



**STAYING LEFT OF BOOM: A FEDERAL DOMESTIC
TERRORISM STATUTE IS NECESSARY FOR
SUCCESSFUL INVESTIGATIONS AND PROSECUTIONS OF
DOMESTIC TERRORISTS**

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INTRODUCTION

Domestic terrorism incidents in the United States continue to rise in number, but the federal government does not have the proper tools to effectively pursue them.¹ “The number of FBI investigations of suspected violent extremists has more than doubled since the spring of 2020,”² with the agency’s domestic terrorism caseload increasing from “1,000 to 2,700 [cases] over the last [eighteen] months.”³ The El Paso shooting, Pittsburgh synagogue shooting, and plots against government leaders—such as the plots to kidnap Michigan Governor Whitmer and to assassinate then presidential-candidate Joseph R. Biden—are just a few well-known events marking the increase in terrorism.⁴ Each of these events has been referred to as an act of domestic terrorism.⁵ Yet, none of the perpetrators were federally charged

¹ See Vera Bergengruen & W.J. Hennigan, *Prosecuting Domestic Terrorism is Notoriously Difficult. This New Team of Lawyers Has a Mounting Caseload*, TIME (Jan. 24, 2022, 8:00 AM), <https://time.com/6140308/domestic-terrorism-justice-department-unit-joe-biden/> (“Under federal law, domestic terrorism itself is not a crime.”).

² See generally Ryan Lucas, *The Justice Department Will Create Domestic Terrorism Unit to Counter Rising Threats*, NPR (Jan. 11, 2022, 1:10 PM), <https://www.npr.org/2022/01/11/1072123333/justice-department-domestic-terrorism-unit>.

³ Bergengruen & Hennigan, *supra* note 1.

⁴ See discussion *infra* Section II.

⁵ See generally Simon Romero & Nicholas Bogel-Burroughs, *El Paso Shooting: Massacre that Killed 20 Being Investigated as Domestic Terrorism*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/el-paso-shooting-updates.html>; Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>; Julia Jones, *Inside the Plot to Kidnap Gov. Whitmer*, CNN (Oct. 11, 2020, 1:46 PM), <https://www.cnn.com/2020/10/11/us/michigan-whitmer-plot/index.html>; Laurel Wamsley, *Man Arrested in N.C. Had Plan to Kill Joe Biden, Feds Say*, NPR

with crimes of terrorism, and none received sentencing enhancements related to terrorism charges.⁶ If each of these events can be characterized as an act of domestic terrorism, why are the perpetrators charged with crimes other than domestic terrorism? Currently, there is no statute allowing prosecutors to charge these individuals with federal crimes of terrorism.⁷

The tragic events of 9/11 brought the realities of terrorism into Americans's homes and informed their understanding of terrorism and the "war against terror." In the years following 9/11, U.S. efforts to combat terrorism focused predominantly on acts of terrorism committed by international organizations and actors rather than domestic terrorism.⁸ While the United States's counterterrorism measures have continued to evolve,⁹ the threat of terrorism to the homeland has changed significantly following 9/11.¹⁰

(Oct. 23, 2020), <https://www.npr.org/2020/10/23/927171709/man-arrested-in-n-c-had-plan-to-kill-joe-biden-feds-say>.

⁶ See Romero & Bogel-Burroughs, *supra* note 5; Robertson et al., *supra* note 5; Devan Cole & Sonia Moghe, *6 Men Indicted on Federal Charges in Plot to Kidnap Michigan Gov. Gretchen Whitmer*, CNN (Dec. 17, 2020, 5:43 PM), <https://www.cnn.com/2020/12/17/politics/gretchen-whitmer-men-charged-kidnapping-plot/index.html>.

⁷ See Rachael Levy, *Proposal Pushes for Focus on Domestic Terrorism*, WALL ST. J., Nov. 14-15, 2020, at A4.

⁸ See Bergengruen & Hennigan, *supra* note 1 ("[S]uccessive administrations in the post 9/11 era have been more focused on jihadist groups. As a result, agency [FBI] leadership hasn't prioritized cracking down on domestic extremism.").

⁹ For example, before 9/11, Al Qaeda acknowledged that terrorism strategies were constantly evolving to fit the needs and goals of terrorist organizations. See generally THE 9/11 COMMISSION REPORT 153 (1st ed.) ("[T]raditional terrorist hijacking operations did not fit the needs of al Qaeda, because such hijackings were used to negotiate the release of prisoners rather than to inflict mass casualties."). Therefore, the United States has continually adapted its counterterrorism strategies to address new tactics imagined by terrorist organizations.

¹⁰ See Christopher Wray, *FBI Oversight*, FBI.GOV (Feb. 5, 2020), <https://www.fbi.gov/news/testimony/fbi-oversight-020520>; see also Neil MacFarquhar, *As Domestic Terrorists Outpace Jihadists, New U.S. Law Is Debated*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/domestic-terrorism-laws.html>

Recently, domestic terrorism has become one of the greatest threats to the security of the United States.¹¹ On January 11, 2022, Matthew Olson, Assistant Attorney General for National Security, warned: “‘The threat posed by domestic terrorism is on the rise,’ . . . [and] describe[ed] an escalating danger from ‘individuals in the United States who seek to commit violent criminal acts in furtherance of domestic social or political goals.’”¹² In the wake of several domestic terrorism attacks in 2019, the Federal Bureau of Investigation (“FBI”) focused on attacks committed or planned by lone offenders, with an emphasis on mass-shootings.¹³ As the threats of domestic terrorism continue to evolve, the United States must adapt its investigative and prosecutorial strategies to enable more successful investigations and prosecutions of domestic terrorism cases.¹⁴

Adapting U.S. counterterrorism practices to deal with the everchanging issue of domestic terrorism is seemingly a step in the right direction, but the United States has been less than

(“The debate over a domestic terrorism law underscores just how complex the terrorist threat has become in the nearly two decades since Sept. 11.”).

¹¹ See Bergengruen & Hennigan, *supra* note 1 (quoting Jill Sanborn, the Executive Assistant Director of the FBI’s National Security Branch: “Today Americans are more likely to be killed by domestic extremists than foreign-born terrorists.”); see also MacFarquhar, *supra* note 10 (“When the New Jersey Office of Homeland Security and Preparedness issued its terrorism threat assessment for 2020, it noted a marked shift. The threat level from violent, home grown-extremists . . . was marked in red as the top category: ‘High.’ The threat from the Islamic State, Al Qaeda and their ilk was demoted to third, in green: ‘Low.’ Terrorism experts believe that holds true for the entire United States.”); see also Harry Litman, *A Domestic Terrorism Statute Doesn’t Exist. Congress Must Pass One—now*, WASH. POST (Aug. 5, 2019, 1:57 PM), <https://www.washingtonpost.com/opinions/2019/08/05/domestic-terrorism-statute-doesn-t-exist-congress-must-pass-one-now/>; see generally Adam Goldman, *The F.B.I.’s New Approach to Combatting Domestic Terrorism: Straight Talk*, N.Y. TIMES (Nov. 10, 2019), <https://www.nytimes.com/2019/11/10/us/politics/domestic-terrorism-justice-department.html> (“Certainly, the most lethality in terms of terrorist attacks over the recent years here in the homeland has been on the domestic terrorism side.”).

¹² Bergengruen & Hennigan, *supra* note 1.

¹³ See Wray, *supra* note 10.

¹⁴ See *id.*

successful in investigating and prosecuting domestic terrorists.¹⁵ The FBI,¹⁶ Congress,¹⁷ the media, and U.S. citizens demonstrate both a clear understanding and recognition of the threat domestic terrorism poses. However, without a federal domestic terrorism statute, investigations and prosecutions of domestic terrorism fall flat. Many institutions, including the FBI and Congress, have created definitions to demarcate and identify what constitutes an act of domestic terrorism,¹⁸ but no federal statute to prosecute these acts exists.¹⁹

The United States effectively investigates and prosecutes perpetrators of international terrorism, but it is unable to do the same for domestic terrorists.²⁰ The U.S. international terrorism statute requires that perpetrators have a relationship with a foreign terrorist organization or a foreign nation, creating an element of terroristic ideologically based intent (“TIBI”).²¹ The TIBI element found in the international terrorism statute has allowed the United States to investigate and prosecute international terrorists without violating First Amendment protections or over-criminalizing behavior. To allow federal investigations and prosecutions of domestic terrorism that result in charges and convictions for crimes of terrorism, it is imperative that Congress enact a domestic terrorism statute. More

¹⁵ Without a federal domestic terrorism statute, perpetrators of domestic terrorism are seldom charged with crimes of terrorism. See Bergengruen & Hennigan, *supra* note 1.

¹⁶ See Wray, *supra* note 10.

¹⁷ See 18 U.S.C. § 2331; H.R. 5602, 116th Cong. (2020).

¹⁸ See 18 U.S.C. § 2331; *What We Investigate: Terrorism*, FBI.Gov, <https://www.fbi.gov/investigate/terrorism> (last visited May 28, 2022) [hereinafter *FBI Definitions*].

¹⁹ *FBI Definitions*, *supra* note 18; see also Bergengruen & Hennigan, *supra* note 1 (“Under federal law, domestic terrorism itself is not a crime.”).

²⁰ See Litman, *supra* note 11.

²¹ See generally 18 U.S.C. § 2331; see also Ken Dilanian, *There Is no Law that Covers ‘Domestic Terrorism.’ What Would one Look Like*, NBC NEWS (Aug. 9, 2019, 4:32 AM), <https://www.nbcnews.com/politics/justice-department/there-no-law-covers-domestic-terrorism-what-would-one-look-n1040386> (“[T]here is no specific federal crime covering acts of terrorism inside the U.S. that are not connected to al Qaeda, ISIS, [or] other officially designated international terror groups or their sympathizers.”).

importantly, the statute must contain a TIBI element specific to domestic terrorism. A federal domestic terrorism statute with a TIBI element will strengthen the United States's ability to achieve its counterterrorism goal—to remain “Left of Boom.”²²

Part I of this Comment highlights the divide between international and domestic terrorism through the criminal justice system, both definitionally and in practice. Part II presents an overview of recent terrorism incidents and the federal government's investigative and prosecutorial approaches to these tragic events. Finally, Part III argues that a federal domestic terrorism statute is needed, provides concrete suggestions to overcome concerns raised in the past regarding domestic terrorism legislation, and suggests necessary components for a federal domestic terrorism statute.

I. THE DIVIDE BETWEEN INTERNATIONAL AND DOMESTIC TERRORISM

Domestic terrorism differs from international terrorism in several meaningful ways. For example, they differ in definition, background ideology, legislative treatment, investigative scope, prosecutorial ability, and sentencing. Understanding the differences in how international and domestic terrorism cases are pursued through the criminal justice system is essential in recognizing the need for a federal domestic terrorism statute with a TIBI element.

A. Definitions

Historically, “terrorism” has been difficult to define. Widely used terrorism definitions established by the FBI²³ and

²² The phrase “Left of Boom” began as a military phrase signifying “U.S. military[] effort[s] to disrupt insurgent cells before they can build and plant bombs.” See *Left of Boom, Glossary*, WASH. POST (Sept. 8, 2007, 7:52 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2007/09/28/AR2007092801683.html>. This phrase has since been used to describe the U.S. government's counterterrorism mission to prevent a terrorist attack or activity before it occurs.

²³ The FBI's definitions are cited here due to the prominent role the agency plays in counterterrorism. The FBI is the premiere federal law enforcement

Congress²⁴ define international and domestic terrorism differently.²⁵ A noteworthy difference between the federal statutory definitions of international and domestic terrorism is the lack of an ideological intent element in the domestic terrorism definition.

Congress provides a statutory definition of domestic terrorism in 18 U.S.C. § 2331.²⁶ Section 2331 defines domestic terrorism as 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.²⁷

The FBI has its own definition of domestic terrorism.²⁸ The FBI defines domestic terrorism as “violent, criminal acts committed by individuals and/or groups to further ideological goals stemming from domestic influences, such as those of a political, religious, social, racial, or environmental nature.”²⁹

Congress and the FBI also created definitions for international terrorism. Section 2331 defines international terrorism as 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

agency in the United States and often takes a lead role in counterterrorism measures and terrorism investigations. *See* THE 9/11 COMMISSION REPORT, *supra* note 9, at 74 (“For countering terrorism, the dominant agency under Justice is the Federal Bureau of Investigation.”).

²⁴ The United States Code’s definitions are cited here due to prosecutors’ reliance on these definitions when analyzing a case and making charging and other prosecutorial decisions.

²⁵ *See generally* 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

²⁶ *See generally* 18 U.S.C. § 2331.

²⁷ *Id.* § 2331(5).

²⁸ *See generally* *FBI Definitions*, *supra* note 18.

²⁹ *Id.*

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; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend 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.”³⁰

The FBI defines international terrorism as “violent, criminal acts committed by individuals and/or groups who are inspired by, or associate with, designated foreign terrorist organizations or nations (state-sponsored).”³¹

A key difference among the federal statutory and internal FBI definitions of international and domestic terrorism is the presence of an ideological component in the statutory definition of international terrorism and in both FBI definitions. In contrast, the statutory domestic terrorism definition provides that specific acts committed in furtherance of specific objectives within the United States would qualify as domestic terrorism.³² One could argue that an element of “intent” or a required *mens rea* for domestic terrorism can be found in the statutory definition because it states that a perpetrator must *intend* “(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.”³³ However, this merely reflects a terrorist’s intended goals for criminal actions, not an ideologically based intent or motivation for committing such crime(s).³⁴

³⁰ 18 U.S.C. § 2331(1).

³¹ *FBI Definitions*, *supra* note 18.

³² *See generally* 18 U.S.C. § 2331.

³³ *Id.*

³⁴ An “ideologically based intent” is necessary to federally prosecute domestic terrorists. The need for this element is explained elsewhere in this Comment. *See discussion infra* Sections I.B-E.

The FBI's domestic terrorism definition includes the necessary activities and requires an ideologically based intent element as well.³⁵ In stating that a terrorist's actions should be based on an intent that "stem[s] from domestic influences, such as those of a political, religious, social, racial, or environmental nature,"³⁶ the FBI adds a TIBI element to its domestic terrorism definition. This TIBI element is the type of ideologically based intent necessary for a federal domestic terrorism statute to enable successful investigations and prosecutions in the United States.

Domestic terrorism definitions created by both Congress and the FBI are vastly different from their definitions of international terrorism. In the federal statutory and FBI international terrorism definitions, the crimes committed and/or the perpetrator's intent must stem from a foreign ideology or foreign group, must be perpetrated in the name of a foreign group, or a majority of the preparatory activities must occur in a foreign country.³⁷ This foreign ideological tie must be present for an action to be considered international terrorism and has enabled successful prosecutions of international actors as terrorists.³⁸ A similar TIBI element is lacking in the statutory domestic terrorism definition and should be included as a necessary element in a federal domestic terrorism statute.

B. Supporting Ideologies

As stated above, the ideological aspect of a terroristic action plays a significant role in U.S. investigations and prosecutions of terrorists. The statutory and internal FBI definitions of domestic and international terrorism analyzed in this Comment demonstrate the dissimilarity in ideological

³⁵ See generally *FBI Definitions*, *supra* note 18.

³⁶ *Id.*

³⁷ See generally *id.*; 18 U.S.C. §2331(1)(C).

³⁸ The ideological intent requirement—that international terrorists have motivations tied to foreign ideologies and/or governments—enables successful charging, prosecution, and conviction of international terrorists for crimes of terrorism and has enabled prosecutors to seek terrorism sentencing enhancements available under terrorism statutes in the U.S. Code. See discussion *infra* Section I.B-F.

support and motivations for these crimes.³⁹ Acts of domestic terrorism are events inspired by domestic ideologies,⁴⁰ whereas acts of international terrorism are events inspired by foreign ideals and groups.⁴¹ Although it may not seem important to identify the origin of ideals inspiring an act of terror, the geography of an ideology significantly impacts investigations and prosecutions of suspected terrorists due to the specific language used in current U.S. law.⁴² A terroristic action that does not stem from a foreign ideology does not technically constitute a federal crime of terrorism under current U.S. law.⁴³ Therefore, federal law enforcement officers and prosecutors are left to charge perpetrators of domestic terrorism with other crimes, such as murder, rather than an act of terrorism or other terrorism related charges.⁴⁴ For that reason, the geographic origin of a terrorist's TIBI becomes the pivotal factor in determining whether a defendant's actions may be deemed a terroristic act under current U.S. law.

C. Legislative Treatment

Legislation concerning crimes of terrorism has exacerbated the inequality of domestic and international terrorism cases due to contrasting foundational ideologies. Chapter 113B of the U.S. Code provides definitions of domestic and international terrorism,⁴⁵ as well as the types of conduct that constitute a "crime of terror."⁴⁶ However, these sections deal almost entirely with acts of international terrorism, or actions based on foreign ideologies, because they include phrases or elements such as: "transcending national boundaries," "international terrorism," "foreign terrorist organization[s]," and

³⁹ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

⁴⁰ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

⁴¹ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

⁴² See generally Charlie Savage, *What Could a Domestic Terrorism Law Do*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/domestic-terror-law.html>; see also discussion *infra* Section I.C.

⁴³ See Savage, *supra* note 42; see also discussion *infra* Section I.C.

⁴⁴ See Savage, *supra* note 42; see also discussion *infra* Section I.C.

⁴⁵ See discussion *supra* Section I.A.

⁴⁶ See generally 18 U.S.C. §§ 2331-2339d.

“national of another state.”⁴⁷ Therefore, laws applicable to actions considered domestic terrorism are lacking. Further, the specific criminal activities listed as federal crimes of terrorism address the “typically imagined” forms of international terrorism, such as the attacks on 9/11 or the Boston Marathon bombings where the perpetrators had ties to foreign ideologies or groups and used weapons of mass destruction.⁴⁸

One of the more glaring differences in the legislative treatment of international and domestic terrorism can be found in sections 2339A and 2339B of the U.S. Code.⁴⁹ Section 2339B makes the act, attempt, or conspiracy to materially support a foreign terrorist organization a crime of terrorism.⁵⁰ Section 2339A makes the acts of providing material support or resources for an act of terrorism and the concealment of supporting a terroristic action crimes of terrorism.⁵¹ A large percentage of terrorism prosecutions are for providing material support to a terrorist organization under § 2339B.⁵² The material support prohibition under § 2339B allows the United States to counter the threat of terrorism by investigating and prosecuting known terrorists or associates of terrorist organizations for supplying support before an attack occurs. Moreover, the use of § 2339B is a helpful tool that allows prosecutors to bring charges against suspected international terrorists before further crimes are committed.⁵³ Importantly, bringing charges under § 2339B directly supports the United States’s counterterrorism mission—staying “Left of Boom.”

Although § 2339B is a helpful tool for both law enforcement officers and prosecutors investigating and trying

⁴⁷ See generally *id.*

⁴⁸ See 18 U.S.C. §§ 2332-2339d. Using the phrase “typically imagined” forms of international terrorism to mean widescale attacks where the funding, planning, or other support is linked to foreign terrorist organizations.

⁴⁹ See generally 18 U.S.C. §§ 2339A-B.

⁵⁰ See 18 U.S.C. § 2339B.

⁵¹ See 18 U.S.C. § 2339A.

⁵² See THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES—THE ISIS CASES 28 (Karen J. Greenberg ed. 2017).

⁵³ See *id.*

international terrorists, acts of domestic terrorism are not covered by § 2339B because the foundational ideology of domestic terrorism, by definition, cannot be tied to a foreign terrorist organization.⁵⁴ Although § 2339A is not limited to actions tied to a foreign ideology, this section is rarely charged.⁵⁵ For § 2339A to apply to an act of domestic terrorism (charging a defendant for materially supporting an act of terrorism), the planned action must violate the specific laws listed within § 2339A.⁵⁶ These acts include: “destruction of aircraft or aircraft facilities,” “prohibitions with respect to biological weapons,” “prohibited transactions involving nuclear materials,” “genocide,” “terrorist attacks and other violence against railroad carriers,” and “use of weapons of mass destruction.”⁵⁷ Though the listed statutes cover an array of criminal behavior, recent domestic terrorism trends indicate that attacks are often committed by lone offenders, using guns, motor vehicles, or other means that are not as widescale as the specific actions listed in § 2339A.⁵⁸ Therefore, § 2339A is rarely used, and is not available to charge domestic terrorists with material support of terrorism in most instances.⁵⁹

An analysis of terrorism legislation makes it clear that the statutory focus on international terrorism hurts the United States’s counterterrorism mission—we cannot continue to counter the rise in domestic terrorism cases without a law enabling domestic terrorists to be charged before an attack occurs. The foreign ideologically based intent element of § 2339B allows for successful international terrorism prosecutions while

⁵⁴ See Dilanian, *supra* note 21 (“[S]ince there is no domestic terrorism statute, there is also no law against [providing] material support to domestic terrorism.”); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 39 (2010) (stating that the prohibition on material support to foreign terrorist organizations found in § 2339B cannot be applied to acts of domestic terrorism or the support of domestic terrorist organizations).

⁵⁵ See Michael Molstad, *Our Inner Demons: Prosecuting Domestic Terrorism*, 61 B. C. L. REV. 339, 370-71 (2020).

⁵⁶ See 18 U.S.C. § 2339A.

⁵⁷ See generally 18 U.S.C. § 2339A.

⁵⁸ See generally Engy Abdelkader et al., *Mass Violence Motivated by Hate: Are New Domestic Terrorism Laws the Answer*, 44 HARBINGER 116, 124-25 (2020).

⁵⁹ See Molstad, *supra* note 55.

domestic terrorism prosecutions suffer without a statute requiring a comparable TIBI element.

D. Investigative Scope

Due to the differing supporting ideological backgrounds between acts of international and domestic terrorism, the investigations into crimes of domestic terrorism are limited. The ability to investigate individuals providing material support to known terrorist organizations opens the door to investigations of future perpetrators of terrorism, which directly supports the United States's counterterrorism mission. Section 2339B of the U.S. Code acts as a gateway charge, allowing law enforcement to track and surveil suspected terrorists by enabling searches of social media accounts, financial records, and other evidence of materially supporting a foreign terrorist organization. Because § 2339B cannot be charged in cases of domestic terrorism,⁶⁰ law enforcement rarely, if at all, investigates or charges suspected domestic terrorists for supporting a terrorist organization or future act of terrorism.

Charging a suspected terrorist with providing material support to a terrorist organization or a future terroristic plot fosters an abundance of intelligence sharing between agencies, creates the ability to conduct surveillance, and increases funding available for these investigations,⁶¹ improving investigations and terrorism prevention. Additionally, investigations and investigative strategies are often aligned with a statute and the elements necessary to prove a specific charge. Accordingly, a federal domestic terrorism statute would allow law enforcement to better tailor investigations and guide evidence collection.

E. Prosecutions

Prosecutors experience, firsthand, greater challenges pursuing domestic terrorism cases as compared to international

⁶⁰ See discussion *supra* Section I.C.

⁶¹ See Dilanian, *supra* note 21; Abdelkader et al., *supra* note 58, at 124; Litman, *supra* note 11; Savage, *supra* note 42.

terrorism cases. First, prosecutors have more resources available to them for international terrorism cases.⁶² For example, in the absence of a specific federal domestic terrorism statute, more resources are allocated to international terrorism prosecutions and investigations because “domestic terrorism” charges are typically pursued through other criminal laws.⁶³ Second, the existence of an international terrorism statute creates clearer guidance for prosecutors regarding the elements of a terrorism case that must be proven, such as the TIBI of the perpetrator.⁶⁴ Lastly, in court, prosecutors may refer to a defendant’s conduct as terrorism in an international terrorism case.⁶⁵ Labelling a defendant’s conduct as terrorism allows a jury to more readily recognize the accused’s actions as terroristic due to the weight and severity of the accusations that a “terrorism” label carries. Without a federal domestic terrorism statute, prosecutors are forced to charge domestic terrorists with crimes other than terrorism,⁶⁶ cannot refer to the defendant’s conduct as terrorism

⁶² See generally Litman, *supra* note 11.

⁶³ To fix this funding gap, President Biden stated that one of his priorities as President was to pass a domestic terrorism law. See Levy, *supra* note 7. In addition to passing a domestic terrorism law, President Biden shared his intent to oversee domestic terrorism prevention. See *id.* Recently, the Department of Justice announced that it is currently working to establish a Domestic Terrorism Unit under the National Security Division. See Lucas, *supra* note 2. But see Bergengruen & Hennigan, *supra* note 1 (“[This] group of ‘dedicated attorneys’ . . . will focus on ensuring ‘that these cases are properly handled and effectively coordinated,’ . . . [but] former Justice and FBI officials and lawyers say it is likely to run into the same issues that have hamstrung such efforts for years . . . [T]he unit will presumably rely on existing laws to charge domestic terrorists with other offenses such as hate crimes and firearms offenses.”).

⁶⁴ See generally Litman, *supra* note 11.

⁶⁵ See generally Chris Shields et al., *An Assessment of Defense and Prosecutorial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors*, DEP’T OF JUST., ii, 92 (Sept. 2009), <https://www.ojp.gov/pdffiles1/nij/grants/228276.pdf>.

⁶⁶ See Bergengruen & Hennigan, *supra* note 1 (noting that without a federal domestic terrorism statute, prosecutors “will presumably rely on existing laws to charge domestic terrorists with other offenses, such as hate crimes and firearms offenses”).

in court,⁶⁷ and cannot convict the defendant for the crime they intended to commit—terrorism.

F. Sentencing

Another area where international and domestic terrorism diverge under U.S. law is sentencing. Individuals convicted of committing crimes of terrorism are eligible for sentencing enhancements.⁶⁸ The U.S. Sentencing Guidelines state: “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism” a judge may enhance the defendant’s sentence.⁶⁹ The issue here, as discussed earlier in this Comment,⁷⁰ is that perpetrators of domestic terrorism are seldom charged with federal crimes of terrorism because their actions do not fall within the U.S. Code’s terrorism sections since the statutory language is better suited to the definition of international terrorism.⁷¹ Because domestic terrorists are not charged with federal crimes of terrorism and therefore cannot receive terrorism sentencing enhancements, their sentences may not reflect the seriousness of their crimes and intended actions.⁷² If a federal domestic terrorism statute is enacted, domestic terrorists could be convicted of federal crimes of terrorism and would be eligible for terrorism sentencing enhancements under the U.S. Sentencing Guidelines.

II. RECENT ACTS OF TERRORISM

As stated previously, there is a notable discrepancy in the way domestic and international terrorism cases are pursued.

⁶⁷ See Shields et al., *supra* note 65, at 84-85. Use of the term “terrorism” by a prosecutor in court, when referencing a defendant’s conduct, especially a defendant who is not charged with committing crimes of terrorism, will likely be prejudicial. *Id.*

⁶⁸ See U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2021).

⁶⁹ See *id.*

⁷⁰ See discussion, *supra* Section I.C.

⁷¹ See generally 18 U.S.C. §§ 2331-2339d.

⁷² See generally U.S. SENT’G GUIDELINES MANUAL § 3A1.4; see also Bergengruen & Hennigan, *supra* note 1 (“These [non-terrorism] crimes tend to carry weaker penalties, whereas links to a foreign terrorist group alone carries a sentence of at least 20 years in prison.”).

Below are several examples of recent domestic terrorism cases in the United States, including the crimes committed and the charges actually filed. Based on the defendants's actions, each case seemingly meets the domestic terrorism definitions written by Congress and the FBI, yet none are charged with crimes of terrorism. An example of a successful terrorism prosecution arising out of terroristic activity within the United States is also provided to illustrate the need for a federal domestic terrorism statute containing a TIBI element.

A. The El Paso Shooting

In 2019, twenty people were killed and twenty-seven others were injured in a shooting at a Walmart parking lot in El Paso, Texas.⁷³ Law enforcement determined the perpetrator, Patrick Wood Crusius, was motivated by radical ideologies causing him to open fire in the parking lot.⁷⁴ The media and investigators referred to the El Paso shooting as an act of domestic terrorism, but prosecutors have not charged the defendant with a crime of terrorism; rather, they sought capital murder charges.⁷⁵ An investigation was conducted to align with the capital murder charges and consequently, a domestic terrorism investigation was not conducted, nor were domestic terrorism charges pursued.⁷⁶ Because a federal domestic terrorism statute requiring a TIBI is not in existence and Crusius did not have a foreign ideologically based intent, he does not meet the qualifications for current terrorism charges.

B. The Pittsburgh Tree of Life Attack

Eleven worshipers, four officers, and two others sustained injuries in "the deadliest [attack] against the Jewish community in the United States," when Robert D. Bowers fired shots into the Tree of Life Synagogue in 2018.⁷⁷ While executing his attack, Bowers shouted anti-Semitic rhetoric, sharing his ideologically

⁷³ Romero & Bogel-Burroughs, *supra* note 5.

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See* Robertson et al., *supra* note 5.

based intent.⁷⁸ Although this tragic attack was referred to as an event of domestic terrorism, the U.S. government charged Bowers with “29 criminal counts . . . includ[ing] obstructing the free exercise of religious beliefs – a hate crime – and using a firearm to commit murder,” but, like the El Paso shooter, no charges of terrorism.⁷⁹

C. Plots Against Government Leaders

In 2020, both the Governor of Michigan, Gretchen Whitmer, and then-presidential candidate Joseph R. Biden were the subjects of plots to prevent them from governing.

An investigation was commenced in May 2020 when Alexander Hillel Treisman’s abandoned van was reported to police.⁸⁰ Upon inspection of the van, officers discovered firearms, explosive materials, ammunition, hundreds of thousands of dollars in cash, and instructional materials for bomb construction.⁸¹ As their investigation continued, federal agents discovered Treisman previously searched online for then-presidential candidate Biden’s home address and had conducted other preparatory searches.⁸² During his post-arrest interview, Treisman told investigators that “he has an interest in terrorist incidents and mass shootings”⁸³ At his grand jury hearing, federal agents testified to Treisman’s interests in mass shootings and terrorist attacks, and his foiled plot to assassinate then-presidential candidate Biden.⁸⁴ Treisman plead guilty to federal child-pornography charges after investigators found images on his seized electronics,⁸⁵ but he was never charged with crimes of terrorism related to his plot to assassinate then-presidential

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *See* Wamsley, *supra* note 5.

⁸¹ *See id.*

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ Michael Gordon, *Man Linked to Threats Against Joe Biden to Plead Guilty to Child Porn Charges in NC*, CHARLOTTE OBSERVER (Updated Nov. 30, 2021, 5:07 PM), <https://www.charlotteobserver.com/article249695494.html>.

candidate Biden.⁸⁶ Because no federal statute criminalizes preparation for a domestic terrorism attack or acts committed domestically with a TIBI, Treisman could not be charged with preparation to commit an act of domestic terrorism.

During the summer of 2020, a group of men were involved in a plan to kidnap Michigan's Governor in response to their opposition to the state's Covid-19 related shutdowns.⁸⁷ The group of men met several times throughout the summer to prepare for their attack.⁸⁸ They conducted firearms trainings, performed combat drills, and practiced building explosive devices.⁸⁹ The group also conducted surveillance at the Governor's vacation home.⁹⁰ Six of the perpetrators were federally charged with conspiracy to kidnap, and some faced additional weapons charges.⁹¹ Although the attempted kidnapping was labeled by the media, and even the public, as an act of domestic terrorism, the participants were not federally charged with committing, or planning to commit, acts of domestic terrorism.⁹²

The actions of the Michigan group and Treisman seemingly qualify as acts of domestic terrorism under the statutory and internal FBI definitions of terrorism, based on the

⁸⁶ *Id.* (“[T]he new [plea agreement] document makes no mention of a rash of Treisman’s disturbing online musings last year, which the FBI described as being ‘consistent with a surveillance and attack plan connected to a possible threat against Joe Biden or other targeted act of violence.’”).

⁸⁷ See Nicholas Bogel-Burroughs, Shalia Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, (Oct. 8, 2020, Updated Apr. 13, 2021), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ See Ed White, *Judge Won’t Dismiss Charges Before Whitmer Kidnap Plot Trial*, U.S. NEWS & WORLD REP. (Jan. 25, 2022), <https://www.usnews.com/news/best-states/michigan/articles/2022-01-25/judge-wont-dismiss-charges-before-whitmer-kidnap-plot-trial>.

⁹² While a few of the men were also charged with violating state terrorism laws, those charges have since been dismissed. See Amber Ainsworth, *Judge Drops Terrorism Charges Against 3 Men Accused of Whitmer Kidnapping Plot*, FOX 2 DETROIT (Mar. 29, 2021, 10:58 PM), <https://www.fox2detroit.com/news/judge-drops-terrorism-charge-against-3-men-accused-of-whitmer-kidnapping-plot>.

subjects's intended plans and preparatory activities. Yet, the perpetrators cannot be charged federally for committing an act of domestic terrorism or preparing to commit an act of domestic terrorism because there is no federal domestic terrorism statute criminalizing a TIBI.

D. An Exception: The Boston Marathon Bombing

Dzhokar Tsarnaev was found guilty of thirty charges related to the horrific attack at the 2013 Boston Marathon.⁹³ Tsarnaev and his older brother (who died while fleeing law enforcement after the bombing) placed homemade bombs along the marathon route, killing three and severely wounding 257 other spectators.⁹⁴ Tsarnaev's actions were committed in support of anti-American Iraqi and Afghan war rhetoric and therefore were attached to foreign ideologies.⁹⁵

Tsarnaev was charged with crimes of terrorism, but only because his method of attack was by bomb and his ideology could be traced to foreign ideals and groups. Although Tsarnaev is a U.S. resident, and his acts were committed entirely within the United States, his actions also meet the criteria for international terrorism charges because his motivating ideologies were foreign based. Additionally, crimes of terrorism can be charged under federal law when weapons of mass destruction, such as a bomb, are used to carry out a crime.⁹⁶

If Tsarnaev was not influenced by a foreign ideology or chose not to use a weapon of mass destruction, Tsarnaev would not have been convicted and sentenced as a terrorist. Terrorism charges were possible since the requisite TIBI was established for Tsarnaev under Chapter 113B of the U.S. Code (*i.e.*, a foreign ideology is needed). But actors with radical ideas and no foreign

⁹³ See Katherine Q. Seelye, *Dzhokar Tsarnaev is Guilty on All 30 Counts in Boston Marathon Bombing*, N.Y. TIMES (Apr. 8, 2015), <https://www.nytimes.com/2015/04/09/us/dzhokhar-tsarnaev-verdict-boston-marathan-bombing-trial.html>.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See generally Savage, *supra* note 42; 18 U.S.C. § 2332a.

ties, such as Crusius, Bowers, Treisman, and the Michigan group, cannot be convicted under many of the terrorism statutes without creating a federal statute requiring a TIBI for domestic terrorism.

III. IMPLEMENTING A FEDERAL DOMESTIC TERRORISM STATUTE

A. *The United States Needs a Federal Domestic Terrorism Statute*

Actors charged as terrorists often receive longer sentences and are subject to more aggressive or proactive prosecutions and investigations with less oversight.⁹⁷ Unless perpetrators of domestic terrorism are pursued as terrorists, their actions may slip through the cracks, and appropriate retribution cannot be provided.⁹⁸ Without a domestic terrorism statute, investigations, prosecutions, the media's reporting accuracy, and the public's understanding of domestic terrorism will continue to suffer.⁹⁹

1. Issues Faced by Law Enforcement Without a Statute

Perpetrators of domestic terrorism have fallen through the cracks because there are no clear best practices for investigating domestic terrorism. Experts claim that a "terrorist profile" does not exist¹⁰⁰ (as they have found for other types of criminals such as serial killers). Because no specific traits or demographics can point to individuals predisposed towards terrorism, law enforcement faces difficulties predicting the next terrorist(s).¹⁰¹ Often, it is likely a combination of an individual's personal experiences, such as social isolation, familial trauma, unmet economic expectations, or identity issues, that lead a

⁹⁷ See Savage, *supra* note 42.

⁹⁸ See *id.* ("[T]he president of the F.B.I Agents Association, Brian O'Hare, urged Congress 'to make domestic terrorism a federal crime. This would ensure that the F.B.I agents and prosecutors have the best tools to fight domestic terrorism.'").

⁹⁹ See generally MacFarquhar, *supra* note 10.

¹⁰⁰ Abdelkader et al., *supra* note 58, at 122.

¹⁰¹ See *id.*

person to sympathize with ideologies that support and foster terrorism.¹⁰² Without a federal statute, law enforcement has limited precautionary or preventative measures available to surveil individuals showing an inclination towards these ideologies or an indication that they may be pursuing or are interested in terroristic activities.

The creation of a federal domestic terrorism statute would allow the FBI to conduct more effective investigations of suspected terrorists and enhance terrorism prevention.¹⁰³ With a statute, the FBI could increase its monitoring of suspected domestic terrorists's internet activities, as it does with suspected international terrorists,¹⁰⁴ and additional resources could be funneled towards these investigations.¹⁰⁵ A federal statute would also allow the FBI to conduct domestic terrorist investigations using investigative strategies employed successfully in other investigations.¹⁰⁶ For example, the FBI would be able to conduct sting operations, using informants to gain information about suspected domestic terrorists, which is a tactic traditionally used by the FBI in other types of investigations.¹⁰⁷

Data collection is also an important law enforcement tool. A statute would assist the FBI in tracking its investigations and successful prosecutions of domestic terrorists.¹⁰⁸ The FBI does

¹⁰² See *id.*

¹⁰³ See Dilanian, *supra* note 21 ("A domestic terrorism statute, proponents argue, could be most helpful on the prevention side. It would give the FBI more legal authority to step up its intelligence gathering and investigative efforts against an amorphous group of people who are becoming radicalized mainly on the internet."); see also Bergengruen & Hennigan, *supra* note 1 ("[T]he Justice Department has struggled in recent years to allocate law enforcement resources to keep up with the rapidly growing number of federal investigations into violent domestic extremists.").

¹⁰⁴ See Bergengruen & Hennigan, *supra* note 1 ("[L]aw enforcement [has not] been granted the same sweeping authorities to surveil and monitor domestic terror suspects as in overseas-linked cases.").

¹⁰⁵ See Dilanian, *supra* note 21 ("[A] domestic terrorism statute could provide an organizing principal to redirect government resources at the domestic terrorism problem.").

¹⁰⁶ See generally Savage, *supra* note 42.

¹⁰⁷ *Id.*

¹⁰⁸ See Abdelkader et al., *supra* note 58, at 123-24.

not currently collect useful statistics on domestic terrorism investigations or prosecutions because suspects are not charged or convicted for crimes of terrorism or as terrorists.

In reaction to the difficulties the FBI faces without a federal domestic terrorism statute, members of the FBI Agents Association recently demanded Congress mandate domestic terrorism as a federal crime.¹⁰⁹ A federal domestic terrorism statute would help law enforcement pursue domestic terrorists by increasing the investigatory tools available to them.¹¹⁰

2. Issues Faced in Prosecutions Without a Statute

Prosecutors support enacting a domestic terrorism statute because it would aid investigations¹¹¹ and create stronger cases for the prosecution of domestic terrorists. As with law enforcement, a domestic terrorism statute would also assist prosecutions of domestic terrorists by making additional resources available to prosecutors seeking to charge perpetrators with crimes of terrorism.¹¹²

Additionally, prosecutors often face challenges in both charging perpetrators of domestic terrorism and trying domestic terrorism cases. Due process requires a written law in order to label specific conduct a crime.¹¹³ Because a federal domestic terrorism statute does not exist, prosecutors often refrain from referring to suspected domestic terrorists's conduct as "terrorism" during trial to avoid unfair prejudice to the

¹⁰⁹ See *id.* at 119; see also Dilanian, *supra* note 21; Bergengruen & Hennigan, *supra* note 1 ("Former Department of Justice officials, along with the FBI Agents Association, have long maintained that the current law doesn't suffice to punish perpetrators and deter future attacks.").

¹¹⁰ See Bergengruen & Hennigan, *supra* note 1 (quoting Frank Figliuzzi, the FBI's former Counterintelligence Director: "Are they going to be allowing the FBI more license to do what they can lawfully do? . . . Will they ever come out and support a [domestic terrorism] statute and say, It's time?").

¹¹¹ See Goldman, *supra* note 11.

¹¹² See Litman, *supra* note 11.

¹¹³ See *id.*

defendant.¹¹⁴ Prosecutors also face difficulty convincing juries that a defendant is a “terrorist” if they have committed an act of domestic terrorism. Unlike international terrorism cases, a prosecutor cannot point to a defendant’s clear affiliation with a terrorist organization (which is an element of international terrorism and many other terrorism crimes),¹¹⁵ because domestic groups are not categorized as terrorist organizations, and membership in a terrorist organization is not an element of domestic terrorism. Because there is no federal domestic terrorism statute, prosecutors are often forced to mix and match criminal charges to reach an appropriate sentence based on the crimes committed, and none of these charges reference terrorism.¹¹⁶

Section 2339B of the U.S. Code allows prosecutors to charge actors for materially supporting foreign terrorist organizations.¹¹⁷ This section allows law enforcement to proactively surveil and act before a violent crime occurs. Section 2339B creates a TIBI for international terrorists.¹¹⁸ By criminalizing acts in support of an international terrorist attack, this statute criminalizes an actor’s support of foreign, radical ideologies and plans. This implied TIBI within § 2339B supports the United States’s counterterrorism mission by allowing law enforcement and prosecutors to investigate and charge future terrorists before an attack occurs. TIBI is the ticket to the counterterrorism train, and without a federal domestic terrorism statute, including a TIBI, there are no preventative measures that

¹¹⁴ See MacFarquhar, *supra* note 10 (“Senior law enforcement officials express frustration that cases like those cannot be called terrorism in court.”); see also Molstad, *supra* note 55, at 369.

¹¹⁵ See MacFarquhar, *supra* note 10 (“There is no legal mechanism for designating domestic extremist groups as terrorists.”).

¹¹⁶ See *id.*; see also Bergengruen & Hennigan, *supra* note 1 (“While the FBI regularly opens ‘domestic terrorism’ probes into attacks by alleged extremists, prosecutors have to use existing criminal statutes to charge them for offenses such as murder, assault, illegally purchasing firearms or conspiring to mail threatening communications. These crimes tend to carry weaker penalties . . . [and] [a]s a result, prosecutors sometimes find work-arounds in order to build a case against them.”).

¹¹⁷ 18 U.S.C. § 2339B.

¹¹⁸ See discussion *supra* Section I.C.

can be taken to charge actors preparing to commit, or assisting in committing, acts of domestic terrorism.

3. Media Accuracy and Public Understanding Without a Statute

For years, the media and the public have received mixed messages about what constitutes domestic terrorism and whether a defendant is actually a domestic terrorist. Domestic terrorism has become a political issue because of the lack of uniformity in actually declaring criminals to be “domestic terrorists.”¹¹⁹ The media takes it upon itself to label criminal actors, leading to political debates and misconceptions within the public’s understanding of domestic terrorism.¹²⁰

A common belief is that perpetrators of domestic terrorism should be branded with the same “terrorist” label as perpetrators of international terrorism,¹²¹ but this cannot be done formally if the perpetrators are not prosecuted for terrorism charges.¹²² Without a federal domestic terrorism statute, a criminal cannot be officially tried as a domestic terrorist, and therefore will not be convicted or held out to the public as a terrorist.¹²³ Additionally, the existence of a federal domestic terrorism statute would allow the media to report on acts or predicate crimes that are mentioned within a statute, increasing public awareness of offenses that are *actually* considered acts of

¹¹⁹ See generally J.M. Burger, *The Difference Between a Killer and a Terrorist*, THE ATLANTIC (Apr. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/04/the-difference-between-killer-and-terrorist/558998/>.

¹²⁰ See *id.*

¹²¹ See Dilanian, *supra* note 21 (“Prosecuting hate-motivated attackers as terrorists . . . would send the message that the threat of extremism is just as significant when it is based on domestic political, economic, religious, or social ideologies as it is when based on violent jihadism.”); see also Litman, *supra* note 11.

¹²² See Bergengruen & Hennigan, *supra* note 1 (quoting Dana Nessel, the Attorney General of Michigan: “Labels matter. Prosecuting hate-motivated attackers as terrorists sends the clear message that the threat of extremism is just as significant when it is based on domestic political, religious, or social ideologies as it is when it’s based on violent jihadism.”).

¹²³ See generally Dilanian, *supra* note 21; Litman, *supra* note 11.

domestic terrorism.¹²⁴ If a statute existed, the public would be more inclined to view perpetrators of domestic terrorism as terrorists,¹²⁵ truly understand the nature of domestic terrorism and its elements,¹²⁶ and support more invasive investigative actions as well.

4. Due Process Requires a Statute

Under criminal law theory, in order to provide an accused due process, prohibited conduct and the penalties arising from such conduct must be previously announced and made publicly clear.¹²⁷ When domestic terrorists are convicted of crimes such as murder or kidnapping, due process can be satisfied because these actions are clearly prohibited and have known penalties. In order for perpetrators of domestic terrorism to be investigated by law enforcement as terrorists and treated by the judicial system as terrorists, due process requires a federal domestic terrorism statute. Perpetrators of domestic terrorism must be aware that their actions will be deemed an act of domestic terrorism and that their actions may be subject to more severe punishment or treatment.¹²⁸

B. Arguments Against a Domestic Terrorism Statute and Why They Come up Short

Past proposals for a domestic terrorism statute were unsuccessful due to strong opposition. Although certain arguments raised by opponents are not without merit, these arguments are sufficiently outweighed by the benefits of a

¹²⁴ See generally Litman, *supra* note 11.

¹²⁵ See *id.*

¹²⁶ See MacFarquhar, *supra* note 10 (quoting Thomas E. Brzozowski, the Department of Justice's Counsel for Domestic Terrorism: "The statutes that are typically [and currently] deployed in connection with domestic terrorism cases are really kind of pedestrian in nature . . . [t]his confuses people.").

¹²⁷ See Litman, *supra* note 11.

¹²⁸ See generally *id.*; see also Bergengruen & Hennigan, *supra* note 1 ("Domestic terrorism is not a federal crime with a penalty. Penalties are required for the definition to be an effective deterrent for would-be perpetrators and an effective tool for law enforcement.").

domestic terrorism statute. The most persuasive arguments against enacting a domestic terrorism statute are noted below, together with reasons why these arguments should not prevail.

1. "It Does Not Matter Whether Defendants Are Actually Convicted as Terrorists; Existing Statutes Already Cover This Behavior"

Opponents against enacting a federal domestic terrorism statute argue that criminal activities used to perpetrate domestic terrorist attacks are already criminalized under existing federal statutes. This is not a persuasive argument. While there are fifty-two crimes that can potentially be applied in domestic terrorism cases,¹²⁹ collecting materials in preparation or in support for a domestic terrorist attack is not covered by existing statutes.¹³⁰

The El Paso shooting and the assassination plot against then-presidential candidate Biden both involved ideologically motivated behavior not covered by existing criminal statutes, demonstrating a need for a federal domestic terrorism statute.¹³¹ Crusius, the El Paso shooter, committed a mass shooting resulting in a significant number of deaths and injuries.¹³² Prosecutors charged Crusius with murder and also considered federal hate crime and gun charges in order to achieve an appropriate sentence.¹³³ The actions committed by Crusius are not entirely covered by other statutes, so prosecutors pieced together charges to obtain the desired outcome, with the investigation being designed to support these charges.¹³⁴

Similarly, in the case against Treisman, the individual who planned to assassinate then-presidential candidate Biden, no

¹²⁹ Abdelkader et al., *supra* note 58, at 130.

¹³⁰ *See id.* at 135.

¹³¹ *See* discussion *supra* Section II.

¹³² *See* Romero & Bogel-Burroughs, *supra* note 5.

¹³³ *See id.*

¹³⁴ *See id.* Even though this event has been referred to as an act of domestic terrorism, and Crusius's actions fit the definitions of domestic terrorism, the charges and investigation were unrelated to domestic terrorism or crimes of terror. *See id.*

charges were sought for crimes of terrorism¹³⁵ because Treisman's actions were not covered by existing criminal statutes. Treisman obtained equipment such as firearms, literature on bomb-making, explosive materials, and cash in preparation for his assassination plan.¹³⁶ Treisman also inquired online as to whether he should kill then-presidential candidate Biden and researched Biden's home address.¹³⁷ But ultimately, Treisman was charged with possession of child-pornography due to images investigators found on his cellphone and other seized devices.¹³⁸ Although the clear objective of Treisman's plan was to commit a domestic terrorism attack, and he took affirmative steps toward achieving his plan, Treisman was only charged with child-pornography crimes because existing statutes do not criminalize preparation for domestic terrorism attacks.

The acts of both Crusius and Treisman were arguably acts of domestic terrorism under the federal statutory and the FBI domestic terrorism definitions.¹³⁹ Yet, their actions were not pursued as plots of terror.¹⁴⁰ Crusius's ideal sentence relied on a patch-work of charges, and Treisman was merely charged with possession of child pornography because his terror planning and preparation are not punishable by statute.¹⁴¹ These cases demonstrate that current federal law is not effective to investigate and prosecute certain domestic conduct considered to be terrorism, leaving prosecutors and investigators to seek charges that do not effectively punish and deter the true crime committed—terrorism.¹⁴²

¹³⁵ See Gordon, *supra* note 85.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

¹⁴⁰ See generally Romero & Bogel-Burroughs, *supra* note 5; Gordon, *supra* note 85.

¹⁴¹ See generally Romero & Bogel-Burroughs, *supra* note 5; Gordon, *supra* note 85.

¹⁴² See Bergengruen & Hennigan, *supra* note 1 ("While the FBI regularly opens 'domestic terrorism' probes into attacks by alleged extremists, prosecutors have to use existing criminal statutes to charge them for offenses such as murder, assault, illegally purchasing firearms or conspiring to mail threatening

2. "A Statute Would Give the Government More Invasive Power"

Critics have also argued that enacting a federal domestic terrorism statute would expand the government's authority and power.¹⁴³ Although this is a valid concern, this has not been a problem with other criminal statutes.¹⁴⁴ When hate crime statutes were originally introduced, many feared this would cause the government to overstep by enforcing and criminalizing "thought crimes."¹⁴⁵ Opponents also argued that the conduct underlying hate crimes was already criminalized through other statutes such as homicide and assault, and therefore hate crime statutes were unnecessary.¹⁴⁶

These concerns are clearly outweighed by the benefits hate crime statutes provide both law enforcement and prosecutors charging those who commit hate crimes. Hate crime statutes were reportedly relied upon 5,479 times by the FBI in 2014¹⁴⁷ and continue to be used regularly.¹⁴⁸ Potential hate crimes are reviewed on a case-by-case basis, giving prosecutors and investigators latitude to determine whether a hate crime charge should apply to a given situation.¹⁴⁹ "Justice Department officials say context matters greatly in such cases, making it hard to generalize too broadly . . . '[i]t requires specificity, it requires

communications. These crimes tend to carry weaker penalties . . . [a]s a result, prosecutors sometimes find work-arounds in order to build a case against them.").

¹⁴³ See Levy, *supra* note 7; MacFarquhar, *supra* note 10.

¹⁴⁴ See generally Litman, *supra* note 11.

¹⁴⁵ See generally Michael Shively, *Study of Literature and Legislation on Hate Crime in America*, NAT'L INST. OF JUST., 36-37 (Mar. 31, 2005), <https://www.ojp.gov/pdffiles1/nij/grants/210300.pdf>.

¹⁴⁶ See Litman, *supra* note 11.

¹⁴⁷ *FBI Releases 2014 Hate Crime Statistics*, FBI.GOV (Nov. 16, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-hate-crime-statistics>.

¹⁴⁸ See generally *Hate Crime Laws*, JUSTICE.GOV (Mar. 7, 2019), <https://www.justice.gov/crt/hate-crime-laws> [hereinafter *Hate Crime Laws*].

¹⁴⁹ See generally Eric Tucker, *How Federal Law Draws a Line Between Free Speech and Hate Crimes*, PBS.ORG (Dec. 31, 2015, 2:15 PM), <https://www.pbs.org/newshour/nation/how-federal-law-draws-a-line-between-free-speech-and-hate-crimes>.

intent and it requires a certain sense of imminence”¹⁵⁰ By evaluating each case in this manner, the government avoids overstepping its boundaries, and expanding its power to criminalize thoughts.

Moreover, a statute with a limited scope can safeguard against expanding the government’s power to convict. Under the Patriot Act, the Department of Justice only considers conduct to be domestic terrorism when an actor violates criminal laws.¹⁵¹ The Patriot Act was enacted following 9/11, and the Department of Justice has successfully narrowed the Patriot Act’s scope by limiting what is deemed to be “domestic terrorism conduct” to criminal behavior.¹⁵² If a federal domestic terrorism statute is created, it should be written so that only individuals violating predicate laws can be charged, alleviating the concern of expanding the government’s power.

3. “Let’s Create Other Statutes to Criminalize Specific Domestic Terrorist Acts”

Another popular argument against enacting a general domestic terrorism statute is to instead create other statutes criminalizing new trends and tactics employed by domestic terrorists.¹⁵³ Critics suggest that creating additional statutes to criminalize behaviors such as mass killings, mass shootings, and mass vehicular manslaughter would solve issues investigators and prosecutors face in the absence of a federal domestic terrorism statute.¹⁵⁴

This alternative would create additional categories of criminalized behavior and address recent trends but does not solve the fundamental problems that exist because the United States does not have a federal domestic terrorism statute.

¹⁵⁰ *Id.*

¹⁵¹ DEP’T OF JUSTICE, https://www.justice.gov/archive/ll/subs/u_myths.htm (last visited May 28, 2022).

¹⁵² *Id.*

¹⁵³ *See generally* Abdelkader et al., *supra* note 58, at 119.

¹⁵⁴ *See generally id.*

Enacting or amending statutes to address behavior such as mass vehicular manslaughter or mass shootings would allow individual charges for these criminal acts, but the need for enhanced surveillance and the inability to bring charges for preparation of a domestic terrorist attack would remain. These new statutes would not allow for charges similar to § 2339B (materially supporting a foreign terrorist organization or foreign terrorist attack), which allows law enforcement to better surveil and prevent suspected international terrorist actions.

Although updating federal law to keep pace with domestic terrorism activity would ultimately criminalize behavior that is admittedly omitted from the U.S. criminal code, this alone does not solve the underlying issue. Criminalizing conduct such as mass killings, mass shootings, and mass vehicular manslaughter does not allow prosecutors to convict a defendant for exhibiting a TIBI, and it does not promote preventative measures to investigate and charge domestic terrorists preparing to commit an act of terrorism.¹⁵⁵ Creating additional criminal statutes to keep up with domestic terrorism trends treats the symptoms of the disease, not the cancer that is domestic terrorism.

4. “Creating a Domestic Terrorism Statute Would Create Unnecessary Legislation”

Proposed domestic terrorism statutes are not the only proposed statutes that have been subjected to backlash for creating unnecessary legislation that adds to “the already bloated federal code.”¹⁵⁶ When federal hate crime statutes were proposed, critics argued against the addition of this crime to the federal criminal code,¹⁵⁷ asserting that the acts criminalized by hate crime statutes were already covered by assault and homicide statutes.¹⁵⁸ Today, opponents to the creation of a federal domestic terrorism statute similarly argue that new legislation is

¹⁵⁵ See Litman, *supra* note 11.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

unnecessary since hate crime, homicide, and other statutes already cover terroristic acts.¹⁵⁹

Since their enactment, federal hate crime statutes have been enforced and used frequently.¹⁶⁰ Just like hate crimes, domestic terrorism should be acknowledged by Congress as its own crime.¹⁶¹ The criminal acts and motivations associated with domestic terrorism are not analogous to those associated with hate crimes or homicide, just as hate crimes are not analogous to assault or homicide. Therefore, a domestic terrorism statute is needed even though it would add an additional statute to the federal code because the benefits of a federal domestic terrorism statute outweigh the burden of adding an additional section to Chapter 113B.¹⁶²

C. Past Issues with Proposed Domestic Terrorism Legislation

Various domestic terrorism statutes have been proposed, but these proposals failed to gain enough support due to fears of over criminalization and infringement on First Amendment rights.¹⁶³ As history shows, legislators successfully combated both of these concerns in the creation of other criminal statutes. By reviewing law enforcement and prosecutorial records, legislative history, and case precedent, the steps necessary to alleviate past concerns with the creation of a domestic terrorism statute are clear. Concerns of over-criminalization and First

¹⁵⁹ *See id.*

¹⁶⁰ *See Hate Crime Laws, supra* note 148; Tucker, *supra* note 149 (“The FBI says local law enforcement agencies reported 5,479 hate crime incidents in 2014.”).

¹⁶¹ *See Litman, supra* note 11.

¹⁶² *See id.*; *see also* discussion *supra* Section III.A.

¹⁶³ *See generally* Levy, *supra* note 7. There is greater awareness and concern regarding the threat of domestic terrorism today. *See generally* Lucas, *supra* note 2. Ironically, the House passed a bill in 2020 to increase funding for domestic terrorism investigations and information sharing amongst intelligence agencies, states are enacting domestic terrorism statutes, and there has been political interest to improve domestic terrorism investigation resources and prosecutions, but no action has been taken by Congress to formally criminalize domestic terrorism due to these concerns. *See generally* H.R. 5602, 116th Cong. (2020); G.A. CODE ANN., § 16-11-220 (West 2017); Levy, *supra* note 7; Lucas, *supra* note 2.

Amendment violations were major concerns with past statute proposals, but these concerns can be avoided.

1. Avoiding Over-Criminalization

One issue raised in opposition to past domestic terrorism statute proposals is the potential for domestic terrorism to become “over-criminalized.” Because certain behaviors already recognized as crimes would also fall under a domestic terrorism statute (such as homicide, vehicular manslaughter, arson, etc.), many critics fear that “simple”¹⁶⁴ cases of homicide, vehicular manslaughter, and other crimes included in Chapter 113B will become domestic terrorism cases.

There is a simple solution to alleviate this concern: discretion. Determining whether a perpetrator’s actions should qualify as domestic terrorism, or as homicide, arson, battery, etc., should be left to the discretion of law enforcement and prosecutors. Law enforcement is typically responsible for determining whether to arrest a suspect, but the prosecutor has full discretion and control over charging decisions.¹⁶⁵ Prosecutors may decide, based on the facts of a case (such as whether it seems likely that the defendant would meet the elements of the recommended charge) to file the charge recommended by law enforcement, charge a lower or higher level offense, or to dismiss charges entirely.¹⁶⁶

The investigation and prosecutions of the perpetrators accused of the attempted kidnapping of Michigan’s Governor demonstrates the use of discretion.¹⁶⁷ A group of men agreed to kidnap the Governor of Michigan because they believed the shutdowns related to the Covid-19 pandemic violated the U.S.

¹⁶⁴ “Simple” is used here to signify cases where the crime committed is merely the base crime (or predicate charge) of homicide, vehicular manslaughter, or other crimes that may fall within a domestic terrorism statute, but lack the other elements needed to charge an act of domestic terrorism.

¹⁶⁵ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: ADJUDICATION*, 973-78 (West Academic, 11th ed. 2018).

¹⁶⁶ *See id.* at 978.

¹⁶⁷ *See generally* Jones, *supra* note 5; *see discussion supra* Section II.C.

Constitution.¹⁶⁸ In preparation for the kidnapping, the group conducted tactical trainings, practiced making weapons such as bombs, and surveilled the Governor's home.¹⁶⁹ Prosecutors and investigators used discretion to determine the appropriate charges and investigative strategies for the case.¹⁷⁰ Because Michigan has a state domestic terrorism statute, the FBI was able to align its investigation with the state domestic terrorism statute, which enabled the use of informants, surveillance, and other, more invasive investigative strategies.¹⁷¹

The actions of the group perfectly fit the FBI's definition of domestic terrorism. Consequently, prosecutors and investigators could have federally charged these men with acts of terrorism if a federal domestic terrorism statute existed (regardless of the state where their actions occurred).¹⁷² Federal prosecutors and law enforcement could have exercised the same discretion applied in this case with respect to the state domestic terrorism law in determining how to investigate and charge these perpetrators under a federal domestic terrorism statute.

To counter the over-criminalization argument, proponents of a federal domestic terrorism statute should emphasize that prosecutorial discretion will be used when determining whether the proposed arrests and charges are

¹⁶⁸ Jones, *supra* note 5.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.*; see also *Principles of Federal Prosecution*, DEP'T OF JUSTICE, § 9-27.110, cmt. (Updated Feb. 2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> ("Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by courts.").

¹⁷¹ See Jones, *supra* note 5.

¹⁷² Unfortunately, the state domestic terrorism charges against these men were dismissed because the District Court Judge found that their actions did not meet the state's definition of domestic terrorism, which requires terroristic threats to "be done with the intent to create mayhem." See Ainsworth, *supra* note 92. If a federal domestic terrorism law contained a TIBI element, prosecutors could have used their discretion to determine whether this group's actions satisfied that element—which seems likely on the facts.

appropriate.¹⁷³ As the Department of Justice states with respect to hate crimes, “context matters greatly” in determining whether hate crime statutes should be applied, and prosecutors should look for “specificity,” “intent,” and “a certain sense of imminence” when making charging decisions.¹⁷⁴ Similar to the Department of Justice’s use of discretion and context to evaluate whether hate crime statutes should apply to specific conduct, discretion and situational context should be used to determine whether a defendant meets the elements of the federal domestic terrorism statute, and specifically the necessary TIBI requirement. Exercising prosecutorial discretion, to charge defendants that satisfy the requisite TIBI, can avoid over-criminalization of a domestic terrorism charge. If the defendant does not have the requisite TIBI, a prosecutor should recommend that the charge of domestic terrorism (or other terrorism charge) be either dropped or lowered to charge only the predicate crime (such as homicide, arson, vehicular manslaughter, etc.).

2. Avoiding First Amendment Challenges: Adding a TIBI Requirement

The First Amendment is often cited as a reason against enacting a federal domestic terrorism statute.¹⁷⁵ Critics fear that a federal domestic terrorism statute would violate the First Amendment¹⁷⁶ because threats of terroristic actions, terror preparations or demonstrations related to domestic terrorism, and other behaviors that may be viewed as an exercise of free speech or expression would be criminalized if considered “radical” or based on domestic ideologies. Though concerns of First Amendment infringement should be given great weight, we can look to Supreme Court precedent to address this concern.

¹⁷³ See generally SALTZBURG & CAPRA, *supra* note 165, at 978.

¹⁷⁴ See Tucker, *supra* note 149.

¹⁷⁵ See generally Levy, *supra* note 7; MacFarquhar, *supra* note 10; see also Bergengruen & Hennigan, *supra* note 1 (“[T]he American Civil Liberties Union and more than 150 groups warned a domestic-counterterrorism law could undermine Americans’s First Amendment rights and be used to target people of color and other marginalized communities.”).

¹⁷⁶ See generally Levy, *supra* note 7; MacFarquhar, *supra* note 10.

The Supreme Court has consistently held that intent matters in determining whether speech is protected under the First Amendment.¹⁷⁷ In *Virginia v. Black*, the Supreme Court held that speech is not protected if the intended result is to make others fear death or bodily harm.¹⁷⁸ For example, the threats made on social media by Treisman regarding his plot to murder then-presidential candidate Biden,¹⁷⁹ and the threats shouted by Bowers during his attack on worshipers at the Pittsburgh synagogue,¹⁸⁰ would not be protected regardless of a federal domestic terrorism statute because the intended result of these statements was to intimidate the victims through threats of impending death or bodily harm.¹⁸¹

In *Elonis v. United States*, the Supreme Court stated that “a defendant must be ‘blameworthy in mind’ before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*.”¹⁸² To augment current definitions of domestic terrorism that encompass a broad range of crimes and actions¹⁸³ motivated by domestic ideologies, a statute should include a TIBI element. A TIBI element avoids criminalizing otherwise lawful behavior, such as the lawful exercise of First Amendment rights, and it avoids charging someone as a terrorist who only intended to commit a predicate crime (*i.e.*, homicide) but not a terroristic action.¹⁸⁴

¹⁷⁷ See generally Leslie Kendrick, *Free Speech and Guilty Minds*, 144 COLUM. L. REV. 1255, 1257 (2014).

¹⁷⁸ *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

¹⁷⁹ See Wamsley, *supra* note 5.

¹⁸⁰ See Robertson et al., *supra* note 5.

¹⁸¹ See generally *Black*, 538 U.S. at 359-60; see also Bergengruen & Hennigan, *supra* note 1 (quoting the FBI Agents Association: “Making domestic terrorism a federal crime would not result in the targeting of specific ideas or groups, rather it would target acts of violence that have no place in the political discourse secured by our Constitution and Bill of Rights.”).

¹⁸² *Elonis v. United States*, 575 U.S. 723, 734 (2015).

¹⁸³ See generally 18 U.S.C. § 2331.

¹⁸⁴ See generally *How the USA Patriot Act Redefines “Domestic Terrorism,”* ACLU.ORG, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> (last visited May 28, 2022).

D. Necessary Components of a Domestic Terrorism Statute

A TIBI is a necessary element for a domestic terrorism statute. As demonstrated throughout this Comment, many activities already deemed “criminal activities” can also serve as a predicate crime to a terroristic action.¹⁸⁵ The TIBI element found impliedly in the federal statutory international terrorism definition demonstrates the necessity to include a TIBI element in a federal domestic terrorism statute.¹⁸⁶

Additionally, a new domestic terrorism statute should align or read similarly to the federal statutory and internal FBI definitions of domestic terrorism. The internal FBI definition of international terrorism reads similarly to the federal international terrorism statute.¹⁸⁷ Thus, it seems practical that a new domestic terrorism statute and such definitions would align as well, with the addition of a TIBI requirement. In reflecting upon the statutory and internal FBI definitions, the language of a new statute should also incorporate the “domestic terrorist conduct” used in the Patriot Act.¹⁸⁸ The Patriot Act only allows domestic terrorism charges for conduct that is already criminal in nature, which safeguards the public against an overreaching government.¹⁸⁹

Lastly, it may also be useful to add crimes intended to cause mass casualties (*e.g.*, mass vehicular manslaughter and mass shootings) and property damage to the list of conduct categorized as “crimes of terror” in Chapter 113B. As the conduct of domestic terrorists evolve, the U.S. criminal code must adapt. The current list of “crimes of terror” is better aligned to the “traditionally” understood international terrorism style attacks (use of bombs, aircrafts, etc.), and those are not the types of attacks that are prevalent in the United States today.

¹⁸⁵ See generally *id.*

¹⁸⁶ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

¹⁸⁷ See generally 18 U.S.C. § 2331; *FBI Definitions*, *supra* note 18.

¹⁸⁸ See generally DEP'T OF JUSTICE, *supra* note 151.

¹⁸⁹ See generally *id.*; see also discussion *supra* Section III.B.2.

CONCLUSION

To strengthen investigations and prosecutions of domestic terrorism cases in the United States, Congress must enact a federal domestic terrorism statute with a TIBI element. This would strengthen both precautionary and reactive investigations as well as prosecutions of domestic terrorists. Additionally, the public would better understand the gravity of this country's domestic terrorism landscape, and the conduct that qualifies as domestic terrorism.¹⁹⁰ A statute, as discussed above, should mirror the statutory and internal FBI definitions of domestic and international terrorism, and should be reflective of the Patriot Act's definition of "domestic terrorism conduct," but should also include a TIBI element, similar to the TIBI element found in the internal FBI's domestic terrorism definition.¹⁹¹ Additionally, "crimes of terror" such as mass casualties, mass shootings, and destruction of property should be added to Chapter 113B. Congressional action is the best approach to improve federal counterterrorism strategies and uphold the United States's counterterrorism mission—to remain "Left of Boom."

¹⁹⁰ See Litman, *supra* note 11.

¹⁹¹ See discussion *supra* Section III.D.

