

2024

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### Recommended Citation

Houdaigui, Sophia (2024) "Domestic Terror Across State Lines: A Failed Federal Framework," *University of Chicago Legal Forum*: Vol. 2023, Article 14.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2023/iss1/14>

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# Domestic Terror Across State Lines: A Failed Federal Framework

*Sophia Houdaigui*<sup>†</sup>

## ABSTRACT

*As white supremacist violence has substantially increased over the last two decades, calls to combat associated attacks have intensified. This Comment outlines the impact of the events of September 11, 2001 on domestic and international terrorism policy, contextualizing the subsequent invocation of international terrorism charges at significantly higher rates than those of domestic terrorism. It introduces the lack of a general criminal statute prohibiting acts of terrorism and discusses the issues associated with the varying definitions of domestic terrorism employed by the federal government.*

*Due to the lack of common terminology in referencing domestic terrorism, a number of white supremacists who have crossed state borders to commit violent acts are prosecuted under federal hate crime and firearm laws. This lack of a consistent definition offers a corrigible reason why white supremacist organizations and supporters have largely circumvented prosecution under domestic terrorism charges. To properly address and regulate the interstate travel of individuals to commit white nationalist violence, the existing domestic terrorism statutory framework must be applied vigorously. This Comment argues that a consistent definition of “domestic terrorism” should be employed at the federal level in order to ensure that the statutory framework is enforced against perpetrators of such violent crimes. It ultimately concludes that a strengthened framework could lead to the regulation and subsequent prosecution of white supremacists who cross state lines to commit violent acts.*

## I. INTRODUCTION

On September 11, 2021, Joey David George called a cannabis dispensary in Rockville, Maryland from his home in Lynwood, Washing-

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ton.<sup>1</sup> He employed racial slurs against the employees, threatening to shoot them and kill Black patrons of the business. That same day, George called a Denny's restaurant in Enfield, Connecticut, and threatened Black individuals in the restaurant. In May 2022, he called a restaurant in San Bruno, California, and "allegedly threatened to shoot Black and Hispanic patrons in the restaurant."<sup>2</sup> On July 19, July 20, and again on July 21, 2022, George called multiple grocery stores in Buffalo, New York. On these phone calls, he expressly threatened to shoot Black patrons, telling the staff to "take him seriously" and ordering the store to clear out the customers as he was "nearby" and "preparing to shoot all Black customers."<sup>3</sup> Under the existing federal statutory framework, George's threats are not considered attempted acts of domestic terrorism.

Recently, Seth Jones, director of the database project at the Center for Strategic and International Studies, declared that a significant threat facing the United States "is that the number of domestic terror plots and attacks are at the highest they have been in decades."<sup>4</sup> This consequential increase in domestic terrorist activity can be traced back to 2014, with approximately thirty-one fatalities occurring per year since then.<sup>5</sup> Additionally, in 2017, the Federal Bureau of Investigations (FBI) produced a report announcing that white supremacists posed a "persistent threat of lethal violence" to the United States.<sup>6</sup> The report detailed that white supremacists had "produced more fatalities than any other category of domestic terrorists since 2000."<sup>7</sup> These fatalities "have [been] targeted [at] individuals because of their racial, ethnic, religious, or political makeup—such as African Americans,

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<sup>1</sup> Press Release, U.S. Dep't of Just., Lynnwood, Washington Man Sentenced to Prison for Making Multiple Threatening Phone Calls to Businesses in Four States Espousing Racial Hatred (Dec. 16, 2022), <https://www.justice.gov/usao-wdwa/pr/lynnwood-washington-man-sentenced-prison-making-multiple-threatening-phone-calls> [https://perma.cc/9Z8B-6CTX].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Robert O'Harrow Jr. et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/> [https://perma.cc/E3NF-NFE8].

<sup>5</sup> *The Rise in Violence Against Minority Institutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 117th Cong. 53 (2022) [hereinafter *Hearing*] (statement of Seth G. Jones, Senior Vice President, Ctr. for Strategic and Int'l Studies).

<sup>6</sup> FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., IA-0154-17, *WHITE SUPREMACIST EXTREMISM POSES PERSISTENT THREAT OF LETHAL VIOLENCE 1* (2017), <https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html> [https://perma.cc/ZZ6Z-GUQR].

<sup>7</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), [https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law#footnote3\\_y8zh2cz](https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law#footnote3_y8zh2cz) [https://perma.cc/N7Q8-YJ2E].

immigrants, Muslims, and Jews.”<sup>8</sup> Federal officials have varied in their approach to prosecuting white supremacist violence,<sup>9</sup> which seems to be exacerbated in instances where people cross state borders to commit violent acts.

This inconsistent prosecutorial approach may be due, in large part, to the lack of a consistent definition of “domestic terrorism” at the federal level. While terrorism is not an explicit charge under federal law, Chapter 113B in Title 18 of the U.S. Code is intended to provide guidance for prosecuting terrorism.<sup>10</sup> 18 U.S.C. § 2331 offers broad definitions of international and domestic terrorism, while 18 U.S.C. § 2332b(g)(5) details specific associated offenses that are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>11</sup>

Federal agencies and pertinent legislation utilize distinct definitions of domestic terrorism consistent with their respective missions and goals. The FBI employs 18 U.S.C. § 2331(5)’s general definition of “domestic terrorism.”<sup>12</sup> The FBI augments this initial interpretation by using the term “violent extremism” to refer to associated threats.<sup>13</sup> This narrowed focus on “violent extremism” is motivated by the FBI’s

<sup>8</sup> *Hearing, supra* note 5, at 55.

<sup>9</sup> See also Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 492 (2022). (“A substantial amount of violence by White supremacists, though not all, fits common legal and academic definitions of both ‘hate crimes’ and ‘terrorism’ . . . . But the categorization of that violence as either hate crimes or terrorism is not inevitable.” (footnote omitted)).

<sup>10</sup> See Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism*, 92 ST. JOHN’S L. REV. 393, 394 (2018).

<sup>11</sup> 18 U.S.C. § 2331(1) (International terrorism “means activities that— (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”); 18 U.S.C. § 2331(5) (Domestic terrorism “means activities that— (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”); 18 U.S.C. § 2332b(g)(5) (Federal crime of terrorism “means an offense that— (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”).

<sup>12</sup> FED. BUREAU OF INVESTIGATION & DEP’T OF HOMELAND SEC., DOMESTIC TERRORISM: DEFINITIONS, TERMINOLOGY AND METHODOLOGY 1 (2020), <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-definitions-terminology-methodology.pdf/view> [https://perma.cc/JK5E-33DV].

<sup>13</sup> *Id.*

mission to prevent “terrorist attacks in the United States, including those conducted by Domestic Violent Extremists.”<sup>14</sup>

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, more commonly referred to as the Patriot Act, offers a constricted interpretation of domestic terrorism.<sup>15</sup> As the Act was motivated by the horrific events of September 11, 2001, the legislation places significant weight on the importance of differentiating between international terrorism and domestic terrorism. The Patriot Act does so by specifying that domestic terrorism acts have to occur primarily within the territorial jurisdiction of the United States.<sup>16</sup>

The Department of Homeland Security’s (DHS) definition of “domestic terrorism” slightly broadens the application of the FBI’s interpretation of “domestic terrorism.” The Department’s definition is derived from the Homeland Security Act’s definition of terrorism, 6 U.S.C. § 101(18).<sup>17</sup> This expanded interpretation stems from the core mission of DHS, an agency that was born out of the September 11 attacks. As such, there are a variety of definitions of domestic terrorism that differ in scope that could be employed by federal prosecutors.

In contrast, definitions of international terrorism are largely consistent across the federal government. Additionally, individuals suspected of international terrorism are charged at much higher rates than those accused of domestic terrorism.<sup>18</sup> Such discrepancies in prosecutorial rates raise questions concerning the need to establish consistency in the definition of “domestic terrorism” within the federal government.

Existing scholarship has raised questions regarding the significance of classifying violent acts by white nationalist organizations as terrorism when other federal charges can be used instead. For example, some have argued that classification of these previously mentioned acts as domestic terrorism may do “little to deter the increasingly frequent mass killings perpetrated by white supremacists and other extremists.”<sup>19</sup>

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<sup>14</sup> FED. BUREAU OF INVESTIGATIONS & DEP’T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 2 (2021) [hereinafter STRATEGIC INTELLIGENCE] (footnote omitted), <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view> [<https://perma.cc/XC6H-ZXTN>].

<sup>15</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 [hereinafter Patriot Act].

<sup>16</sup> Patriot Act § 802(a)(4).

<sup>17</sup> STRATEGIC INTELLIGENCE, *supra* note 14, at 3.

<sup>18</sup> See Khaled A. Beydoun, Online Essay, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213, 1229 (2018).

<sup>19</sup> Corynn Wilson, Comment, *Domestic Terrorism Should Be a Crime: Fighting White Su-*

Advocates of the existing legal framework additionally refer to the fact that federal prosecutors have the opportunity to employ other federal charges, including hate crimes, terrorism-related sentencing enhancements, and firearm-related charges.<sup>20</sup> Scholars have rebuffed the current prosecutorial reliance on hate crime charges, with Professor Daniel Medwed remarking that “[t]here is this symbolic idea that a hate crime is more personal and it doesn’t relate to broader issues in society. Whereas an act of terrorism is often associated with a larger political movement. And by classifying it as a hate crime, someone might diminish its’ [sic] larger implication . . . .”<sup>21</sup> Firearm charges, as found in 18 U.S.C. § 924(c)(1), are additionally implemented against individuals committing associated domestic terrorist acts.<sup>22</sup> However, relying on these charges limits prosecutors as they do not encapsulate the broader social and political issues concerning acts of domestic terrorism, particularly regarding the prosecution of white supremacists.

Due to the lack of common terminology in referencing domestic terrorism, a number of white supremacists who have crossed state boundaries to commit violent acts are prosecuted under federal hate crime and firearm laws. As such, these white supremacists are not subject to the harsher criminal penalties and social impacts of domestic terrorism charges. To properly address and regulate the interstate travel of individuals to commit white nationalist violence, the existing domestic terrorism statutory framework must be applied vigorously. In order to ensure that this framework is enforced against perpetrators of such violent crimes, this Comment argues that a consistent definition of “domestic terrorism” should be employed at the federal level.

Part II provides a brief history of the impact of the events of September 11, 2001 on domestic and international terrorism policy. This history will contextualize the subsequent invocation of international terrorism charges at significantly higher rates than those of domestic

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*premacist Violence like Congress Fought “Animal Enterprise Terrorism”*, 58 HOUS. L. REV. 749, 752 (2021).

<sup>20</sup> AMY C. COLLINS, THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM 11 (2020), <https://extremism.gwu.edu/sites/g/files/zaxdzs5746/files/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf> [https://perma.cc/NR6B-HBPW] (explaining that “[f]ederal hate crimes (18 U.S.C. §§ 247, *et al.*) are a common substitute for a domestic terrorism charge”).

<sup>21</sup> Phillip Martin, *How do We Define Domestic Terrorism? The Legal Meaning of a Loaded Term*, THE WORLD (July 21, 2015, 3:30 PM), <https://www.pri.org/stories/2015-07-21/how-do-we-define-domestic-terrorism-legal-meaning-loaded-term> [https://perma.cc/9MJ6-9EEY].

<sup>22</sup> Blake Pendleton, *The War Within: Is the Anti-Riot Act the Answer to the Growing Threat of Domestic Terrorism in the United States?*, 32 GEO. MASON U. C.R. L.J. 1, 11 (2021) (“Prosecutors use firearms charges because they criminalize carrying a firearm while committing another crime of violence, and violent extremists in the United States primarily use firearms in their attacks.” (footnote omitted)).

terrorism. Part III introduces the lack of a general criminal statute prohibiting acts of terrorism and discusses the issues associated with the varying definitions of domestic terrorism employed by the federal government. It will then propose that the variety in domestic terrorism definitions has contributed to low prosecution rates of white supremacists. Part IV argues for the implementation of a consistent definition of domestic terrorism within the federal government. Combatting inconsistency within the existing statutory framework could provide prosecutors with an additional tool to sufficiently address domestic terrorism threats. Specifically, a strengthened framework could lead to the regulation and subsequent prosecution of white supremacists who cross state lines to commit violent acts. Part V concludes.

## II. THE IMPACT OF SEPTEMBER 11 DOMESTIC AND INTERNATIONAL TERRORISM POLICY

The events of September 11, 2001 radically altered the way the United States approaches international terrorist organizations. On September 18, 2001, President Bush signed into law a congressional resolution vesting the executive with the ability “to use all necessary and appropriate force against those nations, organizations, or persons” behind the attacks on September 11.<sup>23</sup> As discussed, the Authorization for Use of Military Force (AUMF) of 2001 was created to apply to the specific terrorist organization responsible for the September 11 attacks, al Qaeda. However, “[t]here is no contrary textual basis to justify limiting the organizations covered by the AUMF to their lowest level of organizational abstraction based on formal criteria such as the name or structure of a particular group as of September 11.”<sup>24</sup> In fact, the stated purpose of the AUMF was to “prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>25</sup> The “purpose” clause of the joint resolution broadly widened the scope of the United States’ ability to target international terrorist organizations. The AUMF furthermore “indicated an important change in U.S. policy, away from treating terrorism through a law enforcement model and towards the adoption of a military-based approach.”<sup>26</sup>

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<sup>23</sup> Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>24</sup> Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2110 (2005).

<sup>25</sup> Authorization for Use of Military Force § 2(a).

<sup>26</sup> Jonathan Hafetz, *Redefining State Power and Individual Rights in the War on Terrorism*, 46 VAL. U. L. REV. 843, 844 (2012).

However, this militarization of the approach to international terrorism did not substantially change the government's approach to domestic terrorism.<sup>27</sup> For example, DHS was created in direct response to the terrorist attacks on September 11, 2001.<sup>28</sup> One of the Department's "top priorities is to resolutely protect Americans from terrorism and other homeland security threats."<sup>29</sup> While DHS is tasked with countering terrorism, the agency has not historically prioritized the threat of domestic terrorism.<sup>30</sup> As such, the federal government's treatment of domestic terrorists and international terrorists substantially differs.<sup>31</sup>

### III. VARYING DEFINITIONS OF DOMESTIC TERRORISM

#### A. The U.S. Code's Terrorism Statutes

The United States does not maintain a general criminal statute prohibiting "acts of terrorism." However, as previously discussed, Chapter 113B in Title 18 of the U.S. Code is devoted to the general approach of prosecuting terrorism.<sup>32</sup> The chapter outlines various definitions associated with the topic, including "international terrorism" and "domestic terrorism." International and domestic terrorism are broadly defined as violent criminal acts that "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the pol-

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<sup>27</sup> CHRIS SHIELDS ET AL., AN ASSESSMENT OF DEFENSE AND PROSECUTORIAL STRATEGIES IN TERRORISM TRIALS: IMPLICATIONS FOR STATE AND FEDERAL PROSECUTORS ii (2008), <https://www.ojp.gov/pdffiles1/nij/grants/228276.pdf> [<https://perma.cc/5WDU-FKP5>]. The federal government's approach to domestic terrorism has remained largely stagnant. Prior to the 1980s, "the United States avoided practices that might result in terrorists being viewed by the public as anything but common criminals. Responding to public consternation over the Watergate scandal and COINTELPRO, Attorney General Edward Levi implemented guidelines for the FBI that dramatically limited its authority to engage in domestic security investigations." *Id.* at 18.

<sup>28</sup> Joseph I. Lieberman, *DHS Twenty Years After 9/11: Looking Back and Looking Ahead*, BROOKINGS (Sept. 8, 2021), <https://www.brookings.edu/blog/fixgov/2021/09/08/dhs-twenty-years-after-9-11-looking-back-and-looking-ahead/> [<https://perma.cc/X3V9-Q2F4>] ("The Homeland Security Act that established DHS was signed into law in November 2002 by President Bush . . .").

<sup>29</sup> *Counter Terrorism and Homeland Security Threats*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/counter-terrorism-and-homeland-security-threats> [<https://perma.cc/V3WW-K266>] (last visited Feb. 22, 2023).

<sup>30</sup> See DEP'T OF HOMELAND SEC., OIG-22-49, DHS COULD DO MORE TO ADDRESS THE THREATS OF DOMESTIC TERRORISM 6 (2022) ("[A]fter issuing its national strategy in 2004, the Department's priority and focus continued to be international terrorism until 2012. The Department did not expand training for state and local governments and nonprofit organizations to focus on threat assessments and threat management techniques.").

<sup>31</sup> See Francesca Laguardia, Online Essay, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, 1065 (2020) ("Complaints focus primarily on the fact that domestic extremists are charged as terrorists exceedingly rarely. Persons charged as terrorists receive longer sentences and may be subject to more aggressive investigations with less oversight." (footnote omitted)).

<sup>32</sup> See 18 U.S.C. § 2331(1), (5).



icy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>33</sup>

The chapter additionally sets forth fifty-seven federal crimes of terrorism.<sup>34</sup> 18 U.S.C. § 2332b(g)(5) “includes dozens of statutes that generally spring to mind as the types of acts terrorists commit as part of terrorism.”<sup>35</sup> Fifty-one of fifty-seven of these federal crimes of terrorism apply to domestic terrorism.<sup>36</sup> However, “the majority of domestic terrorists do not necessarily use traditional terrorist tactics.”<sup>37</sup> Specifically, the offenses “fail to include mass shootings, despite their prevalence in domestic terrorism.”<sup>38</sup> While potentially limiting, these statutes are the primary legal mechanism prosecutors use to prosecute domestic terrorism within the United States.

While some may criticize the lack of a consistent definition of criminal domestic terrorism, the same is true for international terrorism.<sup>39</sup> This consistency raises questions concerning the underlying reasons for the disparity between the prosecution of those accused of international terrorism and those accused of domestic terrorism. One potential reason lies in internalized racism that imbues within the United States’ national security approach.<sup>40</sup> The perceived inequality

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

<sup>34</sup> 18 U.S.C. § 2332b(g)(5) (defining offenses that are a “Federal crime of terrorism”).

<sup>35</sup> Laguardia, *supra* note 31, at 1069–70.

<sup>36</sup> Six of the federal crimes of terrorism are specifically targeted at international terrorism. Those six offenses include “1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons); “2339C (relating to financing of terrorism); “2339D (relating to military-type training from a foreign terrorist organization); “2340A (relating to torture) of this title”; “956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad); “37 (relating to violence at international airports); and “2332b (relating to acts of terrorism transcending national boundaries).” 18 U.S.C. § 2332b(g)(5).

<sup>37</sup> COLLINS, *supra* note 20, at 13. (“[E]xcluded 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.” (footnote omitted)).

<sup>38</sup> Katie Dilts, Comment, *One of These Things is Not Like the Other: Federal Law’s Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711, 733 (2019) (footnote omitted).

<sup>39</sup> MICHAEL GERMAN & SARA ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM 3 (2018), <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism> [<https://perma.cc/MK6L-VFFW>] (“In practice, however, the Justice Department ignores these statutory definitions and distinguishes cases as domestic or international primarily based on the perpetrators’ perceived ideologies, rather than where their attack occurred . . .”).

<sup>40</sup> See Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters* 54 HARV. J. ON LEGIS. 501, 505 (2017). With regard to the issue of varying definitions of domestic terrorism, Norris asserts that “properly identifying Roof (and attackers like him) as terrorists could lead to several positive results, including more balanced media coverage, greater government accountability in the War on Terror, increased public vigilance against non-jihadi extremists, more attention to the country’s history of racist terrorism, less support for Islamophobia and racism, and a more rational distribution of counterterrorism resources.”

and discrepancy in the application of federal terrorism statutes reveal a rather dark reality.<sup>41</sup> Such a landscape is one wherein those from minority backgrounds and communities have been disproportionately surveilled and subsequently prosecuted, while some prosecutors have historically turned a blind eye to the actions of white supremacist organizations.

### B. The FBI's Definition of Domestic Terrorism

For the FBI's purposes, domestic terrorism is referenced in the aforementioned chapter 113B of the U.S. Code. The FBI describes 18 U.S.C. § 2331(5) as “a definitional statute, not a charging statute.”<sup>42</sup> The agency additionally remarks that it “talk[s] about the threat these actors pose as Domestic Terrorism threats, but each of the FBI's threat categories . . . uses the words ‘violent extremism’ because the underlying ideology itself and the advocacy of such beliefs is not prohibited by US law.”<sup>43</sup> The agency specifically defines “domestic violent extremists” as individuals “based and operating primarily within the United States or its territories without direction or inspiration from a foreign terrorist group or other foreign power who seeks to further political or social goals, wholly or in part, through unlawful acts of force or violence dangerous to human life.”<sup>44</sup> The agency includes the term “violent” as a means of differentiating between threats that may be constitutionally protected and those that may not be.<sup>45</sup> While the FBI utilizes 18 U.S.C. § 2331(5)'s interpretation of domestic terrorism, the agency expands on the definition by using the term “domestic violent extremism” to refer to associated threats.

### C. The Patriot Act's Definition of Domestic Terrorism

The events of September 11 spurred the implementation of an additional definition of domestic terrorism. In the wake of such terrorist attacks, the Patriot Act was implemented as a means of deterring and punishing terrorist acts both nationally and internationally.<sup>46</sup> The Act

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<sup>41</sup> German, *supra* note 7.

<sup>42</sup> FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., *supra* note 12, at 1.

<sup>43</sup> *Id.*

<sup>44</sup> FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 4 (2022), <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report-2022.pdf/view> [<https://perma.cc/K6ZN-LFHP>].

<sup>45</sup> *Id.* (“The word ‘violent’ is important because mere advocacy of political or social positions, political activism, use of strong rhetoric, or generalized philosophic embrace of violent tactics does not constitute violent extremism and may be constitutionally protected.”).

<sup>46</sup> *Surveillance Under the USA/Patriot Act*, ACLU (Oct. 3, 2001), <https://www.aclu.org/other/surveillance-under-usapatriot-act> [<https://perma.cc/9KG3-TKKX>].

defines the term “domestic terrorism” as referring to dangerous activities threatening human life that appear to be intended “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>47</sup>

The Patriot Act’s expansion of the term “domestic terrorism” is so open-ended that it can capture a variety of non-terrorist groups. The American Civil Liberties Union (ACLU) stated that the Act’s definition “is broad enough to encompass the activities of several prominent activist campaigns and organizations” like individuals from “Greenpeace, Operation Rescue, Vieques Island and [World Trade Organization] protestors and the Environmental Liberation Front.”<sup>48</sup> Additionally, as articulated previously, the Patriot Act’s definition of domestic terrorism conflicts with interpretations of the term used by various federal agencies.

#### D. DHS’s Definition of Domestic Terrorism

DHS employs an alternative definition of the term, as described in the Homeland Security Act. The provision defines terrorism as any activity that

(A) involves an act that: (i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and (ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; (B) and appears to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.<sup>49</sup>

The National Counterterrorism Center states that “[d]epartments/agencies differ on their understanding, descriptions, and prioritization of the [domestic terrorism] threat, which may inhibit analytic research and production. With limited or fewer analytic

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<sup>47</sup> Patriot Act, Pub. L. No. 107-56, § 802(a)(4), 115 Stat. 272, 376.

<sup>48</sup> *How the USA Patriot Act Redefines “Domestic Terrorism,”* ACLU (Dec. 6, 2002), <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> [https://perma.cc/94Y4-2SQP] (“The USA PATRIOT Act expanded governmental powers to investigate terrorism, and some of these powers are applicable to domestic terrorism.”). It may seem surprising that a prosecutor would *really* go after environmental organizations such as Greenpeace under this definition. *But see* Betsy Woodruff Swan, *Biden’s Domestic Terrorism Strategy Concerns Advocates*, POLITICO (July 22, 2021, 8:00 AM), <https://www.politico.com/news/2021/07/22/biden-domestic-terrorism-strategy-has-activists-in-the-crosshairs-500478> [https://perma.cc/9DSE-Y8S2].

<sup>49</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 2(15), 115 Stat. 2135, 2141.

products, policymakers may conclude that [domestic terrorism] is not a priority issue.”<sup>50</sup>

#### E. Conflicting Interpretations of Domestic Terrorism Yield Low Associated Prosecution Rates

White supremacist organizations and supporters have largely circumvented prosecution under domestic terrorism charges. The federal government’s lack of a consistent definition of domestic terrorism, as illustrated by the varying interpretations employed by the FBI and Patriot Act, offers a corrigible reason why. The National Counterterrorism Center, whose mission is to “[l]ead the nation’s effort to protect the United States from terrorism by integrating, analyzing, and sharing information to drive whole-of-government action and achieve our national [counterterrorism] objectives,” published a report in 2020 devoted to the topic of domestic terrorism.<sup>51</sup> The report states that “[t]here is no whole-of-government [domestic terrorism] threat picture, largely because the U.S. Government does not have a common terminology to describe the threat.”<sup>52</sup> The lack of a unified approach has resulted in a disjointed and generally unsuccessful prosecutorial method.<sup>53</sup> As a result of these varying definitions, “federal prosecutors refrain from describing domestic cases as terrorism because judges might find such statements prejudicial, but [prosecutors] use the [terrorism] label in international cases because they often include explicit terrorism charges.”<sup>54</sup>

As federal prosecutors refrain from describing such cases as domestic terrorism, the existing terrorism statutory framework has not been deployed against white supremacists at high rates. Even more generally, the federal government has not internally prioritized the prosecution of domestic terrorism. Retired FBI agent Tom O’Connor stated that “[d]omestic terrorism has been a second-tier investigative priority. It was not top tier.”<sup>55</sup> O’Connor, who devoted twenty-three

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<sup>50</sup> NAT’L COUNTERTERRORISM CTR., DOMESTIC TERRORISM CONFERENCE REPORT 3 (2020), [https://www.dni.gov/files/2020-01-02-DT\\_Conference\\_Report.pdf](https://www.dni.gov/files/2020-01-02-DT_Conference_Report.pdf) [<https://perma.cc/8WN7-TAUE>].

<sup>51</sup> Nat’l Counterterrorism Ctr. *Who We Are*, OFF. DIR. NAT’L INTEL., <https://www.dni.gov/index.php/nctc-who-we-are> [<https://perma.cc/ETG3-CBFZ>] (last visited Dec. 19, 2022).

<sup>52</sup> NAT’L COUNTERTERRORISM CTR., *supra* note 50, at 2.

<sup>53</sup> *See id.*

<sup>54</sup> Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1364 (2019) (footnote omitted).

<sup>55</sup> Ken Dilanian, *Biden May Have Trouble Cracking Down on Domestic Terrorism Because of Free Speech and the FBI*, NBC NEWS (Feb. 5, 2021, 2:00 AM), <https://www.nbcnews.com/politics/justice-department/biden-may-have-trouble-cracking-down-domestic-terrorism-because-free-n1256727> [<https://perma.cc/ZU7D-3JP2>] (“Former senior FBI agents who worked domestic terrorism in recent years say that despite some improvement, that stubbornness is still required. They say domestic terrorism cases have been hamstrung by FBI lawyers who cite First Amend-

years of his career to domestic terrorism cases, explained that “[d]omestic terrorism was not a career-enhancing position, because after 9/11 everybody wanted to work international terrorism.”<sup>56</sup> Such statements reflect a sense of priority of certain forms of terrorism over others. This hierarchy seems to be impacted by political and social climates, in addition to the severity of certain threats. As a result of the very public and harmful events of September 11, the American body politic was apt to politically and economically prioritize international terrorism over domestic terrorism.

O’Connor’s assertions additionally indicate that the heightened incidents of white supremacist domestic terror attacks have not been met with parallel levels of prosecution. Michael German and Harsha Panduranga bluntly hypothesize that “[t]he FBI’s inadequate response to far-right violence results from a lack of will, not a lack of legal authority.”<sup>57</sup> Others have surmised that “[t]his reticence to call terrorist attacks what they are, apart from making the government seem disingenuous, can be seen as an attempt to avoid accountability.”<sup>58</sup> German and Panduranga further this argument by pointing out that federal agencies disproportionately use the existing domestic terrorism statutory framework against groups that are not composed of white supremacists: “The FBI has used its domestic terrorism authorities aggressively to target and harass environmentalists and animal rights activists, despite the fact that these groups have not committed a single fatal attack.”<sup>59</sup>

One particularly prominent case of the federal government charging an environmental activist with domestic terrorism is *United States v. Reznicek*.<sup>60</sup> This case concerned Jessica Reznicek, an environmental activist who set fire to machinery at a Dakota Access Pipeline construction site and used a blowtorch to cut holes within the pipeline. Reznicek was not only “charged with and pleaded guilty to conspiracy to damage an energy facility, 18 U.S.C. § 1366(a),” but the district court additionally “applied a terrorism enhancement under U.S.S.G. § 3A1.4 that increased her Guidelines range from 37–46 months to

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ment concerns in blocking investigative steps such as infiltrating chat rooms or introducing informants.”).

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

<sup>57</sup> Michael German & Harsha Panduranga, *How to Combat White Supremacist Violence? Avoid Flawed Post-9/11 Counterterrorism Tactics*, BRENNAN CTR. FOR JUST. (Sep. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-combat-white-supremacist-violence-avoid-flawed-post-911> [https://perma.cc/7V8W-VBDS].

<sup>58</sup> Norris, *supra* note 40, at 527.

<sup>59</sup> German & Panduranga, *supra* note 57.

<sup>60</sup> No. 21-2548, 2022 WL 1939865, at \*1 (8th Cir. June 6, 2022).

210–240 months.”<sup>61</sup> The Eighth Circuit upheld the district court’s decision, despite Reznicek’s protest and subsequent appeal.<sup>62</sup> As such, Reznicek is “one of the most prominent people dubbed a domestic terrorist by the FBI” in recent years, notwithstanding the fact she did not injure or kill anyone.<sup>63</sup> Following Reznicek’s sentencing, FBI Special Agent in Charge Eugene Kowel declared that the agency would “continue to work with our law enforcement partners to bring domestic terrorists like Jessica Reznicek to justice. Her sentence today should be a deterrent to anyone who intends to commit violence through an act of domestic terrorism.”<sup>64</sup> Special Agent in Charge Kowel’s warning of deterrence is notable for its use of the phrase “domestic terrorists like Jessica Reznicek.”<sup>65</sup> One could interpret this phrase as concerning domestic terrorists at large or specifically targeting environmental activists like Reznicek.

Additionally, federal statutes regarding domestic terrorism may not be employed against white supremacists at the same rates as those concerning international terrorism due to internalized racial, ethnic, and religious preferences. Following 9/11, “the Justice Department has prioritized ‘international terrorism’ investigations, which in practice primarily target Muslims, over ‘domestic terrorism’ investigations, which do not. International terrorism investigations often involve aggressive monitoring and infiltration of Muslim, Arab, Middle Eastern, South Asian, and African American communities throughout the United States.”<sup>66</sup> While § 102 of the Patriot Act includes specific language “condemning discrimination against Arab and Muslim Americans,” the subsequent surveillance of such communities generated by the Act led to a great deal of racial and ethnic profiling.<sup>67</sup> The very rhetoric employed in “labeling Islamist violence ‘terrorism’ while violent acts by white extremists are ‘hate crimes’ or various conventional criminal violations . . . both reflects and encourages racism

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<sup>61</sup> *Id.* at \*1 (footnote omitted).

<sup>62</sup> *Id.* at \*1; see also Swan, *supra* note 62 (“Jessica Reznicek’s friends insist on one thing: She is not a terrorist. . . . ‘She did not harm anyone through her acts,’ one of Reznicek’s supporters wrote to the judge overseeing her sentence, ‘and she is the farthest thing from a domestic terrorist.’”).

<sup>63</sup> Swan, *supra* note 62.

<sup>64</sup> Press Release, Dep’t of Just., Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline (June 30, 2021), <https://www.justice.gov/usao-sdia/pr/des-moines-woman-sentenced-eight-years-prison-conspiracy-damage-dakota-access-pipeline> [<https://perma.cc/NV2D-WDCJ>].

<sup>65</sup> *Id.*

<sup>66</sup> GERMAN & ROBINSON, *supra* note 39, at 2 (footnote omitted).

<sup>67</sup> Jothie Rajah, *Law, Politics, and Populism in the U.S.A. P.A.T.R.I.O.T. Act*, 26 IND. J. GLOB. LEGAL STUD. 61, 83 (2019).

and othering.”<sup>68</sup> The aforementioned surveillance and discrimination have not been parallel to the experiences of individuals who make up white supremacist organizations.<sup>69</sup>

While individuals who demographically mirror those within white supremacist organizations may not be subject to strict parallel rates of surveillance, members in other organizations are prosecuted at asymmetrical rates. For example, “within the field of domestic terrorism, the Justice Department has a history of minimizing far-right violence while aggressively targeting minority activists and far-left protest movements.”<sup>70</sup> The Brennan Center for Justice’s report *Wrong Priorities on Fighting Terrorism* notes that while far-left protest movements have “engaged in civil disobedience and vandalism” they have statistically “presented a much lower danger to human life, which is a key element of the federal definition of terrorism.”<sup>71</sup> As such, one may infer that a key reason for the stark inequities in prosecutorial rates between international and domestic terrorism could be due to a disinclination to enter the political fray by individual prosecutors. Altering the federal government’s definitional approach to domestic terrorism may afford prosecutors the opportunity to reckon with such discriminatory practices.<sup>72</sup> A disruption of the contemporary method could additionally result in a more equitable application of the current statutory framework with regard to both international and domestic terrorism.

#### IV. THE CASE FOR A CONSISTENT DEFINITION OF DOMESTIC TERRORISM

##### A. Calls for Changes to the Current Approach to Domestic Terrorism

The Biden administration has issued multiple public statements affirming that it is considering proposals to provide law enforcement officers novel statutory authority to combat domestic terrorism and target white supremacist organizations.<sup>73</sup> These statements are due in

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<sup>68</sup> Laguardia, *supra* note 31, at 1065–66 (footnote omitted).

<sup>69</sup> *Id.* at 1066. Laguardia additionally hypothesizes that “[a]n examination of the Code and typical prosecutions shows that the real difference between domestic and international terrorists is largely relegated to the ability to use material support statutes to pursue defendants who were inspired by FTOs, rather than a lack of a “domestic terror statute.” *Id.* at 1067.

<sup>70</sup> GERMAN & ROBINSON, *supra* note 39, at 2.

<sup>71</sup> *Id.*

<sup>72</sup> Laguardia, *supra* note 31, at 1096. (“Merely using the word [“domestic terrorism”] could lessen the social effects that concern many critics, such as reinforcing racial stereotypes and othering.” (footnote omitted)).

<sup>73</sup> For example, the Assistant Attorney General for National Security has remarked that “[a] hate crime—which is violence motivated by things like race, religion, gender or sexual orientation—might also be designed to coerce a civilian population or influence government policy,

large part to the lack of domestic terrorism charges against white supremacists. In 2021, the administration published a report entitled the “National Strategy for Countering Domestic Terrorism.”<sup>74</sup> The report stated that the administration was “exploring ways to convene non-Federal partners to have open, robust exchanges of ideas on novel approaches for collaboration in addressing domestic terrorism.”<sup>75</sup> The administration specifically noted the possibility of “including state constitutional provisions requiring the subordination of the military to civil authorities” and “state statutes prohibiting groups of people from organizing as private military units without the authorization of the state government, and state statutes that criminalize certain paramilitary activity.”<sup>76</sup> While these suggestions are primarily aimed at state statutory authority, they do signify a departure from routine means of combating domestic terrorism that could be successful in prosecuting white supremacist organizations and supporters.<sup>77</sup>

#### B. The Lack of a Consistent Definition of Domestic Terrorism Has Deterred the Prosecution of White Supremacists Crossing State Borders

While the federal government may be considering novel approaches to mitigating domestic terrorism, regulating the interstate travel of white supremacists intending to commit violent acts after crossing state lines has not been sufficiently addressed. Individuals in support of white supremacist organizations can cross state borders with the intention of harm with ease. As reported in the *Texas Tribune*, “Members from Texas regularly cross state lines to take part in

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which is the domestic terrorism definition. When that happens, we ask: What is the best and strongest tool in DOJ’s arsenal we can use to respond? How can we be as effective as possible to hold those who terrorize our communities accountable and to achieve justice for the victims?” Matthew G. Olsen, Assistant Att’y Gen. for Nat’l Sec., Dep’t of Just., Keynote Address at George Washington University Program on Extremism Symposium (June 15, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-keynote-address-george-washington> [https://perma.cc/6UMX-VHVT].

<sup>74</sup> NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> [https://perma.cc/Q752-89R7].

<sup>75</sup> *Id.* at 25.

<sup>76</sup> *Id.*

<sup>77</sup> While many have lauded the Biden administration’s domestic terrorism national strategy, certain organizations have raised concerns. The Leadership Conference on Civil and Human Rights criticized the current approach, stating, “These authorities and policies have disproportionately harmed communities of color; relied on surveillance of constitutionally protected speech, belief, and conduct; and denied fundamental due process protections to those impacted by them.” Julia Shapero, *Civil Rights Group Calls on Biden to Change Domestic Terrorism Strategy*, THE HILL (Dec. 2, 2022, 1:26 PM), <https://thehill.com/homenews/administration/3759813-civil-rights-group-calls-on-biden-to-change-domestic-terrorism-strategy/> [https://perma.cc/DC28-GAYC].



racist activism, which includes harassing local residents at the Pride parade in Coeur d'Alene, Idaho, as well as traveling out of state to post racist propaganda . . . .”<sup>78</sup> The article additionally reported that “[m]embers from Texas also travel across state lines to destroy murals that depict Black life, LGBTQ pride, as well as memorials to victims of police violence and racially motivated mass shootings.”<sup>79</sup> Regulation of such interstate travel, following clear statements and actions in support of an intention to commit violent acts, could prove crucial in thwarting potential violent acts committed by white supremacists. The intent to travel across state lines to commit a violent act illustrates a certain sense of preparation that seems to rise to the level of a terrorism charge, as arranging travel can involve buying a plane ticket or arranging child care. This preparation can demonstrate a true intent to harm due to its monetary and social costs.

As previously discussed, there are a number of recorded instances where white supremacists crossed state lines to commit violent acts. Notably, many white supremacists traveled across state boundaries to partake in the infamous Unite the Right rally in August of 2017.<sup>80</sup> Some of these individuals were subsequently charged and prosecuted for their violent acts at the rally.<sup>81</sup> These events indicate that, had law enforcement officials intervened at the preparation or subsequent travel stage, the ensuing violent acts may have been circumvented. Crossing state lines, as illustrated, for example, by purchasing flight tickets, offers a unique opportunity for intervention that could potentially save lives. While there are a number of documented instances wherein individuals in support of white nationalist organizations and causes have crossed state lines to commit violence, there is a dearth of correlated prosecutions under federal domestic terrorism charges.

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<sup>78</sup> Jaden Edison, *Texas-Based Hate Group Was Behind Attempted Riot at Pride Event in Idaho, Authorities Say*, TEX. TRIBUNE (June 13, 2022, 6:00 PM), <https://www.texastribune.org/2022/06/13/idaho-pride-riot-texas/> [<https://perma.cc/GM3U-N43N>].

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

<sup>80</sup> See Dara Lind, *Unite the Right, the Violent White Supremacist Rally in Charlottesville, Explained*, VOX (Aug. 14, 2017, 12:06 PM), <https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva> [<https://perma.cc/HU8D-HZ3V>] (“According to the Charlottesville police affidavit put out before the rally, planned attendees included the Klan; the militia movement (a right-wing movement that gained traction in the 1990s, whose members include the activists who took over a federal nature reserve in early 2016); the ‘3%’, a right-wing anti-government movement; the Alt-Knights, an alt-right ‘fight club’; and others.”).

<sup>81</sup> See Elisha Fieldstadt, *James Alex Fields, Driver in Deadly Car Attack at Charlottesville Rally, Sentenced to Life in Prison*, NBC NEWS (June 28, 2019, 11:22 AM), <https://www.nbcnews.com/news/us-news/james-alex-fields-driver-deadly-car-attack-charlottesville-rally-sentenced-n1024436> [<https://perma.cc/RV4K-GZFS>] (“The driver who plowed his car into a group of counterprotesters . . . was sentenced . . . to life in prison on federal hate crime charges. James Alex Fields Jr. pleaded guilty to 29 of 30 hate crime charges in . . . in a plea deal to avoid the death penalty.”).

The examples of charges against white supremacist interstate travel are scant but enlightening. *United States v. Ellison*<sup>82</sup> concerned James D. Ellison, the founder and leader of white supremacist organization The Covenant, The Sword, and the Arm of the Lord (CSA).<sup>83</sup> Ellison was charged with “violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) . . . and of violating 18 U.S.C. § 1952(a)(3) through interstate travel to promote arson.”<sup>84</sup> With regard to the interstate travel offense, “the government need[ed] only [to] show that Ellison had the intent to carry on the illegal activity—here, arson—which occurred in conjunction with interstate travel.”<sup>85</sup> As the evidence demonstrated, Ellison, alongside other CSA members, crossed state borders to burn down a religious institution.<sup>86</sup> These violent acts could potentially rise to the level of a domestic terrorism charge. As such, it may initially seem surprising that the prosecution did not bring forward this claim. However, federal prosecutors historically have hesitated to bring forward domestic terrorism charges against white supremacists for the variety of aforementioned reasons.

One particularly instructive case concerns the Unite the Right rally in Charlottesville, Virginia. *United States v. Daley*<sup>87</sup> implicated a group of California residents associated with the “Rise Above Movement” (RAM). RAM is a white supremacist organization whose members “believe they are fighting against a ‘modern world’ corrupted by the ‘destructive cultural influences’ of liberals, Jews, Muslims and non-white immigrants.”<sup>88</sup> In 2017, the defendants “traveled to multiple political rallies and organized demonstrations in California and Virginia, where they prepared to and engaged in acts of violence

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<sup>82</sup> 793 F.2d 942 (8th Cir. 1986).

<sup>83</sup> *Id.* at 945. The CSA committed a variety of violent acts: “[M]embers bombed a natural gas pipeline in Arkansas, killed a pawnbroker they mistakenly thought was Jewish and attempted to murder a federal judge and an F.B.I. agent.” Laura Smith, *Lone Wolves Connected Online: A History of Modern White Supremacy*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2021/01/26/us/louis-beam-white-supremacy-internet.html> [<https://perma.cc/FJ5T-GKDZ>].

<sup>84</sup> *Ellison*, 793 F.2d at 945.

<sup>85</sup> *Id.* at 950 (citing *United States v. Clark*, 646 F.2d 1259, 1268 n.16 (8th Cir. 1981)).

<sup>86</sup> *Id.* at 950–51 (“The evidence showed that while in Arkansas, Ellison planned to burn down the church in Springfield, Missouri, and later with other CSA members helped execute this plan. The carrying out of this arson required travel between Arkansas and Missouri and thus violated 18 U.S.C. § 1952(a)(3).”).

<sup>87</sup> 378 F. Supp. 3d 539 (W.D. Va. 2019).

<sup>88</sup> *Rise Above Movement (R.A.M.)*, ANTI-DEFAMATION LEAGUE (Jan. 22, 2018), <https://www.adl.org/resources/backgrounder/rise-above-movement-ram> [<https://perma.cc/PKV3-DQWT>] (“While they consider themselves part of the alt right, R.A.M.’s membership has deep roots in California’s racist skinhead movement, and includes individuals who have faced serious criminal charges, including assault, robbery and weapon offenses.”).

against numerous individuals.”<sup>89</sup> These specific RAM members purchased flights from California to Charlottesville with the very purpose of inciting and committing acts of violence in furtherance of a riot. The defendants were charged “on one count of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 . . . and one count of traveling in interstate commerce with the intent to riot . . . in violation of 18 U.S.C. § 2101.”<sup>90</sup> The described violent behavior of the defendants would seemingly rise to the level of domestic terrorism, but the prosecution did not bring this charge.<sup>91</sup> While difficult to ascertain, one could speculate that prosecutors did not charge the defendants with domestic terrorism due to the obstacles produced by inconsistent definitions.

### C. The Creation of a New Domestic Terrorism Statute is Not Necessary to Deter the Interstate Travel of White Supremacists to Commit Domestic Terrorism

In response to the issues associated with the existing domestic terrorism framework, some have argued that a new domestic terrorism statute should be developed in order to adequately address the underlying issues. On several occasions, members of Congress have proposed the introduction of a new domestic terrorism statute over the past decade. One particularly notable bill, proposed by Representative Adam Schiff (D-CA) in the House of Representatives and then-Senator Martha McSally (R-AZ) in the Senate “would criminalize the conduct included in the definition of domestic terrorism under § 2331(5), as well as attempts or conspiracy to commit such conduct.”<sup>92</sup> Such bills would “serve a ‘symbolic benefit’ by eliminating the false divide between the seriousness of domestic and international terrorism.”<sup>93</sup> Additionally, commentators have argued that the development of a single federal statute dedicated to domestic terrorism “would provide federal law enforcement agencies with a straightforward criminal predicate

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<sup>89</sup> *Daley*, 378 F. Supp. 3d at 545.

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

<sup>91</sup> *Id.* In describing the defendants’ alleged behavior, the court reported that they “purchas[ed] athletic tape and baseball helmets in Charlottesville; ‘obtain[ed] torches and attend[ed] a torch-lit march’ on the grounds of the University of Virginia (UVA) on August 11, 2017, where they incited and ‘committed acts of violence in furtherance of a riot’; ‘attend[ed] the Unite the Right rally in and around the vicinity of Emancipation Park’ on August 12, 2017 after ‘wrapping their hands with athletic tape,’ where they incited and ‘committed acts of violence in furtherance of a riot’; and, finally, travel[ed] on return flights to California on or around August 13, 2017.” *Id.* at 546.

<sup>92</sup> Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government’s Powers to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775, 788–89 (2022) (footnote omitted).

<sup>93</sup> *Id.* at 789 (footnote omitted).

with which they can begin investigations of suspected domestic terrorists.”<sup>94</sup>

A number of leading legal scholars and policy analyses object to enacting a single federal statute dedicated to domestic terrorism. Beyond associated political costs, proposals for a new domestic terrorism statute largely disregard the tools currently available to the Justice Department. In response to the creation of a novel domestic terrorism statute, former special agent Michael German commented on the current statutory scheme: “Suggesting that these 51 ‘federal crimes of terrorism’ are not sufficient because they don’t explicitly use the word ‘domestic’ in their titles hardly justifies passing a new law that would expand the government’s already-broad prosecutorial powers.”<sup>95</sup> Federal prosecutors have adequate mechanisms at their disposal—they just are not using them.

A novel domestic terrorism statute could disproportionately impact minority and politically disfavored organizations and groups. Opponents of such a statute “charge that the political preferences of the current Administration limit the national focus on white supremacist organizations (despite their prevalence) while encouraging investigations on other groups such as ‘Black Identity Extremists.’”<sup>96</sup> The creation of a new statute would increase federal authority to investigate political and social groups that the government perceives as domestic terrorists. As such, this statute could provide federal agencies and individual prosecutors increased opportunity to target religious, ethnic, and racial minorities.<sup>97</sup>

A strong argument in favor of the creation of a new domestic terrorism statute is that it could provide the Justice Department an opportunity to improve its ability to document violent acts perpetrated by domestic terrorists. Congress responded to this issue by passing the Hate Crimes Statistics Act in 1990.<sup>98</sup> The Act required the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”<sup>99</sup> Howev-

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<sup>94</sup> *Id.* (footnote omitted).

<sup>95</sup> Michael German, *Why New Laws Aren’t Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously> [https://perma.cc/2AQF-74FH].

<sup>96</sup> Laguardia, *supra* note 31, at 1077.

<sup>97</sup> See GERMAN & ROBINSON, *supra* note 39, at 2 (“Further, within the field of domestic terrorism, the Justice Department has a history of minimizing far-right violence while aggressively targeting minority activists and far-left protest movements.”).

<sup>98</sup> Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 34 U.S.C. § 41305). See also FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2010 (2011).

<sup>99</sup> Hate Crime Statistics Act § 1(b)(1).

er, the methodology employed severely undercounted the amount of violence associated with bias-motivated crimes.<sup>100</sup> As such, it appears that the implementation of a new domestic terrorism statute would not result in improved documentation of acts perpetrated by domestic terrorists. Rather, the introduction of additional tools may prove overwhelming and excessive.

#### D. The Federal Government Should Employ One Consistent Statutory Definition

The lack of regulation of white-supremacist-sponsored interstate travel could be resolved by selecting a consistent definition of domestic terrorism and vigorously applying the existing domestic terrorism statutory framework. The FBI's definition of terrorism, as defined by 18 U.S.C. § 2331(5), plainly encompasses the whole of white supremacist organizations. The general nature of the language used by lawmakers reflects a desire to include a variety of different individuals and organizations within the definition of domestic terrorism. As such, federal prosecutors could employ 18 U.S.C. § 2331(5) in defining the scope of domestic terrorism, and additionally utilize 18 U.S.C. § 2332b, which establishes criminal penalties for "acts of terrorism transcending national boundaries."<sup>101</sup>

While the proposal to employ the current statutory framework as it exists may seem trite, such an approach would signify a stark divergence from current policy. This proposal would additionally begin to address the lack of prosecution concerning white supremacist interstate travel with the intent of committing acts of domestic terrorism. By promoting consistent domestic terrorism definitions within the federal government, prosecutors may feel more empowered to charge white supremacists. Principally, charging white supremacists as domestic terrorists could deter individuals from crossing state lines to commit violence in the first place.

Following the adoption of a consistent federal definition, prosecutors may consider applying the statutes regulating domestic terrorism proportionally to those concerning international terrorism. As previously described, the federal statutes detailing domestic terrorism—18 U.S.C. § 2331(5)—and international terrorism—18 U.S.C. § 2331(1)—employ the same descriptive language. The only textual difference has to do with the scope of international terrorism as set out by 18 U.S.C.

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<sup>100</sup> See Arjun Singhi Sethi, Opinion, *The FBI Recorded a Surge of Hate Crimes Last Year. But It Undercounted—By a Lot*, WASH. POST (Nov. 14, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/11/14/fbi-recorded-surge-hate-crimes-last-year-it-undercounted-by-lot/> [https://perma.cc/6ALY-QFMS].

<sup>101</sup> 18 U.S.C. § 2332b.

§ 2331(1)(C). International terrorism-related acts are defined as occurring “primarily outside the territorial jurisdiction of the United States, or transcend[ing] national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”<sup>102</sup> Standardizing these practices will introduce uniformity to, and diminish disparities within, the greater terrorism statutory framework.

One may counter that the definition of domestic terrorism employed in 18 U.S.C. § 2331(5) is too broad. Acts that “appear to be intended to . . . intimidate or coerce a civilian population” and “influence the policy of a government by intimidation or coercion” could be interpreted in a variety of ways.<sup>103</sup> As a result, this definition may afford a great deal of prosecutorial discretion that could be extremely harmful.<sup>104</sup> For example, individual prosecutors may read the statute in a general manner that would encompass racial justice and environmental organizations that have not committed acts that rise to the level of a domestic terrorism charge in the eyes of an ordinary American citizen.<sup>105</sup> Specifically, some environmental activists have been deemed domestic terrorists without even having committed violent, let alone lethal, acts.<sup>106</sup>

However, the broad nature of 18 U.S.C. § 2331(5)’s definition of domestic terrorism is its very strength. This comprehensive definition affords certain prosecutors the opportunity to engage with white supremacists who may otherwise circumvent responsibility for their actions. As such, the definition of domestic terrorism as employed in 18 U.S.C. § 2331(5) could be adopted across all agencies as a means of standardizing the federal government’s approach to white supremacist organizations. Clearer standards may need to be introduced to regulate what conduct rises to the level of domestic terrorism. In com-

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<sup>102</sup> 18 U.S.C. § 2331(1)(C).

<sup>103</sup> 18 U.S.C. § 2331(5)(B)(i)–(ii).

<sup>104</sup> The language employed in 18 U.S.C. § 2331(5)(B)(i)–(ii) skirts potential First Amendment issues. Specifically, this broadly worded definition implicates “threats,” which are not protected speech. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (“What is a threat must be distinguished from what is constitutionally protected speech.”).

<sup>105</sup> Swan, *supra* note 62. The Biden Administration’s domestic terrorism strategy document “listed a number of ideologies that could motivate domestic terrorists to violence, including . . . abortion, animal rights [and] the environment.” *Id.* In response to this list, Andy Stepanian, a progressive communications professional, remarked, “Whenever I hear animal rights, environmental, or anti-racist activists named within sprawling counter-terrorism strategies, I am concerned about the chilling effect it will have upon activism writ-large.” *Id.*

<sup>106</sup> *See Adam Federman, Revealed: How the FBI Targeted Environmental Activists in Domestic Terror Investigations*, GUARDIAN (Sep. 24, 2019, 1:00 AM), <https://www.theguardian.com/us-news/2019/sep/23/revealed-how-the-fbi-targeted-environmental-activists-in-domestic-terror-investigations> [https://perma.cc/6JHM-V24Z].

municating these direct guidelines to the public, the government can be held accountable when it exceeds such standards.

The Justice Department and individual prosecutors have the sufficient items in their toolkits to prosecute white supremacists who cross state lines with the intent to cause harm as domestic terrorists. Once definitional consistency is introduced, the Department can begin to use those tools properly.

## V. CONCLUSION

As white supremacist violence has substantially increased over the last two decades, calls to combat associated attacks have intensified. Due to the lack of a federal statute criminalizing domestic terrorism, prosecutors turn to the existing statutory framework. In contrast to international terrorism, where prosecutors feel comfortable bringing forward charges against accused individuals, the existing domestic terrorism landscape is underdeveloped. This lack of employment is due in large part to the variety of definitions of domestic terrorism used at the federal level.

In an effort to combat the interstate travel of white supremacists crossing state lines to commit violent acts, definitional consistency must be introduced with regard to domestic terrorism. Were the government to employ 18 U.S.C. § 2331(5) at the federal level, prosecutors could begin to feel empowered to bring accurate charges against white supremacists like Joey David George. In doing so, both prosecutors and the American public could begin to formally recognize these individuals for what they truly are: domestic terrorists that pose a substantial threat to the nation.