States Code, is amended by inserting after “2339D (relating to military-type training from a foreign terrorist organization),” the following: “2339E (relating to acts of domestic terrorism).”

**(2) Definition of Domestic Terrorism.** Section 2331(5), of title 18, United States Code, is amended as “activities in violation of a criminal law of the United States or any state, where an act takes place within the jurisdiction of the United States, and the acts appear to be intended to (i) intimidate or coerce a civilian population, or (ii) influence the policy or conduct of a government by intimidation, coercion, or violent means.”

**(e) Definitions.** As used in this section—

**(1)** The term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act.

**(2)** The term “person” means any individual or entity capable of holding a legal or beneficial interest in property.

**(3)** The term “United States”, as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.

**(f) Reports.** The Federal Bureau of Investigation (FBI) must produce a yearly report on the crime statistics associated with this section's use, including instances where an individual is investigated under, but is not charged pursuant to, subsection (a), and submit each report to the Attorney General, the National Security Division of the Department of Justice, the Department of Homeland Security, and the following congressional committees:

**(1)** the Committee on the Judiciary of the House of Representatives;

**(2)** the Committee on the Judiciary of the Senate;

**(3)** the Committee on Homeland Security of the House of Representatives;

**(4)** the Committee on Homeland Security and Governmental Affairs of the Senate;

**(5)** the Permanent Select Committee on Intelligence of the House of Representatives; and

**(6)** the Committee on Intelligence of the Senate.

- (g) Delineating Domestic Terrorist Threats.** In its annual reports, the Federal Bureau of Investigation must include clear criteria for delineating domestic terrorist threats as it pertains to inclusion and staleness.
- (h) Oversight.** National Security Division of the Department of Justice is required to provide oversight in cases involving this section, consistent with its oversight activities in international terrorism cases.
- (i) Appropriations.** There are authorized to be appropriated to the Department of Justice, including the Federal Bureau of Investigation, such sums as may be necessary to carry out this Act.

This statute responds to many shortcomings in other proposed legislation and goes beyond simply offering a quick fix. For instance, this statute amends the definition of domestic terrorism in a manner that honors practical and policy considerations and does not limit charging to instances where no foreign influence exists; instead, domestic terrorism can cover the tricky case of what the FBI has traditionally considered international terrorism with HVEs, but it does not require such an application, allowing the statute to be limited by internal U.S. Department of Justice policy. Because it functions on a scheme of perpetrating acts that are already criminalized, this statute is not inherently over- or under-inclusive to where innocent or protected conduct is punished.<sup>108</sup>

In addition to amending the definition of domestic terrorism, this statute provides sentencing enhancements for use of the most common weapons for domestic terrorist attacks. Indeed, the FBI is most concerned about lone offenders, primarily those using firearms, as these individuals represent the dominant trend for lethal domestic terrorists and such attacks are the hardest to predict.<sup>109</sup>

Further, while this statute responds to the number of problems plaguing our counterterrorism framework, what this statute does not do is also significant: this statute does not propose a DTO framework, nor does it increase investigatory power in the context of domestic terrorism.

## V. CONCLUSION

In the aftermath of the September 11, 2001 attacks, Congress grappled with the losses that resulted from its lack of preparation—“despite all the warnings of the looming terrorist threat to our homeland” and in light of two devastating terrorist attacks just years before: the Oklahoma City and the World Trade Center bombings.<sup>110</sup> Five years later, Congressmembers asked themselves “What lessons were learned? Where do we stand in our ability to detect and deter the next attack that we know is being plotted?”

<sup>108</sup> See 18 U.S.C. § 2331(5); USA PATRIOT Act § 802.

<sup>109</sup> See McGarrity, *Confronting White Supremacy*, *supra* note 5.

<sup>110</sup> *Crisis Response Capabilities to Domestic Acts of Terrorism Related to Weapons of Mass Destruction: Hearing Before the H. Military Procurement Subcomm. of the H. Comm. on Armed Services*, 107th Cong. 1 (2002) (statement of Rep. Curt Weldon, Chairman, H. Military Procurement Subcomm.).

And is our government ready to respond effectively to mitigate the damage to our citizens and our way of life should another terrorist attack be carried out?”<sup>111</sup> Many years later, in the face of new threats and challenges, Congress must ask itself these questions yet again. Though, in light of domestic terrorism’s statutory framework, I opine that the answers would be the same now as they would be on September 12, 2001.

Where an individual commits a political act of violence, the availability of a terrorism-related charge should not depend on the source of the inspiration;<sup>112</sup> “the American people deserve parity” in the U.S. government’s “rhetoric, resources, and response.”<sup>113</sup> Indeed, Congress must “do all that it can to combat terrorist attacks, both overseas and here at home,”<sup>114</sup> otherwise, “[w]e cannot protect our country, our way of life, our government[,] and the democratic processes that ensure our freedoms and liberties.”<sup>115</sup> Accordingly, Congress should enact the domestic terrorism charge announced here to finally place international terrorism and domestic terrorism on a level playing field, both legally and morally.

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<sup>111</sup> *Confronting the Terrorist Threat to the Homeland: Six Years after 9/11, Hearing Before the Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. (2007) (statement of Joseph I. Lieberman).

<sup>112</sup> *See Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the H. Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight and Reform*, 116th Cong. (2019) (statement of Brette Steele, Director of Prevention and National Security, McCain Institute for International Leadership, on behalf of Arizona State University).

<sup>113</sup> *Id.*

<sup>114</sup> H. Cong. Rec. 2144 (March 13, 1996) (statement of Rep. Benjamin A. Gilman).

<sup>115</sup> *Combating Domestic Terrorism: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. (1995) (prepared statement of Louis J. Freeh, Director, Federal Bureau of Investigation).