

THE WAR WITHIN:
IS THE ANTI-RIOT ACT THE ANSWER TO THE GROWING THREAT
OF DOMESTIC TERRORISM IN THE UNITED STATES?

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INTRODUCTION

Politically or socially motivated acts of violence and intimidation represent significant security threats to a government and its citizens. Since the terrorist attacks on September 11, 2001, the biggest terrorist threat to the United States is domestic terrorism conducted by individuals or groups operating under right-wing and white supremacist ideologies.¹ As such acts of violence increase, many Americans call for adequate preventative measures and full prosecution of offenders.² Specifically, federal prosecutors have sought effective methods to prosecute domestic terrorists, primarily to no avail.³ Instead, federal prosecutors use other less desirable and less effective state and federal alternatives.⁴ These federal statutes largely fail to address the evolving nature of domestic terrorism and fail to create a uniform framework for prosecution under federal law.

To fix this problem, many legal scholars and prosecutors have continued to call for the passage of a single comprehensive domestic terrorism statute.⁵ With thousands of supporters of former President Trump converging on Washington, D.C., and storming the United States Capitol on January 6, 2021,⁶ President-elect, now President, Biden and other federal lawmakers are engaging in discussions for

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¹ See Diane Webber, *Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?*, 34 AM. U. INT'L L. REV. 205, 232 (2018).

² *Id.* at 216-17.

³ *Id.*

⁴ Michael Molstad, Note, *Our Inner Demons: Prosecuting Domestic Terrorism*, 61 B.C. L. REV. 339, 361 (2020).

⁵ E.g., Nichole Anderson, Article, *Exploring the Viability of a Federal Domestic Terrorism Statute*, 55 GONZ. L. REV. 475, 476 (2020).

⁶ Marie Fazio, *Notable Arrests After the Riot at the Capitol*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2021/01/10/us/politics/capitol-arrests.html>.

passage of a federal domestic terrorism statute.⁷ However, because of the extensive gaps in the current federal statutory framework, many legal scholars disagree on the best approach to create such a law. Thus, the question remains: is a uniform federal domestic terrorism statute necessary, and if so, is it even possible?

This Comment will propose using the Anti-Riot Act as a foundation for creating a uniform federal domestic terrorism statute in combination with other current statutory requirements discussed below to adequately address the current threat of domestic terrorism while respecting constitutional rights. Part I will discuss the development of domestic terrorism in the United States. Part II will introduce the current statutes relevant to domestic terrorism. Part III will discuss the gaps and inconsistencies in the current statutory framework. Part IV will detail the provisions of the Anti-Riot Act, including the Fourth Circuit's recent opinion in *United States v. Miselis*. Finally, the analysis will discuss potential proposals for and against a single federal domestic terrorism statute and how the Anti-Riot Act may be squared with other statutory provisions to provide a successful framework for a federal domestic terrorism law.

BACKGROUND

I. DEVELOPMENT OF DOMESTIC TERRORISM IN THE UNITED STATES

Following the terrorist attacks on September 11, 2001, there has been a substantial focus on international terrorist threats, yet, domestic terrorism remains a significant and growing threat in the United States.⁸ In recent years, "individuals adhering to racially motivated violent extremism ideology have been responsible for the most lethal incidents among domestic terrorists."⁹ It is difficult, however, to determine with definitiveness the number of domestic terror attacks in the

⁷ Zolan Kanno-Youngs & Nicole Hong, *Biden Steps Up Federal Efforts to Combat Domestic Extremism*, N.Y. TIMES (April 4, 2021), <https://www.nytimes.com/2021/04/04/us/politics/domestic-terrorism-biden.html>.

⁸ Matthew James Enzweiler, *Swatting Political Discourse: A Domestic Terrorism Threat*, 90 NOTRE DAME L. REV. 2001, 2012-13 (2015).

⁹ Peter Bergen, David Sterman, & Melissa Slyk-Virk, *Terrorism in America 18 Years After 9/11*, NEW AM. (Sept. 18, 2019), <https://www.newamerica.org/international-security/reports/terrorism-america-18-years-after-911/what-is-the-threat-to-the-united-states/>.

United States because there is no official, public list of domestic terrorist organizations published by the government.¹⁰ Instead, private organizations began to document terrorism trends within the United States,¹¹ such as the Center for Strategic and International Studies (CSIS), which published a study tracking the evolution of terrorism in the United States over time.¹² According to this study, there have been 893 terrorist attacks and plots in the United States between 1994 and 2020.¹³ From this data, three categories of domestic terrorism emerge: religious extremism, left-wing extremism, and right-wing extremism.¹⁴

A. *Religious Extremism*

Religious extremism is “violence in support of a faith-based belief system, such as Islam, Judaism, Christianity, and Hinduism, among many others.”¹⁵ Although terrorist attacks perpetrated by religious extremists are responsible for the most significant number of fatalities resulting from terrorism, only fifteen percent of all attacks and plots between 1994 and 2020 were committed by religious terrorist groups.¹⁶ In the eighteen years following the 9/11 attacks, religious extremists have killed 104 people in the United States.¹⁷ However, none of these deadly attacks were linked to training from a foreign terrorist group such as Al-Qaeda or the Islamic State of Iraq and Syria (ISIS).¹⁸ In fact, no foreign terrorist organization has carried out a successful lethal attack in the United States since 9/11.¹⁹ Instead, attacks are lone-wolf attacks inspired by foreign religious extremists.²⁰ All in all,

¹⁰ Molstad, *supra* note 4, at 354.

¹¹ *Id.* at 354-55.

¹² Seth G. Jones, Catrina Doxsee, & Nicholas Harrington, *The Escalating Terrorism Problem in the United States*, CTR. FOR STRATEGIC AND INT’L STUD. (June 17, 2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200612_Jones_DomesticTerrorism_v6.pdf.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Bergen et al., *supra* note 9, at 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (For example, the seventeen-year-old boy—inspired in part by ISIS, with influence from white supremacy and other extremist ideologies—who stabbed another boy at a sleepover in Florida in 2018).

“the United States does not face the same level of threat today from religious extremists” as it did in the early 2000s.²¹ While religious extremist threats have diminished, there has, however, been a rise in deadly violence from left and right-wing extremism.

B. *Left-Wing Extremism*

Left-wing extremism involves “the use or threat of violence by subnational or non-state entities that oppose capitalism, imperialism, and colonialism; pursue environmental or animal rights issues; espouse pro-communist or pro-socialist beliefs; or support a decentralized social and political system such as anarchism.”²² Historically, most left-wing attacks and plots have targeted property associated with animal research, farming, and construction, and have been carried out by groups such as the Animal Liberation Front or the Earth Liberation Front.²³

Between the 1960s and 1980s, left-wing terrorist threats were most prominent in the United States.²⁴ Left-wing extremist groups primarily held “socialist ideals” and viewed themselves as advocates against the evils of capitalism and imperialism.²⁵ Historical examples of prominent left-wing extremist groups include the Black Panther Party, Students for a Democratic Society, the Weather Underground,²⁶ the Earth Liberation Front, and the Animal Liberation Front.²⁷ In the 1990s, eco-terrorism—criminal acts committed to protect the environment—rose to prominence, using violence and intimidation while targeting property and individuals in efforts to enact policies related to environmental protection.²⁸ Such eco-terrorism attacks have included arson at a veterinary lab and raiding an animal research lab to draw attention to animal cruelty.²⁹ In recent years, another group has emerged known as “ANTIFA,” which “refers to a decentralized network of far-left militants that oppose what they

²¹ Jones et al., *supra* note 12.

²² *Id.*

²³ *Id.*

²⁴ Enzweiler, *supra* note 8, at 2020.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Jones et al., *supra* note 12.

²⁸ Enzweiler, *supra* note 8, at 2023.

²⁹ *Animal Liberation Front (ALF)*, ENCYCLOPEDIA.COM (2020), <https://www.encyclopedia.com/politics/legal-and-political-magazines/animal-liberation-front-alf>.

believe are fascists, racist, or otherwise right-wing extremists.”³⁰ From 1994 to 2020, left-wing groups accounted for approximately twenty-five percent of all terrorist attacks and plots, altogether resulting in twenty-two total deaths.³¹ Although there has been a statistical rise in left-wing extremist threats, right-wing extremism remains the United States’ deadliest terrorist threat today.³²

C. *Right-Wing Extremism*

Right-wing extremism refers to the use or threat of violence by groups or entities “whose goals may include racial or ethnic supremacy; opposition to government authority; anger at women . . . ; and outrage against certain policies, such as abortion.”³³ Over time, three types of right-wing terrorists have emerged: white supremacists, antigovernment extremists, and “incels.”³⁴ Throughout the 1990s, most right-wing extremist attacks targeted abortion clinics.³⁵ Since 2014, however, most attacks have targeted religious institutions and involved specific individuals based on their race, religion, or ethnicity.³⁶

Between 1994 and 2020, right-wing extremists accounted for approximately fifty-seven percent of all domestic terrorist attacks and plots.³⁷ In fact, “[r]ight-wing attacks and plots were predominant from 1994 to 1999 and accounted for more than half of all incidents in 2008 as well as every year since 2011, with the exception of 2013.”³⁸ Additionally, right-wing attacks and plots have grown substantially in number every year since 2014.³⁹ For instance, nearly two-thirds of attacks and plots in the United States in 2019, and over ninety percent of attacks and plots from January to May 2020, were committed by right-wing extremists.⁴⁰ Right-wing terrorism is also the deadliest group. Since the 1990s, not including September 11, 2001, right-wing extrem-

³⁰ Jones et al., *supra* note 12.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Jones et al., *supra* note 12.

³⁷ *Id.*

³⁸ Jones et al., *supra* note 12.

³⁹ *Id.*

⁴⁰ *Id.*

ists have accounted for approximately 335 total deaths.⁴¹ In the twenty-one years of CSIS record-keeping, right-wing terrorists were responsible for a majority of all annual fatalities in fourteen of those years.⁴² In eight of the twenty-one years, right-wing perpetrators caused every fatality resulting from domestic terrorism.⁴³

In the modern era of right-wing domestic terrorism, a dangerous trend emerged: “lone-wolf terrorism.”⁴⁴ Former President Obama stated that the lone-wolf terrorist poses a more significant threat to the country than a large-scale attack by any group.⁴⁵ Although lacking a precise definition, most definitions include the notion that a lone-wolf terrorist is one that “acts entirely on his or her own to further an ideology, even if that ideology is held by a larger group.”⁴⁶ In other words, a lone-wolf terrorist involves an individual motivated by specific ideologies and political violence “whose *modi operandi* are conceived and directed by the individual without any direct outside command or hierarchy.”⁴⁷ What distinguishes lone-wolf terrorism from other forms of terrorism is that lone-wolves operate without organizational support, and are not influenced by organizational dynamics—they act independently under the influence of the organization’s extremist ideologies.⁴⁸ For instance, many lone-wolf extremists have been Americans with prominent connections to white supremacist violence.⁴⁹ Their radicalization stems from the growth of the internet and social media platforms which allow easy dissemination of violent messages.⁵⁰

Individuals pledging these radical ideologies can quickly recruit, organize, and spread their ideas to larger audiences using online platforms, creating decentralized networks and “leaderless resistance” that is difficult to track and prevent.⁵¹ Such platforms that right-wing

⁴¹ See *id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Molstad, *supra* note 4, at 358.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ramón Spaaij, *The Enigma of Lone Wolf Terrorism: An Assessment*, 33 *STUD. IN CONFLICT & TERRORISM* 854, 856 (Aug. 2010).

⁴⁸ See *id.* at 866.

⁴⁹ Molstad, *supra* note 4, at 358-59.

⁵⁰ See *id.* at 359.

⁵¹ Jones et al., *supra* note 12.

extremists use include Facebook, Twitter, Reddit, and Discord.⁵² Attackers also use these platforms to inspire other attackers.⁵³ Similar attacks have inspired at least one-third of white extremist killers since 2011.⁵⁴ For instance, the Tree of Life Synagogue white supremacist attacker wrote a related online manifesto referencing two other synagogue attacks.⁵⁵ The attacker's manifesto did not indicate an organized far-right terrorist threat *per se*, but it did reveal an interconnected network of far-right movements, presenting a growing threat within the United States.⁵⁶

II. DEVELOPMENT OF CURRENT FEDERAL AND STATE TERRORISM STATUTES

There is no uniform policy addressing domestic terrorism or allowing for prosecution of domestic terrorists in the United States.⁵⁷ Instead, there is a collection of approximately fifty-two separate federal crimes of terrorism that apply in domestic contexts.⁵⁸ This Section will briefly discuss the most prominent federal domestic terrorism statutes that have developed over time.

A. *The USA Patriot Act and §§ 2331-2332*

Following the terrorist attacks on September 11, 2001, terrorism definitions and statutes have undergone significant changes. One major change was the introduction of the USA Patriot Act.⁵⁹ The Patriot Act did not create a new definition of domestic terrorism, but it expanded existing federal criminal statutes defining acts of international terrorism.⁶⁰ Previous statutes included only assassination and kidnapping and incorporated only actions occurring outside of United

⁵² *Id.*

⁵³ See Bergen et al., *supra* note 9, at 25-27.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.*

⁵⁶ See *id.* at 26-27.

⁵⁷ Molstad, *supra* note 4, at 361.

⁵⁸ Anderson, *supra* note 5, at 480.

⁵⁹ 18 U.S.C. § 2331(5) (2021); Amy C. Collins, *The Need for a Specific Law Against Domestic Terrorism*, GEO. WASH. PROGRAM ON EXTREMISM, 7 (Sept. 2020).

⁶⁰ See 18 U.S.C. § 2331(1)–(4); Katie Dilts, Comment, *One of These is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711, 718 (2019).

States jurisdiction.⁶¹ The Patriot Act expansion included two primary changes: (1) incorporating acts that were intended to affect the government through mass destruction, and (2) specifying that the acts must occur within the territorial jurisdiction of the United States.⁶² Thus, under the Patriot Act, domestic terrorism occurs when a person (1) conducts an illegal act that is (2) “dangerous to human life,” (3) within the territorial jurisdiction of the U.S., and (4) intended to “intimidate or coerce a civilian population,” “influence the policy of a government by intimidation or coercion,” or “affect the conduct of a government by mass destruction, assassination, or kidnapping.”⁶³

Next, 18 U.S.C. §§ 2332, 2332a, and 2332b create criminal penalties for such offenses.⁶⁴ These penalties are divisible into three categories.⁶⁵ The first category criminalizes offenses committed using specific tactics commonly associated with terrorist activity, such as taking hostages or hijacking airplanes.⁶⁶ This first category also addresses offenses involving explosives, chemical weapons, biological weapons, nuclear weapons, or other weapons of mass destruction.⁶⁷ It is important to note, however, that this category does not include use of firearms.⁶⁸ The second category focuses specifically on the “violent targeting of specific places and people of federal interest, such as federal officials, federal facilities, and mass transit, utility, or communication systems.”⁶⁹ The third category deals with suspects with an international connection, such as one who provides material support to foreign terrorist organizations or otherwise engages in conduct that transcends national boundaries.⁷⁰ However, the scope of these statutes is limited to serving as a reference for the Attorney General’s investigative power and as a basis for sentencing enhancements if sought in prosecution.⁷¹ Thus, because these statutes operate only to create

⁶¹ *Id.*

⁶² *Id.*

⁶³ Drew Fennell, *The USA Patriot Act: Can We Be Both Safe and Free?*, 10 DEL. LAW. 2 (2003); *see also* 18 U.S.C.A. § 2331(5).

⁶⁴ 18 U.S.C. §§ 2332 (2021), 2332a (2021), 2332b (2021).

⁶⁵ Anderson, *supra* note 5, at 481.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 488.

⁶⁹ *Id.* at 481.

⁷⁰ *Id.* at 481-82.

⁷¹ Anderson, *supra* note 5, at 482; *see also* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

criminal penalties for offenses under the Patriot Act, they do not establish stand-alone crimes.⁷² Other sections of the federal criminal code likewise create criminal penalties under the definitional framework of the Patriot Act. Under 18 U.S.C. § 2332b(a)(1), offenses such as murder, serious assaults, and property damage are placed under the umbrella of terrorism when they occur within the United States, but only if the conduct also transcends national boundaries.⁷³ Although prosecutors primarily use this section to target international terrorism, it also applies to domestic terrorism if it meets the jurisdictional requirements.⁷⁴ Similarly, § 2339(a) includes “harboring or concealing” any person known, or reasonably believed, to have committed or is about to commit the offenses specified above.⁷⁵ Lastly, § 2339(a) criminalizes providing “material support” to terrorists when that support “facilitates the commission of any one of [the] . . . enacted terrorism-related offenses.”⁷⁶

In sum, this statutory framework presents notable shortfalls. Despite a comprehensive framework of over fifty-seven specified crimes, no criminal sanction exists for domestic terrorism aside from using or threatening to use a weapon of mass destruction.⁷⁷ Throughout the language of this statutory scheme, it only mentions conduct occurring *outside* the United States.⁷⁸ Therefore, the Patriot Act⁷⁹ represents only a definitional provision without attaching any criminal sanctions. However, the Patriot Act’s lack of criminal sanctions does not mean that attackers escape criminal prosecution. Instead, sanctions fall to prosecution under state statutes or other federal charges.⁸⁰ Nonetheless, most of these attackers escape the “terrorist” label, which presents important ramifications in sentencing and future investigatory procedures.⁸¹

⁷² *Id.*

⁷³ Anderson, *supra* note 5, at 481-82.

⁷⁴ *Id.* at 477-78.

⁷⁵ See 18 U.S.C. § 2339A(a) (2021).

⁷⁶ Anderson, *supra* note 5, at 483; see also 18 U.S.C.A. § 2339A.

⁷⁷ See 18 U.S.C. § 2332A(a).

⁷⁸ See generally 18 U.S.C. § 2332(a) (emphasis added).

⁷⁹ See 18 U.S.C. § 2331(5).

⁸⁰ See Anderson, *supra* note 5, at 486.

⁸¹ *Id.*

B. *Foreign Intelligence Survey Act (FISA)*

The Foreign Intelligence Surveillance Act (FISA), passed in 1978, was the first federal statute to define terrorism in the United States.⁸² Among other things, FISA empowers the President to authorize warrantless wiretapping to acquire foreign intelligence information.⁸³ However, Congress's surveillance measures were expressly limited to foreign powers and their agents to avoid Fourth Amendment issues that would arise if United States citizens were the target of government surveillance.⁸⁴ Even so, FISA did not establish international terrorism as an independent federal crime.⁸⁵ Instead, it required that the act "occur totally outside the United States, or transcend national boundaries," excluding any possibility of covering domestic terrorism.⁸⁶

C. *State Statutes*

State statutes are commonly used as gap fillers to prosecute individuals alleged to have committed acts of domestic terrorism because no federal domestic terrorism statute exists.⁸⁷ Many state statutes adopt language similar to that of § 2331(5), meaning acts must be intended to intimidate or coerce a civilian population or influence a government's policy.⁸⁸ As of 2021, thirty-four states and the District of Columbia have laws in place that make certain acts of terrorism illegal.⁸⁹ Many state statutes carry harsh punishments for terrorism convictions, including life sentences or capital punishment.⁹⁰ Despite having such laws at their disposal, states rarely pursue terrorism prosecutions.⁹¹ Instead, the common practice is to proceed under conven-

⁸² Dilts, *supra* note 60, at 715; see 50 U.S.C. § 1801 et seq. (2021).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Collins, *supra* note 59, at 9.

⁸⁸ Collins, *supra* note 59, at 9; see also IDAHO CODE ANN. § 18-8102(5) (West 2021); D.C. CODE ANN. § 22-3152(8) (West 2021).

⁸⁹ Anderson, *supra* note 5, at 476-505; Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, n. 26 (2020); see generally Margot Williams & Trevor Aaronson, *How Individual States Have Criminalized Terrorism*, INTERCEPT (Mar. 23, 2019), <https://theintercept.com/2019/03/23/state-domestic-terrorism-laws/>.

⁹⁰ Anderson, *supra* note 5, 478-80.

⁹¹ *Id.* at 479.

tional state criminal charges such as murder, attempted murder, conspiracy, destruction of property, assault, or battery.⁹²

D. *Other Federal Charges*

The lack of a federal domestic terrorism statute has also forced federal prosecutors to rely on other federal charges or sentencing enhancements when prosecuting individuals committing domestic terrorism.⁹³ Such federal charges primarily include hate crimes and firearm-related charges.⁹⁴ While federal hate crimes⁹⁵ and domestic terrorism often involve acts that overlap, hate crimes “generally involve acts of personal malice directed at individuals” that miss the broader political intentions of domestic terrorism in attempting to coerce or intimidate a civilian population or government.⁹⁶ There is also considerable disagreement among scholars over whether hate crimes should be considered terrorism, and over the application of hate crime statutes to acts perceived to be domestic terrorism.⁹⁷ Similarly, firearms charges such as those found in 18 U.S.C. § 924(c)(1) are commonly used to handle domestic terrorism.⁹⁸ 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.⁹⁹

Nonetheless, although there are other legitimate avenues to address domestic terrorist threats and attacks to some degree, such avenues fail to fully address the nature of domestic terrorism, leaving considerable gaps and inconsistencies in the current statutory framework that a uniform federal statute could remedy.

III. GAPS AND INCONSISTENCIES IN THE CURRENT STATUTORY FRAMEWORK

There are substantial gaps in current law that a federal domestic terrorism statute could bridge. Despite the numerous laws aimed at

⁹² *Id.* at 478.

⁹³ Collins, *supra* note 59, at 10; *see also* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

⁹⁴ Collins, *supra* note 59, at 10.

⁹⁵ *See* 18 U.S.C. §§ 247, *et seq.* (2021).

⁹⁶ Collins, *supra* note 59, at 11.

⁹⁷ *See generally* Laguardia, *supra* note 89.

⁹⁸ Collins, *supra* note 59, at 11.

⁹⁹ *Id.* at n. 43.

addressing terrorism in the United States, some common terrorist acts fit within one statutory framework, but not others.¹⁰⁰ Similarly, because an official federal domestic terrorism statute does not exist, labeling a crime as “domestic terrorism,” or a group as “domestic terrorists,” is widely unpredictable.¹⁰¹ The current statutory framework also treats international terrorism much harsher than domestic terrorism despite clear statistics indicating a rising concern of domestic terrorist threats over international ones.¹⁰² Under current law, only the following actions meet the definition of terrorism: the use of explosives, attempts to recruit individuals to carry out acts on behalf of foreign terrorist organizations, and “acting in accordance with a doctrine of self-radicalization promoted by an extremist group.”¹⁰³ Notably absent is the use of firearms, vehicles, or other common methods of attack. Likewise, the differing treatment of international versus domestic terrorism because of differences in group identity and ideology present considerable gaps within the current statutory framework. With careful textual considerations and attention to potential drawbacks, a uniform federal domestic terrorism statute could serve to fill these gaps and successfully address domestic terrorism.

A. *Firearms and Vehicles Do Not Constitute Weapons of Mass Destruction*

The current definitional framework for federal domestic terrorism includes many offenses, but these offenses do not fully cover the tactics domestic terrorists currently employ.¹⁰⁴ Even if a defendant commits a violent act with the intent to intimidate or coerce a civilian population or the government, not all federal crimes constitute federal criminal terrorist activity if specific methods or weapons are not used.¹⁰⁵ When a particular method or weapon listed in current federal

¹⁰⁰ Molstad, *supra* note 4, at 369-70.

¹⁰¹ Anderson, *supra* note 5, at 486.

¹⁰² Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1343 (2019).

¹⁰³ 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, 397 (2018); see also 18 U.S.C.A. § 2332b(g)(5)(B).

¹⁰⁴ John Lewis, *Rethinking Domestic Terrorism Law After Boogaloo Movement Attacks*, LAWFARE (July 27, 2020), <https://www.lawfareblog.com/rethinking-domestic-terrorism-law-after-boogaloo-movement-attacks>.

¹⁰⁵ See Carpenter, *supra* note 103, at 397-400.

statutes is used, specifically weapons of mass destruction, the Federal Bureau of Investigation (FBI) can investigate the activity to determine whether ties exist to adverse foreign powers or extremist underpinnings.¹⁰⁶ When these methods or weapons are not used in attacks or plots, these investigative powers are not triggered, and prosecutors must turn elsewhere.¹⁰⁷

This difference in investigative power based on what method or weapon is employed presents an important gap related to firearms and other methods of terrorism not included in the definitional framework for federal domestic terrorism. When a violent act is intended to intimidate a civilian population or influence government policy, and has an international connection, the perpetrator will face federal terrorism prosecution regardless of the method or weapon used.¹⁰⁸ Conversely, even if an actor acts with the same intent, but lacks an international connection, a prosecutor can only charge an act as terrorism at the state level, unless the actor used a weapon of mass destruction.¹⁰⁹ For instance, three men in an anti-muslim and anti-immigrant extremist group were apprehended on charges of conspiring to use a weapon of mass destruction against a Muslim community in Kansas.¹¹⁰ This conspiracy only triggered federal investigatory mechanisms, and only allowed for federal prosecution, merely because it involved a weapon of mass destruction.¹¹¹ Had these defendants planned to carry out the attack using different methods, such as using firearms or a vehicle, it would not have been considered a federal crime of terrorism, despite their intent to intimidate or coerce a civilian population.¹¹² This disparity in treatment exists because federal domestic terrorism definitions do not apply to offenses committed using firearms as they do not fall under a “weapons of mass destruction” definition.¹¹³

¹⁰⁶ See *id.* at 401.

¹⁰⁷ See *id.* at 406-07.

¹⁰⁸ Lisa Daniels, *Prosecuting Terrorism in State Court*, *LAWFARE* (Oct. 26, 2016), <https://www.lawfareblog.com/prosecuting-terrorism-state-court>.

¹⁰⁹ *Id.*

¹¹⁰ Carpenter, *supra* note 103, at 398.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Anderson, *supra* note 5, at 487-88.

The importance of this gap can be shown with the increase in protests and political riots in recent years.¹¹⁴ From January 2020 to August 2020, sixty-seven percent of attacks and plots in the United States were committed by violent right-wing extremists.¹¹⁵ Within this, fifty percent of attacks and plots targeted demonstrators and protestors, including white supremacist attacks in opposition to the Black Lives Matter movement or attacks otherwise supporting police or anti-abortion movements.¹¹⁶ Other targets included government, military, police, private individuals, religious institutions, and journalists.¹¹⁷ Similarly, twenty-five percent of these attacks and plots included explosives and incendiaries, twenty-four percent included firearms, twenty-seven percent included vehicles, and twenty-four percent included melee or other attacks.¹¹⁸ Under the current statutory framework, only twenty-five percent of attacks and plots—those carried out with explosives and incendiaries—could potentially face federal domestic terrorism prosecution if the weapons meet the definition for weapons of mass destruction.¹¹⁹ That means seventy-five percent of violent right-wing attacks in 2020 intended to intimidate a civilian population or coerce government policy cannot be federally prosecuted as domestic terrorism.¹²⁰

The statutory framework also ignores the spike in vehicles as a method of violent attack, which accounts for twenty-seven percent of attacks in 2020. From 2015 to 2019, a vehicle was used in only one violent right-wing extremist attack.¹²¹ In contrast, from January to August 2020, eleven different right-wing extremist attacks involved driving a vehicle into large crowds of people.¹²² As a Department of Homeland Security assessment concluded, “Attacks of this nature require minimal capability, but can have a devastating impact in

¹¹⁴ Seth G. Jones et al., *The War Comes Home: The Evolution of Domestic Terrorism in the United States*, CTR. FOR STRATEGIC AND INT’L STUD. (Oct. 22, 2020), <https://www.csis.org/analysis/war-comes-home-evolution-domestic-terrorism-united-states>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See 18 U.S.C. § 921 (2019).

¹²⁰ See Jones et al., *supra* note 114.

¹²¹ *Id.*

¹²² *Id.*

crowded places”¹²³ Yet, such attacks escape the current statutory framework for federal domestic terrorism prosecution.¹²⁴ With growing civil unrest, political polarization, economic strife, and other challenges following Covid-19 that motivated violent attacks across the United States, the gaps in the current statutory frameworks are cause for great concern moving forward.¹²⁵ Such issues are likely to persist for the foreseeable future.¹²⁶ A federal domestic terrorism statute must address the full extent of the threat to trigger adequate redress and preventative measures.

B. *Membership in Domestic Hate Groups Does Not Trigger Federal Prosecution or Investigatory Procedures*

Moreover, regardless of the attacker’s method, an individual with a history of membership or participation in domestic hate groups is not eligible to be charged under current federal domestic terrorism law even when the killing was grounded in violent extremist views.¹²⁷ For instance, Curtis Wayne Allen, Patrick Eugene Stein, and Gavin Wayne Wright all belonged to an organization with known anti-muslim and anti-immigrant extremist beliefs and conspired to use a bomb on a Muslim community in Kansas.¹²⁸ This conspiracy constituted a federal crime of terrorism under the current statutory framework, not because of their associations with violent extremists, but because they conspired to use a bomb or other weapon of mass destruction.¹²⁹ Similarly, when Frazier Glenn Cross, Jr., a professed white supremacist, shot and killed three people at a Jewish community center and a Jewish retirement home because of his antisemitic views, he could not be charged with federal domestic terrorism.¹³⁰ Despite Cross’s intent to intimidate or coerce a civilian population, his killings did not constitute domestic terrorism because he used a gun rather than a bomb or

¹²³ *Id.* (quoting *Vehicle Ramming: Security Awareness for Soft Targets and Crowded Places*,” U.S. DEPARTMENT OF HOMELAND SECURITY, <https://www.cisa.gov/sites/default/files/publications/Vehicle%20Ramming%20-%20Security%20Awareness%20for%20ST-CP.PDF>).

¹²⁴ *Id.*

¹²⁵ Jones et al., *supra* note 114.

¹²⁶ *Id.*

¹²⁷ See Carpenter, *supra* note 103, at 400-02.

¹²⁸ *Id.* at 398.

¹²⁹ *Id.*

¹³⁰ *Id.* at 400-01.

other incendiary device.¹³¹ In contrast, when Sayfullo Saipov drove a vehicle down a crowded bike path killing eight people, his conduct could be prosecuted as a federal crime of domestic terrorism because he had ties to, and was inspired by, Islamic extremist groups.¹³² Despite similar intent, the difference in prosecutorial power between the acts of Cross and Saipov lies solely with Saipov's ties to a "foreign" Islamic extremist group.¹³³ Had Saipov lacked this "international link," his actions would not constitute domestic terrorism under the current statutory framework for the same reason Cross's did not.¹³⁴

The difference lies in the connection between the defendant's ideology with a foreign element. Had Saipov been motivated by neo-Nazi extremist ideology rather than an Islamic extremist ideology, his conduct would have fallen *outside* the scope of current federal terrorism law.¹³⁵ Prosecutors would have had to prosecute him under a different law.¹³⁶ The difference also lies in the method of attack. Had Cross used an explosive device rather than a firearm, his conduct would undoubtedly fall under the current domestic terrorism definition.¹³⁷ Likewise, if the three defendants in Kansas used firearms or vehicles to attack the Muslim community, they would not face domestic terrorism charges under the current definition.¹³⁸ Some may argue that such designation or distinction is inconsequential because the defendants still received heavy sentences—Allen, Stein, and Wright all received twenty-five to thirty years in federal prison,¹³⁹ and prosecutors sought the death penalty for Cross and Saipov.¹⁴⁰ Nevertheless, the key importance of a domestic terrorist designation is that such a label triggers important federal and local investigatory mechanisms.¹⁴¹ When individuals are charged within the federal domestic terrorism

¹³¹ *Id.* at 401.

¹³² *Id.* at 399.

¹³³ Carpenter, *supra* note 103, at 399, 401.

¹³⁴ *Id.* at 399.

¹³⁵ *See id.*

¹³⁶ *Id.* at 400-01.

¹³⁷ *Id.*

¹³⁸ *Id.* at 398.

¹³⁹ *Justice in Kansas: Three Men Sentenced in Conspiracy to Bomb Somali Immigrants*, FBI.gov (April 12, 2019), <https://www.fbi.gov/news/stories/three-sentenced-in-plot-to-bomb-somali-immigrants-041219>.

¹⁴⁰ Carpenter, *supra* note 103, at 399-401.

¹⁴¹ *Id.* at 400-01.

definition, the FBI and other government agencies are then able to investigate “any existing ties to hate groups, including the structure of those groups, and the likelihood of further violence by members of those groups.”¹⁴² An overly specific or under-inclusive definition substantially quells the government’s ability to investigate and deter future acts,¹⁴³ and reinforces stereotypes that only certain races or religions commit terrorism.¹⁴⁴ Thus, the definition creates an inaccurate view of the steadily increasing domestic threat.¹⁴⁵ Therefore, creating a new federal domestic terrorist statute that effectively bridges these gaps can ensure that domestic terrorists are adequately prosecuted and investigated when necessary.

C. *Disparate Treatment of International versus Domestic Terrorism*

There is also a large gap in the treatment of international terrorism compared to domestic terrorism. Under current federal statutes, international terrorism receives significantly more attention than domestic terrorism.¹⁴⁶ One consequence of this disparity is that it creates substantial gaps in the treatment of victims of terrorism and prosecution of alleged domestic terrorists.¹⁴⁷ It also fails to trigger essential investigative procedures necessary to prevent future attacks.¹⁴⁸

Currently, the law provides a civil cause of action for victims of international terrorism.¹⁴⁹ In 1992, Congress enacted the Federal Courts Administration Act of 1992, allowing victims, heirs, survivors, or one’s estate, to bring claims for injury sustained “by reason of an act of international terrorism.”¹⁵⁰ Plaintiffs succeeding on such claims recover three times the damages sustained from the injury and the cost of the suit, including attorney’s fees.¹⁵¹ However, for victims of domestic terrorism or their families, no such statute exists to provide a

¹⁴² *Id.* at 400.

¹⁴³ *See id.* at 400-01.

¹⁴⁴ Laguardia, *supra* note 89, at 1076.

¹⁴⁵ *Id.*

¹⁴⁶ Mary McCord, *Filling the Gap in Our Terrorism Statutes*, GEO. WASH. PROGRAM ON EXTREMISM (Aug. 2019), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Filling%20The%20Gap%20in%20Our%20Terrorism%20Statutes.pdf>.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.*

¹⁴⁹ Dilts, *supra* note 60, at 716.

¹⁵⁰ *Id.* at 728 (quoting 18 U.S.C. § 2333 (West 2018)).

¹⁵¹ *Id.*

civil cause of action or other financial remedies.¹⁵² Civil cases seeking redress for allegations of domestic terrorism have been consistently dismissed by courts for failure to state a claim.¹⁵³

Moreover, the law prohibits providing material support to an organization in the international context if the organization has been designated as a Foreign Terrorist Organization (FTO).¹⁵⁴ Acts such as providing funds to the organization or an overt violent act may constitute material support in violation of § 2339B.¹⁵⁵ The FTO's breadth allows persons engaging in nonviolent behavior, or behavior that would not otherwise be criminal, to face federal criminal prosecution when the behavior is associated with an FTO.¹⁵⁶ There is no such parallel statute that exists concerning domestic terrorism.¹⁵⁷ This means federal investigative agencies must react after a crime has been initiated rather than incorporate preventative measures to domestic terrorist threats.¹⁵⁸ Thus, federal agencies only investigate domestic hate groups in the rare instance that an individual meets the current federal definition of domestic terrorism.¹⁵⁹ As a result, this leaves significant gaps in accounting for the rise of domestic terrorism in recent years.¹⁶⁰

Providing material support to domestic violent extremist groups cannot be prosecuted criminally under current law because of First Amendment concerns.¹⁶¹ Statutes criminalizing material support hinge on the ability to designate specific groups or organizations as terrorist groups.¹⁶² Designation of groups or organizations as terrorist groups would threaten freedoms of speech and association guaranteed by the Constitution if used in the domestic context.¹⁶³ Thus, incorporating material support statutes within a federal domestic terrorism statute is unlikely to withstand the constitutional challenges that would follow.¹⁶⁴

¹⁵² *Id.*

¹⁵³ *Id.* at 728.

¹⁵⁴ Laguardia, *supra* note 89, at 1071; 18 U.S.C. § 2339B.

¹⁵⁵ Laguardia, *supra* note 89, at 1071.

¹⁵⁶ *Id.* at 1073-74.

¹⁵⁷ Anderson, *supra* note 5, at 490.

¹⁵⁸ *Id.* at 489.

¹⁵⁹ *Id.* at 490.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Anderson, *supra* note 5, at 490-91.

¹⁶³ *Id.* at 498-501.

¹⁶⁴ *Id.*

Notwithstanding constitutional concerns, however, a new uniform statute can fill the apparent gaps and inconsistencies in the current federal statutory framework. With careful attention to the nature of domestic terrorist threats and language used in a statute, Congress can address the gaps discussed without creating potential civil liberty violations. With the rise in civil unrest and politically charged protests in recent years, federal prosecutors are instead turning to the Anti-Riot Act to substitute for the lack of a single federal statute.¹⁶⁵ Although the Act raises concerns of its own, it provides valuable guidance in structuring a federal domestic terrorism statute. A brief discussion of the Act's background and its status follows.

IV. THE ANTI-RIOT ACT

Congress enacted the Anti-Riot Act in 1968.¹⁶⁶ The Act is different from traditional state riot laws in that it does not criminalize rioting itself.¹⁶⁷ Rather, the Act criminalizes interstate travel or the use of interstate commerce with the intent to do one of four things: (1) incite a riot; (2) organize, promote, encourage, participate in, or carry on a riot; (3) commit any act of violence in furtherance of a riot; or (4) aid or abet any person in inciting, participating in, or carrying on a riot, with an overt act for that purpose.¹⁶⁸ The statute defines "riot" in § 2102(a) as:

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

¹⁶⁵ Tarlton Polk, *Pushing Back Against the Anti-Riot Act*, TARLTON POLK LAW, <https://tarltonpolk.com/anti-riot-act/>.

¹⁶⁶ 18 U.S.C. §§ 2101-2102 (2021).

¹⁶⁷ 18 U.S.C. § 2101; Margot E. Kaminski, Article, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 27 (2012).

¹⁶⁸ *Id.*

injury to the property of any other person or to the person of any other individual.¹⁶⁹

As a result of a recent decision from the United States Court of Appeals for the Fourth Circuit in *United States v. Miselis*,¹⁷⁰ the statute's text faces dramatic change that may curb federal prosecutorial efforts to address modern domestic terrorism.

A. *Background of the Act*

Congress implemented the Anti-Riot Act as a subset of the Civil Rights Act of 1968.¹⁷¹ The passage of the statute followed on the heels of riots in more than 150 cities across 34 states in 1967, stirred by issues of racial injustice and the war in Vietnam.¹⁷² After more social upheaval in over 100 cities following the assassination of Martin Luther King, Jr. in 1968, politicians looked for a response to quell racial conflicts.¹⁷³ A report from President Johnson's commission recommended that federal funds be spent on housing, employment, education, and public welfare for low-income populations to stop the riots.¹⁷⁴ This report received immediate backlash from Republican members of Congress who called for federal criminalization of the rioting rather than allocating funds.¹⁷⁵ Specifically, the Republicans wanted to pass an act that could stop riots before they could even occur by targeting the sources—the organizers, supporters, and those who travel and share information supporting the riots.¹⁷⁶ Eventually, Congress implemented the Anti-Riot Act within the Civil Rights Act of 1968 as a compromise between pro-civil-rights and pro-order politicians.¹⁷⁷

For the most part, the Act has remained largely unused since its creation.¹⁷⁸ Most notably, the Act was used against a famous group of

¹⁶⁹ 18 U.S.C. § 2102(a).

¹⁷⁰ *United States v. Miselis*, 972 F.3d 518, 525-26 (4th Cir. 2020).

¹⁷¹ Polk, *supra* note 165.

¹⁷² *Miselis*, 972 F.3d at 527-28.

¹⁷³ Polk, *supra* note 165; see also Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 912 (1975).

¹⁷⁴ Polk, *supra* note 165.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *How Segregationists Rushed Through the 1968 Rioting Laws DOJ is Using in 2020*, HIST. NEWS NETWORK (Sept. 24, 2020), <https://historynewsnetwork.org/article/177608>.

defendants known as the “Chicago Seven,” who organized anti-war protests and demonstrations at the 1968 Democratic convention.¹⁷⁹ During several successive nights, members of the group defied curfews in city parks that sparked confrontations with local police officers, leading the Nixon administration to pursue charges under the Act.¹⁸⁰ Five of the seven members were eventually convicted for “inciting a riot” under the Act.¹⁸¹ Later, the United States Court of Appeals for the Seventh Circuit reversed their convictions without comment on the merits of the Act itself.¹⁸²

More recently, the Act has returned to the forefront. Following the protests and riots that unfolded this year as a result of the deaths of George Floyd,¹⁸³ Breonna Taylor,¹⁸⁴ and others across the country, Attorney General William Barr claimed that the government would “take all action necessary” to enforce federal law to address what the Trump administration identified as actions of “far-left extremists groups” such as ANTIFA.¹⁸⁵ The federal law he referred to was the Anti-Riot Act, but recent efforts to use the Act in federal prosecutions have faced obstacles.¹⁸⁶

In 2019, a federal judge in the United States District Court for the Central District of California struck down charges against three members of the Rise Above Movement (RAM)—a neo-Nazi group—ruling that the Act was unconstitutional for violating protected free speech.¹⁸⁷ Federal prosecutors also used the Act against members of the Rise Above Movement who participated in and organized the “Unite the Right” rally in Charlottesville, Virginia, in 2017 that led to

¹⁷⁹ John R. Vile, *Chicago Seven Trial*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1043/chicago-seven-trial>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Jamila Michener, *George Floyd's Killing was just the Spark. Here's What Really Made the Protests Explode.*, WASH. POST (June 11, 2020), <https://www.washingtonpost.com/politics/2020/06/11/george-floyds-killing-was-just-spark-heres-what-really-made-protests-explode/>.

¹⁸⁴ *Id.*

¹⁸⁵ Josh Gerstein and Evan Semones, *Barr threatens to bust 'far-left extremist groups in Floyd unrest*, POLITICO (May 30, 2020), <https://www.politico.com/news/2020/05/30/william-barr-george-floyd-protests-290792>.

¹⁸⁶ *Id.*

¹⁸⁷ *United States v. Rundo*, 497 F. Supp. 3d 872, 875 (C.D. Cal. 2019), *appeal docketed*, No. 19-50189 (9th Cir. 2019) (holding the Anti-Riot Act facially overbroad and dismissing indictments against Rise Above Movement (RAM) members who did not travel to Charlottesville, Virginia).

a deadly riot.¹⁸⁸ In August of 2020, the United States Court of Appeals for the Fourth Circuit upheld the defendants' convictions in *United States v. Miselis*, but held that although the Anti-Riot Act in its entirety was not unconstitutional, portions of the Act violate rights to free speech.¹⁸⁹ Therefore, the *Miselis* ruling did not resolve (1) whether the Anti-Riot Act is the answer to the lack of a federal domestic terrorism statute, or (2) whether the Act can be used as guidance for creating a new statute with its potential to violate individuals' First Amendment rights.

B. *United States v. Miselis*

In August 2020, the Fourth Circuit upheld two convictions of members of a white supremacist group involved in the 2017 Unite the Right rally that resulted in Heather Heyer's death.¹⁹⁰ The two defendants were known members of RAM and traveled from California to attend the event.¹⁹¹ While there, the defendants fought with counter-protesters in the twenty-four hours before the riot and during the riots themselves.¹⁹² As a result, federal prosecutors brought charges under the Anti-Riot Act that ultimately led to convictions of both defendants.¹⁹³ The defendants appealed their convictions, claiming the Anti-Riot Act is facially overbroad under the Free Speech Clause of the First Amendment and void for vagueness under the Due Process Clause of the Fifth Amendment.¹⁹⁴

Addressing the challenge under the First Amendment, the Fourth Circuit agreed that the Act violated constitutionally protected speech, but only in some applications.¹⁹⁵ As the court stated:

While the category of speech that lies at the core of the Anti-Riot Act's prohibition, called 'incitement,' has never enjoyed First Amendment Protection, the statute sweeps up a substantial amount of speech

¹⁸⁸ Polk, *supra* note 165.

¹⁸⁹ *Miselis*, 972 F.3d at 525-26.

¹⁹⁰ *Id.* at 526; Brad Kutner, *Fourth Circuit Strikes Down Parts of Anti-Riot Law*, COURT-HOUSE NEWS SERV., (August 24, 2020), <https://www.courthousenews.com/fourth-circuit-strikes-down-parts-of-anti-riot-law/>.

¹⁹¹ Kutner, *supra* note 190.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Miselis*, 972 F.3d at 525.

¹⁹⁵ *Id.* at 525-26.

that remains protected advocacy under the modern incitement test of *Brandenburg v. Ohio*,¹⁹⁶ insofar as it encompasses speech tending to ‘encourage’ or ‘promote’ a riot under 18 U.S.C. § 2101(a)(2), as well as speech ‘urging’ others to riot or ‘involving’ mere advocacy of violence under § 2102(b).¹⁹⁷

However, the Fourth Circuit held that in all other respects, the Anti-Riot Act was in line with the First Amendment because the statute is severable, meaning only those provisions that are overbroad would be invalidated, and the rest would be untouched.¹⁹⁸ This holding also meant that the defendants’ convictions would stand because the factual bases for their convictions fell under the statute’s severable language that was not invalidated.¹⁹⁹

ANALYSIS

I. ALTERNATIVE PROPOSALS FOR STRUCTURING A DOMESTIC TERRORISM STATUTE

Characterizing acts as domestic terrorism creates stiffer sentencing guidelines and triggers federal authorities to investigate the threats properly.²⁰⁰ However, this expansion of power carries serious ramifications that a federal domestic terrorism statute must guard against to keep citizens safe while respecting their constitutional rights.²⁰¹ As the threat of domestic terrorism in the United States has grown, scholars have sought to create a proposal for a federal domestic terrorism statute that adequately addresses these issues.²⁰² Many agree that a new, standalone statute is necessary to overcome the gaps present in the current statutory framework.²⁰³ Others contend that the risks posed by

¹⁹⁶ 395 U.S. 444 (1969).

¹⁹⁷ *Miselis*, 972 F.3d at 526.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Enzweiler, *supra* note 8, at 2025.

²⁰¹ See *id.*

²⁰² See e.g., Dilts, *supra* note 60, at 714; Carpenter, *supra* note 103, at 395; Anderson, *supra* note 5, at 476; Molstad, *supra* note 4, at 344-45; Laguardia, *supra* note 89, at 1064; Sinnar, *supra* note 102, at 1341; Jesse J. Norris, *Why Dylann Roof Is A Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 264 (2017); McCord, *supra* note 146.

²⁰³ See e.g., Dilts, *supra* note 60, at 714; Carpenter, *supra* note 103, at 395; Anderson, *supra* note 5, at 476; Molstad, *supra* note 4, at 344-45; Laguardia, *supra* note 89; Sinnar, *supra* note 102; Norris, *supra* note 202, at 259; McCord, *supra* note 146.

such a new statute outweigh the potential benefits and argue that the current framework should remain to protect against violations of civil liberties.²⁰⁴ This section will consider the proposed solutions as well as the arguments against a single federal domestic statute.

A. *Scholars' Proposed Solutions Supporting a New Domestic Terrorism Statute*

To bridge the gaps between modern methods of domestic terrorism and current federal domestic terrorism statutes, many legal scholars agree that a new federal domestic terrorism statute is necessary.²⁰⁵ A new domestic terrorism statute would provide government agencies greater ability to investigate and monitor domestic terror threats and give federal prosecutors adequate tools to prosecute offenders.²⁰⁶ Scholars disagree, however, over the best approach to combat the rising threat of domestic terrorism while maintaining the civil liberties guaranteed by the Constitution.²⁰⁷

One approach looks to the federal definition of international and domestic terrorism codified in 18 U.S.C. § 2331.²⁰⁸ The definition covers actions posing a risk to human life with the intent to coerce or intimidate a civilian population or influence a government's policy.²⁰⁹ Scholars argue that such a definition "fits with the expert perception that terrorism is public violence intended to advance a certain ideology, whether it be social, religious, or political."²¹⁰ The proposal suggests attaching increased criminal penalties to the definition of domestic terrorism specifically codified in § 2331(5), replicating the structure for international terrorism.²¹¹ In this way, scholars argue it would overcome the lack of sufficient penalties in federal law to

²⁰⁴ See e.g., Anderson, *supra* note 5, at 476-77; Laguardia, *supra* note 89, at 1064-65; Sinnar, *supra* note 102, at 1341; Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUSTICE (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously>.

²⁰⁵ Laguardia, *supra* note 89, at 1063-64.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 18 U.S.C. § 2331 (West).

²⁰⁹ Molstad, *supra* note 4, at 347.

²¹⁰ *Id.* at 380.

²¹¹ Anderson, *supra* note 5, at 503; Robert Chesney, *Should We Create a Federal Crime of 'Domestic Terrorism'?*, LAWFARE (Aug. 8, 2019), <https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism>.

accompany the definitional provisions.²¹² The problem, some suggest, is not that federal prosecutors lack the authority to prosecute suspected domestic terrorists, but that prosecutors have been inattentive to right-wing violence in policy and practice.²¹³

Another approach focuses on creating a new domestic terrorism statute that closely mirrors hate crime statutes.²¹⁴ Such a statute would label any act of murder or attempted murder motivated by a desire to advance or promote a particular ideology as a terrorist act.²¹⁵ More specifically, it would include those acts where an individual “attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, . . . national origin, gender, sexual orientation, gender identity, or disability of any person.”²¹⁶ Cases like Dylann Roof’s and Kevin Harpham’s are primary examples of instances where prosecutors could use a federal domestic terrorism statute in the same manner as hate crime statutes.²¹⁷ Many argue that Dylann Roof’s attacks were not only hate crimes but were acts of domestic terrorism because of their racial underpinnings.²¹⁸ Nevertheless, he was ultimately only charged under a hate crime statute because it did not specifically fall under the current definitions of domestic terrorism.²¹⁹ Likewise, Kevin Harpham attempted to bomb a parade honoring Dr. Martin Luther King, Jr., but rather than getting charged with domestic terrorism, he pled guilty to a federal hate crime and an attempt to use a weapon of mass destruction.²²⁰ Harpham was a known member of the neo-Nazi National Alliance group and had been in prior contact with a leader of a white supremacist group. Still, the government decided not to pursue a sentencing enhancement for domestic terrorism for unknown reasons.²²¹ As discussed before, “it is hard to imagine that a Muslim defendant would have been charged with a hate crime under similar circumstances.”²²²

²¹² Anderson, *supra* note 5, at 503.

²¹³ German, *supra* note 204.

²¹⁴ Norris, *supra* note 202, at 292.

²¹⁵ *Id.*

²¹⁶ Carpenter, *supra* note 103, at 405.

²¹⁷ *See id.*

²¹⁸ *Id.*

²¹⁹ *See id.* at 404-05.

²²⁰ *Id.* at 405.

²²¹ *Id.*

²²² Carpenter, *supra* note 103, at 405.

Another proposed approach to a new domestic terrorism statute includes adding murder and manslaughter as specific acts that may constitute terrorism.²²³ Within this, some argue that the statute must have a *mens rea* requirement to adequately encompass all acts of domestic terrorism without indiscriminately expanding the definition.²²⁴ In other words, the focus would be on the intent rather than the target or method used.²²⁵

A prosecutor cannot charge a perpetrator for the mere fact that they subscribe to a particular ideology because that prosecution would raise serious constitutional concerns.²²⁶ However, an act carried out to advance that ideology in a violent manner would satisfy the intent requirement.²²⁷ When the act is carried out to coerce a government or civilian population or promote another similar political purpose, the requirement would be satisfied.²²⁸ Without such a requirement, some fear that common criminal acts may be swept up within the definition of terrorism.²²⁹ As one scholar argues, this intent requirement allows proper prosecution of terrorist acts no matter their ideology.²³⁰ This argument looks to the District of Columbia's terrorism statute as a guiding example for a federal statute.²³¹ The District's statute includes murder and manslaughter as specific acts constituting terrorism when such acts are intended to "[i]ntimidate or coerce a significant portion of the civilian population . . . ; or [i]nfluence the policy or conduct of a unit of government."²³² Therefore, the intent element allows the statute to cover crime traditionally seen as domestic terrorism, without swallowing up common criminal acts.

Overall, arguments in favor of a uniform domestic terrorism statute follow similar patterns. Many call for an intent element that would require prosecutors to show that the attack was intended to intimidate or coerce a civilian or government population. Others argue that following the guidelines of current hate crime provisions and definitional frameworks is sufficient. However, these proposals do not come with-

²²³ *Id.* at 407-08.

²²⁴ Molstad, *supra* note 4, at 381; see Carpenter, *supra* note 104, at 409-10.

²²⁵ Carpenter, *supra* note 103, at 407-08.

²²⁶ See *id.* at 417.

²²⁷ Molstad, *supra* note 4, at 381.

²²⁸ *Id.*

²²⁹ Carpenter, *supra* note 103, at 408.

²³⁰ Molstad, *supra* note 4, at 381.

²³¹ Carpenter, *supra* note 103, at 407-08.

²³² *Id.* at 407.

out pushback; many scholars argue against a uniform statute in favor of maintaining the current frameworks to protect against constitutional overreach.

B. *Arguments Against Creating a New Domestic Terrorism Statute*

Scholars have also expressed various concerns about introducing a new domestic terrorism statute. As one put it, “[h]ate and anger are not crimes; neither are hardline and poisonous ideologies. It’s only when actions by groups or individuals cross the line into threats, the actual use of force or violence, or other law-breaking activities that [law enforcement authorities] can investigate.”²³³ Of the major concerns surrounding the creation of a new domestic terrorism statute, “[f]uture civil rights violations tend to be at the heart of the issue.”²³⁴ Many fear that a new federal statute will allow greater federal investigatory power to infringe on individuals’ civil liberties.²³⁵ The government, therefore, must be cautious to avoid infringing individuals’ constitutional guarantees, such as those associated with legal activism and nonviolent protest.²³⁶

Some worry that outlawing material support for domestic terror groups would be unconstitutional.²³⁷ Material support statutes make it illegal to provide financial aid or recruit on behalf of extremist groups.²³⁸ In the domestic context, material support statutes would designate certain domestic groups as terrorist organizations, which would raise serious First Amendment concerns.²³⁹ In the context of a domestic terrorism statute, “overbroad measures threaten speech and privacy and invite the suppression of dissent for improper political reasons.”²⁴⁰ It would also leave room for political abuses of power against groups with different viewpoints or agendas than the political party in power.²⁴¹ Despite its offensive nature, the First Amendment protects hate speech.²⁴² Therefore, some argue that labeling domestic

²³³ Enzweiler, *supra* note 8, at 2025.

²³⁴ Anderson, *supra* note 5, at 500.

²³⁵ *Id.*

²³⁶ *See id.* at 499-500.

²³⁷ Carpenter, *supra* note 103, at 417.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Anderson, *supra* note 5, at 498.

²⁴¹ Sinnar, *supra* note 102, at 1400-01; Laguardia, *supra* note 89, at 1077.

²⁴² *Virginia v. Black*, 538 U.S. 343, 358 (2003).

groups as terrorist organizations would stifle people's ability to associate with groups of their choosing freely.²⁴³

Creating an official list of domestic terrorist organizations could potentially instigate contentious and politically charged debates over what groups must be included and why.²⁴⁴ Even if a new law were to target strictly white nationalist violence, it still leaves the possibility that it may target racial minorities.²⁴⁵ For example, the FBI disrupted the Civil Rights Movement and other African American protestors in the 1960s more so than the Ku Klux Klan and other white supremacist groups. This history created a growing concern that a federal domestic terrorism statute could create similar situations today.²⁴⁶ One study even concluded that the FBI "uses more questionable tactics against left-wing threats" than it does when targeting white nationalists or other far-right extremist groups.²⁴⁷ Therefore, the fear is that a new federal domestic terrorism statute may disproportionately harm minority groups.²⁴⁸

Others argue that a domestic terrorism statute is not needed because the issue is adequately addressed under current statutes.²⁴⁹ Regardless of a federal law, some argue that state statutes are sufficient to prosecute and punish typical acts of domestic terrorism.²⁵⁰ General state criminal statutes such as murder, attempted murder, assault, battery, and destruction of property apply to most domestic terrorism acts and keep perpetrators from walking free.²⁵¹ Combined with a federal domestic terrorism sentencing enhancement under § 3A1.4 of the United States Sentencing Guidelines,²⁵² some argue that perpetrators receive sufficient punishment.²⁵³ However, relying strictly on state statutes fails to adequately activate essential

²⁴³ Anderson, *supra* note 5, at 498.

²⁴⁴ Brian Michael Jennings & Richard C. Daddario, *Think Mass Shootings are Terrorism? Careful What You Wish For*, POLITICO (Nov. 7, 2017), <https://www.politico.com/magazine/story/2017/11/07/think-mass-shootings-are-terrorism-careful-what-you-wish-for-215797>.

²⁴⁵ Sinnar, *supra* note 102, at 1400.

²⁴⁶ *Id.* at 1401.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1400-01.

²⁴⁹ Chesney, *supra* note 211.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

²⁵³ Chesney, *supra* note 211.

federal investigatory procedures that follow a domestic terrorism prosecution under a uniform statute.

II. ANTI-RIOT ACT: IS IT THE SOLUTION TO THE PROBLEM, OR IS IT THE SOURCE OF EVEN MORE PROBLEMS?

With thousands of supporters for former President Trump converging on Washington, D.C. and storming the United States Capitol on January 6, 2021, President Biden and federal lawmakers are reviving discussions for passage of a federal domestic terrorism statute.²⁵⁴ Not long after Trump spoke to the crowd claiming that the election was fraudulent, and he had won, the crowd turned violent.²⁵⁵ While Congress was in the process of certifying the electoral votes, the mob of Trump supporters stormed the United States Capitol building.²⁵⁶ The mob breached the building's security by climbing walls, fighting with police officers, smashing building windows, and breaking through barriers inside.²⁵⁷ Inside the building, the mob ransacked congressional offices, stole government property, and fought with more police, ultimately causing the evacuation of all members of Congress.²⁵⁸ The initial death toll from the riots stood at five: one police officer, one rioter fatally shot by security, and three other deaths from medical emergencies directly caused by the riot.²⁵⁹ Numerous others who sustained injuries needed medical attention.²⁶⁰ With federal prosecutions ongoing,²⁶¹ calls for a new federal domestic terrorism statute are again prevalent.²⁶² The Anti-Riot Act may be a good tool for federal prosecutors with the January riots, and it serves some limited value for creating a new federal domestic terrorism statute. Yet, it does not entirely solve the broader problems surrounding domestic terrorism in the United States.

²⁵⁴ Fazio, *supra* note 6.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

²⁶⁰ *Id.*

²⁶¹ *Capitol Breach Cases*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/usao-dc/capitol-breach-cases>.

²⁶² Rachel Oswald, *Lawmakers divided over need for new domestic terrorism law*, ROLL CALL (Apr. 19, 2021), <https://www.rollcall.com/2021/04/19/lawmakers-divided-over-need-for-new-domestic-terrorism-law/>.

Even following the language change to the Anti-Riot Act from the Fourth Circuit, the violent crowds or mobs both inside and outside the Capitol certainly satisfy all its provisions. First, all of the violent mob members that traveled to Washington, D.C., traveled in interstate commerce or used facilities of interstate commerce.²⁶³ Second, the mob's actions meet § 2102's definition of "riot" because they involved acts of violence by numerous individuals presenting a clear and present danger to both property and people.²⁶⁴ Similarly, all individuals who stormed the Capitol or fought with police "participate[d] in, or carr[ied] on a riot."²⁶⁵ Therefore, everyone arrested would likely face federal charges under the Act if so prosecuted. However, most only face charges such as assault on a police officer, violent entry to Capitol grounds, unlawful possession of a firearm, and knowingly, with the intent to impede government functions, engaging in disorderly conduct on Capitol grounds.²⁶⁶ It seems clear that many of the rioters' actions meet the Anti-Riot Act's provisions, so it begs the question: why are federal prosecutors not bringing charges under the Act? The likely answer is that the Act fails to bridge the federal statutory framework's gaps fully and does not adequately address the modern methods of domestic terrorism.

Applying the Anti-Riot Act to lone-wolf offenders or attacks involving vehicles illuminates the Act's glaring drawbacks.²⁶⁷ In this respect, neither plot nor attack would satisfy the definition of riot or even involve participation in a riot except in rare circumstances.²⁶⁸ Even instances of isolated or lone-wolf shootings because of white supremacist or antisemitic ideologies would not be covered by the Act unless perpetrated during an active riot.²⁶⁹ However, the Act's provision regarding travel in interstate commerce or use of any facility of interstate commerce still provides valuable guidance for a federal domestic terrorism statute.²⁷⁰ The inclusion of an interstate commerce provision not only takes into account that most domestic extremists

²⁶³ 18 U.S.C. § 2101.

²⁶⁴ 18 U.S.C. § 2102.

²⁶⁵ *Id.*

²⁶⁶ *Thirteen Charged in Federal Court Following Riot at the United States Capitol*, DEPARTMENT OF JUSTICE (Jan. 8, 2021), <https://www.justice.gov/opa/pr/thirteen-charged-federal-court-following-riot-united-states-capitol>.

²⁶⁷ See 18 U.S.C. §§ 2101, 2102; *Miselis*, 972 F.3d at 535.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

cross state lines to commit violent acts, but also provides a jurisdictional hook necessary for federal prosecution.²⁷¹ Thus, to create an effective federal domestic terrorism statute, the new statute must combine interstate commerce provisions with other elements common to domestic terrorist plots and attacks, as discussed above.

Nonetheless, to fill the gaps of the current statutory framework adequately, more than just an interstate commerce provision is needed; a federal domestic terrorism statute must also be expansive. Under the current statutory framework, many of the current statutes or definitions are under-inclusive and fail to adequately address the fluidity and adaptative abilities of domestic terrorists. Terrorism is an ideologically motivated crime.²⁷² Thus, a uniform federal statute for domestic terrorism must contain provisions regarding the appearance of an intent to intimidate or coerce a *civilian* population or *government policy* to separate it from other general acts of violence. Without this intent requirement, the statute would likely sweep up everyday criminal acts that do not constitute terrorism. However, including the intent to coerce a civilian population in a new statute covers crimes perpetrated against people because of group identifiers like race, religion, and gender identity, and including government targets also shows that attacks can target the government, even if the attack is not *required* to target the government.²⁷³

Along the same lines, a federal domestic terrorism statute must contain provisions regarding bodily injury, including murder and other violent acts resembling hate crimes. Under the current framework, basing domestic terrorism charges only upon the use of weapons of mass destruction fails to address the most prominent methods used by domestic terrorists today—firearms and vehicles. By including bodily injury and murder, the statute will more adequately reflect today's deadly uses of firearms, vehicles, or other weapons that currently escape federal domestic terrorism prosecution.

Similarly, adding hate crimes to the statute fills the inequality that exists between the disparate treatment of international and domestic terrorists by showing an understanding that violent domestic extremists often target specific groups.²⁷⁴ Adding hate crimes also removes

²⁷¹ Laguardia, *supra* note 89, at 1083.

²⁷² Molstad, *supra* note 4, at 381.

²⁷³ *Id.*

²⁷⁴ Carpenter, *supra* note 103, at 415-17.

the need to designate domestic groups as terrorist organizations, something which poses considerable First Amendment concerns because the hate crime language would cover only individuals who act with violent or extremist intent regardless of their affiliations. In this regard, combining broad offenses with narrower intent requirements will keep the statute from swallowing up other acts that should not receive domestic terrorism classification. By focusing on both intent and target or method, the statute would refrain from focusing on one specific type of attack. This broader focus would avoid the issues present in the current federal definition and statutory framework. The proposed statute would also guard against classifying more general criminal acts without terroristic intent as acts of domestic terrorism.

In turn, a federal domestic terrorism statute will trigger the proper federal and local investigative and preventative procedures, so that deadly riots like those that occurred in Charlottesville or Washington, D.C., are preventable. When an individual acts with the requisite intent, a single federal statute would allow federal agencies to investigate the source of the perpetrator's extremism that may prevent similar future attacks. It also gives federal prosecutors the adequate tools to prosecute attackers for what they are: domestic terrorists.

CONCLUSION

For years, federal prosecutors struggled to find an adequate prosecutorial response to the growing number of violent right-wing extremist domestic terrorist attacks occurring in the United States. In recent years, prosecutors turned to the Anti-Riot Act as a potential response to an apparent lack of any federal answer. However, with the decision in *United States v. Miselis* holding the Act partially unconstitutional, the question was beseeched yet again: Is there a way to implement a federal terrorism statute that sufficiently addresses the issue without creating constitutional or political concerns? While the Anti-Riot Act may no longer be the best answer, a uniform federal domestic terrorism statute is still possible. Such a federal statute must incorporate an interstate commerce provision combined with narrow intent requirements to avoid swallowing other criminal acts undeserving of the terrorist label. It must also be expansive enough to fully capture the evolving nature of domestic terrorism so that specific targets or methods commonly used will fall into its definitions. Such a statute will not only provide prosecutors with the proper tools to pros-

ecute all domestic terrorists but will also trigger the necessary investigatory procedures of the federal government to stop domestic terrorists in their tracks.

