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Domestic Terrorism

In This Issue

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Introduction

Matthew F. Blue
Chief, Counterterrorism Section
National Security Division
Department of Justice

Welcome to this edition of the *Department of Justice Journal of Federal Law and Practice* focusing on Domestic Terrorism. Over the last few years, our country has seen the threat that domestic terrorism poses increase dramatically. As a result, the Department of Justice and the National Security Division (NSD) have taken a number of steps to ensure an enhanced focus on domestic terrorism and domestic violent extremists (DVEs).

As Attorney General Merrick Garland noted in June 2021, "Attacks by domestic terrorists are not just attacks on their immediate victims. They are attacks on all of us collectively, aimed at rending the fabric of our democratic society and driving us apart."[1] Announcing at the time of the Administration's release of the first *National Strategy for Countering Domestic Terrorism*,[2] the Attorney General noted that in order to confront the threat, we must "(i) understand and share information regarding the full range of threats we face; (ii) prevent domestic terrorists from successfully recruiting, inciting, and mobilizing Americans to violence; (iii) redouble and expand our efforts to deter and disrupt domestic terrorism activity before it yields violence; and (iv) address the long-term issues that contribute to domestic terrorism in our country."[3] In March 2021, the Deputy Attorney General's Office issued a memorandum noting that "[d]omestic violent extremism, including the threat of domestic terrorism, poses one of the most significant threats to our Nation" and that "[t]he United States Attorney's Offices, the Federal Bureau of Investigation (FBI), and numerous components across the Justice Department play a critical role in identifying, disrupting, and holding accountable domestic violent extremists who engage in criminal conduct."[4] Codifying

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[1] Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Domestic Terrorism Policy Address (June 15, 2021).

[2] Nat'l Sec. Council, The White House, National Strategy for Countering Domestic Terrorism (2021).

[3] Garland, *supra* note 1.

[4] Memorandum from the Acting Deputy Att'y Gen. to All Fed. Prosecutors, Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism 1 (Mar.

and expanding on the memorandum was a Justice Manual update that called for "effective coordination of DVE-related matters," which "is particularly critical where threats arise in connection with movements and groups whose existence spans multiple jurisdictions or even the entire nation."[5]

In light of that guidance and a corresponding update to the Department's Justice Manual, NSD and national security prosecutors in the United States Attorneys' Offices (USAOs) across the country have enhanced their focus on this significant threat. First, NSD's Counterterrorism Section is working closely with the FBI and the USAOs to understand the volume and variety of domestic terrorism matters. That effort includes closely tracking and monitoring matters that fall into several DVE-related categories to identify patterns and trends and ensure a comprehensive approach. Second, NSD established a dedicated Domestic Terrorism Unit within its Counterterrorism Section (CTS). While CTS attorneys have always been notified of and assisted with domestic terrorism matters occurring across the country, the attorneys in this Unit are focused exclusively on coordinating DVE-related cases and providing expertise and a national perspective on the DVE threat to ensure a more consistent, coordinated, and effective approach. Third, NSD, in coordination with the Office of Legal Education, has focused its training over the past few years on domestic terrorism in an effort to familiarize national security prosecutors on the variety of threats and the statutes used to charge these cases, as well as to provide practical tips from experienced prosecutors who have conducted successful investigations and prosecutions.

This Journal edition is being published to continue that education. It provides guidance on the many and varied topics that national security prosecutors must address when investigating and prosecuting domestic violent extremism. The Journal begins with an article discussing what domestic terrorism is and why the definition matters. Sophia Brill, who authored the article while serving as Senior Counsel to the Assistant Attorney General for National Security, describes the federal laws that provide guideposts for defining the term and explains how their application can have specific legal consequences for sentencing, the use of certain investigative techniques, and other matters. Tom Brzozowski, Counsel for Domestic Terrorism in CTS, provides an informative history of the legislation surrounding domestic terrorism and how it evolved. Dr. Karie

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8, 2021).

[5] U.S. Dep't of Just., Justice Manual 9-2.137: Notification, Consultation, and Approval Requirements in Matters Involving Domestic Violent Extremism, Including Domestic Terrorism.

Gibson, Unit Chief at the FBI's Behavioral Analysis Unit, describes the work of the FBI's Behavioral Analysis Unit, which has a long history of preventing acts of terrorism and mass casualty targeted violence. NSD Appellate attorney Joe Palmer discusses the legal analysis that must occur when prosecutors are determining if and when online speech becomes a federal crime. Civil Rights attorneys Julia Gegenheimer and Samantha Trepel discuss civil rights statutes that may be used to prosecute violent extremism, thereby emphasizing the important partnership between the Civil Rights Division and NSD in this effort. Assistant United States Attorney Jessica Knight and CTS attorneys Justin Sher and Michael Dittoe focus on charging 18 U.S.C. § 2339A in domestic terrorism cases. While this statute that prohibits providing material support to "terrorists" has long been used in our fight against international terrorism, this article shows how it can also be a useful tool in domestic terrorism prosecutions. Angela Woolridge, Senior Attorney in the Office of Chief Counsel for the Bureau of Alcohol, Tobacco, Firearms and Explosives, describes the various criminal statutes applicable to firearms, explosives, and related weapons violations that can often be useful to federal prosecutors when evaluating potential charges in domestic terrorism cases. With the recent increase in juveniles who are radicalized and inspired by violent ideologies and extremist groups, Bridget Behling, CTS Deputy Chief, addresses the prosecution of juveniles in domestic terrorism matters by discussing the process used to bring charges against juveniles in the federal system under the federal Juvenile Justice and Delinquency Prevention Act. CTS attorneys Jake Warren and Tom Brzozowski discuss the global and local problem of transnational violent extremism. While the concept of individuals from one country radicalizing citizens from another is not new, prosecutors and law enforcement must be aware of this trend and coordinate closely on these types of international terrorism investigations. CTS attorney John Cella and Assistant United States Attorney Craig Heeren discuss the terrorism sentencing enhancement and its application to domestic terrorism. While the sentencing enhancement has been applied most often to offenses related to international terrorism, John and Craig discuss the substantial and growing body of precedent applying the enhancement to domestic terrorists. Once these DVE offenders are convicted and imprisoned, managing and monitoring them is vital, especially because most of these individuals will return to communities within the United States. Dr. Miranda Faust, Administrator in the Intelligence and Counterterrorism Branch of the Federal Bureau of Prisons (BOP), and Nick Masellis, Correctional Program Officer in the Intelligence and Counterterrorism Branch of the BOP, discuss their work in BOP's Intelligence and Counterterrorism Branch and the programs that work to target

reintegration post-incarceration. And finally, we include a discussion of reporting requirements for DVE and why collecting data matters. Kate Porter, Lead Program Analyst in CTS, and Stephen Brundage, Senior Counsel in CTS, describe the Department's efforts to work with USAOs to collect, analyze, and share information related to DVEs.

I first want to thank our authors—not only for their contributions to this Journal, but also for the work that they are doing every day to confront the threat of domestic terrorism. I also want to thank all those who worked behind the scenes with editing, reviewing, and coordinating this publication. They include CTS Deputy Chief Bridget Behling, Counsel for Domestic Terrorism Tom Brzozowski, and Kelly Shackelford, NSD's Director of Training and Workforce Development. This team worked closely with me to ensure that the information provided was relevant, accurate, and useful.

About the Editors

Matthew Blue is the Chief (SES) of the Department of Justice's Counterterrorism Section (CTS). CTS is responsible for designing, implementing, and supporting law enforcement efforts, legislative initiatives, policies, and strategies relating to combatting international and domestic terrorism. The Section seeks to assist, through investigation and prosecution, in preventing and disrupting acts of terrorism anywhere in the world that impact on significant United States interests and persons. Before rejoining CTS as the Chief in late 2020, Mr. Blue was detailed to the Office of the Deputy Attorney General as the Associate Deputy Attorney General for National Security where he advised the Attorney General, Deputy Attorney General, and other senior officials on sensitive and complex national security matters with domestic and international magnitude. Mr. Blue has also served assignments as the Deputy Director of an Attorney General task force, CTS Deputy Chief, a long-term detail as a Special Assistant United States Attorney in the Eastern District of Virginia's National Security and International Crime Unit, and as a CTS Trial Attorney. Before joining DOJ in 2008, Mr. Blue served on active duty as a Judge Advocate General in the United States Air Force and continues to serve as a Colonel in the Air National Guard. Mr. Blue attended law school at the University of Arkansas and is an Air War College graduate.

Bridget Behling is a Deputy Chief in the National Security Division, Counterterrorism Section. She joined the Section in 2009 through the Attorney General's Honors Program. During her time with CTS, she has served as a Regional Anti-Terrorism Advisory Council (ATAC) Coordinator, and completed a year-long detail assignment to the Office of the Assistant Attorney General for National Security. She also completed two detail assignments to the United States Attorney's Office for the District of Columbia. She graduated from Tufts University and American University's Washington College of Law.

Thomas E. Brzozowski currently serves as the Counsel for Domestic Terrorism in the National Security Division of the U.S. Department of Justice. Tom received his Bachelor of Arts in International Relations from the College of William & Mary in 1996, after which he was commissioned as a Second Lieutenant in the U.S. Army. Tom spent three years as an artillery officer at Fort Bragg, North Carolina, before he was selected to attend William & Mary Law School under the auspices of the U.S. Army Funded Legal Education Program. After law school, Tom spent six years in Europe serving as an officer in the U.S. Army JAG Corps. He then left active duty and clerked for Judge Stanley Birch, Jr., at the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Before taking up his present position, Tom was an Assistant General Counsel in the FBI's Office of General Counsel. Tom holds a Master of Laws degree in National Security Law from the Georgetown University Law Center and a master's degree in security studies from the U.S. Army War College. He also is an adjunct professor at the George Washington University Law School and continues to serve as a JAG officer in the U.S. Army Reserves.

Kelly Shackelford has served as the Director of Training and Workforce Development for the National Security Division since May of 2013. Before that, she was an Assistant United States Attorney for the District of South Carolina from 1992–2013, although she served a variety of detail assignments during that time. From 2010–2013 and 2005–2006, she served as the National Anti-Terrorism Advisory Council (ATAC) Coordinator in the National Security Division's Counterterrorism Section. From October 2006 to December 2009, Kelly served as the ATAC Coordinator in the District of South Carolina. In 2003–2004, Kelly served on the Counsel to the Director's Staff at the Executive Office for United States Attorneys (EOUSA) and as Deputy Counsel to the Director at EOUSA from 2004–2005. From 1999–2003, Kelly served as Deputy Director for the Office of Legal Education at the National Advocacy Center in Columbia, South Carolina. Kelly received a J.D. from the University of South Carolina School of Law and a B.A. from Presbyterian College.

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What Is Domestic Terrorism and Why Does the Definition Matter?

Sophia Brill
Senior Counsel to the Assistant Attorney General for National Security[1]
National Security Division

I. Introduction

In recent years, U.S. law enforcement and intelligence agencies have reported a steady rise in threats from domestic terrorists and domestic violent extremists. The number of Federal Bureau of Investigation (FBI) investigations of suspected domestic violent extremists more than doubled between 2020 and 2021, in large part due to the January 6, 2021 attack on the U.S. Capitol.[2] In June 2022, the FBI, the Department of Homeland Security, and the National Counterterrorism Center reported that "domestic violent extremists (DVEs) fueled by various evolving ideological and sociopolitical grievances pose a sustained threat of violence to the American public, democratic institutions, and government and law enforcement officials."[3] Among other events, the report cited the recent mass shooting by an alleged white supremacist targeting Black victims at a grocery store in Buffalo, New York, which resulted in the deaths of 10 people.[4] Other mass shootings by violent extremists in recent years include the 2019 attack at a Walmart in El Paso, Texas; the 2018 attack on the Tree of Life Synagogue in Pittsburgh, Pennsylvania; and the 2015 attack on Black parishioners at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina.[5]

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[1] At the time this article was drafted and submitted, Ms. Brill served in this role.

[2] *The Domestic Terrorism Threat One Year After January 6: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Matthew G. Olsen, Assistant Att'y Gen., U.S. Dep't of Just. & Jill Sanborn, Exec. Assistant Dir., FBI).

[3] FBI & Dep't of Homeland Sec., Strategic Intelligence Assessment and Data on Domestic Terrorism app. C (2022).

[4] *Id.*

[5] *See, e.g.*, Press Release, U.S. Dep't of Just., Texas Man Pleads Guilty to 90 Federal Hate Crimes and Firearms Violations for August 2019 Mass Shooting at Walmart in El Paso, Texas (Feb. 8, 2023); Press Release, U.S. Dep't of Just., Pennsylvania Man Charged with Federal Hate Crimes for Tree of Life Synagogue Shooting (Oct. 31,

Few people would hesitate to call the perpetrators of these attacks "domestic terrorists." But questions about how far this definition extends and to which types of actions it applies are often contested. After all, a domestic terrorist is no ordinary criminal. At the most extreme, such a person is in the company of notorious murderers like Timothy McVeigh and the Unabomber.

The law cannot dictate precisely who counts as a domestic terrorist in a moral, social, or political sense. Nor is there any specific crime of "domestic terrorism" in the United States Code. However, federal law provides some guideposts for defining these terms, and their application can have specific legal consequences for sentencing, the use of certain investigative techniques, and other matters.

This article discusses those legal definitions and their origins. It then explores why those definitions matter, both for legal purposes and more broadly. Finally, given the moral, social, and political weight these terms carry, the article discusses the critical importance of ideological neutrality by law enforcement.

II. Statutory definitions: 18 U.S.C. §§ 2331(5) and 2332b(g)(5)

The United States Code has two definitions that are most relevant in defining domestic terrorism: 18 U.S.C. § 2332b(g)(5) defines a "Federal crime of terrorism," while 18 U.S.C. § 2331(5) specifically defines the term "domestic terrorism." The two provisions overlap but serve different purposes, and neither constitutes its own freestanding criminal offense. Both definitions and their origins are discussed in turn.

A. 18 U.S.C. § 2332b(g)(5)

18 U.S.C. § 2332b(g)(5) states that "the term 'Federal crime of terrorism' means an offense that—(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of" an enumerated list of federal statutes. Those statutes include offenses expressly related to terrorism, such as provision of material support to a foreign terrorist organization,[6] as well as violent acts that terrorists often carry out,

2018); Press Release, U.S. Dep't of Just., Federal Jury Sentences Dylann Storm Roof to Death (Jan. 10, 2017).

[6] 18 U.S.C. § 2332b(g)(5)(B)(i) (listing 18 U.S.C. § 2339B).

such as the use of weapons of mass destruction,[7] destruction of aircraft,[8] hostage taking,[9] and assassination of public officials.[10] The list also includes more general crimes such as destruction of government property, arson, and computer hacking.[11]

Section 2332b, including its definitional provision, was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[12] As a Congressional Research Service report produced shortly after its passage summarized, AEDPA was "the culmination and amalgamation of disparate legislative efforts, some of them stretching back well over a decade. The [1995] bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and to a lesser extent the [1993] bombing of the World Trade Center in New York, supplied the most obvious stimuli for its enactment, but concern over other issues like habeas corpus and immigration contributed to its passage as well."[13]

AEDPA is the source of many significant terrorism-related authorities that are relied on today. Among other things, it grants the Secretary of State the authority to designate foreign terrorist organizations (FTOs);[14] prohibits the provision of material support to FTOs;[15] prohibits the provision of material support for terrorist activities;[16] and in 18 U.S.C. § 2332b, it defines and punishes a new criminal offense for "[a]cts of terrorism transcending national boundaries."[17] The substantive offense set out in section 2332b, however, does not cross-reference 2332b(g)(5)'s definition of a "Federal crime of terrorism." Section 2332b(a)(1) instead imposes penalties against

> [w]hoever, involving conduct transcending national boundaries . . .
>
> > (A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United

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7 *Id.* (listing 18 U.S.C. §§ 175, 229, 831).
8 *Id.* (listing 18 U.S.C. § 32).
9 *Id.* (listing 18 U.S.C. § 1203).
10 *Id.* (listing 18 U.S.C. §§ 1114, 1751).
11 *Id.* (listing 18 U.S.C. §§ 1361, 844(i), and 1030(a)(1)).
12 Pub. L. No. 104-132, § 702, 110 Stat. 1214, 1291 (1996) [hereinafter AEDPA].
13 Charles Doyle, Cong. Rsch. Serv., Antiterrorism and Effective Death Penalty Act of 1996: A Summary (1996) (on file with author).
14 AEDPA § 302 (codified at 8 U.S.C. § 1189).
15 AEDPA § 303 (codified at 18 U.S.C. § 2339B).
16 AEDPA § 323 (codified at 18 U.S.C. § 2339A).
17 AEDPA § 702 (codified at 18 U.S.C. § 2332b).

> States; or
> (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;
>
> in violation of the laws of any State, or the United States . . . .[18]

Section 2332b therefore does not require that an offender engage in conduct that is already a federal crime. Rather, it creates a new offense for certain conduct if (1) the conduct is prohibited by federal *or* state law; and (2) the conduct "transcend[s] national boundaries." By contrast, section 2332b(g)(5) defines a "Federal crime of terrorism" as one of several specifically enumerated federal offenses if the offense is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[19]

Section 2332b(g)(5)'s definition of a "Federal crime of terrorism" is therefore broader in some respects than the offense that section 2332b proscribes but narrower in others. A "Federal crime of terrorism" under section 2332b(g)(5) need not require conduct that "transcend[s] national boundaries."[20] Section 2332b(g)(5) can thus include quintessential acts of domestic terrorism, such as the destruction of a federal research facility by eco-terrorists[21] or a white nationalist plot to kill or kidnap public

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[18] 18 U.S.C. § 2332b(a)(1). Section 2332b also sets forth various jurisdictional circumstances such as the use of interstate commerce, at least one of which must be present. *Id.* § 2332b(b).

[19] *Id.* § 2332b(g)(5). One of these enumerated offenses is section 2332b itself. Thus, in theory, one could commit a "Federal crime of terrorism" within the meaning of section 2332b(g)(5) by violating state law in a manner that satisfies the other elements of section 2332b.

[20] *See id.* § 2332b(a)(1).

[21] *See* United States v. Christianson, 586 F.3d 532, 537–40 (7th Cir. 2009). In that case, the defendants pleaded guilty to destruction of government property, in violation of 18 U.S.C. § 1361, which is an enumerated offense under section 2332b(g)(5). *See id.* at 539. The court expressly rejected the argument that the terrorism enhancement provided for in the U.S. Sent'g Guidelines Manual (U.S.S.G.) § 3A1.4 (U.S. Sent'g Comm'n 2021)—which applies to offenses that "involved, or [were] intended to promote, a federal crime of terrorism" as defined in section 2332b(g)(5)—must also incorporate section 2332b's requirement that the conduct "transcend[] national boundaries." *Id.* at 539–40.

officials.[22] A section 2332b(g)(5) "Federal crime of terrorism," however, must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,"[23] whereas section 2332b contains no such intent requirement.

One might ask why Congress bothered including a "Federal crime of terrorism" definition in section 2332b(g)(5) if that definition is not tied to the offense created in section 2332b. The answer appears to lie in AEDPA's section 730—the only part of the statute to cross-reference section 2332b(g). That provision directed the U.S. Sentencing Commission to "forthwith . . . amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code."[24] As discussed further below, the terrorism enhancement now codified at U.S.S.G. § 3A1.4, which can entail heavy consequences, thus turns on whether the person's offense involved or was intended to promote a "Federal crime of terrorism" as defined in section 2332b(g)(5).

After AEDPA's enactment, several further cross-references to section 2332b(g)(5) and usages of the term "Federal crime of terrorism" have been added to the United States Code. For example, it is unlawful to purchase a firearm for or on behalf of a person whom one knows or has reasonable grounds to believe will use the firearm in furtherance of a federal crime of terrorism as defined in section 2332b(g)(5).[25] Property used by individuals or entities engaged in federal crimes of terrorism can be subject to civil forfeiture.[26] If a judicial officer in pretrial detention proceedings finds probable cause that the accused committed an offense listed in section 2332b(g)(5) carrying a maximum term of 10 years' imprisonment or more, a rebuttable presumption arises that the person must be detained pending trial.[27] And the offenses listed in section 2332b(g)(5) are subject

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22 *See* United States v. Hasson, 26 F. 4th 610, 621–27 (4th Cir. 2022).

23 18 U.S.C. § 2332b(g)(5)(A).

24 AEDPA § 730; *see* U.S.S.G. § 3A1.4 Historical Notes, 1996 Amendments and 1997 Amendments. AEDPA also specifies in 18 U.S.C. § 2332b(f) (contained in section 702 of AEDPA) that the Attorney General has "primary investigative responsibility for all Federal crimes of terrorism," presumably relying on the definition of that term in section 2332b(g)(5).

25 18 U.S.C. § 932(b). 18 U.S.C. § 922(d)(10) also makes it illegal to sell or give a firearm to someone under those circumstances. Both provisions were enacted as part of the Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004, 136 Stat. 1313 (2022).

26 18 U.S.C. § 981(a)(1)(G); *see* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 120, 120 Stat. 192, 221 (2006).

27 18 U.S.C. § 3142(e)(3)(C); *see* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6952, 118 Stat. 3638 (2004).

to an eight-year statute of limitations period rather than the standard five years, with no limitations period if the offense resulted in or created a foreseeable risk of death or serious bodily injury.[28]

Whether an act is enumerated within section 2332b(g)(5) and constitutes a "Federal crime of terrorism"—including in instances of domestic terrorism—can therefore carry significant consequences. Consider again the example of an eco-terrorist who destroys a government research facility, and assume she is charged under 18 U.S.C. § 1361, which prohibits destruction of federal property and is included in the offenses listed under section 2332b(g)(5). The statute of limitations for the government to bring charges in such a case would be eight years rather than five; the accused would be subject to a rebuttable presumption of pre-trial detention if the judge finds probable cause that she committed the charged offense; she would be subject to a heavy sentencing enhancement upon conviction; and her assets used in furtherance of the crime could be subject to civil forfeiture.

B. 18 U.S.C. § 2331(5)

The term "domestic terrorism" was not specifically defined until enactment of the 2001 USA PATRIOT Act, a suite of counterterrorism and related authorities passed shortly after the September 11, 2001 attacks. As with section 2332b(g)(5), the statutory provision defining "domestic terrorism" does not give rise to a freestanding criminal offense. But whether a person's underlying conduct fits within this definition can carry certain consequences.

18 U.S.C. § 2331(5) defines "domestic terrorism" as follows:

> (5) [T]he term "domestic terrorism" means activities that—
>
> > (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
> >
> > (B) appear to be intended—
> >
> > > (i) to intimidate or coerce a civilian population;
> > >
> > > (ii) to influence the policy of a government by intimidation or coercion; or
> > >
> > > (iii) to affect the conduct of a government

[28] 18 U.S.C. § 3286; *see* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 809, 115 Stat. 272 (2001).

> by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the territorial jurisdiction of the United States . . . .[29]

A section-by-section analysis of the USA PATRIOT Act produced by the Senate Judiciary Committee explains that this definition served as a counterpart to section 2331(1)'s definition of "international terrorism."[30] That term, already in existence at the time, is similar but provides that the activities in question must "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."[31] The Senate Judiciary Committee analysis explained that the "domestic terrorism" definition "is for the limited purpose of providing investigative authorities (i.e., court orders, warrants, etc.) for acts of terrorism within the territorial jurisdiction of the United States."[32]

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[29] 18 U.S.C. § 2331(5); *see* USA PATRIOT Act § 802.

[30] Although the Senate Judiciary Committee did not produce a report, the section-by-section analysis was printed in the Congressional Record at the request of Chairman Leahy. *See* 147 Cong. Rec. S11,005–14 (daily ed. Oct. 25, 2001).

[31] 18 U.S.C. § 2331(1) provides in full:

> (1) the term "international terrorism" means activities that—
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; 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 . . . .

[32] 147 Cong. Rec. S11,012; *see also* H.R. Rep. No. 107-236, at 72 (2001) ("This section also adds the definition of 'domestic terrorism' to title 18 U.S.C. Sec. 2331, which currently defines 'international terrorism.' This new definition is used in this

Specifically, the USA PATRIOT Act amended Federal Rule of Criminal Procedure 41 to permit federal magistrate judges to issue search warrants across multiple jurisdictions in any "investigation of domestic terrorism or international terrorism."[33] As subsequently amended, Rule 41(b)(3) provides that "a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district." Rule 41 further specifies that the terms "[d]omestic terrorism" and "international terrorism" "have the meanings set out in 18 U.S.C. § 2331."[34]

Among other cross-references to section 2331's definitions, the USA PATRIOT Act also amended civil forfeiture provisions to permit forfeiture of assets by individuals or groups engaged in acts of domestic or international terrorism,[35] and to allow courts to permit disclosure of certain educational records in investigations of acts of domestic or international terrorism.[36] The legislative record, however, contains little discussion of domestic terrorism as a discrete issue set—which is unsurprising given the recent context of the September 11 attacks that al-Qaeda perpetrated.

In subsequent years, several additional laws have been enacted or amended that rely on section 2331(5)'s definition of domestic terrorism. Many involve enhancements of maximum sentences for other crimes if those crimes involve or are committed to facilitate international or domestic terrorism. For example, as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Congress amended false statement and obstruction of justice statutes to enhance the maximum penalty for conduct involving international or domestic terrorism as defined in section 2331.[37] Various forms of identity fraud also carry enhanced maximum penalties if those acts are committed to facilitate international or domestic terrorism as defined in section 2331.[38]

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legislation.").

[33] USA PATRIOT Act § 219 (codified as amended at Fed. R. Crim. P. 41(b)(3)).

[34] Fed. R. Crim. P. 41(a)(2)(D).

[35] USA PATRIOT Act § 806. Although this provision initially relied on the definitions of domestic and international terrorism provided in section 2331, Congress subsequently amended the forfeiture law to instead rely on the definition of a "Federal crime of terrorism" provided in 18 U.S.C. § 2332b(g)(5). *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 120, 120 Stat. 192, 221 (2006) (codified at 18 U.S.C. § 981(a)(1)(G)).

[36] USA PATRIOT Act § 507 (codified at 20 U.S.C. § 1232g(j)(1)(A)).

[37] Pub. L. No. 108-458, § 6703, 118 Stat. 3638 (2004) (codified at 18 U.S.C. §§ 1001(a), 1505).

[38] *See, e.g.*, 18 U.S.C. § 1425(b)(4); *see also* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249,

Publicly available judicial opinions interpreting section 2331(5) are scant. One helpful exception, however, is a recent opinion by a magistrate judge in the U.S. District Court for the District of Columbia regarding a search warrant application in an investigation into the January 6, 2021 breach of the United States Capitol.[39] The government had applied for a warrant to seize a cellphone located in Texas as part of an investigation into a group that "engaged in significant planning prior to descending on Washington, D.C., and breaching the Capitol building . . . ."[40] Among other offenses, the warrant application stated that there was probable cause to believe the owner of the phone and others had engaged in seditious conspiracy, obstruction of Congress, and destruction of property, and that evidence of these offenses would be found on the phone.[41]

Magistrate Judge Faruqui posed the key question as whether the evidence proffered in the application supported a determination that "there is 'reason to believe' that the activities under investigation fall within the § 2331(5) definition of 'domestic terrorism.'"[42] He first concluded that "the storming of the U.S. Capitol 'involve[d] acts dangerous to human life that are a violation of the criminal laws of the United States,'" as required under section 2331(5)(A).[43] He cited, among other things, the assaults and injuries that occurred on January 6 and the criminal charges for which members of the group had already been indicted.[44] Second, Magistrate Judge Faruqui concluded that the group's actions "appear[ed] to be intended . . . to influence the policy of a government by intimidation or coercion" as set forth under section 2331(5)(B)(ii), citing other judicial findings that the goal of the rioters that day was to "interfer[e] with—or even prevent[]—the peaceful transition of power."[45] Third, Magistrate Judge Faruqui concluded that the alleged acts of the group "'occur[red] primarily within the territorial jurisdiction of the United States' in accordance with 18 U.S.C. § 2331(5)(C)."[46]

The opinion thus supports a fairly commonsense understanding of

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257 (2004) (describing other cross-references to section 2331 in the United States Code).

39 *In re* Search of One Apple iPhone Smartphone, No. 21-sw-253, 2022 WL 4479799 (D.D.C. Sept. 6, 2022).

40 *Id.* at *1.

41 *Id.*; *see* 18 U.S.C. §§ 2384, 1512(c), 1361.

42 In re *Search of One Apple iPhone Smartphone*, 2022 WL 4479799, at *4.

43 *Id.* at *5 (alteration in original).

44 *Id.*

45 *Id.* (first alteration in original) (quoting 18 U.S.C. § 2331(5)(B)(ii) and United States v. Chrestman, 525 F. Supp. 3d 14, 28 (D.D.C. 2021)).

46 *Id.* (alteration in original).

section 2331(5). Actions can constitute domestic terrorism if they involve dangerous and illegal conduct, appear intended to inflict fear on civilians or the government, and occur primarily in the United States. Notably, the analysis was not limited to considering the specific elements of the potential crimes at issue. That is, the government was not required to demonstrate that a charge for seditious conspiracy, obstruction of Congress, destruction of property, or any other alleged offense necessarily entails conduct dangerous to human life, or that such offenses are necessarily intended to further one of the purposes in section 2331(5)(B). Rather, the government satisfied the requirements of section 2331(5) by describing the conduct alleged by these specific subjects of the investigation.

III. The U.S. Sentencing Guidelines: U.S.S.G. § 3A1.4

In its current form, U.S.S.G. § 3A1.4 provides:

> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Section 3A1.4's Application Note 1 states that the term "federal crime of terrorism" has the meaning given in section 2332b(g)(5).[47]

A. Guideline history

The guideline for terrorism offenses has evolved in several phases, due in significant part to directions from Congress. The Sentencing Commission first added a provision relating to terrorism in 1989. U.S.S.G. § 5K2.15

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[47] Additionally, Application Note 4 states that for certain cases not fitting within section 2332b(g)(5)'s definition of a "Federal crime of terrorism," an upward departure may still be warranted if "(A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct . . . ; or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." U.S.S.G. § 3A1.4 cmt. n.4. This provision is discussed in greater detail in John D. Cella & Craig R. Heeren, *The "Terrorism" Sentencing Enhancement and Its Application to Domestic Terrorism*, 71 DOJ J. Fed. L. & Prac., no. 2, 2023.

simply stated that a court "may" impose an upward departure above the guidelines range "[i]f the defendant committed the offense in furtherance of a terroristic action."[48] It provided no definition of "terroristic action."

In 1994, Congress directed the Sentencing Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime."[49] The Sentencing Commission thereafter adopted the following guideline:

> 3A1.4. International Terrorism
>
> > (a) If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
> >
> > (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.[50]

Application Note 1 indicated that "international terrorism" carried the definition contained in 18 U.S.C. § 2331.[51] That is, "international terrorism" meant an action that endangered human life; violated federal or state law; was intended to intimidate or coerce the government or civilians; and occurred primarily outside the United States or transcended national boundaries.[52]

As noted previously, AEDPA directed another significant amendment to the guideline, instructing the Sentencing Commission to "forthwith . . . amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18 . . . ."[53] That direction prompted the Commission to adopt U.S.S.G. § 3A1.4 in its current form, applying to felonies that involved or were intended to promote "federal crime[s] of terrorism" as defined in section 2332b(g)(5).[54]

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48 U.S.S.G. § 5K2.15 (1989) (now deleted effective Nov. 1, 1995).

49 Violent Crime Control Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 (1994).

50 U.S.S.G. § 3A1.4 (1995).

51 *Id.* cmt. n.1.

52 *See* 18 U.S.C. § 2331(1).

53 AEDPA § 730.

54 *See, e.g.*, United States v. Hasson, 26 F.4th 610, 621–22 (4th Cir.), *cert. denied*, 143 S. Ct. 310 (2022) (describing amendment history).

Although Congress's use of the word "only" might suggest an intent to further restrict the guideline's application, courts have uniformly held that the guideline—and with it, section 2332b(g)(5)—applies in cases of domestic terrorism. *United States v. Hasson*, involving a white nationalist who stockpiled weapons and plotted mass murders, including against public officials, is instructive. On appeal from Hasson's sentence, the Fourth Circuit concluded that Congress's direction to the Sentencing Commission in AEDPA

> is reasonably read as instructing the Commission to edit the type of terrorism to which the adjustment applies by replacing "international terrorism" with "federal crimes of terrorism," which the Commission did. The word "only" clarified that Congress intended for "federal crimes of terrorism" to supplant "international terrorism," rather than supplement it such that the adjustment covered both "international terrorism" and "federal crimes of terrorism."[55]

B. Impact and interpretation

The consequences of applying the section 3A1.4 sentencing enhancement can be stark. The guideline first requires a 12-level enhancement and a minimum offense level of 32. Suppose, for example, that an offender with no criminal history is convicted for causing $10,000 worth of damages to government property in violation of 18 U.S.C. § 1361. That person's offense level would ordinarily be 8 pursuant to U.S.S.G. § 2B1.1,[56] producing a guideline range of zero to six months.[57] Applying section 3A1.4 would bring the offense level to 32, increasing the guideline range to 121–151 months,[58] or about 10 to 12.5 years of imprisonment. Moreover, U.S.S.G. § 3A1.4(b) requires that the offender's criminal history be treated as Category VI. That brings the applicable guideline range all the way to 210–262 months,[59] or about 17.5 to 22 years' imprisonment.

To be sure, other factors would reduce the sentence in an example like this one. The statutory maximum for violating 18 U.S.C. § 1361 is 10

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55 *Id.* at 623; *see also, e.g.*, United States v. Salim, 549 F.3d 67, 78 (2d Cir. 2008) ("Our refusal to incorporate a transnational conduct element in the definition of 'Federal crime of terrorism' accords with the judgment of our sister circuits" (collecting cases)).

56 U.S.S.G. § 2B1.1 prescribes a base offense level of 6 and adds 2 levels if the amount of damage is between $6,500 and $15,000. *See* U.S.S.G. §§ 2B1.1(a)(2), (b)(1)(B)–(C).

57 *See* U.S.S.G. ch. 5, pt. (A) (Sentencing Table).

58 *See id.*

59 *See id.*

years. Further, the Sentencing Guidelines are only advisory,[60] and judges have discretion to depart downward (or upward if the statutory maximum allows) based on a range of factors.[61] In *United States v. Christianson*, the eco-terrorism case referenced in Part I, for example, the district court concluded that U.S.S.G. § 3A1.4 applied to the two offenders' conduct but imposed only 24 months' and 36 months' imprisonment, respectively.[62] In other circumstances such as those involving mass casualty attacks, U.S.S.G. § 3A1.4 may not be as impactful simply because the applicable guideline range already produces a high sentence.

Nonetheless, applying U.S.S.G. § 3A1.4 can carry significant consequences by raising an offender's presumptive sentence to the statutory maximum and requiring sentencing courts to justify any downward departure or variance. Perhaps for that reason, the guideline has been frequently litigated. Another article in this issue discusses relevant case law in more detail.[63] For purposes here, one important feature of the case law is that courts have uniformly upheld applying the guideline to offenders who are not convicted of an offense enumerated in section 2332b(g)(5) so long as their offense was "*intended to promote*" a "federal crime of terrorism" enumerated in section 2332b(g)(5).[64] In *Hasson*, for example, the defendant was convicted for various firearms-related offenses, and the district court concluded that those offenses were intended to promote violations of 18 U.S.C. § 351, an offense enumerated under section 2332b(g)(5) that prohibits attempts to kill or kidnap various public officials.[65] The Fourth Circuit upheld the sentence on appeal and rejected Hasson's argument that the Sentencing Commission had exceeded its instructions from Congress by applying the guideline beyond cases involving convictions for enumerated section 2332b(g)(5) offenses.[66]

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60 *See generally* United States v. Booker, 543 U.S. 220 (2005).

61 *See* 18 U.S.C. § 3553(a); U.S.S.G. § 5K2.0.

62 586 F.3d 532, 536 (7th Cir. 2009).

63 *See generally* John D. Cella & Craig R. Heeren, *The "Terrorism" Sentencing Enhancement and Its Application to Domestic Terrorism*, 71 DOJ J. Fed. L. & Prac., no. 2, 2023.

64 U.S.S.G. § 3A1.4(a) (emphasis added).

65 United States v. Hasson, 26 F.4th 610, 616 (4th Cir.), *cert. denied*, 143 S. Ct. 310 (2022).

66 *Id.* at 621–24; *see also, e.g.*, United States v. Awan, 607 F.3d 306, 314–15 (2d Cir. 2010); United States v. Arnaout, 431 F.3d 994, 1000–02 (7th Cir. 2005); United States v. Mandhai, 375 F.3d 1243, 1247–48 (11th Cir. 2004); United States v. Graham, 275 F.3d 490, 513–19 (6th Cir. 2001).

IV. Impact and implications of domestic terrorism definitions

The discussion thus far demonstrates that in many criminal cases, the labeling of an offense as an act of "terrorism" can carry significant consequences, including in cases involving domestic rather than international terrorism. Perhaps most concretely, cases like *Hasson* and *Christianson* illustrate that if an offense involves a "Federal crime of terrorism" as defined in section 2332b(g)(5)—or if the offense was intended to promote such a crime—the offender's sentence can be raised substantially. Other potential consequences include civil forfeiture of assets, a presumption against pre-trial release, and a longer statute of limitations period.[67]

The consequences of an offense fitting within section 2331(5)'s definition of "domestic terrorism" are less immediate. In investigating such an offense, the government can apply to a single magistrate judge for search warrants across multiple jurisdictions.[68] And statutory maximum sentences are higher for crimes such as obstruction of justice or identity fraud if those crimes involve or are intended to facilitate domestic terrorism within the meaning of this term.[69] Still, most defense lawyers would probably prefer that their client stand accused of an offense qualifying as "domestic terrorism" under section 2331(5) rather than an offense qualifying as a "Federal crime of terrorism" under section 2332b(g)(5).

Beyond the legal consequences, these terms undoubtedly carry moral, social, and even political weight. In *Christianson*, for example, one of the defendants challenged his sentence on what the U.S. Court of Appeals for the Seventh Circuit described as a "visceral" argument "rest[ing] on the assumption that he is not a terrorist because his only motivation was 'the hope of saving our earth from destruction' and redressing 'the misdeeds and injustice that [he] felt industry inflicted on the natural world.'"[70] The court responded in part with legal arguments, describing what it called the Sentencing Guidelines' "practical definition for what constitutes an act of terrorism" and the requirements of section 2332b(g)(5).[71] The defendant had been convicted for destruction of government property, in violation of 18 U.S.C. § 1361; that offense is enumerated under section 2332b(g)(5); and the defendant's actions served to intimidate government employees and further political goals through violence. Thus, the court

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67 *See supra* at Part II.A.

68 Fed. R. Crim. P. 41(b)(3); *see supra* at Part II.B.

69 *See supra* at Part II.B.

70 United States v. Christianson, 586 F.3d 532, 537 (7th Cir. 2009).

71 *Id.* at 539.

concluded that the evidence "sufficiently defines him as a terrorist."[72]

Before arriving at that analysis, however, the court noted that the defendant's organization, the "Earth Liberation Front" or "ELF," was "not to be confused with [] typical environmental protester[s]" and that "ELF members are of a different sort."[73] Citing dozens of bombings and acts of arson and vandalism attributed to ELF's members, as well as violent crimes for which the defendants' uncharged co-conspirators had been convicted, the court observed that "ELF's members take their activism to unconscionable levels."[74] It further observed that although the defendants did "not look the part of our current conception of a terrorist," that "does not separate them from that company. Indeed, it doesn't matter why the defendants oppose capitalism and the United States government—if they use violence and intimidation to further their views, they are terrorists."[75]

The court thus responded to the defendant's moral, social, and political arguments with moral, social, and political claims of its own. But while it is not unusual for a court considering a sentence to opine about the nature of the defendant's conduct, some of the court's commentary warrants caution. The tactics used by *other* members of a domestic organization should not bear on a defendant's sentence (unless perhaps those members and the defendant are part of a single conspiracy). Determining whether a defendant has engaged in terrorism based on actions of other members of an organization resembles a form of guilt by association—or sentencing by association—and could intrude on important First Amendment principles.[76] Courts and prosecutors should therefore refrain from suggesting that entire domestic organizations or all their members are terrorists. On the other hand, the court's observation that a defendant need not "look the part" for his actions to qualify as acts of terrorism is undoubtedly correct.[77] So, too, is the court's statement that "it doesn't matter why the defendants oppose capitalism and the United States government," because what matters is simply whether "they use violence and

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72 *Id.*

73 *Id.* at 537.

74 *Id.* at 538.

75 *Id.* at 539.

76 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982) ("[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected"); *id.* at 919 ("to punish association with" a group having both legal and illegal aims, "there must be 'clear proof that a defendant specifically intends to accomplish the aims of the organization by resort to violence'" (cleaned up) (quoting Scales v. United States, 367 U.S. 203, 229 (1961))).

77 *See Christianson*, 586 F.3d at 539.

intimidation to further their views."[78]

Federal law, of course, cannot answer every question about the moral, social, and political dimensions of domestic terrorism. It can, however, provide definitions grounded in individuals' specific actions and motives for those actions. And although sections 2332b(g)(5) and 2331(5) differ in their details, both in essence require that a person commit a dangerous and illegal act to bring about social or political goals. As *Christianson* correctly observed, the "why" of those goals is irrelevant; a person can commit a terrorist act regardless of whether her aim is to "protect" the environment,[79] to bring about a race war,[80] or to retaliate against immigration policies.[81]

Federal prosecutors, too, must remain carefully neutral as to ideology when characterizing conduct as domestic terrorism, whether for sentencing purposes or otherwise. As Attorney General Garland stated in announcing the release of the White House's *National Strategy for Countering Domestic Terrorism*, the Department of Justice is "focused on *violence*, not on ideology."[82] As the Attorney General noted, the *National Strategy*, too, "explains that 'it is critical that we condemn and confront domestic terrorism regardless of the particular ideology that motivates individuals to violence.'"[83]

When a person engages in violence to advance political or social goals, they have rejected democratic institutions as a means for solving disagreements. That is true regardless of the ideology that motivated the attack. Further, any perception that the government enforces its counterterrorism authorities differently based on ideology would risk fueling the type of polarization and mistrust that can lead down the path to more violence.

About the Author

Sophia Brill served as Senior Counsel to the Assistant Attorney General for National Security at the time the article was drafted and submitted. In that role, she worked with leadership of the Department and NSD. Before rejoining the Department in 2021, Ms. Brill served as an Attorney

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78 *Id.*

79 *See id.* at 537–40.

80 *See* United States v. Hasson, 26 F.4th 610, 621–27 (4th Cir.), *cert. denied*, 143 S. Ct. 310 (2022).

81 *See* United States v. Stein, 985 F.3d 1254, 1266–67 (10th Cir. 2021).

82 Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Domestic Terrorism Policy Address (June 15, 2021).

83 *Id.* (quoting Nat'l Sec. Council, The White House, National Strategy for Countering Domestic Terrorism 13 (June 2021)).

Advisor in NSD's Office of Law and Policy from 2014–2017, where she received two Assistant Attorney General awards for excellence. She has also served as counsel on the House Judiciary Committee and as Chief Counsel to Senator Chris Coons. She received her J.D. from Yale Law School.

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18 U.S.C. § 2331(5): Domestic Terrorism—A Brief Legislative History

Thomas E. Brzozowski
Counsel for Domestic Terrorism
National Security Division

I. Introduction

In the spring of 1993, a small knot of people gathered on a bluff overlooking the Branch Davidian compound in Waco, Texas. Over the course of several days, they watched a developing stand-off between federal authorities and the Branch Davidians, a religious cult. On April 19, 1993, the Federal Bureau of Investigation (FBI) raided the compound with tragic consequences. Soon after the raid, several fires broke out and quickly engulfed the building, resulting in the deaths of dozens trapped inside, including 25 children. Among those witnessing the unfolding drama was a 24-year old Army veteran named Timothy McVeigh. Two years later, on another spring day in Oklahoma City, he would exact retribution by executing the most lethal domestic terror attack in U.S. history.[1]

McVeigh's assault on the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995—exactly two years after the Waco siege—catalyzed congressional consideration of a federal definition for domestic terrorism. Although federal law contains no provision criminalizing domestic terrorism per se, Congress did define the term. This article will, in part, trace the legislative history of that effort. In addition, this article will examine the specific legal effect of the federal statutory definition of domestic terrorism, including enhanced statutory maximums, use of the definition as an element in an offense, and the definition's significance in multi-jurisdictional search warrant authority, among others.

II. Legislative history

Under federal law, domestic terrorism is defined as activities that—

(A) involve acts dangerous to human life that are a violation

[1] *FBI History: Oklahoma City Bombing*, FBI, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing (last visited May 23, 2023).

> 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 . . . .[2]

Although Congress ultimately passed a definition of domestic terrorism under the USA PATRIOT Act (Patriot Act),[3] Congress initially debated versions of the definition during consideration of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[4] In both the AEDPA and the Patriot Act, the paradigm legislators had the Oklahoma City bombing in mind when drafting the definition of domestic terrorism. Moreover, legislators also explicitly conceived the definition of "domestic terrorism" at 18 U.S.C. § 2331(5) as an analogue for the existing definition of "international terrorism" in 18 U.S.C. § 2331(1).

Congress and the courts occasionally referenced the term "domestic terrorism" during congressional debates and in judicial opinions before the AEDPA and Patriot Act, but with no real attempt at defining it. For example, several bombings by the Fuerzas Armadas de Liberacion Nacional Peurotrriquena (FALN), a Puerto Rican separatist group, in New York City in the mid-1970s were referred to off-handedly as domestic terrorism in subsequent trials in both New York and Chicago.[5] In *Alliance to End Repression v. City of Chicago*, the Seventh Circuit implicitly referred to groups like the FALN, Weather Underground, Posse Comitatus, and White Knights of the Ku Klux Klan as domestic terrorists in distinction to the "rise in [unspecified] international terrorism" in the 1970s and

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[2] 18 U.S.C. § 2331(5).

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[4] Pub. L. No. 104-132, 110 Stat. 1214, 1291 (1996).

[5] *See, e.g.*, Matter of Wood, 430 F. Supp. 41, 43 (S.D.N.Y. 1977); *In re* Cueto, 443 F. Supp. 857, 858 (S.D.N.Y. 1978); United States v. Torres, 583 F. Supp. 86, 88–89 (N.D. Ill.) (listing original charges), *rev'd*, 751 F.2d 875, 876–77 (7th Cir. 1984) (providing additional details of FALN activities); United States v. Torres, 602 F. Supp. 1458, 1459–60 (N.D. Ill. 1985) (referencing domestic terrorism); United States v. Rodriguez, 803 F.2d 318, 319 (7th Cir. 1986) (providing additional details of FALN activities).

early 80s.[6] Another court described as domestic terrorism a conspiracy to bomb a gay bar in Seattle, Washington, by an organization known as the Aryan Nations.[7]

A definition for domestic terrorism appeared for the first time in an amendment to the AEDPA that Senator Lieberman proposed.[8] Under Lieberman's proposed language, domestic terrorism would mean "any activities that 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 and which appear to be intended to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping."[9] It is worth noting here that this language is almost exactly what passed into law under the Patriot Act, codified at 18 U.S.C. § 2331(5)—reproduced below with additions italicized and deletions in brackets. Under section 2331(5), domestic terrorism "means activities that—

> (A) involve [violent acts or] acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) [and which] 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 . . . .*[10]

Although Senator Lieberman's amendment was repeatedly rejected for inclusion in the AEDPA, several senators called out the similarity in language between the 1995 proposal and the language in the 2001 bill during the debates over the Patriot Act.[11] This explicit linkage indicates that when passing the Patriot Act's definition of domestic terrorism, Congress

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6 742 F.2d 1007, 1019, 1027 (7th Cir. 1984).

7 *See* United States v. Winslow, 755 F. Supp. 914, 922 (D. Idaho 1991) (referencing domestic terrorism); United States v. Winslow, 962 F.2d 845, 847–48 (9th Cir. 1992) (describing group and crime).

8 *See* 141 Cong. Rec. 14,447, 14,529 (1995); 141 Cong. Rec. S7,585, S7,600 (1995).

9 141 Cong. Rec. S7,585, S7,600 (1995).

10 18 U.S.C. § 2331(5).

11 147 Cong. Rec. S10,989, S10,991, S11,048–49 (2001).

had in mind the same concepts and concerns from the original proposal for the AEDPA, namely the Oklahoma City bombing.

Congress explicitly linked the Oklahoma City bombing and domestic terrorism at least 20 times during the AEDPA debates and at least 3 times during the Patriot Act debates.[12] Additionally, legislators made numerous alterations to what became the AEDPA in the wake of the Oklahoma City bombing, including Lieberman's proposed definition of domestic terrorism.[13] Moreover, throughout the congressional debates over the AEDPA, legislators placed domestic terrorism—represented by the Oklahoma City bombing—and international terrorism—represented by the 1993 World Trade Center bombing—in contradiction to one another at least nine times.[14] For example, then-Senator Biden indicated that the bill was originally introduced in response to the World Trade Center bombing, but that the Oklahoma City bombing "teaches that the threat of *homegrown terrorism* must be taken every bit as seriously as the threat of *terrorism from abroad*."[15] He also pointed out that under current law, the death penalty was available for the perpetrators of the Oklahoma City bombing, but not for those who committed international terrorism like the World Trade Center bombing.[16] Similarly, Senator Feinstein lauded the provisions of the bill that allowed for increased monitoring of "extremist and potential terrorist groups" because "the primary lesson of [the two attacks] is that from now on we face the possibility of a serious terrorist problem here at home. In addition to international terrorist groups that may set up cells in the United States, there is a growing danger of armed extremist groups of Americans . . . using violence to pursue

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12 141 Cong. Rec. 14,447, 14,528–29 (1995); 141 Cong. Rec. S7,651, S7,662 (1995); 141 Cong. Rec. S7,585, S7,586–88, S7,598 (1995) (one senator citing Waco, Ruby Ridge, and Oklahoma City as domestic terrorism; another senator expressing concern about Waco and Ruby Ridge as domestic terrorism); 142 Cong. Rec. S7,801, S7,837, S7,851, S7,853, S7,856 (1996); 142 Cong. Rec. S3,337, S3,380 (1996); 142 Cong. Rec. S3,417, S3,463–65, S3,469, S3,473, S3,475 (1996); 142 Cong. Rec. S3,503, S3,613–14 (1996); *Administration's Draft of Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 22 (2001); 147 Cong. Rec. S10,989, S10,991 (2001); *see also* 142 Cong. Rec. S3,337, S3,367 (1996) (citing the Unabomber as an example of domestic terrorism).

13 141 Cong. Rec. 14,447, 14,523–24, 28 (1995); 141 Cong. Rec. S7,585, S7,585, S7,600 (1995); 142 Cong. Rec. S7,801, S7,853 (1995); 142 Cong. Rec. S3,417, S3,469, S3,473 (1996).

14 141 Cong. Rec. 14,447, 14,528–29 (1995); 141 Cong. Rec. S7,651, S7,663, S7,667 (1995); 142 Cong. Rec. S7,801, S7,837, S7,853, S7,856 (1995); 142 Cong. Rec. S3,337, S3,380 (1996); 142 Cong. Rec. S3,417, S3,475 (1996).

15 141 Cong. Rec. 14,447, 14,528 (1995) (emphasis added).

16 *Id.* at 14,529.

their agenda."[17]

The floor debates during consideration of the Patriot Act make clear that Congress viewed the definition of domestic terrorism in section 2331(5) as an analogue to international terrorism in section 2331(1), but covering attacks that were solely inspired, planned, and executed within the territorial jurisdiction of the United States. During the House Judicial Committee consideration of the Patriot Act, Representative Scott introduced an amendment requiring that the acts "are intended" to coerce or frighten, as opposed to only acts that "appear to be intended or have the effect" of coercing or frightening in order to "tighten up the definition of domestic terrorism . . . ."[18] In arguing (successfully) against the amendment, Representative Sensenbrenner explained that the definition of domestic terrorism "is based upon the current law definition of international terrorism . . . in 18 USC [§] 2331."[19] The Congressional Research Service's *Terrorism: Section by Section Analysis of the USA Patriot Act* similarly explained that the definition for domestic terrorism is "borrow[ed]" from the definition for international terrorism.[20] "Section 2331 has for some time defined international terrorism as those criminal acts of violence, *committed primarily overseas or internationally*," and the Patriot Act "defines domestic terrorism as those criminal acts dangerous to human life, *committed primarily within the United States* . . . ."[21]

There is very little case law interpreting section 2331(5) or discussing any definition of "domestic terrorism." However, because the term was intended to be identical to "international terrorism" except for territoriality, courts likely would accept the application of constructions of the latter to "domestic terrorism." In fact, at least two courts did exactly this before the passage of the Patriot Act.[22] The few cases construing

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17 141 Cong. Rec. S7,651, S7,662 (1995).

18 H.R. Rep. No. 107-236, at 422 (2001).

19 *Id.* at 422–23.

20 Charles Doyle, Cong. Rsch. Serv., Terrorism: Section by Section Analysis of the USA PATRIOT Act 46 (2001).

21 *Id.* (emphases added); *see also* 147 Cong. Rec. H7,129, H7,199 (2001) (section-by-section analysis explaining that the definition of domestic terrorism "is for the limited purpose of providing investigative authorities (i.e., court orders, warrants, etc.) for acts of terrorism *within the territorial jurisdiction of the United States*") (emphasis added); 147 Cong. Rec. S10,989, S11,012 (2001) (section-by-section analysis explaining the same and indicating that the definition of domestic terrorism is "a counterpart to the current definition of 'international terrorism'").

22 *See* United States v. Wells, 163 F.3d 889, 898–900 (4th Cir. 1998); Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1014–15 (N.D. Ill. 2001) (citing *Wells* with approval), *aff'd sub nom.* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev., 291 F.3d 1000 (7th Cir. 2002).

domestic terrorism support this conclusion. The United States District Court for the Southern District of Texas held that the definitions at sections 2331(1) and (5) "distinguish between 'international' and 'domestic' terrorism . . . by including a subsection specifying whether the activities occurred within or outside of the territorial jurisdiction of the United States."[23] The United States District Court for the Southern District of New York drew the same distinction, stating that section 2331 "defines 'international terrorism' in contradistinction to 'domestic terrorism.' The main difference is that domestic terrorism involves acts that 'occur primarily within the territorial jurisdiction of the United States,' while international terrorism involves acts that 'occur primarily outside the territorial jurisdiction of the United States, or transcend[s] national boundaries . . . .'"[24] Additionally, the Second Circuit, in construing "Federal crime[s] of terrorism" under 18 U.S.C. § 2332b(g)(5), defined domestic terrorism in contradistinction with transnational and international terrorism.[25] Transnational terrorism involved "conduct transcending national boundaries" and international terrorism involved acts overseas, whereas domestic terrorism involved "purely intra-national" conduct.[26] Finally, a large number of district court cases hold that there is no private cause of action under section 2333 for "domestic terrorism" because the statute explicitly only covers section 2331(1) "international terrorism."[27]

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[23] United States v. DeAmaris, 406 F. Supp. 2d 748, 750 (S.D. Tex. 2005).

[24] Smith *ex rel.* Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003) (alteration in original) (holding that the 9/11 attacks were "international terrorism" because they involved conduct transcending national boundaries), *amended sub nom.* Smith *ex rel.* Est. of Smith v. Islamic Emirate of Afghanistan, No. 01 CIV.10132, 2003 WL 23324214 (S.D.N.Y. May 19, 2003); *see also* Wells, 163 F.3d at 898-900 (holding that federal crime of "terrorism" and "international terrorism" reach beyond "acts" to include planning and support to plans).

[25] United States v. Salim, 549 F.3d 67, 76–79 (2d Cir. 2008).

[26] *Id.* (cleaned up); *see also id.* at 78–79 (indicating that other circuits have held similarly); United States v. Salim, 287 F. Supp. 2d 250, 331–54 (S.D.N.Y. 2003) (construing "Federal crime of terrorism" to require conduct that transcends national boundaries and thus excludes purely domestic conduct).

[27] *E.g.*, Archer v. City of Taft, No. 1:12-CV-261, 2012 WL 1458136, at *6 (E.D. Cal. Apr. 26, 2012); Boyd v. City of Oceanside Police Dep't, No. 11-CV-3039, 2013 WL 5671164, at *17 (S.D. Cal. Oct. 11, 2013); Calhoun v. Mann, No. CIV-A-08-458, 2009 WL 839214, at *1–2 (E.D. Pa. Mar. 26, 2009); Hayes v. Burns, No. 3:13-CV-28, 2013 WL 4501464, at *4 (M.D. Tenn. Aug. 22, 2013), *report and recommendation adopted*, No. 3:13-28, 2013 WL 5331539 (M.D. Tenn. Sept. 23, 2013); White v. Time Warner Cable Inc., No. CIV-12-406, 2013 WL 787967, at *4 (D. Haw. Feb. 28, 2013); Williams v. City of Monroe, No. CV-15-448, 2015 WL 9261217, at *4 (W.D. La. Nov. 3, 2015), *report and recommendation adopted*, No. CV-15-448, 2015 WL 9244565 (W.D. La. Dec. 17, 2015).

The congressional floor debates also highlight a few other interesting features concerning the definition of domestic terrorism. During congressional consideration of the AEDPA, Senator Lieberman proposed an amendment to the bill that would alter the existing authority for emergency wiretaps. Lieberman's amendment "would add the words 'domestic or international terrorism' to the limited number of situations in which the Attorney General, the Deputy Attorney General, or the Assistant Attorney General can obtain an emergency 48-hour wiretap without having to go [to] court in that first period of time."[28] Senator Lieberman articulated his rationale for the amendment as follows:

> Terrorists are cowards. Terrorists are cowards because they strike at undefended targets. And while we are quite logically now, in the aftermath of Oklahoma City, attempting to rebuild our defenses around more likely targets, particularly public buildings affected, the terrorist group that wants to create panic in our society, wants to punish our society, wants to strike at the sense of order and security in our society can, as we have seen in other settings, just as easily not strike at a governmental building, but go down the street and attack a large private building, an office building, or strike, as some have suggested, at the water supply in a community; so that we can never defend against all the potential targets of terrorists.
>
> The best defense is an offense. And the offense in this case, as this bill carries out in many ways, is to be watching people who indicate by their own behavior that they are capable of violent acts. I am not talking about inhibiting political freedoms here. We are not talking about prohibiting anybody from writing or speaking or demonstrating in a way that they believe, even if we find it abhorrent. But if they act in a way that indicates they may be capable of violent acts, criminal acts, then we, the people, should have our law enforcement agents there watching them, listening to them, infiltrating their groups to see to it that whenever possible we can stop them; we can strike before they strike at the heart of our society to prevent more death and destruction.
>
> The witnesses that spoke to committees that I have been on were commenting mostly on internationally inspired terrorism, but they focused again on the importance of electronic

[28] 141 Cong. Rec. S7,600 (daily ed. May 26, 1995) (statement of Sen. Lieberman).

> surveillance as a component of the overall approach of stopping terrorist acts whenever possible before they are committed, and electronic surveillance is part of that.
>
> I would argue that electronic surveillance may be more important with domestically based terrorists than with international terrorism. So far as we know, they are not generally reliant on outside State sponsors who, at some point, may be vulnerable to political or military pressure.
>
> Our weapons here are limited to effective law enforcement, including one of the most powerful tools law enforcement has, which is carefully circumscribed, legally authorized electronic surveillance, particularly in this high-technology communication age.[29]

Senator Lieberman's amendment, although it did not pass, nevertheless prompted several legislators to voice civil liberties concerns in connection with the scope of the definition of domestic terrorism. Senator Hatch, for example, argued that the amendment "defines domestic terrorism in an unwise and extremely broad manner."[30] He voiced concern that the definition might sweep in legitimate acts of protest "because they, in some way, pose a danger or are viewed as 'intimidating.'"[31] He expressed alarm that Senator Lieberman's amendment

> would permit the Government to obtain emergency wiretaps . . . [of] groups in our society today, ranging from the right to the left. Take a gay rights group like Act Up, or an environmental group like some of the more vociferous environmental groups; or you could take some groups on the right that are vociferous that stage a sit-in that may violate some State property or some loitering felony. It seems to me that a demonstration blocking a busy street or entrance to a church or hospital could endanger human life under certain circumstances, and certainly a demonstration of this nature would be intended to change the Government's policy. This amendment could thus permit the Government to listen to the conversations of such groups without obtaining a court order.[32]

Although Senator Lieberman's emergency wiretap amendment failed,

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29 *Id.* at 16.
30 *Id.* at 17.
31 *Id.*
32 *Id.*

as did his effort to define domestic terrorism under the AEDPA, his work eventually bore fruit several years later under the Patriot Act.

Congressional debate of the definition of domestic terrorism under the Patriot Act also drew civil liberties-related reservations from several legislators, but those objections had little impact on the definition ultimately passed under that statute. In one example, previously noted, Representative Scott introduced an amendment to the definition requiring that the acts concerned "are intended" to coerce or frighten, as opposed to only acts that "appear to be intended or have the effect" of coercing or frightening in order to "tighten up the definition of domestic terrorism . . . ."[33] Echoing many of Senator Hatch's earlier concerns about Senator Lieberman's proposed definition under the AEDPA, Representative Scott argued that the new definition offered under the Patriot Act was "too broad and unclear and would include activities that few of us would define as domestic terrorism. The present wording of quote, appear to be intended or have the effect, unquote, will allow someone to be accused of an act of domestic terrorism based on appearances or effects without the traditional intent required."[34] In response, Representative Sensenbrenner brushed these concerns aside and insisted that Scott's effort to water down the definition of domestic terrorism would only serve to "require a tougher standard of proof for domestic terrorism than for international terrorism."[35] Ultimately, efforts to cabin the scope of the definition failed, signaling congressional resolve to adopt a more expansive definition of domestic terrorism under the Patriot Act.

Although not a direct byproduct of the federal definition of domestic terrorism, another provision that Congress passed during the same timeframe offers unique insight into congressional thinking on domestic terrorism in the weeks after 9/11. In November 2001, legislators amended 28 U.S.C. § 504, the statute governing the appointment of the Deputy Attorney General. Congress added new language that authorized the "appointment of a Deputy Attorney General for Combating Domestic Terrorism, if by June 30th, 2002, the President had not submitted a proposal to restructure the Department of Justice to include a coordinator of Department of Justice activities relating to combating domestic terrorism, or if Congress had failed to enact legislation establishing such a new position."[36] Although no such position was ever created, and Congress

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[33] H.R. Rep. No. 107-236, at 422 (2001).
[34] *Id.*
[35] *Id.*
[36] 28 U.S.C. § 504 note related to section 612.

repealed the amendment the next year,[37] the provision is a potent illustration of how domestic terrorism also was front of mind in Congress in the immediate wake of 9/11.

III. Legal effect

As noted earlier, the federal code defines "domestic terrorism" but does not criminalize the activities the definition describes. However, the definition does have specific legal effect in certain circumstances. For example, it establishes enhanced statutory maximums for select statutes, features as an element in at least one federal offense, and significantly impacts multi-jurisdictional search warrant authority.

Some statutes carry enhanced statutory caps if the offense "involves" domestic or international terrorism (or, in another formulation, "is committed to facilitate an act of domestic terrorism" or international terrorism). 18 U.S.C. § 1001, for example, outlaws knowingly and willfully making a materially false statement or representation.[38] Although the maximum penalty for this offense is 5 years, "if the offense involves international or domestic terrorism (as defined in section 2331), [the defendant may be] imprisoned not more than 8 years . . . ."[39] 18 U.S.C. § 1505 operates in a similar fashion. This statute criminalizes the obstruction of justice and normally carries a penalty of five years, unless "the offense involves international or domestic terrorism (as defined in section 2331) . . . ."[40] If it does, the cap increases to eight years. Finally, the federal definition of domestic terrorism allows for a substantial 15-year bump from 15 to 30 years in the statutory cap for violations of 18 U.S.C. § 1028, which concerns the use of fraudulent identification. Because the fact of involving domestic terrorism as outlined in the three statutes noted above enhances the statutory maximum, it must be specifically alleged as an element in any charging document and found by the jury.[41]

In addition to increasing the statutory cap for certain crimes, the federal definition of domestic terrorism also is an element of the offense in at least one statute. 18 U.S.C. § 226 generally criminalizes bribery affecting port security. More specifically, the statute provides that whoever, with respect to a seaport, knowingly commits bribery "with intent to commit international terrorism or domestic terrorism (as those terms

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[37] 28 U.S.C. § 504 note related to section 4004(f).

[38] 18 U.S.C. § 1001(a)(2).

[39] *Id.*

[40] 18 U.S.C. § 1505.

[41] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Blakely v. Washington, 542 U.S. 296, 303 (2004).

are defined under section 2331)" or "knowing that such influence will be used to commit, or plan to commit, international or domestic terrorism, shall be . . . imprisoned not more than 15 years . . . ."[42] This provision was one of several statutes passed under Title III (Reducing Crime and Terrorism at America's Seaports) of the USA Patriot Improvement and Reauthorization Act of 2005.[43]

The federal definition of domestic terrorism also has the potential to substantially impact domestic terrorism investigations. Federal Rule of Criminal Procedure 41(b)(3) provides that a federal magistrate judge "in an investigation of domestic terrorism or international terrorism" has the "authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district[.]"[44] The provision explicitly addresses the authority of a magistrate judge to issue a search warrant in an investigation of domestic or international terrorism. So long as the magistrate judge has authority in a district where activities related to terrorism may have occurred, the magistrate judge may issue a warrant for persons or property not only within the district, but outside the district as well. This provision was added to reduce delays and burdens on law enforcement officers investigating terrorist activities that have occurred across multiple judicial districts, which can have serious adverse consequences on an ongoing terrorism investigation.

Although judicial opinions construing the federal definition of domestic terrorism are rare, one recent case from the United States District Court for the District of Columbia addressed the applicability of Rule 41(b)(3) in domestic terrorism cases head on. A magistrate judge found that the court had jurisdiction under Rule 41(b)(3) to issue an extraterritorial warrant to seize and search a cellular device located outside the district in connection with the domestic terrorism investigation into the January 6th, 2021 United States Capitol Breach.[45] In the warrant application, federal authorities alleged that there was probable cause to believe the device contained evidence relating to the ongoing investigation, including videos, photographs, geolocation data and messages showing the user's involvement in and planning of various federal crimes, the identity

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[42] 18 U.S.C. § 226.

[43] Brian T. Yeh & Charles Doyle, USA PATRIOT Improvement and Reauthorization Act of 2005: A Sketch 5 (2006); *see* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 226, 120 Stat. 192, 242 (2006).

[44] Fed. R. Crim. P. 41(b)(3).

[45] *In re* Search of One Apple iPhone Smartphone, No. 21-sw-253, 2022 WL 4479799, at *1 (D.D.C. Sept. 6, 2022).

of co-conspirators, and communications in furtherance of the conspiracy.[46]

The court first evaluated venue under Rule 41(b)(3), finding that, under the flexible "reason to believe" standard, the government proffered sufficient facts to establish both that there was (1) "an investigation of domestic terrorism or international terrorism"; and (2) that the court is in a district "in which activities related to the terrorism may have occurred."[47] Because there is no underlying federal crime of domestic terrorism, the court looked to the definition of domestic terrorism under 18 U.S.C. § 2331(5) to determine whether the activities under investigation fell within the permissible scope.[48] Additionally, the court analogized the broad definition of "activities" found within the Racketeer Influenced and Corrupt Organization (RICO) statute to the present case, arguing that domestic terrorism, like racketeering or other types of long-term organized crime, often involves criminal activity wholly operating within legitimate enterprises.[49] Consequently, even lawful acts will fall under the scope of "activities" so long as they are related to domestic terrorism.[50]

The government proffered evidence that the owner of the device was a member of a group who conspired to come to Washington, D.C., during the election certification process and encouraged others to do so. Members of the group subsequently invaded the Capitol building and attempted to enter the Senate wing of Congress, while other members were waiting outside the district ready to provide support. The court found that an angry mob storming the Capitol, assaulting police officers, and destroying government property "involved acts dangerous to human life" in violation of 18 U.S.C. § 2331(5)(A).[51] Furthermore, because members of the group descended upon the Capitol with the goal of preventing Congress from certifying the vote count of the Electoral college, this action "appear[ed] to be intended . . . to influence the policy of a government by intimidation or coercion" in violation of 18 U.S.C. § 2331(5)(B)(ii).[52]

The court then laid out the permissible offenses and scope of searches under Rule 41(b)(3). When searching for evidence of domestic terrorism, a court can authorize searches for evidence of: (1) terrorism crimes that occur domestically; (2) any non-terrorism crime that relates to the acts of domestic terrorism; or (3) any crime, even if there was no relation-

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46 *Id.*
47 *Id.* at *3–4.
48 *See id.* at *3–5.
49 *Id.* at *3–4.
50 *See id.* at *4.
51 *Id.* at *5 (cleaned up).
52 *Id.* (alteration in original).

ship to the act of domestic terrorism.[53] The court analyzed the charges under the first two categories, finding that one of the target offenses, 18 U.S.C § 1361, is a crime of terrorism, and thus permitted the extraterritorial search and seizure of evidence related to this offense.[54] Furthermore, relying on the legislative history of the Patriot Act, the court found that non-terrorism offenses that relate to acts of domestic terrorism can provide the basis for an extraterritorial search under Rule 41(b)(3).[55] Because the government proffered sufficient evidence that members of the group violated various federal crimes related to breaching the Capitol building, violently engaging with law enforcement, and attempting to obstruct the functions of Congress, these charges, while not traditional crimes of terrorism, were within the scope of the second category of permissible offenses.[56]

Although the federal statutory definition of domestic terrorism carries no penalty, its legislative history signals strong congressional resolve both to distinguish it from international terrorism and to broaden the scope of its application. The definition also has tangible legal effect in certain circumstances. It increases the statutory maximum penalties for select federal offenses and constitutes an element of the offense for at least one federal violation. And in the investigative arena, the definition substantially expands the reach of Rule 41 search warrants. The carnage wrought in Oklahoma City nearly thirty years ago spurred Congress to initially consider and then later pass a federal definition of domestic terrorism. Although the definition does impact the legal architecture governing domestic terrorism investigations and prosecutions, its ultimate utility in a constantly evolving threat landscape of increasingly global dimensions has been the subject of fierce debate ever since.

About the Author

Thomas E. Brzozowski currently serves as the Counsel for Domestic Terrorism in the National Security Division of the U.S. Department of Justice. Tom received his Bachelor of Arts in International Relations from the College of William & Mary in 1996, after which he was commissioned as a Second Lieutenant in the U.S. Army. Tom spent three years as an artillery officer at Fort Bragg, North Carolina, before he was selected to attend William & Mary Law School under the auspices of the U.S. Army Funded Legal Education Program. After law school, Tom spent six years

53 *Id.* at *6.
54 *Id.*
55 *Id.* at *7.
56 *Id.* at *7–8.

in Europe serving as an officer in the U.S. Army JAG Corps. He then left active duty and clerked for Judge Stanley Birch, Jr., at the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Before taking up his present position, Tom was an Assistant General Counsel in the FBI's Office of General Counsel. Tom holds a Master of Laws degree in National Security Law from the Georgetown University Law Center and a master's degree in security studies from the U.S. Army War College. He also is an adjunct professor at the George Washington University Law School and continues to serve as a JAG officer in the U.S. Army Reserves.

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Pathway to Targeted Violence: Can Early Intervention Work?

Dr. Karie Gibson
Unit Chief
Federal Bureau of Investigation
Behavioral Analysis Unit-1

I. Introduction

Within the Federal Bureau of Investigation's (FBI) Critical Incident Response Group are the FBI Behavioral Analysis Units. Specifically, the FBI's Behavioral Analysis Unit-1 (BAU-1) has a long history of preventing acts of terrorism and mass casualty targeted violence. Many are not aware of how the FBI has been instrumental in operationally preventing these attacks; assisting our local, state, and federal partners; providing training; and conducting research. BAU-1 is the subject-matter expert in preventing acts of terrorism and mass casualty targeted violence both domestically and internationally.

In 2010, BAU-1 created the Behavioral Threat Assessment Center (BTAC), which is the only federal national level, multi-agency, multidisciplinary task force focused on preventing terrorism and targeted violence through applying behavioral-based support, training, and research. BTAC is staffed by agents, analysts, mental health professionals, and researchers from the FBI, ATF, U.S. Capitol Police, U.S. Marshals Service, and Department of Defense. In this unique capacity, BTAC provides investigative and operational support for the FBI's most complex, concerning, and complicated international and domestic terrorism investigations. In addition, BTAC provides threat assessment and threat management support to federal, state, local, tribal and campus law enforcement partners, as well as community stakeholders, all working diligently across the United States on targeted violence prevention. Significant lines of effort on targeted violence prevention include persons of concern, potential active shooters, threats of school shootings, stalking, and workplace violence concerns.

II. The FBI's BTAC

BTAC leads the FBI's efforts to organize, coordinate, and synchronize an enterprise-wide strategy to incorporate Threat Assessment and Threat Management (TATM) principles for preventing mass casualty violence. When implemented properly, TATM principles are designed to prevent acts of targeted violence before they occur, consistent with the FBI's authority to disrupt, mitigate, and prevent federal crimes and threats to the national security. Integral to TATM concepts is the need to develop and leverage partnerships and relationships across all levels of government, including non-traditional law enforcement partners, such as mental health, probation and parole, and social services.

BTAC's capabilities are enhanced through the more than 300 BAU Coordinators, including more than 149 Threat Management Coordinators (TMCs) with advanced training, assigned throughout the 56 FBI field offices across the United States. In 2018, following the 2017 Las Vegas, Nevada, and 2018 Parkland, Florida mass casualty attacks, BAU-1 needed to be more forward-leaning with TATM resources within the FBI divisions versus only relying on a headquarters' resource. Therefore, in response to the rise in mass casualty violence and the accompanying public expectation for law enforcement disruption before an attack, BTAC developed the National TATM Initiative. BTAC's TATM Initiative aimed at building operational response capabilities within all FBI field offices and to lead efforts to build similar capabilities across law enforcement at all levels of government. Through this national approach, BTAC aids field offices in building local capability to triage, action, and manage proactive investigations involving terrorism and mass casualty targeted violence.

It is time to be proactive in our prevention approach, given the number of mass casualty events in the United States has increased steadily over the last two decades. While the threat of long-term, sophisticated attacks by organized terrorist networks persists, BTAC has seen a rapidly developing, technology-amplified threat from individual actors motivated by a broad spectrum of ideologies and grievances. These persons of concern include would-be terrorists, school or workplace attackers, and active shooters. When they come to the attention of law enforcement, these cases can be particularly challenging when no identifiable or significant law has yet been broken or when the person of concern is a juvenile.

To further complicate this issue, law enforcement agencies have experienced increasing public pressure to disrupt would-be attackers before a mass casualty event. When offenders do execute a mass casualty attack, law enforcement agencies often receive the most scrutiny from the communities they serve, the media, and the nation at large. In the last

several years, victims and their families have settled for over $200 million in payments from the federal government for alleged missed opportunities in advance of an attack.[1]

III. The FBI's national-level resources

BTAC engages in operational support to the most concerning law enforcement cases around the country, assessing over 300 persons of concern annually and developing strategies to manage the threats they pose. In cases where a mass casualty event has occurred, BTAC deploys to assist local investigators in determining what may have motivated a particular offender. Additionally, BTAC has published landmark academic research on pre-attack behaviors of active shooters and lone offender terrorists. BTAC's extensive and broad-ranging capabilities are enhanced through the BAU Coordinators assigned to all 56 FBI field offices.

A. Building field office capability

The purpose of the TATM Initiative is to educate, lead, and support the incorporation of proactive law enforcement strategies to prevent acts of terrorism and mass casualty targeted violence. To reinforce this effort, BTAC assists FBI field offices as they build operational response capabilities. BTAC also supports field offices leading efforts to build similar capacity across law enforcement at all levels of government. In July 2020, BTAC articulated this operational and legal foundation and scope of this strategy by issuing guidance to all field offices.

Utilizing TATM principles is similar to a cardiologist analyzing patient cases based on history, current circumstances, risk factors, and warning signs. In TATM, investigators view a person of concern in light of his or her pre-attack behavioral indicators, risk factors, and warning signs. This approach encourages structured assessment of an individual subject and what triggers could move that person along a pathway to violence. It also

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[1] On April 29, 2022, a U.S. District Court finalized a settlement between the FBI and victims of the Marjorie Stoneman Douglas High School shooting in Parkland, Florida. The settlement was valued at $127.5 million. Press Release, U.S. Dep't of Just., Justice Department Announces Civil Settlement in Cases Arising from 2018 School Shooting in Parkland, Florida (Mar. 16, 2022). On October 20, 2011, the Department announced a settlement with victims of the Charleston AME Church shooting valued at $88 million. Marianna Wharry, *DOJ Reaches $88M Civil Settlement with Families of Charleston Shooting Victims*, ALM Law.com (Oct. 28, 2021), https://www.law.com/2021/10/28/doj-reaches-88m-civil-settlement-with-families-of-charleston-shooting-victims/?slreturn=20230618122822; Press Release, U.S. Dep't of Just., Justice Department Announces Multi-Million Dollar Civil Settlement in Principle in Mother Emanuel Charleston Church Mass Shooting (Oct. 28, 2021).

provides a framework for developing strategies to manage the threat that a particular person of concern poses.

Each FBI field office has at least one designated TMC who has received three weeks of advanced BTAC training and serves as a point of contact for local TATM capability building. In addition to initial training, BTAC provides monthly continuing education opportunities for TMCs to learn about national-level trends and field office program examples. All TMCs are selected from the BAU Coordinator cadre. BTAC provides TMCs with mentoring and program support organized by six regions in the United States.

BTAC classifies field office engagement in the TATM Initiative by four categories:

- *Level 1*: Field office incorporates TATM principles on FBI terrorism and threat cases (international and domestic terrorism, WMD, arson and bombing, firearms, stalking, communicated threats, etc.) by requesting BTAC operational support. TMCs have provided effective education to substantive squads such that cases may be identified and elevated for BTAC assistance.
- *Level 2*: Field office offers TATM support for non-FBI law enforcement cases via 343W domestic police cooperation classification (juvenile or adult persons of concern, active shooter threats, workplace violence threats, stalking and harassment, communicated threats, etc.). TMCs have provided effective education and liaison to partner agencies such that state and local cases may be elevated for BTAC assistance.
- *Level 3A*: Field office is engaged with existing TATM team(s) in a field office's Authorized Organizational Representative (AOR). In this capacity, the FBI is a participating member of a local threat management team and acts as a liaison for case referrals to and from the FBI and other participating agencies. Although the FBI may participate at varying degrees, these teams are owned and operated by an agency external to the FBI (fusion center, state or local law enforcement agency, etc.).
- *Level 3B*: Field office builds and maintains a TATM team. FBI-led teams are appropriate in areas where no other TATM exists and there is no appetite for creating one outside of the FBI.

B. Advantages of local capability

Incorporating TATM principles in cases involving terrorism and other mass casualty threats enhances the FBI's ability to prevent and disrupt

attacks. This proactive capability reduces risk to both the FBI and the communities they serve. It incorporates a structured approach for assessing threats so each case can be managed with appropriate resources.

Participating in an active TATM team brings structure to crisis situations. Assistant United States Attorneys (AUSAs) and District Attorneys (DAs) are a great resource to consider as members to such teams. Cases involving the threat of violence are often complex ones in which investigators must consider effects or consequences of law enforcement action. Rather than relying on individual experience or "gut feel", access to local TATM capability provides the framework for triage, assessment, and resource allocation.

Engaging with TATM teams allows FBI field offices to share resources specific to threat cases. Specifically, TATM teams likely have access to resources and expertise related to mental health services, local protective orders, and other government or community services that could be useful to mitigate threats. Building these relationships before handling a crisis or specific threat case allows FBI field offices to have immediate access to resources useful in threat management.

IV. How do we prevent these mass attacks of violence?

Offenders who commit acts of terrorism and mass casualty targeted violence do not snap; rather, they decide. Clinical and forensic studies have shown that virtually all acts of targeted violence are premeditated and planned rather than spontaneous, emotion-driven, impulsive crimes. To date, no evidence in the research indicates that "snap" mass murders occur. As will be discussed in more detail, the offenders usually have a grievance, and they take time to consider, plan, and prepare how to resolve their grievance with violence. Many of the pre-attack behavior indicators are present, observable, and recognizable for bystanders to report before the attack. These predatory offenders take time to plan and prepare their attacks, which provides law enforcement with the time to disrupt and prevent mass violence.

A. Pathway behaviors—observable pre-attack indicators

Most persons of concern on the pathway to violence start with a personal grievance and are unable to process the slights, rejections, teasing, and bullying that any individual may encounter in their life. These persons of concern lack the necessary psychological armor needed to deal with these stressors. The grievance is best described as when a person

perceives that he or she has been personally and intensely wronged and feels a strong sense of injustice.

In a study that the FBI's BTAC conducted examining the pre-attack behaviors of active shooters in the United States between 2000 and 2013, it was determined that 79% of active shooters appeared to be acting in accordance with a real or perceived grievance.[2] A majority of these grievances seem to have originated in response to some specific action taken regarding the shooter. Of the active shooters who had an identifiable grievance, 33% were related to an adverse interpersonal action against the shooter, 16% were related to their employment, and the remaining half encompassed a spectrum of other sources ranging from ideology to academics.[3] This study also determined that 44% of those active shooters experienced a precipitating or triggering event related to the grievance which ultimately led to the attack.[4]

In a study examining lone offender terrorism cases within the United States between 1972 and 2015, lone offender terrorists claimed their violence was done in service of larger ideological goals such as inciting social or political change.[5] Most offenders were categorized as primarily carrying out their attack for the following ideological causes: 25% anti-government violent extremism, 19% racially motivated violent extremism advocating for the superiority of the white race, 19% radical Islamist violent extremism, 10% pro-life violent extremism, 4% racially motivated violent extremism using force or violence in response to real or perceived racism and injustice in American society, and 4% environmental violent extremism.[6] Although the offenders carried out violence in service of a stated ideological goal, these broader claimed purposes rarely existed in isolation from personal motives.[7] Most offenders (69%) had an identifiable primary grievance, defined as a real or perceived injustice or feeling of being wronged.[8]

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2 James Silver et al., FBI, A Study of Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013, at 22 (2018).
3 *Id.*
4 *Id.*
5 Lauren Richards et al., FBI, Nat'l Ctr. for the Analysis of Violent Crime, Lone Offender: A Study of Lone Offender Terrorism in the United States (1972–2015), at 29 (2019).
6 *Id.*
7 *Id.* at 35.
8 *Id.*

B. Movement from thought to action

It becomes a concern when an offender displays behaviors that suggest he or she is on the pathway to commit an act of targeted violence. Targeted violence has been defined as a predatory act, generally with planned and purposeful violence intended for an identified target.[9] Research in the field of threat assessment has defined discernible steps an offender will likely traverse before committing the violent act.[10] Calhoun and Weston defined those steps as the Pathway to Violence, which begins with a grievance based upon real or perceived slights, followed by violent ideation, research and planning, preparation, a breach of normal security or prevention measures, and finally an attack.[11] Many times, the Pathway to Violence will be built upon a foundation of narcissism, in which the offender feels they are special and the world should treat them as such. When the world treats them in an incongruent way with the superiority they feel, a struggle ensues with how to reconcile such a discrepancy. This point is when they are most vulnerable to develop a grievance and pursue justice for the perceived wrong. As previously discussed, the grievance stage is best described as when a person perceives that he or she has been personally and intensely wronged and feels a strong sense of injustice. Some individuals progress from the grievance to the ideation phase, which is achieved when a person believes that violence is the only solution that will right the wrong or bring justice.[12] Many people have grievances, but few will begin contemplating using violence to solve the problem. Indicators that a person has reached this stage may include making inappropriate communications or contacts indicating a belief that violence is justified, fixating on weapons and violence in relation to achieving justice for the wrongs done to the person, and discussing a plan of attack with others.

Once the offender decides that violence should or must be used to seek justice for real or perceived wrongs, under most circumstances the offender must then begin to think and plan the next stage, called research and planning. This stage includes researching methods, the planned target, past offenders, and previous targeted violence incidents. The offender

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[9] J. Reid Meloy, Violence Risk and Threat Assessment: A Practical Guide for Mental Health and Criminal Justice Professionals 83 (2000).

[10] *E.g.*, Frederick S. Calhoun et al., Contemporary Threat Management: A Practical Guide for Identifying, Assessing, and Managing Individuals of Violent Intent (2003).

[11] *See generally id.*; J. Reid Meloy, The Psychology of Stalking: Clinical and Forensic Perspectives 175–91 (1998).

[12] Calhoun et al., *supra* note 10.

may consider both practical and symbolic reasons when selecting potential targets. As with other steps along the pathway, research and planning need not cease when the next step begins; it can comingle with other steps.[13]

When the offender has progressed from research and planning to preparation, the offender starts to acquire the equipment, skills, and any other resources necessary to conduct an attack. This can include obtaining weapons and gear as well as familiarization of and practice with the weapons. The person may conduct an actual or virtual rehearsal of any aspect of the attack (for example, driving the intended route to the site). It can also include farewell writings, other end of life planning, or creation of artifacts meant to be left behind to claim credit and explain motive.[14]

The final step on the pathway before the attack is called breach. This step involves probing of security measures or boundaries at the target location. Breach activities can include conducting dry runs, engaging in approach behaviors to include stalking, and testing security at the target location. In practice, BTAC has expanded this definition to include cyber intrusion behaviors where these breaches may be intended to identify security plans and weaknesses, gain protected information about a target, or otherwise further an attack plan via unauthorized access to systems. Breach behavior may occur immediately before an attack, or earlier. The final stage of the pathway behaviors is the attack. The attack is a violent offense against both pre-planned and opportunistically chosen targets. The violent offense is the culmination of a highly personalized quest for justice, which only the offender may fully understand.[15]

When the offender moves from thought (that is, grievance and ideation) to action (that is, research, planning, preparation, and breach), the concern for targeted violence increases dramatically, and the need for immediate mitigation needs to be implemented. Research, planning, preparation, and attack planning is a process that represents a progression from the initial idea of carrying out an attack to the actual decision to engage in violent action. It is often the first time when others can observe and detect the offender's Pathway to Violence behavior. Research on active shooters has determined that 73% of active shooters had a known connection with the attack site.[16] Moreover, 88% of active shooters age 17

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[13] *See* Molly Amman et al., FBI, Nat'l Ctr. for the Analysis of Violent Crime, Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks 32 (2016).

[14] *Id.* at 33.

[15] *Id.*

[16] Silver et al., *supra* note 2, at 14.

and younger targeted their school or former school.[17] In cases where the amount of time spent planning and preparing could be determined, 77% of the active shooters spent a week to 24 months planning their attack, and 46% spent a week to 12 months preparing.[18] In 21% of cases, active shooters researched or studied past attacks by other previous attackers.[19] It is, however, important to note that the FBI suspects this behavior may be underrepresented in the study sample, especially because it could not be determined if active shooters researched past attacks in 46% of the cases.[20] Another research study looking at lone offender terrorism cases determined that 73% of the offenders selected their target because it was instrumental to their goal or ideology.[21] During attack planning, 79% of the offenders selected targets that had no or minimal security.[22] Despite 60% of the offenders trying to learn how to assemble explosives or trying to obtain explosive materials before the attack, only 27% ultimately used explosives in their attack.[23]

C. Bystanders are part of the solution

Third-party bystanders are individuals who observe or otherwise become aware of potentially concerning information about a person of concern. While the term traditionally refers to individuals who witness a specific event, counterterrorism and threat assessment professionals use an expanded definition to capture individuals who may witness a range of pre-attack behaviors and statements that elicit concern, such as when an existing behavior escalates in frequency or intensity, or when a new behavior emerges. Research has shown at least one bystander witnessed one or more concerning behaviors in 100% of the cases reviewed.[24] Similarly, it was identified that 93% of attackers engaged in some behavior before the attack that caused others to be concerned.[25] A third study that the FBI BTAC and the National Counterterrorism Center conducted looked at fully adjudicated Sunni violent extremist cases in the United States, most of which were disrupted between 2007 and 2013. The study found that at least one bystander became aware of a subject's violent extremist

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17 *Id.*
18 *Id.* at 15.
19 *Id.* at 14.
20 *Id.*
21 *Id.*
22 *Id.* at 22.
23 Richards et al., *supra* note 5, at 49.
24 *Id.* at 71.
25 Silver et al., *supra* note 2, at 14.

views or activities in 75% of cases.[26]

D. Leakage

Leakage occurs when a person intentionally or unintentionally reveals clues to a third party about feelings, thoughts, fantasies, attitudes, or intentions that may signal the intent to commit a violent act. Leakage can be found not only in verbal communications but also in writings (for example, journals, school assignments, artwork, and poetry) and in online interactions (for example, blogs, tweets, texts, and video postings). Prior research has shown that leakage of intent to commit violence is common before attacks perpetrated by both adolescents and adults.[27] It is, however, more common among adolescents.[28]

In a study examining the pre-attack behaviors of active shooters in the United States, 88% of active shooters age 17 and younger were found to have leaked intent to commit violence, versus 51% of adults.[29] In a separate study looking at lone offender terrorism cases in the United States, 62% of the cases identified at least one person who knew the offender supported violence in furtherance of an ideology.[30] In 25% of the cases, at least one other individual became aware of the offenders' research, planning, and preparation of an attack. In addition, it was revealed that in 18% of the cases, at least one other person knew of the offenders' specific attack plans.[31]

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[26] Nat'l Counterterrorism Ctr. & FBI, Understanding Bystander Interventions to Prevent Terrorism 2 (2022), https://ciacco.org/files/D2DF/Understanding%20Bystander%20Interventions%20 to%20Prevent%20Terrorism_NCTC.pdf (last visited July 18, 2023).

[27] Silver et al., *supra* note 2, at 24.

[28] *See generally* Anthony G. Hempel et al., *Offender and Offense Characteristics of a Nonrandom Sample of Mass Murderers,* 27 J. Am. Acad. Psychiatry and L. 213 (1999); J. Reid Meloy et al., *The Role of Warning Behaviors in Threat Assessment: An Exploration and Suggested Typology,* 30 Behav. Sci. and L. 256 (2012) [hereinafter Meloy, *Warning Behaviors*]; J. Reid Meloy et al., *The Concept of Leakage in Threat Assessment,* 29 Behav. Sci. and L. 513 (2011) [hereinafter Meloy, *Leakage*].

[29] Silver et al., *supra* note 2, at 25.

[30] Richards et al., *supra* note 5, at 66.

[31] *Id.*

V. Warning behaviors

A. Fixation warning behavior[32]

Any behavior that indicates an increasing preoccupation with a person or a cause may be fixation warning behavior.[33] It can be demonstrated by an increased focus on the person or cause and an increasingly negative characterization of the same. Further, the frequency, intensity, and duration of the person of concern's communications about the fixation may significantly increase. Opinions may become more rigid, and speech and actions may appear angrier. Social or occupational deterioration can occur as the person loses interest or ability to focus on these aspects of life.

B. Identification warning behavior[34]

The person may adopt a "pseudocommando" identity or warrior mentality, often with the goal of targeting unarmed civilians in a non-military encounter.[35] A preoccupation with firearms and a desire to use them for revenge may be evident.[36] The person may view himself as an agent to advance a particular cause or belief system.[37] The practical aspect of identification warning behavior may feature an unusual fascination with weapons or other military or law enforcement paraphernalia. This can be demonstrated through actual weapons, ammunition, or paraphernalia purchases, or through virtual activities such as intense preoccupation with and practice on first-person shooter games, or in-depth online research of weapons.[38] A psychological aspect of identification may involve physical costuming, immersion in aggressive or violent materials, or fantasizing about offending violently. Conversations or writings may indicate a desire to copycat and "one up" previous attackers or assassins.

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32 Amman et al., *supra* note 13, at 33.

33 *See* Meloy, *Warning Behaviors*, *supra* note 28, at 265.

34 Amman et al., *supra* note 13, at 34.

35 *See generally* James L. Knoll, *The "Pseudocommando" Mass Murder: Part I, The Psychology of Revenge and Obliteration*, 38 J. Am. Acad. Psychiatry and L. 87 (2010) [hereinafter Knoll, *Part I*]; James L. Knoll, *The "Pseudocommando" Mass Murderer: Part II, The Language of Revenge,* 38 J. Am. Acad. Psychiatry and L. 263 (2010) [hereinafter Knoll, *Part II*]; J. Reid Meloy et al., *The Concept of Identification in Threat Assessment,* 33 Behav. Sci. and L. 213 (2015).

36 Park E. Dietz, *Mass, Serial and Sensational Homicides,* 62 Bull. N.Y. Acad. Med. 477, 483 (1986); Knoll, *Part I*, *supra* note 34, at 87; Knoll, *Part II, supra* note 34, at 264.

37 Meloy et al., *supra* note 35, at 9.

38 Hempel et al., *supra* note 28, at 220.

C. Energy burst warning behavior[39]

This is demonstrated by an increased pace, duration, or range of any noted activities related to a potential target, even if the activities themselves seem harmless.[40] These can be overt or stealthy behaviors and have been noted to occur usually in the hours, days, or weeks before a targeted violence incident.[41] For example, a would-be offender may make more frequent trips, errands, purchases, or communications as he rushes to finalize his plans and settle his affairs before an assault.[42]

D. Last resort warning behavior[43]

This behavior includes communications or actions indicating increasing desperation, distress, or that the person of concern perceives no alternatives to violence.[44] Drastic changes in appearance or personal caretaking may be present, potentially indicating either preparation to act, mental decompensation, or both. Examples have included obtaining large or multiple tattoos with violent imagery and messaging, dramatic weight loss, shaving head hair, cessation of hygiene or suddenly appearing unkempt, or a significant disruption in sleeping or eating patterns. Additional last resort behaviors demonstrating a sense of desperation might include sudden onset of reckless sexual acts, financial decisions, or other acts that suggest a lack of concern for future consequences.

VI. Other factors to consider

A. Criminal history and aggression

Research has found evidence that 94% of active shooters over the age of 18 had no violent criminal history.[45] For many offenders, their first time committing violence was the targeted attack itself. It was identified, however, that 62% had a history of acting in an abusive, harassing, or oppressive way; 16% had engaged in intimate partner violence; and 11% had engaged in stalking-related conduct.[46] Similar to the lone offender

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39 *See generally* Amman et al., *supra* note 13, at 34.
40 *Id.*
41 Meloy, *Warning Behaviors*, *supra* note 28, at 265; Candice L. Odgers et al., *Capturing the Ebb and Flow of Psychiatric Symptoms with Dynamic Systems Models*, 166 Am. J. Psychiatry 575, 580 (2009).
42 Amman et al., *supra* note 13, at 34.
43 *See generally id.* at 36.
44 *Id.*
45 Silver et al., *supra* note 2, at 12.
46 *Id.*

study, the active shooter study also identified that individuals who knew the offender recognized concerning behaviors.[47] These behaviors included, symptoms of a mental health disorder (62%), interpersonal interactions (57%), leakage (56%), quality of thinking and communications (54%), work performance (46%), and school performance (42%).[48] Looking at lone offender terrorism cases within the United States between 1972 and 2015, 30% of offenders were never arrested as an adult, and 70% of the offenders were arrested at least once as an adult before their attack.[49] While a majority of the offenders had not been previously arrested for a violent offense, most had previously exhibited behavior that was hostile or aggressive based on their arrest history and according to individuals who knew the offender.[50] Of the concerning behaviors reported by those who knew the offender, 85% expressed concern for the offender's interpersonal communications, 83% for the offender's anger and aggression, and 75% for the offender's mood.[51] In this study, quality of thinking was defined as indications of confused or irrational thought process.[52]

B. Employment

According to research, 44% of offenders who were age 18 and older were employed at the time of the attack, while 38% were neither employed nor attending school.[53] In another study looking at lone offender terrorism cases, fewer than a third of the offenders were actively employed at the time of the attack.[54] In total, 54% were neither employed nor attending school, which afforded many offenders the time to focus on their grievances and ideologies, and to engage in logistical planning and preparation for their attack.[55] These findings were consistent with BTAC operational experience and direct engagements with previously radicalized subjects, who have repeatedly cited the abundance of time and the lack of other responsibilities as a contributing factor to their radicalization.

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47 *Id.* at 20.
48 *Id.* at 18.
49 Richards et al., *supra* note 5, at 20.
50 *Id.* at 21.
51 *Id.* at 62.
52 Silver et al., *supra* note 2, at 29.
53 *Id.* at 11.
54 Richards et al., *supra* note 5, at 17.
55 *Id.*

C. Mental health

Formally diagnosed mental illness is not a specific predictor of violence of any type, let alone targeted violence.[56] According to research, there are important and complex considerations regarding mental health, both because it is the most prevalent stressor (62%) and because of the common but erroneous inclination to assume that anyone who commits an active shooting must de facto be mentally ill.[57] First, the stressor "mental health" is not synonymous with a diagnosis of mental illness. The stressor "mental health" indicates that the active shooter appeared to be struggling with (most commonly) depression, anxiety, or paranoia in their daily life in the year before the attack.[58] There may be complex interactions with other stressors that give rise to what may ultimately be transient manifestations of behaviors and moods that would not be sufficient to warrant a formal diagnosis of mental illness. The FBI could only verify that 25% of the active shooters were known to have been diagnosed by a mental health professional with a mental illness of any kind before the offense.[59] To a reasonable person, no offender who commits an act of targeted violence is mentally well. This conclusion, together with research findings, underscores the importance of observing and addressing issues of mental wellness for long-term threat management. Further, a majority of active shooters experienced multiple stressors (three to four) in one year before the attack.[60] It is noteworthy, given the outcome of completed acts of violence, that active shooters appear to be unable to navigate conflict and lack resiliency in the face of challenges. Overall, active shooters showed concerning behaviors in multiple ways, with an average of four to five concerning behaviors per active shooter.[61] Behaviors observed in more than half of the sample were related to the shooter's mental health (62%), interpersonal interactions (57%), leakage (56%), and the quality of the active shooter's thinking or communication (54%).[62] In a separate study looking at lone offender terrorism cases, 38% of offenders were ul-

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56 Eric B. Elbogen et al., *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions,* 66 Archives Gen. Psychiatry 152, 159 (2009); Sherry Glied & Richard G. Frank, *Mental Illness and Violence: Lessons from the Evidence,* 104 Am. J. Pub. Health e5–e6 (2014); John Monahan et al., Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence 1485 (2001).

57 *Id.* at 16.

58 Silver et al., *supra* note 2, at 17.

59 *Id.* at 7.

60 *Id.* at 16.

61 *Id.*

62 *Id.* at 18.

timately diagnosed with a psychiatric disorder, and an additional 35% of offenders were suspected by others (for example, friends, family, associates, or mental health professionals) of having one or more undiagnosed mental disorders.[63] While it cannot be concluded that an offender likely had a suspected disorder, the data suggests people in the offenders' networks may have noted behaviors or symptoms that could have reflected mental health stressors.[64]

D. Suicidality & homicidality

There is a fine line between suicidality and homicidality when considering acts of targeted violence. In a study of pre-attack behaviors of active shooters in the United States between 2000 and 2013, 48% of active shooters had suicidal ideation or engaged in suicide-related behaviors at some point before the attack.[65] Of these cases, 90% showed signs of suicidal ideation, 23% made actual suicide attempts, and 70% of suicidal behaviors occurred within one year of committing an act of targeted violence.[66] Within the Safe School Initiative research that the United States Secret Service conducted, 78% of students who committed acts of school violence exhibited a history of suicide attempts or suicidal thoughts at some point before the attack.[67] According to Dr. Thomas Joiner, "The desire for death arises through a distinct process, composed of two essential elements: the perception that one's death will be worth more than one's life, and the perception that one is deeply alienated from others."[68] Murder-suicide is best viewed as a subset of suicide.[69]

In BTAC's anecdotal experience, narcissistic personality characteristics or a brittle personality style is present in many who are on the pathway to commit an act of targeted violence and for those who have committed an act of targeted violence. According to Dr. Joiner, these disappointed narcissists are likely to develop paranoia, and this paranoia can lead them to violence.[70] This inflated self-concept, combined with a

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63 *Id.* at 16.

64 Richards et al., *supra* note 5, at 23.

65 Silver et al., *supra* note 2, at 24.

66 *Id.*

67 Bryan Vossekuil et al., Nat'l Threat Assessment Ctr., U.S. Dep't of Educ. & Nat'l Inst. of Just., Safe School Initiative: An Interim Report on the Prevention of Targeted Violence in Schools 22 (2000).

68 Thomas E. Joiner, Jr., The Perversion of Virtue: Understanding Murder-Suicide 90 (2014).

69 *Id.* at 53.

70 Thomas E. Joiner, Jr. et al., *Perceived Burdensomeness and Suicidality: Two Studies on the Suicide Notes of Those Attempting and Those Completing Suicide,* 21 J.

negative evaluation by others, leads to a discrepancy between internal and external appraisals.[71] Maintenance of inflated self-concept, together with rejection of an unfavorable external appraisal, is associated with negative emotions and attitudes (for example, mistrust, suspicion, and anger) toward the source of the threat, and possibly aggression or violence.[72] A "narcissistic injury" may occur when the situation or current reality is not congruent with a grandiose sense of self-importance. Experiencing a narcissistic injury can result in the individual considering self-harm or harm toward others as options to address the incongruence and restore ego balance.

For targeted violence, perversion of justice and glory is seen as a possible motivating factor. With murder-suicides that stem from a perversion of justice or glory, the calculation has an overlay of grandiosity and notoriety (for example, "I will mete others out justice" or "their deaths are worth my glory", and "I have decided on suicide, but as long as I am to die, it is virtuous that I use by death for the glory of my society and for revenge and justice too").[73] Looking at lone offender terrorism research within the United States between 1972 and 2015, it was determined that 40% of the offenders experienced suicidal ideation before implementing their attack.[74]

E. Substance abuse

Psychostimulants are concerning and are encountered as both illicit and prescription drugs, which can increase the fight-or-flight response or lead to grandiosity and paranoia in some users. Moreover, prescription medication side effects can vary and potentially include violent ideation and altered thought processing. In a study of lone offender terrorism cases, BTAC determined that at least 50% of offenders exhibited some evidence of prior drug use.[75] While few offenders were formally diagnosed with a substance use disorder, issues with drug and alcohol use were common among offenders.[76] In at least 42% of the cases, there was someone identified in the social circle who had expressed concern about the offender's drug or alcohol abuse.[77] More than a third of offenders experienced em-

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Soc. & Clinical Psych. 531, 537 (2002).

71 Roy F. Baumeister et al., *Relation of Threatened Egotism to Violence and Aggression,* 103 Psych. Rev. 5, 8 (1996).

72 Joiner, *supra* note 68, at 74.

73 *See id.* at 103.

74 Richards et al., *supra* note 5, at 25.

75 *Id.*

76 *Id.*

77 *Id.*

ployment, interpersonal, or legal issues stemming from problems with substance use.[78] When a sudden change in behavior is observed, where drug use decreases or ceases, it may indicate that the person of concern is attempting to maintain a clearer mind for attack preparation and action.

F. Firearms

According to lone offender terrorism cases, the primary attack method that offenders used was a firearm (67%).[79] Of the offenders who used a firearm in their attack, 77% used a handgun, 40% used a rifle, and 20% used a shotgun.[80] Of these offenders, 87% had previously owned a firearm.[81] Similarly, in a separate study, it was determined that a significant number of active shooters (35%) already possessed a firearm and did not appear to have obtained it for the express purpose of committing the shooting.[82] For the active shooters who did acquire a firearm specifically for the purpose of perpetrating the attack, 40% purchased their firearm legally, 11% borrowed or took a firearm from a person whom they knew, 6% stole a firearm, and 2% purchased a firearm illegally.[83]

G. Radicalization

The FBI defines radicalization as the process by which individuals come to believe that engagement in or facilitation of non-state violence to achieve social and political change is necessary and justified.[84] A study on lone offender terrorism cases categorized 52 perpetrators of targeted violence under the following ideological themes: anti-government (13 offenders), racially motivated violent extremism advocating for the superiority of the white race (12 offenders), radical Islamic violent extremism (10 offenders), pro-life violent extremism (5 offenders), environmental violent extremism (2 offenders), and other violent extremism (10 offenders).[85] In the 69% where time estimations could be made, 94% were involved with their ideology for more than a year before they carried out their attack, and 75% supported more than one violent ideology or supported a violent ideology involving multiple themes or components.[86] Although most of-

78 *Id.*
79 *Id.* at 47.
80 *Id.* at 48.
81 *Id.* at 49.
82 Silver et al., *supra* note 2, at 14.
83 *Id.*
84 Richards et al., *supra* note 5, at 29.
85 *Id.* at 33.
86 *Id.* at 36.

fenders carried out violence in service of a stated ideological goal, 69% had an identifiable primary personal grievance co-mingled with their violent ideologies for carrying out an attack.[87] This study revealed at least 77% of the offenders consumed radical ideological material or propaganda.[88] Operational experience has found that individuals could be inspired by influential or charismatic leaders and may reference past lone offender terrorists in their communications. Advances in technology have increased the offender's ability to communicate directly with their intended audiences, as seen in 96% of offenders who have produced writings or videos intended for others to view.[89] Of those who produced writings or videos, 44% produced content both before and after their attack, 48% only produced content before their attack, and 8% only wrote publicly after their attack.[90] The study also revealed that of those who produced public narratives, 80% of the offenders described their grievances, ideologies, or the intent behind their actions.[91] Manifestos and letters relating specifically to the attack were often posted or sent shortly before the attack, brought to the attack site, or sent after the attack had occurred.[92] While some offenders' pre-attack writings and postings addressed grievances and ideologies without explicitly discussing violence, other offenders posted public writings and videos that endorsed violence in the weeks, months, and years before the attack.[93]

VII. What works? Bystander action and TATM

Threat assessment teams are tasked with the challenge of assessing the level of concern that a person will commit an act of targeted violence and managing or mitigating that threat. Findings illustrate that several key variables help differentiate between active shooters and disrupted actors who do not commit violence. In one BTAC research study, 63 active shooters were compared to 63 persons of concern who were on the pathway to violence but did not commit a mass attack.[94] Persons

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87 *Id.*
88 *Id.* at 37.
89 *Id.* at 39.
90 *Id.*
91 *Id.*
92 *Id.* at 40.
93 *Id.* at 36.
94 Karie A. Gibson et al., *Possible Attackers? A Comparison Between the Behaviors and Stressors of Persons of Concern and Active Shooters*, 7 J. Threat Assessment & Mgmt. 1, 10 (2020).

of concern were considered "high risk" because the cases had exceeded threat assessment capabilities at the local level. They were referred to and accepted by BTAC as requiring their attention and were mitigated through TATM. None of the 63 persons of concern who were referred to BTAC ever became violent or progressed to an attack.[95]

A key takeaway of this research was that the bystanders of active shooters were more likely to discuss the observed concerning behaviors with friends or do nothing, and bystanders of high-risk persons of concern were more likely to report to non-law enforcement or to do something else.[96] Both groups were equally as likely to discuss the concerning behaviors with the subject.[97] This research supports the idea that the prevalence of bystander inaction (that is, doing nothing) in the active shooter population is a stark reminder of the need to increase opportunities for bystanders to report the concerning behaviors they observe. The odds of being an active shooter are 16 times higher if the subject had at least one bystander who did nothing when they noticed concerning behaviors.[98] The key to threat management is others noticing concerning behaviors and giving assistance. This study highlights the potential for active shooters to perceive bystander inaction as permission to act violently.[99] Bystander action sends the message that the person who is struggling matters, and that the bystander cares about the person's well-being enough to act in some way to better their situation. Unfortunately, whether purposeful or not, bystander inaction sends the message that the person of concern is not worth the time or effort.

VIII. Humiliation enhances targeted violence

During threat assessment, it is important to look for a humiliating event. Humiliation is a sense of being publicly victimized and exposed to be somehow deficient, which can then lead to feelings of shame and anger.[100] A key difference between persons of concern who went on to commit an act of targeted violence and those who did not was humiliation. When a timeframe of the event could be determined, 69% experienced

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95 *Id.*

96 Sarah W. Craun et al., *(In)action: Variation in Bystander Responses Between Persons of Concern and Active Shooters,* 7 J. Threat Assessment & Mgmt. 113, 117 (2020).

97 *Id.* at 118.

98 *Id.* at 117.

99 *Id.* at 119.

100 *See* Clark McCauley, *Toward a Psychology of Humiliation in Asymmetric Conflict*, 72 Am. Psychologist 255, 256–58 (2017).

humiliation within the two years before the attack.[101] Therefore, when assessing threats, it is important to remember that what is "humiliating" to one person may not be humiliating to another. The subject's feelings or reactions may seem disproportionate to their situation, but it is their perspective that matters in understanding the threat they pose. Further, it is paramount as stakeholders not to create a humiliating event through the threat assessment and management process.

IX. Key aspects to consider when comparing active shooters to persons of concern who did not attack

Active shooters were more likely to make another person feel unease due to their interest in violent media (that is, unusual interest in visual or aural depictions of violence).[102] Bystanders, however, may not recognize the significance of this variable without observing other concerning behaviors such as anger and leakage.[103]

There is no significant difference in suicidality between active shooters and persons of concern; however, both show more suicidality than the general population, as almost half of the active shooters exhibited suicidal ideation or behavior sometime before the attack and 100% were subsequently homicidal.[104] These results show that both groups struggle with suicidality, demonstrating a need for others to intervene and support. As previously discussed, with targeted violence there is a thin line between suicidality and homicidality. When only examining high-risk persons of concern, those who were suicidal were almost twice as likely to be homicidal as compared to the high-risk persons of concern who were not suicidal.[105] Emphasis on suicidality provides a gateway for intervention, which then assists in preventing homicidal acts. If we want to prevent homicides, we need to focus on preventing suicidal thoughts and behaviors.

X. Threat management

The research on threat management is starting to illuminate different individual layers to focus on with persons of concern. The picture is be-

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101 Gibson et al., *supra* note 94, at 10.
102 *Id.* at 5.
103 *See* Craun et al., *supra* note 96, at 119.
104 Gibson et al., *supra* note 94, at 6.
105 *Id.* at 9.

coming clearer on who may perpetrate an act of mass violence based upon enhancers to targeted violence being present. Bystanders are a part of the threat assessment and management process and are key for informing the threat picture. While active shooters may be more covert in their actions, research shows that they still present opportunities for intervention. In comparing persons of concern who went on to commit an act of targeted violence with high-risk persons of concern who did not go on to attack, the two groups appear similar in their stressors, concerning behaviors, and other previous behaviors. This alignment highlights the importance of bystander observations and the threat assessment and management process as key in preventing acts of targeted violence.[106]

Threat management requires an individual approach that focuses specifically on the subject and deficits he or she is exhibiting. Awareness of a person of concern's state of mind, coping mechanisms, and how they handle stress allows for more strategic planning to address individual needs through threat management. Also, when assessing threats some focus on whether the person has been diagnosed with a mental health issue. While an official diagnosis provides some indication of a subject's psychological state of mind, threat assessors should focus specifically on subjects' behaviors, mental wellness, and overall stressors for mitigation of threats.

XI. Structured professional judgment: A TATM industry standard

When implemented properly, TATM principles are designed to prevent acts of targeted violence before they occur. Effective threat management relies heavily upon thorough, accurate, and holistic threat assessment. Threat assessment is a fact-based method of assessment and investigation that focuses on an individual's patterns of thinking and behavior to determine whether, and to what extent, they are moving toward an attack on an identified target.[107] A threat management strategy is a coordinated plan of direct or indirect interventions with the subject that, based on current information and level of threat posed, are designed to defuse the risk of a given situation at a particular point in time.[108]

BTAC uses a process called structured professional judgment (SPJ) to evaluate and assess the level of concern presented by individuals who pose a threat of targeted or ideologically motivated (that is, terrorism)

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106 *See* Craun et al., *supra* note 96, at 119.

107 Randy Borum et al., *Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence,* 17 Behav. Sci. & L. 323, 327 (1999).

108 Amman et al., *supra* note 13, at 98.

violence.[109] One of the SPJ tools that BTAC uses is primarily for terrorism-related assessments. BTAC, other U.S. government entities, and foreign liaison part-ners have since collaboratively modified the SPJ to incorporate elements of other widely known and accepted SPJ tools. The BTAC believes that this SPJ incorporates the best of those other SPJ tools, lessons learned from op-erational experience, academic research, and BAU's internal research on FBI and other law enforcement investigations.

The information presented below should be used as a starting point for investigators working on ideologically motivated threat investigations. This type of data will ultimately assist BTAC in conducting a threat assessment using SPJs. The following information discussed is not in-tended to be a comprehensive description of the SPJ process but rather to provide key considerations for TATM. Further, gathering the following data alone should not be construed as a substitute for an actual threat assessment by the FBI's BTAC.

A. Step 1: Data gathering

Research and operational experience indicate that acts of terrorism are rarely carried out for purely ideological or personal reasons. There is often a blending of ideological motivators with life experiences, stressors, and other personal motivators like glory or revenge. There is no demographic profile, checklist, or actuarial tool that can be effectively used to assess threats of terrorism and targeted violence. Therefore, a holistic, 360-degree analysis of the person of concern is required to formulate an accurate threat assessment. The categories below, as well as the amplifying questions, can be broadly used to guide data gathering efforts or avenues of inquiry relevant to threat assessment that may not normally be pursued through a typical investigation. The gathering of this type of data will enhance threat assessment and ultimately inform threat management strategies.

1. **Context**: Each case is different, so it must be assessed on its own unique and specific factors.

    - History of mental health problems?

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[109] The Structured Professional Judgment (SPJ) approach is an analytical method used to understand and mitigate the risk for interpersonal violence posed by individual people that is discretionary in essence but relies on evidence-based guidelines to systematize the exercise of discretion. *See* Laura S. Guy et al., *Risk Assessment and Communication*, *in* 1 APA Handbook of Forensic Psychology: Individual and Situational Influences in Criminal and Civil Contexts 35, 35–86 (B.L. Cutler & P.A. Zapf eds., 2015).

- Presence of personality difficulties?
- Significant life stressors, trauma, or loss?
- Problems with social functioning and adjustment?
- Problems with employment and education history?
- Negative coping (for example, addictions, self-harm, suicidal behavior)?

2. **Mindset**: Understanding the underlying motivators and drivers is very important for assessing the threat and devising effective threat management strategies.

    - Identifying with an extremist group?[110]
    - Sense of perceived injustice, grievance, or threat?
    - Support for extremist ideology?
    - Attitude that justifies violence towards others?
    - Social support for extremist views?

3. **Capability**: Capability development can occur along the pathway to violence and provides opportunities for observation and reporting, especially when put into context with other information gathered or available. Capability and capability development are critical to threat assessment and determining how viable a threat might be, how far a person of concern has progressed from thought to action, and how close or ready the person of concern is to carrying out an actual attack.

    - Bystander observations of subject?
    - Relevant experience, skills, or knowledge?
    - History of non-violent criminality or antisocial behavior?
    - History of violence?
    - Exposure to violence or criminality?
    - Access to networks, funding, or resources to commit the act?
    - Organized thinking?
    - Access to weapons?

4. **Signs of Imminence**: This factor is always important for threat assessment. It is a critical variable to drive decisions about additional data gathering and potential threat management actions required.

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[110] Randy Borum, *Radicalization into Violent Extremism I: A Review of Social Science Theories,* 4 J. Strategic Sec. 7, 8 (2011).

- Planning and preparation?
- Breach?
- Leakage or other communication of intent?
- Rejection of non-violent options?
- Identification of specific targets?
- Finishing behaviors?

5. **Protective Factors and Mitigators**: Informative to both threat assessment and threat management, the identification of protective factors and mitigators helps determine what can be done to help minimize and possibly effect a change of trajectory along the pathway to violence.

    - Shift in ideology away from extremism?
    - Dissatisfaction with role in extremist group?
    - Unmet expectations in extremist group?
    - Competing roles and priorities?
    - Barriers to action (real or perceived, self or imposed)?
    - Social support for non-violence from others?
    - Personal resources (resilience)?

B. Step 2: Identify the threats

To formulate an accurate threat assessment, one needs to specifically define the threat to be assessed. Based on the information gathered to date, is there concern the subject is planning an attack overseas, in a major metropolitan city, or in their hometown? Is there concern that the subject is planning to use simplistic or sophisticated methods, or both, to conduct the attack? For example, the threat assessment for someone planning to travel overseas to join a terrorist organization to attack unidentified enemies will be markedly different than the threat assessment for someone planning a targeted attack on their peers at a location within their hometown. Similarly, the threat assessment will likely vary depending on whether the subject is planning to attack specific people, symbolic targets related to an ideology or grievance, or targets more directly related to their personal desire for notoriety or glory. By carefully defining the different threats to be assessed, the data can then be organized in a way that helps formulate an accurate assessment. Remember, accurate assessment drives effective management.

C. Step 3: Formulation

Once the data is gathered and the threat, or threats, to be assessed are identified, BTAC uses a process of formulation to conduct the threat assessment and construct threat management strategies. The formulation process attempts to explain the underlying mechanism of the threat (the threat of what and why) and serves as the foundation for potential action strategies to manage the threat.

BTAC organizes data gathered as follows: Risk Factors, Mitigators, Triggers, and Maintenance.

1. **Risk Factors (predisposing)**: For example, history of health problems, rigidity, vengefulness, problems with social functioning, problems with authority figures, or identification with a violent group. What is driving the subject to action? Focus on risk factors, threat enhancers, and life stressors. What indicates the subject is moving to action, for example, evidence of warning behaviors?
2. **Mitigators (protective)**: For example, thinking ahead and future planning, hope of promotion, or positive influence of others. What is keeping the subject from action? Focus on life anchors, personal mitigators, and inhibitors from action.
3. **Triggers (precipitating)**: For example, losing a job, humiliation, loss of a loved one or confidant, or prompting by an ideologically based extremist group. What could happen to prompt change from the current state of inaction to action?
4. **Maintenance (perpetuating)**: For example, grievance, mental health, or pattern of thinking. What needs to be managed (maintained, enhanced, or eliminated) to ensure the subject does not progress toward action? Oftentimes, the data gathered can be informative or relevant to multiple sections in the formulation process. The formulation process is dynamic and involves robust discussion amongst a multidisciplinary team of subject matter experts. Only after a thorough analysis of the information, to include a discussion regarding the impact of that information on the specific threats being assessed, can effective threat management strategies emerge. This process can be conducted as a single instance or on an ongoing basis while the investigation progresses. BTAC is available to assist in cases requiring threat assessment and threat management strategies.

XII. The BAU-1's National TATM Initiative continues to grow

The FBI's BTAC executes the TATM strategy through leadership, partnership development, and training. As TATM solutions gain traction, the FBI continues to establish partnerships with other federal entities with interests in preventing targeted violence. At the national level, in 2019 BTAC worked closely with the Department of Justice (the Department), Office of the Deputy Attorney General on concurrent implementation of the Department's Disruption and Early Engagement Programs and continues to support ongoing prevention efforts through the BTAC National TATM Initiative. In addition, BTAC works alongside the Department of Homeland Security's Center for Prevention, Programs, and Partnerships (CP3) on concurrent efforts to deploy the Department of Homeland Security (DHS) Regional Prevention Coordinators throughout the United States and grant applications for funding for building local TATM teams. Additionally, BTAC regularly coordinates with the United States Attorney's Offices (USAO) in ongoing efforts to mitigate threats on active cases.

All 56 FBI field offices have at least one TMC who received advanced TATM training, with many having multiple trained TMCs. Since 2018, BTAC has trained a total of 149 TMCs, with more being trained each year. This training has resulted in the development of a forward leaning capability within every office for evaluating threats and preventing acts of terrorism and mass casualty targeted violence. In addition to BTAC's biyearly TMC advanced training, BTAC hosts the FBI Task Force Officer (TFO) Conference once a year to train TFOs to work as liaison counterparts within state and local governments. In 2022, BTAC began hosting the Mental Health Practitioners Conference to inform and educate FBI mental health partners on TATM related topics. As a direct result of training and increased awareness of BTAC capabilities, leads and consultations have doubled in the past five years. With the increased demand, now more than ever local TATM infrastructure and resources are needed.

XIII. Key considerations for TATM capabilities in your area

Tailoring TATM capabilities to the region served is integral to success, including the development of partnerships and relationships across all levels of government, and incorporation of non-traditional partners such as mental health professionals (MHPs), when such expertise is necessary and not available within law enforcement (LE) agencies. Proper

implementation of TATM principles ensures consistency with existing laws and departmental policies and allows for agility to ensure TATM strategies are employed effectively within a jurisdiction. There are five key considerations for the TATM model.

1. **Multidisciplinary**: The multidisciplinary make-up of TATM teams is critical. Highly effective teams collaborate, coordinate, and communicate across various parts of organizations or communities to address threats of targeted violence and persons of concern. Leveraging the perspective, expertise, and insight of various disciplines aids in effectively assessing concerning behaviors and developing tailored threat management strategies. Threat management teams should be comprised of a core group of representatives from relevant disciplines. A threat management team with a diverse composition provides a versatile team of practitioners with different perspectives, capabilities, and backgrounds to address targeted violence concerns from multiple lenses.
2. **Construct**: In many situations, it is important to build separate teams.
    - Core: The core team may vary, but generally includes law enforcement and key operational stakeholders such as MHPs and prosecutors to assess and manage threats. Federal and state laws may limit the extent to which LE agencies and MHPs are authorized to share information with one another.
    - Affiliate: The affiliate team includes a broader group of stakeholders who can be educated on TATM concepts, refer cases to the core team, and be leveraged to support the core team on an ad hoc basis. The affiliate team may include LE partners who lack the resources to participate on a core team with private sector partners and other non-law enforcement community stakeholders.
3. **Scalable and Overlapping**: TATM teams with participants from, or connectivity to, multiple levels of government are ideal because they provide the team with the ability to elevate threats and obtain additional support and resources from other TATM teams. Examples of such teams include:
    - Individual: Teams operating at the individual level, such as within businesses, houses of worship (HoW), schools, institutions of higher education (IHE), or within a Department of Defense (DoD) command;

- County or City: Teams operating within a municipal jurisdiction, including teams such as those for a full school district or at an individual DoD installation;
- Regional: Teams operating across municipal jurisdictions, sometimes including a regional fusion center, USAO district, or FBI Resident Agency (RA);
- State: Teams covering the entire state, often run by state police headquarters or state fusion centers, USAO District, or FBI field office; and
- National: FBI BTAC

4. **Law Enforcement Involvement**: Law enforcement involvement is critical to accurate threat assessment and effective threat management. While law enforcement (LE) is involved, not only do they have ownership of the case, but they help navigate local resources needed for mitigation. The nature of LE involvement can vary depending on the type of TATM team. Examples include the following:

    - Individual Level Teams (Businesses, HoWs, IHEs, K–12 schools): Routine LE liaison or public outreach ensures individual TATM teams have the appropriate LE contacts necessary to escalate specific threats as needed. Ideally, school-based teams have local LE involvement in the form of campus law enforcement or a school resource officer (SRO). Many K–12 schools, however, lack a dedicated or sworn SRO, thus requiring additional efforts.
    - County or City Level Team: Teams can collaboratively work cases generated by participating core team members, from referrals by affiliate partners, or on an ad hoc basis. LE involvement on these teams may vary due to priorities and resources. Robust liaison relationships between county, city, and federal LE partners, however, aids in appropriate information flow and the ability to escalate specific threats as needed, which is sometimes accomplished through involvement on overlapping teams.
    - Regional Level Team: Teams can work collaboratively across municipal jurisdictions with LE participation across multiple agencies or departments. For many regional teams, active and engaged involvement from an FBI representative, likely a BAU Coordinator, TMC, or local FBI representative familiar with FBI TATM concepts, is merited. In some instances, FBI connectivity may be accomplished through involvement on other

overlapping teams if they have previously developed an effective working relationship.

- State Level Team: Teams work collaboratively across municipal jurisdictions, typically led by state police entities, or housed within state police headquarters or state level fusion centers. FBI connectivity to these teams will vary, but FBI participation is encouraged and often merited by a BAU Coordinator, TMC, or local FBI representative familiar with FBI TATM concepts.

5. **Mental Health Involvement**: The roles and responsibilities of an MHP may vary based on team composition, resources, and location. Many factors impact the MHP's role on a team, including federal and state laws, rules and regulations on information sharing, and the knowledge, skills, and experience of the MHP. It is important to ensure the MHP has the requisite expertise and experience to contribute specific opinions and recommendations. BTAC is a multidisciplinary team of SMEs—to include MHPs—available to assist on FBI cases or person of concern cases being worked by LE partners. Two-way information sharing with MHPs can be complicated but is often critical to the prevention of terrorism and targeted violence. While exceptions exist, the Privacy Act of 1974 limits the FBI's ability to share information within and outside the agency, including with MHPs.[111] Consultation with legal experts is recommended to ensure compliance with policies and law.

XIV. Lessons learned

BTAC has identified the following keys to success in establishing TATM teams and leveraging TATM principles to enhance violence prevention capabilities.

- **Management Support and Awareness**: The most successful TATM teams had the support of their entire chain of command. Front line supervisors enable participants to be effective members of the team and encourage appropriate buy-in from relevant stakeholders. Mid-level supervisors can help cross the divide between criminal and national security threat cases, and aid in broader resource allocation to support the department or agency's mission and strategy. Executive management is key to providing vision and leadership to external partners.

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[111] Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, *as amended*, 5 U.S.C. § 552a.

- **Collaboration with USAOs**: While the Department only works a portion of the threat cases the FBI sees, their buy-in for the TATM principles are important. AUSA involvement on core teams can be critical to developing effective threat management strategies. Early TATM efforts worked in tandem with the USAO's prevention efforts and continues today with established networks led by local TMCs and existing TATM teams. BTAC continues to support local TATM resources being developed throughout the United States and early involvement from AUSAs.
- **Trained and Empowered FBI TMC**: TATM concepts are new, and they involve complexities and challenges related to risk and information sharing. From the FBI perspective, a well-trained TMC is critical. The TMC must be empowered to build partnerships and systems which support the field office vision related to TATM.
- **Collaboration Between Federal, State, and Local Partners**: By its nature, TATM requires layered support and effective partnerships. In many instances, the local TMC can provide training and resources to local and state partners through reach back to BTAC. Significant momentum and support for TATM concepts across the country may be leveraged to aid in establishing new, and enhancing existing, partnerships with state and local LE, as well as other relevant non-LE partners. The DHS National Threat Evaluation and Reporting Program has developed several curriculums targeting community stakeholders to increase their understanding of TATM concepts and their role within larger TATM efforts affecting their agency or organization.
- **BTAC Support**: Some of the best programs have developed as a result of trained TMCs and their field office management working collaboratively with BTAC program managers. BTAC can assist greatly with generating buy-in from key stakeholders. This support often comes through the engagement of TATM services on a more complex or challenging case involving outside partners. BTAC can also assist by coordinating operationally focused training for field office partners.
- **Start Small, But Start**: Establishing a TATM team can be intimidating, and it takes time. Start by communicating with key stakeholders and leveraging existing liaison relationships to identify whether a team already exists locally. Provide training to LE and community partners on TATM concepts to generate interest in forming a TATM team. Similarly, start a small team covering a single jurisdiction by partnering with a local LE counterpart with

whom a relationship already exists. The key is to start small. School-based teams can be leveraged as a resource, as they were mandated at IHEs following the Virginia Tech shooting in April 2007; in addition, some states have since mandated them for K–12 schools as well.

There has been great interest in building TATM teams with a focus on developing the local infrastructure to address threat cases proactively. The FBI is leading efforts establishing TATM resources at the local level and within the FBI. As discussed previously, 26 of the 56 FBI field offices are more forward-leaning with local and regional TATM teams or FBI-led TATM teams currently in operation throughout the United States. Some examples of those TATM teams are as follows:

- **Honolulu, Threat Team Oahu (TTO)**: The TTO was established in 2017 to mitigate the potential for targeted violence and active shooter incidents in their communities. TTO consists of two components: a Stakeholder Group and a Consultation Group. The Stakeholder Group is a large team with over 200 representatives, including the Department of Education, DoD, hospitals, airlines, universities, community and religious organizations, Probation, Bureau of Prisons, U.S. Marshals, social services, LE, and prosecutors. The Consultation Group is a smaller team with approximately 15 representatives including FBI, military, Honolulu Police Department, sheriffs, police psychologists, Department of Health, the Hawaii State Fusion Center, and representatives from prosecutors' offices. Due to its diverse partnerships, TTO has developed the ability to pass ownership on certain threat investigations to stakeholders in the best position to assist. In addition, BTAC resources have been leveraged in cases toward the development of tailored threat management strategies.
- **Boston, Mass Bay Threat Assessment Team (MBTAT)**: The MBTAT was established in 2019 to identify, assess, and manage threats when criminal prosecution is unavailable. The MBTAT meets monthly and includes the USAO, representatives from federal, state, and local law enforcement agencies, including Joint Terrorism Task Force (JTTF) officers from the U.S. Secret Service, Massachusetts State Police, Boston Police Department, Massachusetts Department of Mental Health, Boston Emergency Services, Massachusetts Department of Public Health, Massachusetts Department of Education, Massachusetts Children's Hospital, and the Executive Offices of the Trial Courts. The MBTAT process relies on case evaluation and case referral. Any member or outside

agency may refer a case for evaluation. Their broad partnerships allow MBTAT to pass ownership on certain threat investigations to stakeholders in the best position to assist. In addition, BTAC resources have been leveraged in cases toward the development of tailored threat management strategies.

- **Philadelphia, FBI Philadelphia (FBI-PH)**: FBI-PH created the Community Anti-Threats Officer (CATO) Program in 2018 in order to train local, county, state, and federal law enforcement agencies how to prevent targeted acts of violence. Currently, the CATO Program has over 350 members who attend monthly virtual meetings and quarterly hybrid trainings. A monthly CATO Intelligence Bulletin is distributed to all CATOs and their command staff to provide intelligence updates, briefing points for their fellow officers on best TATM practices, and upcoming training announcements. CATOs work jointly with FBI-PH agents and TFOs on local and federal threats cases. FBI-PH has leveraged the resources of the CATO Program to partner with the Pennsylvania State Police, the Pennsylvania Governor's Office of Homeland Security, the Pennsylvania Department of Education-Office of Safe Schools, the USAOs in the Middle and Eastern Districts of Pennsylvania, and various other county prosecutor's offices, probation and parole offices, and mental health agencies to create multidisciplinary county TATM teams across their AOR. Thus far, FBI-PH is assisting in the creation of nine county TATM teams, with the goal of every county within FBI-PH's AOR having an operational county TATM Team. To support the county TATM teams, FBI-PH in partnership with The Pennsylvania State University-Behavioral Threat Management Team, created regional Community Anti-Threat Teams (CATT) providing training, mutual aid, best TATM practices, and national resources through BAU-BTAC, for county TATM teams. The CATTs receive quarterly hybrid trainings which are attended by CATOs and the members of the multidisciplinary county TATM teams. FBI-PH Regional TMCs serve as core members of county TATM teams, along with serving as regional coordinators for their regional CATO Program and CATTs. Through partnership with FBI-PH, our CATOs, and multidisciplinary county TATM teams, numerous threats cases have been successfully mitigated.
- **San Antonio**: The Public Safety Threat Assessment Group (PSTAG) was created to promote TATM awareness by sharing information, capabilities, and communication among partners to address targeted acts of violence. PSTAG is a locally created and driven organization that relies on LE tools and mental health and

social service resources. The PSTAG meets approximately monthly and is comprised of high-level managers and directors from 35 federal, state, and local agencies, including members of the USAO. The Behavioral Threat Assessment Group (BTAG) meets three times per week to discuss individual cases from the Southwest Texas Fusion Center and leverages subject matter experts from PSTAG as necessary. Cases with high threat concern that lack federal jurisdiction are often referred to the BTAG for mitigation. The FBI San Antonio TMC is fully engaged in PSTAG and BTAG efforts. In addition, an FBI TFO who was the first to complete BTAC's Advanced TATM training is an integral member of the PSTAG and BTAG. The ability of FBI SA to leverage this BTAC-trained TFO to push capabilities forward has served as a catalyst to train additional TFOs. The diverse partnerships between BTAG and PSTAG have allowed for threat investigations to be diverted to the stakeholders best positioned to assist. In addition, BTAC resources have been leveraged in cases toward the development of tailored threat management strategies.

- **Phoenix**: The Arizona Statewide Threat Assessment and Mitigation Program (AZ-S.T.A.M.P.) was created in 2019 and focused on Maricopa County with the goal to collectively investigate, prosecute, and manage difficult threats cases. Since then, AZ-S.T.A.M.P. has expanded and continues to spread across the state, developing stakeholders in Pima, La Paz, Coconino, and Yavapai Counties, with the intent of being entirely statewide by the end of 2023. The AZ-S.T.A.M.P. process is evaluative and consultative, ensuring stakeholders maintain ownership of their cases while taking advantage of the resources and expertise found across the state. AZ-S.T.A.M.P.'s monthly meetings include representatives from federal, state, tribal, county, and local law enforcement agencies and prosecutors from the USAO and County Attorney's Offices. AZ-S.T.A.M.P. leverages its intersections with the FBI, U.S. Secret Service, U.S. Marshals Office, and the Desert Southwest Chapter of the Association of Threat Assessment Professionals to positively impact education, health care, and corporate organizations across the state.
- **Las Vegas, FBI Las Vegas TATM Team**: In 2014, due to an ambush on two Las Vegas Metropolitan Police Department (LVMPD) Officers, FBI JTTF and LVMPD hypothesized the need for an increased awareness, recognition, and training on pathway to violence indicators, threat assessment principles, and threat management development. Working jointly with FBI Las Vegas JTTF (agents and

TFOs) and Southern Nevada Counterterrorism Center and counterterrorism detectives, all entities created a fusion center-based Threat Assessment Program (TAP) for targeted violence and terrorism. The program has grown since 2019 to include direct and embedded partnerships with over 25 local, state, and federal partners, as well as private sector mental health facilities and clinicians, resulting in a holistic and multidisciplinary approach to TATM. Persons of concern, often where federal jurisdiction does not exist, are referred to the LVMPD TAP for TATM efforts. Cases are regularly screened and triaged between FBI and local law enforcement partners in a police-centric model. Once collaborated, resources and management efforts are focused on off ramping, providing robust mental health services, and active law enforcement engagement.

- **Miami**: The Palm Beach County Threat Management Team (PBC-TMT) was established in 2020 by FBI Miami Division Palm Beach County RA and the Palm Beach County Sheriff's Office. The PBC-TMT includes federal, state, and local law enforcement agencies including the USAO, Secret Service, Department of Veterans Affairs, Florida Department of Law Enforcement, State Attorney's Office, Palm Beach County School District Police, and a dozen or so key area stakeholders. In addition to law enforcement partners, the PBC-TMT also has representation from public and private universities, schools, and religious establishments within the county as well as a regional presence in South Florida as far south as Monroe County up to Martin County and in between. The PBC-TMT has ensured prompt deconfliction and collaboration when responding to imminent threat to life allegations, as well as investigating long-term threat cases. The Palm Beach County Sheriff's Office's, Delray Beach Police Department's, and Boca Raton Police Department's respective mental health clinicians have been a force multiplier in ensuring that persons of concern receive the proper treatment and services when necessary and in conjunction with appropriate legal prosecution. PBC-TMT has also utilized FBI BTAC resources, specifically to provide tailored threat assessment and threat management strategies.
- **Rochester**: The Rochester Area Threat Advisory Committee (ROCTAC) was formed by the Monroe County Sheriff's Office (MCSO) to better pinpoint possible targeted threats in the Rochester and Monroe County, New York, areas and to provide guidance on mitigation of the threat. The ROCTAC meets bi-weekly and brings together law enforcement agencies, the USAO, District Attorneys' Offices, public safety, youth crisis services, corporate security, domestic vi-

olence prevention specialists, public mental health, and education institutes. Since inception, ROCTAC has also organized an Executive Committee that meets quarterly to make decisions regarding the organization and structure of meetings, membership (participant members vs. associate members), training requirements, and MOU's. The FBI TMC is fully engaged with ROCTAC and is currently in the process of coordinating the onboarding of a TATM trained MCSO deputy as a part-time FBI TFO to enhance efforts between ROCTAC and FBI Buffalo.

- **Los Angeles**: In 2011, FBI-LA designed and established the Threat Assessment Regional Evaluation Team (TARGET) Working Group. The initial goal of TARGET was to develop best practices in the identification, assessment, and management of threats to college and university campuses. This was accomplished through the identification of subject matter experts, sharing of information, and facilitation of training. Since its inception, TARGET has expanded its outreach to include the following sectors: K–12 schools, HoW, healthcare facilities, and other critical infrastructures. Annually, TARGET hosts three half-day training events and a full day threat assessment seminar. With the assignment of an FBI-LA TMC, TARGET's education and liaison focus evolved. FBI-LA utilized the pre-existing relationships developed by TARGET to create regional TATM teams to effectively provide services to the seven counties within the FBI-LA area of responsibility. To this end, the following multidisciplinary TATM teams have been created and meet each month independently: TARGET-Orange County (Orange County); TARGET-Inland Empire (Riverside and San Bernardino Counties); TARGET-Santa Barbara (Santa Barbara County); and TARGET-South Bay Cities. FBI-LA has identified and will be establishing the following TATM teams to complement the ones listed above: TARGET-Ventura (Ventura County); TARGET-San Gabriel Valley; and TARGET-Greater Metropolitan Area. This network of seven multidisciplinary TATM teams, FBI-LA BAU Coordinators, JTTF, Criminal Guardian Squad, and two fusion centers will enable private and public sector partners to structure a safety net of resources necessary to mitigate potential threats of targeted violence and provide long-term case management strategies.

XV. Next steps

As the National TATM Initiative continues to progress, local TATM infrastructure and resources continue to be needed. Leadership support

and buy-in are paramount to address the increased demand to proactively address persons of concern cases for both adults and juveniles through TATM teams. To acquire more leadership support and resources, BAU-1 partnered with the FBI's Counterterrorism Division. With TMCs now in almost every FBI field office, forward leaning capability exists for evaluating threats and preventing acts of terrorism and mass casualty targeted violence. Having support from the higher levels of the FBI was important for obtaining TATM resource development for all the 56 FBI field offices.

A. BAU Counter Terrorism Division (CTD) threat management alliance

In 2022, BTAC partnered with the FBI's CTD to expand field office messaging related to application of the TATM model to counterterrorism investigations. As part of the BAU-CTD Threat Management Alliance, BTAC offers a one-week TATM familiarization course to CTD International Terrorism Operations Section (ITOS) and Domestic Terrorism Operations Section (DTOS) personnel, with the objective of leveraging TATM as a tool in complex terrorism investigations. Select CTD personnel who complete BTAC's Threat Program Manager (TPM) Course will be designated TPMs within ITOS and DTOS.

B. What is a CTD TPM?

TPMs are primary points of contact in CTD for TATM related matters. TPMs are CTD assets who, in addition to their primary CT program management responsibilities, are charged with identifying CT investigations and guardians that may benefit from involvement of BTAC and field-level TATM team resources.

TPMs coordinate with field office CT supervisors and case agents to ensure visibility of field office TMCs on cases of particular concern and complex counterterrorism investigations involving troubled juveniles, persons with severe mental health challenges, heightened potential for targeted violence, and when traditional law enforcement tools are unavailable or otherwise undesirable. TPMs identify CT investigations appropriate for referral to BTAC, and then promote the referral process via established case agent and field office TMC channels. Further, TPMs advocate for the TATM model and field office support for the development of local TATM teams consistent with the processes established through BTAC's TATM Initiative. Unlike TMCs, TPMs are not tasked with identifying or implementing TATM strategies for individual cases. TPMs receive familiarization training on TATM principles and BTAC's processes for assessing threats and providing threat management strategies.

XVI. How does BTAC get contacted?

BTAC continues to be committed to preventing acts of terrorism and targeted violence. Everyday cases are being successfully managed, allowing the persons of concern to be moved from the pathway to violence onto the pathway to hope. Many can be successfully managed without even entering the criminal justice system. Early intervention is key to this process. For cases that would be appropriate for TATM resources or need assistance with the prosecution options, contact the local FBI field office BAUC or TMC. Through the TMC, a referral to BAU-1 and BTAC can be accomplished for assessment and ongoing management of the risk the person of concern poses to the community. BTAC continues to conduct social science research related to terrorism and acts of targeted violence and post-attack analysis of mass attacks to better inform our prevention efforts. In addition, BTAC will continue to evaluate lessons learned as local processes are refined and additional TATM teams are established throughout the United States. As subject matter experts in the field of TATM, the FBI's BAU-1 and BTAC remain committed to preventing acts of terrorism and mass casualty targeted violence both domestically and internationally.

BAU-1 team members include the following: Supervisory Special Agent (SSA) Jason Ernst, SSA Brad Hentschel, SSA Jennifer Jostes, SSA Heather Koch, SSA Gabe Krug, SSA Shanti McAninley, SSA Mond Mugiya, SSA Robyn Powell, SSA Mathew Richert, SSA G Ryman, CA Taylor Cilke, CA Jordan Kennedy, CA Jennifer Tillman, IA Andrea Fancher, IA Karen McCaulley, TFO SA Chris Desrosiers (USCP), TFO Insp Sam Hill (USMS), TFO SSA Tyler Mensing (ATF), and TFO SSA Melissa Stormer (OSI).

About the Author

Dr. Karie Gibson has been a Special Agent with the FBI for 16 years and currently serves as the Unit Chief for the FBI's Behavioral Analysis Unit-1 (BAU-1), Behavioral Threat Assessment Center (BTAC), a national-level, multi-agency, multi-disciplinary task force focused on the prevention of terrorism and targeted violence through the application of behaviorally-based operational support, training, and research for local, state, federal, and international partners. BTAC routinely completes threat assessments, threat management strategies, statement analysis, interview and interrogation strategies, prosecutorial strategies, media strategies, and unknown offender profiles. Before being promoted to Unit Chief, Dr. Gibson was a Supervisory Special Agent and Profiler at BAU-1 for over six years.

Before becoming an agent with the FBI, Dr. Gibson was and con-

tinues to be a licensed clinical psychologist. She was an officer in the United States Air Force (USAF) where for four years she worked as a psychologist conducting therapy and psychological assessments for military members and their families. After the USAF, Dr. Gibson was a Forensic Evaluator for the State of Washington for one year before leaving to join the FBI. As a Forensic Evaluator, Dr. Gibson completed court ordered evaluations such as competency to stand trial, mental state at time of offense, and civil commitment evaluations.

Dr. Gibson earned a Bachelor of Arts in Psychology from the University of Minnesota, Morris in 1997; a Master of Arts in Clinical Psychology with an emphasis in psychological assessment from the Minnesota School of Professional Psychology in 2000; and a Doctor of Psychology in Clinical Psychology with a concentration in forensics from the Minnesota School of Professional Psychology in 2002.

When Does Online Speech Become a Federal Crime?

Joseph Palmer
Office of Law & Policy
National Security Division

I. Introduction

Threats to commit violence are becoming increasingly common in online discourse. The conditions causing the growing plague of online threats—including sky-high political polarization and an internet culture that amplifies vicious taunts over reasoned discourse—show no signs of waning. The internet and social media have greatly increased both the number of violent threats and their potential scope and effect. And the contentious political environment has spawned an ever-growing wave of threats against law enforcement officers, judges, members of Congress, and other public officials.

The proliferation of violent online threats creates serious harm. Victims of such threats suffer fear and stress. Some must adopt restrictive measures to protect themselves, and they lose the ability to live and travel freely. Other victims are forced by threats to remain in abusive relationships. Threats compel law enforcement to devote significant resources to determine which threats are serious and to mitigate the dangerous ones. Some threats lead to counter-threats, triggering a vicious cycle of increasingly violent verbal exchanges that too often escalate into physical attacks. Threats against law enforcement officers and public officials can prevent them from fulfilling their vital functions and deter talented people from public service.

As the amount of threatening speech keeps trending up, so does the demand for law enforcement to remedy the problem. Congress has recognized the grievous harms that threats can cause and has enacted criminal statutes that prohibit making threats in various contexts.[1] Moreover, the Justice Department's (the Department) emphasis on early intervention,

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[1] *See, e.g.*, 18 U.S.C. § 115 (threats against public officials); 18 U.S.C. § 871(a) (threats against the President); 18 U.S.C. § 875(c) (threats made in interstate commerce); 18 U.S.C. § 876(c) (threats made via U.S. Mail); 18 U.S.C. § 878(a) (threats against foreign officials); 18 U.S.C. § 1992(1) (threats to mass transportation systems); 18 U.S.C. § 2332a (threats to use weapons of mass destruction).

prevention, and disruption of terrorism and other criminal violence before it occurs means law enforcement cannot afford to ignore dangerous online threats. In this environment, Department prosecutors will increasingly face questions about when threatening online expression crosses the line from constitutionally protected speech to violations of federal law.

Those boundaries are not always clear. This article addresses two key issues that have divided courts in addressing First Amendment challenges to prosecutions based on online threats. The first issue is what mental state the government must prove to establish that the statement was a "true threat" that is unprotected under the First Amendment. Although federal and state courts have long been divided on that issue, the Supreme Court finally resolved the question this term.[2] In *Counterman v. Colorado*, the Court held that the First Amendment requires proof that the defendant subjectively understood the threatening nature of his communications.[3] The Court further held that recklessness is the minimum mens rea for a criminal conviction based on threats.[4] Even though the Supreme Court has now established a clear intent requirement for unprotected threats, uncertainty remains over whether various intent elements in existing statutes will satisfy that requirement.

The second issue involves the boundary between a threat of violence *by the speaker* (for example, "I will kill you!") and advocating violence *by someone else* (for example, "You should be killed!"). In general, the former kind of statement is unprotected speech, while the latter in some circumstances is protected advocacy. As explained below, courts have struggled to resolve cases in which the speaker's words on their face may appear merely to advocate violence by someone else, while the surrounding context suggests that the speaker might intend to threaten violence by the speaker himself or those he controls. Although the cases reach disparate outcomes, with frequent dissents, there are a few overarching lessons. When threats are specific and concrete, directed at the victim, and connected with actual incidents of violent conduct, courts are likely to deem them unprotected "true threats" even if the speaker does not explicitly state who will carry out the threatened violence. On the other hand, when the speech amounts to abstract advocacy of violence that is neither communicated to the victim nor connected with actual violent conduct, courts are more likely to determine that it is protected under the First Amendment.

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[2] *See* Counterman v. Colorado, 143 S. Ct. 2106 (2023).

[3] *See id.* at 2116–17.

[4] *See id.* at 2117–18.

II. Background: Threats and the First Amendment

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech[.]"[5] Under the First Amendment, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[6] The First Amendment "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality."[7]

There are, however, a few "historic and traditional categories" of speech that the First Amendment does not protect. Those categories include advocacy intended, and likely, to incite imminent lawless action;[8] speech integral to criminal conduct, including solicitation of violent crime;[9] and "true threats."[10] Under the "true threats" exception, the First Amendment permits prohibiting statements that constitute serious expressions of an intent to commit harm, rather than "political hyperbole," jest, or other forms of protected speech.[11]

True threats fall "outside the First Amendment."[12] The government may prohibit such threats to protect the recipient from "the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur."[13] In *Virginia v. Black*, the Supreme Court held that a statute that banned cross burning with an "intent to intimidate" violated the First Amendment because it "treat[ed] any cross burning as prima facie evidence" of that intent.[14] But in doing so, the Court reiterated that the First Amendment permits prosecution of true threats "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[15]

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5 U.S. Const. amend. I.

6 Texas v. Johnson, 491 U.S. 397, 414 (1989).

7 Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 660 (2004) (citations omitted).

8 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

9 *See* United States v. Williams, 553 U.S. 285, 297 (2008).

10 *See* Watts v. United States, 394 U.S. 705 (1969) (per curiam).

11 *Id.* at 706, 708 (finding defendant's statement at a political rally that, if he were drafted, "the first man I want to get in my sights is L.B.J.," was, in context, "political hyperbole" rather than a "true threat" (cleaned up)).

12 R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

13 Virginia v. Black, 538 U.S. 343, 360 (2003).

14 *Id.* at 347–48.

15 *Id.* at 359.

III. What is the required mens rea for a "true threat"?

After *Black,* the courts of appeals were divided on what mental state is required for making a prohibited "true threat." Two circuits held that the First Amendment requires proof that the defendant had a subjective intent to threaten. Most other circuits, however, concluded that a "true threat" could be shown by proving that a reasonable person would consider the communication a threat.[16] Specifically, the Ninth and Tenth Circuits held that "the First Amendment allows criminalizing threats only if the speaker intended to make 'true threats.'"[17] Most other circuits, by contrast, adopted formulations based on a "reasonable person" standard.[18]

The Supreme Court granted certiorari on this issue in *Elonis v. United States.*[19] The Court, however, did not reach the First Amendment question. Instead, the Court invalidated the "reasonable person" standard on statutory grounds by holding that the relevant statute, 18 U.S.C. § 875(c), does not apply to negligent conduct.[20] *Elonis*, therefore, left intact the circuit conflict on what mens rea the Constitution requires in prosecutions under statutes that prohibit making threats.[21]

Earlier this year, however, the Supreme Court again granted certiorari on this issue in *Counterman.*[22] *Counterman* presents the question

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16 State courts are also divided. *See, e.g.*, State v. Boettger, 450 P.3d 805, 818 (Kan. 2019) (requiring proof of intent); People *ex rel.* R.D., 464 P.3d 717, 731 n.21 (Colo. 2020) (applying an objective test).

17 United States v. Bachmeier, 8 F.4th 1059, 1064 (9th Cir. 2021); *accord* United States v. Heineman, 767 F.3d 970, 975 (10th Cir. 2014) ("[T]he First Amendment, as construed in *Black*, require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened."); *see* United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) ("The clear import of [*Black*] is that only *intentional* threats are criminally punishable . . . .").

18 *See, e.g.*, United States v. White, 670 F.3d 498, 507 (4th Cir. 2012) (defining the standard as whether "an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury" (alterations in original)); United States v. Jeffries, 692 F.3d 473, 477, 479 (6th Cir. 2012) (defining the standard as whether "in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury"). As explained below, the Supreme Court's decision in *Counterman* effectively overruled these cases.

19 575 U.S. 723 (2015).

20 *Id.* at 738–40.

21 *Elonis* also left open whether a mens rea of recklessness would be sufficient under section 875(c).

22 Counterman v. Colorado, No. 22-138 (cert. granted Jan. 13, 2023).

whether, to establish that a statement is an unprotected "true threat," "the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show solely that an objective 'reasonable person' would regard the statement as a threat of violence."[23]

In opposing the "reasonable person" standard, the petitioner in *Counterman* argued that allowing conviction based on negligence would erode the breathing space that safeguards free exchange of ideas.[24] The petitioner contended that imposing criminal liability under a negligence standard would, by essentially criminalizing misunderstandings, chill protected speech such as political rhetoric, minority religious beliefs, and artistic expression.[25]

Participating as *amicus*, the United States argued—consistent with its position in *Elonis* and with the state's argument in *Counterman*—that the First Amendment was traditionally understood to allow prohibiting communications that a reasonable person would understand as a true threat, regardless of the speaker's subjective intent.[26] In the government's view, that longstanding principle makes sense: Threats are classified as unprotected because any social value that objectively threatening speech may have is outweighed by the victim's right to be protected from the harms that such threats produce.[27] As a fallback, the government argued that if the Court were to require proof of subjective intent in true threats cases, it should hold that a recklessness standard is sufficient to provide the necessary breathing space for protected speech.[28]

In *Counterman*, the Supreme Court essentially adopted the government's fallback recklessness argument. The Court began by rejecting the objective standard on which the defendant's conviction was based. The Court explained that proof of some level of subjective intent was necessary to avoid "chilling fully protected expression."[29] Using an objective standard, the Court explained, that looks only at "how reasonable

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[23] Brief for Petitioner at I, Counterman v. Colorado, 143 S. Ct. 644 (2023) (No. 22-138).

[24] *Id.* at 30–35; *see* United States v. Alvarez, 567 U.S. 709, 733–34 (2012) (Breyer, J., concurring) (noting that the First Amendment in certain contexts uses "*mens rea* requirements that provide 'breathing room' . . . by reducing an honest speaker's fear that he may accidentally incur liability for speaking").

[25] Brief for Petitioner, *supra* note 23, at 4.

[26] Brief for the United States as Amicus Curiae Supporting Respondent at 9-17, Counterman v. Colorado, 143 S. Ct. 644 (2023) (No. 22-138).

[27] *Id.* at 10–13.

[28] *Id.* at 28–31.

[29] Counterman v. Colorado, 143 S. Ct. 2106, 2115 (2023).

observers would construe a statement in context" would deter at least some speech that was not truly threatening because some speakers would choose to avoid the risk that their non-threatening speech would be misunderstood.[30]

Having determined that some level of subjective intent is required, the Court then addressed "the type of subjective standard the First Amendment requires."[31] The Court determined that a recklessness standard, rather than requiring a higher level of intent, strikes the right balance between the competing interests of providing breathing space for protected speech while mitigating the harms that truly threatening statements cause.[32] "Recklessness offers the right path forward," the Court explained, because it "offers enough 'breathing space' for protected speech, without sacrificing too many of the benefits of enforcing laws against true threats."[33]

The Supreme Court's adoption of a recklessness standard for true threats resolves a long-standing circuit conflict on that issue. But questions remain over whether intent requirements in various federal criminal statutes are sufficient under the First Amendment. Some federal threat statutes have their own distinct intent requirements that may be broader than the constitutional intent requirement established in *Counterman*. For example, the statute prohibiting threats against federal officials requires intent "to impede, intimidate, or interfere with such official . . . or with intent to retaliate against such official . . . ."[34] But establishing an intent to "interfere with" or "retaliate against" a public official might not satisfy the constitutional intent requirement for a "true threat."

As another example, the mens rea requirement in the federal cyberstalking statute, which criminalizes certain harmful "course[s] of conduct" performed "with intent to kill, injure, harass, or intimidate" might be broader than an intent to threaten.[35] In response to First Amendment challenges, some courts have adopted a narrow construction of "harass" or "intimidate" to limit the statute to unprotected speech.[36] Other courts, however, interpret those terms according to their ordinary meanings.[37] Other statutes likewise prohibit speech with an arguably broader intent

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30 *Id.* at 2116–17.
31 *Id.* at 2117.
32 *Id.* at 2117–18.
33 *Id.* at 2117, 2119 (cleaned up).
34 18 U.S.C. § 115(a)(1)(B).
35 *See* 18 U.S.C. § 2261A.
36 *See, e.g.*, United States v. Yung, 37 F.4th 70, 77–81 (3d Cir. 2022); United States v. Ackell, 907 F.3d 67, 76–77 (1st Cir. 2018).
37 *See, e.g.*, United States v. Osinger, 753 F.3d 939, 945 (9th Cir. 2014).

requirement than *Counterman's* "true threat" intent standard.[38] Because the Supreme Court held that the First Amendment requires subjective awareness of the threatening nature of the communications, prosecutions under the cyberstalking statute or other statutes with broader intent elements may require a separate "true threat" jury instruction to ensure the jury finds that the defendant acted with the constitutionally required intent.

IV. Threats or advocacy: Who will carry out the violence?

Cases addressing First Amendment challenges to threat prosecutions frequently involve circumstances where the threat statements are ambiguous about who will execute them. In its clearest form, a threat announces plainly that the speaker himself will conduct the violence. The statement "I will kill you!" leaves no room for ambiguity about who will do the killing. At the other pole, a warning that merely predicts that violence might be done by someone unconnected to the speaker is not a threat. For example, the statement "If you wear that Giants jersey to the Eagles game, you will get beat up!" is merely a warning or prediction rather than a threat, unless the speaker is one of the overzealous Eagles fans who would attack the hapless Giants supporter.

Many threat cases involve statements that fall in the ambiguous space between these poles. Such statements are not threats on their face. Instead, they can be interpreted literally as a call for unspecified third parties to commit violence against the victim (for example, "Joe should be shot!"). But when the broader context of the statements indicates that the speaker himself or others whom he controls intend to carry out the violence themselves, such statements can amount to an unprotected threat.

Determining whether this kind of "third-party threat" amounts to a constitutionally unprotected "true threat" requires scrutinizing both the literal meaning of the statement and its surrounding context. Carefully examining meaning and context is necessary to distinguish true threats from speech that is mere jest, "political hyperbole," or "vehement, caustic," or "unpleasantly sharp attacks" that fall short of serious expressions of an intent to do harm.[39] In *Watts,* for example, the Supreme Court held that, when a speaker who had received a draft notice stated at a political

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[38] *See, e.g.*, 47 U.S.C. § 223(a)(1)(C) (prohibiting making certain telephone calls "with intent to abuse, threaten, or harass any specific person").

[39] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," and the audience laughed in response, the speaker had not made a true threat.[40] "Taken in context," which included "the expressly conditional nature of the statement and the reaction of the listeners," the Court found that the statements were only a "very crude offensive method of stating a political opposition to the President."[41] Other examples of contextual clues may include the language, specificity, and frequency of the threats; the relationship between the defendant and the threat recipient; the recipient's response; and any previous threats by the defendant.[42]

Consistent with *Watts*, courts and juries carefully consider contextual factors to determine whether a statement that seems merely to advocate violence by someone else might nevertheless qualify as a true threat. As the following cases illustrate, courts have reached different conclusions in addressing such third-party threat fact patterns.[43]

A. Cases finding that third-party threats were unprotected

1. Nuremberg Files case (Planned Parenthood)

The majority and dissenting opinions in the Ninth Circuit's en banc decision in the famous "Nuremberg Files" case vividly illustrate the line-drawing problems inherent in "third-party threat" fact patterns.[44] In that case, the defendants' "Nuremberg Files" website contained "wanted" posters with photographs, addresses, and names of doctors who performed abortions. The posters declared the doctors guilty of crimes against humanity. The website included the names of three physicians who had been murdered (though not by the defendants) with their names crossed off. The en banc majority held that these posters constituted a "true threat"

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40 *Id.* at 706–07.

41 *Id.* at 707–08.

42 *See, e.g.*, United States v. Stock, 728 F.3d 287, 300 (3d Cir. 2013) ("in the right context, an expression of an intent to injure in the past may be circumstantial evidence of an intent to injure in the present or future"); United States v. Stevenson, 126 F.3d 662, 664–65 (5th Cir. 1997) (recognizing "content, tone, and language" of threat as proof it was intentionally made).

43 Calling for violence by a third party can sometimes fall within other categories of unprotected speech, even if they are not "true threats." For example, speech that encourages a specific person to violently attack a specific victim can amount to an unprotected solicitation under 18 U.S.C. § 373; *see* United States v. White, 698 F.3d 1005 (7th Cir. 2012).

44 *See* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc).

because they "connote something they do not literally say," namely, that "You'll be shot or killed."[45] The court explained that, according to the background context, including the killings of the three physicians, "the poster format itself had acquired currency as a death threat for abortion providers."[46]

Judge Kozinski dissented. He explained that, although the posters could be viewed as "a call to arms for *other* abortion protesters to harm" the physicians, to be a "true threat" they "must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence."[47] Because the posters amounted to, at most, a call for violent action by "unrelated third parties," the proper First Amendment analysis was the *Brandenburg* imminence test (which was not satisfied).[48] Judge Kozinski noted that a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear. And, in Judge Kozinski's view, this may be true even where the speaker indicates political support for the violent third parties.[49]

2. Turner

In *United States v. Turner*, the defendant published a blog post announcing that three Seventh Circuit judges "deserve[d] to be killed" for their decision holding that the Second Amendment did not apply to the states.[50] Turner's diatribe declared that the judges' blood would "replenish the tree of liberty."[51] Turner published the judges' photographs and work addresses, and he posted a map to the courthouse. Turner referred to the recent murder of a different Chicago judge's family members and stated that the three Seventh Circuit judges needed to "get the hint."[52]

In a divided opinion, the Second Circuit found sufficient evidence to establish a "true threat." The court concluded that "[t]he full context" of Turner's statements "reveals a gravity readily distinguishable from mere

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45 *Id.* at 1085.
46 *Id.* at 1079.
47 *Id.* at 1091–92 (Kosinski, J., dissenting).
48 *Id.* at 1092; *see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); *see also* New York *ex rel.* Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001) (to find a true threat, "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker*").
49 *Planned Parenthood*, 290 F.3d at 1092–93 (Kozinski, J., dissenting).
50 720 F.3d 411, 413–14 (2d Cir. 2013).
51 *Turner,* 720 F.3d at 413.
52 *Id.*

hyperbole . . . ."[53] The most significant aspect of that context, according to the court, was Turner's reference to the killings of the other judge's family members: That kind of "serious reference[] to actual" murders "in apparent retribution for a judge's decision would clearly" support a finding of a "true threat."[54]

The court rejected Turner's argument that he never explicitly stated that he would kill the judges, but said only that they "deserve[d] to be killed."[55] The court explained that "rigid adherence to the literal meaning of a communication" would leave society "powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat."[56] The court concluded that, although Turner's "language, on its face, purported to be directed at third parties," the broader context, including Turner's "lengthy discussion of killing the three judges, his reference to the killing of [the other judge's] family, and his update the next day with detailed information" of the judges' location all supported the jury's conclusion that the statements were true threats.[57] Turner's argument, according to the court, depended too much on "literal denotation and syntax," but threats "need be neither explicit nor conveyed with the grammatical precision of an Oxford don."[58]

Judge Pooler dissented. In her view, Turner's threats were constitutionally protected advocacy rather than a true threat.[59] In reaching that conclusion, she emphasized the distinction between a threat, which "warns of violence or other harm that the speaker controls," and "incitement," which involves "predictions or exhortations to others to use violence."[60] Judge Pooler did not suggest that the distinction between "I will kill you" and "You deserve to die" was absolute. She specifically recognized that "[s]peech may be ambiguous as to *who* will cause injury and still constitute a threat."[61] But in this case, Judge Pooler maintained that the evidence was not sufficient to "find that Turner's conduct constituted a threat."[62]

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53 *Id.* at 421.
54 *Id.* at 421–22.
55 *Id.* at 414.
56 *Id.* at 422–23.
57 *Id.* at 423–24.
58 *Id.* at 425.
59 *See id.* at 429–36 (Pooler, J., dissenting).
60 *Id.* at 431–32 (cleaned up).
61 *Id.* at 432.
62 *Id.* at 434.

3. Wheeler

In *United States v. Wheeler*, the defendant posted on Facebook that his "religious followers" should "kill" certain named police officers.[63] In a later post, Wheeler stated that, if the authorities did not drop DUI charges against him, Wheeler's "religious followers and religious operatives" should "commit a massacre" at a particular preschool—"just walk in and kill everybody."[64] The Tenth Circuit rejected Wheeler's argument that his statements were "exhortations to unspecified others to commit violence" rather than "true threats."[65] According to the court, the context of Wheeler's statements clearly suggested that the "individuals ordered to take violent action" were subject to Wheeler's command.[66] The fact that Wheeler did not actually have any followers was irrelevant because "a reasonable recipient of the threat" could have thought that the followers existed.[67]

The court also rejected Wheeler's argument that "treating his statements as true threats creates an end-run around the stringent *Brandenburg* requirements."[68] The court explained that, although Wheeler's speech "may at first blush appear to be closer to incitement," that did not matter because "[e]xhorting groups of followers to kill specific individuals can produce fear in a recipient no less than more traditional forms of threats."[69] Echoing *Turner*, the court concluded that such a "wooden [] interpretation" of the true threat requirement would "leave the state 'powerless against the ingenuity of threateners.'"[70]

4. Weiss

In *United States v. Weiss*, the defendant wrote threatening statements to Senator Mitch McConnell through the Senator's official website contact form.[71] Among other vitriolic statements, Weiss declared that Senator McConnell would "die in the street" at the hands of the "Resistance," which would "cut [McConnell's] throat from ear to ear."[72] The district court (Judge Breyer) dismissed the indictment on the ground that

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63 776 F.3d 736 (10th Cir. 2015).
64 *Id.* at 738.
65 *Id.* at 744.
66 *Id.*
67 *Id.* at 746.
68 *Id.* at 744–45; *see also* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
69 *Wheeler*, 776 F.3d at 745.
70 *See id.* (quoting United States v. Turner, 720 F.3d 411, 422 (2d Cir. 2013)).
71 475 F. Supp. 3d 1015 (N.D. Cal. 2020).
72 *Id.* at 1020–23.

the statements were not "true threats." The court explained that Weiss had not identified himself as part of the named "resistance" groups. And although the statements were "indisputably violent," they simply "predicted that *other* people would hurt Senator McConnell, not that Weiss would."[73]

The government appealed, and the Ninth Circuit reversed in an unpublished memorandum disposition.[74] The court reasoned that, although Weiss "did not explicitly indicate that *he* was going to kill Senator McConnell, . . . he associated the sender of the message with the 'Resistance'" that would carry out the violence.[75] That fact, together with other factors including that Weiss's message was "privately communicated" to and "personally targeted" at Senator McConnell, were sufficient to permit a reasonable jury to find that Weiss's statement was a "true threat."[76]

5. Hunt

In *United States v. Hunt*, the defendant, following the storming of the Capitol on January 6, 2021, publicly posted a video he created called "Kill Your Senators" on the video-sharing site BitChute.[77] In the video, Hunt stated that "we need to go back to the U.S. Capitol" and "this time we have to show up with our guns" and "slaughter" the members.[78] Hunt asserted that "[t]hey're gonna kill us. So we have to kill them first. So get your guns . . . put some bullets in their fucking heads. If anybody has a gun, give me it. I will go there myself and shoot them and kill them. We have to take out these Senators . . . ."[79]

The government charged Hunt under 18 U.S.C. § 115(a)(1)(B) for the "Kill Your Senators" video as well as three social media posts. A jury convicted Hunt for the video but acquitted him of the counts based on the social media posts. After trial, the district court denied Hunt's motion for a judgment of acquittal on the remaining count in a published opinion.[80] The court rejected Hunt's contention that his statements were mere advocacy of violence by third parties whom he did not control. The court noted that Hunt "referred to the violent actors as 'we,' and said, 'I

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73 *Id.* at 1036.
74 *See* United States v. Weiss, 2021 WL 6116629 (9th Cir. Dec. 27, 2021) (not precedential).
75 *Id.* at *2 (cleaned up).
76 *Id.*
77 573 F. Supp. 3d 779 (E.D.N.Y. 2021).
78 *Id.* at 784.
79 *Id.*
80 *Id.* at 779.

will go there myself and shoot them and kill them.'"[81] The court noted further that "the jury acquitted Defendant on the three statements that did not include such expressions of personal intent."[82]

B. Cases finding that third-party threats were protected advocacy

1. Bagdasarian

In *United States v. Bagdasarian*, the Ninth Circuit reversed a conviction under 18 U.S.C. § 879(a)(3), which prohibits threatening to kill a presidential candidate.[83] The defendant posted that then-Senator Obama "will have a 50 cal in the head soon," and "shoot the [racial slur]."[84] The court explained that the "prediction" that Obama would have a "50 cal in the head" was not a threat because it "does not convey the notion that Bagdasarian himself had plans to fulfill the prediction . . . ."[85] And the call to "shoot" Obama likewise "makes no reference to Bagdasarian himself" but rather "expresses the imperative that some unknown third party should take violent action," or was "simply an expression of rage or frustration."[86] The court also noted that the statements were posted on a "non-violent discussion forum that would tend to blunt any perception that statements made there were serious expressions of intended violence."[87]

Judge Wardlaw dissented. She noted that, in light of the country's recent "experience with internet threats and postings that presaged tragic events" including mass shootings, "a reasonable person would foresee" that Bagdasarian's statements were threats.[88]

2. White

In *United States v. White*, the defendant had posted articles about Richard Warman, a Canadian civil rights activist.[89] These postings called for Warman's death, referenced an article about the firebombing of a Canadian Communist Party candidate's house, and added, "Good. Now

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[81] *Id.* at 800–02 (noting that the statements showed "Defendant's intent to *personally* harm members of Congress").
[82] *Id.*
[83] 652 F.3d 1113 (9th Cir. 2011).
[84] *Id.* at 1115.
[85] *Id.* at 1122.
[86] *Id.* at 1119, 1122.
[87] *Id.* at 1121.
[88] *Id.* at 1126 (Wardlaw, J., dissenting).
[89] 670 F.3d 498 (4th Cir. 2012).

someone do it to Warman."[90] White also called for Warman to be "dr[agged] out into the street and shot, after appropriate trial by a revolutionary tribunal," and provided his home address.[91] The district court found that these posts did not amount to a "true threat" and granted a judgment of acquittal. The government appealed, but the Fourth Circuit affirmed. The court explained that, while the communications "clearly called for someone to kill [Warman]," they did not "actually provide[] a threat *from White* that expressed an intent to kill Warman."[92] Calling on "others to kill Warman when the others were not even part of White's organization" amounted to "political hyperbole" rather than a "true threat."[93] Moreover, because the statements were "not directed to Warman," they looked more like advocacy of violence made to an audience of like-minded individuals.[94]

C. Analyzing the cases

What lessons can be gleaned from these "third-party" cases?

1. Caution

The first lesson is caution. The different outcomes and the frequency of dissents and jury acquittals highlight the absence of any obvious bright line here.[95]

2. Protected advocacy is abstract and general; unprotected threats are concrete and specific

The cases reflect uncertainty about the relationship between the true threats doctrine and the *Brandenburg* imminence standard that governs

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90 *Id.* at 505.

91 *Id.* at 506.

92 *Id.* at 513 (emphasis added).

93 *Id.* at 513–14 ("The principal message expressed in White's communications was that *someone else* should kill Warman.").

94 *See id.* at 513.

95 For a thoughtful analysis of some of these cases, which argues ultimately that even advocacy of violence by third parties against identifiable victims should be unprotected, see Marc Rohr, *"Threatening" Speech: The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 Rutgers J.L. & Pub. Pol'y 150 (2015).

advocacy of violence.[96] As the third-party threat cases illustrate, political rhetoric that threatens violence that the speaker does not control may appear indistinguishable from the kind of advocacy that the Court held was protected speech in *Brandenburg* and *Claiborne Hardware*.[97]

One factor that seems to divide protected advocacy from unprotected threats is the speech's level of generality or abstractness. The *Brandenburg* standard applies where there is general advocacy of criminal conduct, that is, where the third-party threat appears to be a rhetorical tool used to advance an abstract political principle.[98] On the other hand, where the threat appears more like a specific and concrete targeting of discrete individuals, rather than overheated political rhetoric as part of an abstract debate, courts are more likely to find the speech to be unprotected.

3. Nexus with criminal conduct

A third-party threat is more likely to be deemed a "true threat" when it is closely associated with real-world criminal conduct. The exception for speech that is integral to criminal conduct, such as solicitation, is a distinct category from true threats. But a third-party threat that constitutes or closely resembles an unprotected solicitation or integral part of actual criminal conduct is not the kind of abstract advocacy that should be subject to *Brandenburg*. Similarly, a third-party threat that refers to a specific act of violence that had actually occurred, and that describes that prior act as a pattern for the threatened violence, is more likely to be deemed a true threat.

In *Turner*, for example, the court found it significant that Turner referred repeatedly to the Chicago judge whose family had previously been murdered and then connected that murder with his threats to other judges.[99] The majority in *Planned Parenthood* relied on the fact that

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96 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (holding, in a case where activists threatened physical violence against violators of a boycott, that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment").

97 *See*, *e.g.*, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1092–98 (9th Cir. 2002) (Kozinski, J., dissenting); United States v. Turner, 720 U.S. 411, 434 (2d Cir. 2013) (Pooler, J., dissenting).

98 *See Brandenburg*, 395 U.S. 444; *see also* United States v. Williams, 553 U.S. 285, 298–99 (2008) ("[T]here remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."); United States v. Bell, 414 F.3d 474, 482 n.8 (3d Cir. 2005) ("*Brandenburg* clearly does not apply to . . . unprotected or unlawful speech or speech-acts (e.g., aiding and abetting, extortion, criminal solicitation, conspiracy, harassment, or fighting words).").

99 *See Turner*, 720 F.3d at 421–22.

some physicians who had appeared on the "Wanted" posters had been killed, and the defendants' website displayed their crossed-out names.[100] In her *Bagdasarian* dissent, Judge Wardlaw felt that the context of mass shootings that had recently occurred supported treating Bagdasarian's statements as true threats.[101] Accordingly, references to specific instances of real-world violence that resemble the threatened violence appear to be an important contextual factor in analyzing third-party threats.

4. Direct communication with the target, while not required, is an indicator of a true threat

The audience also matters. A communication sent directly to the victim is more likely to be deemed a threat than a communication to like-minded friends whom the victim might never hear about.[102] The rationale underlying this distinction is that threats that the victim never hears about are far less likely to cause fear or other harm. As Judge Pooler explained in her *Turner* dissent, "the fact that Turner's words were posted on a blog on a publicly accessible website" and "had the trappings of political discourse" suggested that the statements were not a threat.[103] The speech "might be subject to a different interpretation if, for example, the statements were sent to the judges in a letter or email."[104] Thus, a direct communication to the target, or at a minimum the existence of some path through which the threat might somehow reach the victim and cause fear, can be an important factor in determining whether the speech is a true threat.

V. Conclusion

As online threats proliferate, prosecutors and courts will continue to wrestle with the boundary between constitutionally protected expression and unprotected threats. Although the Supreme Court in *Counterman* has now established a clear mens rea standard for "true threats," prosecutors will still face uncertainty over whether the various intent require-

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100 *See Planned Parenthood*, 290 F.3d at 1079.

101 *See* United States v. Bagdasarian, 652 F.3d 1113, 1126 (9th Cir. 2011) (Wardlaw, J., dissenting).

102 *See, e.g.*, United States v. Weiss, 2021 WL 6116629, at *2 (9th Cir. Dec. 27, 2021) (not precedential) (relying in part on the fact that Weiss's message was "privately communicated" to and "personally targeted" at Senator McConnell); United States v. White, 670 F.3d 498, 513–14 (4th Cir. 2012) (noting that White's communications were not communicated directly to the Canadian activist).

103 *Turner,* 720 F.3d at 434 (Pooler, J., dissenting).

104 *Id.*

ments in threat statutes (such as the intent to "harass" in the cyberstalking context) are sufficient to satisfy the new constitutional standard. In the context of third-party threats, the line-drawing is even more difficult, as this article's tour of the caselaw shows. But the caselaw does suggest a few broad guidelines. Speech is more likely to be deemed an unprotected threat when it is (1) specific and concrete rather than general and abstract; (2) directed at the target; and (3) connected in some way with real-world violent conduct.

About the Author

Joseph Palmer has been an attorney in the National Security Division's (NSD) Appellate Unit since 2012. Before coming to NSD, he worked in the Appellate Section of the Criminal Division. He is currently on detail to the Computer Crime and Intellectual Property Section.

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Using Civil Rights Statutes to Prosecute Domestic Violent Extremism

Julia Gegenheimer and Samantha Trepel
Special Litigation Counsels
Criminal Section
Civil Rights Division

Around 10:30 a.m. on a Saturday in El Paso, Texas, a young man wearing dark clothing and ear protection, and carrying an assault rifle and multiple loaded magazines, entered a Walmart parking lot. He began shooting at people in front of the store. He then entered the store and continued firing inside, moving through the aisles to target people whom he believed to be Hispanic.[1] He ultimately murdered 23 people and injured 22 others.[2]

Investigators soon learned that the man had driven to El Paso—and targeted this particular Walmart—because it served a predominantly Latinx community, one comprised of American families from El Paso and Mexican families from Ciudad Juarez, located just minutes away on the other side of the Mexican border.[3] The shooter wrote that his intent in attacking innocent people out shopping was to prevent what he perceived as a "Hispanic invasion of Texas," and to dissuade future Hispanic immigrants from coming to the United States.[4]

The day the Justice Department (Department) announced it was bringing federal hate crimes and firearms charges against the shooter, the Department described the shooter's actions as "domestic terrorism"

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[1] Chas Danner, *Everything We Know About the El Paso Walmart Massacre*, Intelligencer (Aug. 7, 2019).

[2] Press Release, U.S. Dep't of Just., Federal Grand Jury in El Paso Returns Superseding Indictment against Patrick Crusius (July 9, 2020).

[3] Simon Romero, Manny Fernandez & Michael Corkery, *Walmart Store Connected Cultures, Until a Killer "Came Here for Us*," N.Y. Times (Aug. 4, 2019).

[4] Tim Arango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. Times (Aug. 3, 2019); Press Release, U.S. Dep't of Just., Federal Grand Jury in El Paso Returns Superseding Indictment Against Patrick Crusius (July 9, 2020); Press Release, U.S. Dep't of Just., Texas Man Sentencing to 90 Consecutive Life Sentences for 2019 Mass Shooting at Walmart in El Paso, Texas, Killing 23 People and Injuring 22 Others (July 7, 2023).

and compared it to prior "violence wrought by white supremacists and the Ku Klux Klan."[5] The Department assured citizens that "[t]his kind of terror will not stand."[6] In his remarks announcing the charges, Assistant Attorney General Eric Dreiband committed to using "the resources and full authority of the Department of Justice to combat these heinous crimes."[7]

With these words, the Department unequivocally described the shooter's crimes as acts of racially motivated terrorism. Yet the Department charged the shooter with violating federal hate crimes and firearms statutes—not necessarily the statutes one typically associates with a terrorism prosecution. The tragedy at the El Paso Walmart and the manner in which that violence was charged provide a high-profile example of the intersection between domestic terrorism (DT) and criminal civil rights. Cases exemplifying this overlap are not unusual, as many domestic terrorism offenses are best prosecuted using federal civil rights statutes. The reverse may also be true: Civil rights prosecutions may also implicate domestic terrorism and be stronger for embracing that fact. Approaching cases well-informed about both potential civil rights and domestic violent extremism (DVE) angles allows federal prosecutors and investigators to fully utilize available legal tools, thereby promoting more comprehensive investigations and more effective prosecutions. Bringing all available tools to bear on these threats is now even more urgent, as racially motivated domestic violent extremists "have been responsible for a majority of DVE-related deaths since 2010,"[8] and hate crime incidents are on the rise.[9]

After providing some foundational definitions, this article reviews the federal civil rights statutes most likely implicated in DVE investigations and discusses the advantages of incorporating civil rights charges in DVE prosecutions, both for the case and for the victims and their community.[10]

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5 Eric Dreiband, Assistant Att'y Gen., U.S. Dep't of Just., Remarks by Assistant Attorney General Eric Dreiband Announcing the United States v. Patrick Wood Crusius Indictment (Feb. 6, 2020).

6 *Id.*

7 *Id.*

8 U.S. Dep't of Homeland Sec., Fed. Bureau of Investigation & Nat'l Counterterrorism Ctr., Wide-Ranging Domestic Violent Extremist Threat to Persist 1 (2022).

9 Press Release, U.S. Dep't of Just., Associate Attorney General Vanita Gupta Issues Statement on the FBI's Supplemental 2021 Hate Crime Statistics (Mar. 13, 2023) (announcing that "[n]ationally, reported hate crime incidents increased 11.6% from 2020 to 2021," the most recent year for which the Department has data).

10 This article updates and builds on Julia Gegenheimer, *Prosecuting Acts of Domestic Violent Extremism as Federal Hate Crimes*, 70 DOJ J. Fed. L. & Prac., no. 2, 2022,

I. Defining hate crimes, domestic terrorism, and domestic violent extremism

A. Hate crimes

A hate crime, as used here, refers to a violation of any of the specific federal statutes that criminalize the use of violence or threats of violence against individuals or groups based on certain protected characteristics.[11] Over time, Congress has expanded the list of protected characteristics to include race, color, religion, national origin, gender, sexual orientation, gender identity, disability, and familial status;[12] however, no single hate crime statute includes protections for each of these characteristics. The statutes also differ in the types of violent conduct they proscribe and in the jurisdictional elements prosecutors must establish.[13]

B. Domestic terrorism and domestic violent extremism

Federal law 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 . . . .[14]

This definition comes from the United States Code, which defines the term "domestic terrorism"; there is, however, no federal criminal statute

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at 157.

11 *See generally* Barbara Kay Bosserman & Angela M. Miller, *Prosecuting Federal Hate Crimes*, 70 DOJ J. Fed. L. & Prac., no. 2, 2022, at 127–28 (providing a more in-depth discussion of the federal hate crime statutes, their history, elements, and jurisdictional limits).

12 "Familial status" is defined by statute to mean a parent or legal guardian who lives with their minor child, or a pregnant person or person who is in the process of securing legal custody of a minor. 42 U.S.C. § 3602. The Fair Housing Act is the only federal hate crime statute that includes familial status as a protected characteristic. *See* 42 U.S.C. § 3631 (the criminal provision of the Fair Housing Act).

13 *See generally* Bosserman & Miller, *supra* note 11, at 127–28.

14 18 U.S.C. § 2331(5).

that creates a chargeable offense by that name.[15] Instead, prosecutors must look to other federal criminal laws, including hate crimes statutes, when seeking to charge an act of DT.

The term "domestic violent extremist" (or domestic violent extremism) refers to those persons "based [in] . . . the United States . . . who seek[] to further political or social goals . . . through unlawful acts of force or violence."[16] The U.S. government, including the Federal Bureau of Investigation (FBI), generally groups DT threats into five broad categories based on the ideological motivations of the criminal actors involved. Three of these threat categories encompass ideologically motivated violent conduct that is potentially prosecutable using federal civil rights statutes. These threat categories include (1) "Racially or Ethnically Motivated Violent Extremism," defined as the "use or threat of force or violence . . . in furtherance of political or social agendas which are deemed to derive from bias, often related to race";[17] (2) "Abortion-Related Violent Extremism," which is the "use or threat of force or violence . . . in furtherance of political and/or social agendas relating to abortion, including individuals who advocate for violence in support of either pro-life or pro-choice beliefs";[18] and (3) the umbrella category of "All Other Domestic Terrorism Threats," into which are grouped acts motivated by "bias related to religion, gender, or sexual orientation," among others.[19]

These definitions demonstrate that conduct classified as domestic terrorism or domestic violent extremism (DVE) may also constitute a violation of federal civil rights statutes, including those prohibiting hate crimes and the Freedom of Access to Clinic Entrances (FACE) Act, a statute enforced by the Civil Rights Division that criminalizes violence or threats directed at reproductive health services providers, including abortion providers.[20] For example, a criminal actor who commits a mass shooting against individuals because of their race or religion and who is also motivated by ideological or socio-political goals—such as the desire to start a race war or end the perceived replacement of white people in the United States by minority groups (the so-called "great replacement theory"[21])—may have both committed an act of DVE or DT and violated

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15 *See id.*

16 FBI & U.S. Dep't of Homeland Sec., Strategic Intelligence Assessment and Data on Domestic Terrorism 4 (2022).

17 *Id.*

18 *Id.* at 5.

19 *Id.*

20 18 U.S.C. § 248.

21 Jason Wilson & Aaron Flanagan, *The Racist "Great Replacement" Conspiracy Theory Explained*, S. Poverty L. Ctr. (May 17, 2022), https://www.splcenter.org/

federal hate crime laws.

II. Federal criminal civil rights statutes in the DVE toolbox

Understanding which federal criminal civil rights statutes to consider when investigating an incident of DVE is crucial for three reasons. First, the federal criminal code has no statute that specifically criminalizes DT; without a generic DT statute to charge acts of domestic violent extremism, prosecutors by necessity must consider other types of charges. Frequently, criminal civil rights statutes will present appropriate options. Second, racially or ethnically motivated violent extremists (RMVEs)—and specifically those advocating the superiority of the white race—have posed the most lethal category of DT threats since 2010.[22] The FBI and Department of Homeland Security (DHS) have assessed that the threat to the American public from this subcategory of RMVEs continues to be significant today.[23] Those who work in the DT space are therefore likely to encounter matters involving RMVE violence, the category most typically chargeable with federal hate crime statutes. Third, when supported by the evidence, hate crimes charges can be particularly fitting in the wake of RMVE mass violence due to the seriousness of the penalties available and because the statutes require proof that the defendant acted because of certain enumerated biases. In this way, federal hate crimes charges account for the defendant's hate-based extremist ideologies.

Below, this article briefly summarizes the five federal civil rights statutes most commonly charged in DVE-related prosecutions.

A. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), 18 U.S.C. § 249, is the country's newest federal hate crime statute, having been added to the United States Code in 2009. Section 249 criminalizes willfully causing bodily injury, or attempting to cause bodily injury using a dangerous weapon, because of a person's actual or

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hatewatch/2022/05/17/racist-great-replacement-conspiracy-theory-explained (discussing the "great replacement" theory as a white supremacist ideology linked to numerous acts of DVE charged as federal hate crimes, including the El Paso Walmart shooting and the 2018 murder of 11 people at the Tree of Life Synagogue in Pittsburgh, PA).

22 Wide-Ranging Domestic Violent Extremist Threat to Persist, *supra* note 8, at 1.

23 *Id.*

perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.[24] In some respects, section 249 provides broader protections than earlier hate crime statutes, as it covers more protected characteristics: It is the first, and currently only, federal hate crime statute to punish violence committed because of a person's sexual orientation or gender identity.[25] In other respects, section 249 is a more narrowly tailored hate crime statute than its predecessors. This is because it only proscribes willfully causing or attempting to cause bodily injury; it cannot be used to prosecute threats.[26] Some, but not all, of section 249's provisions contain a jurisdictional element, in that they require proof that the offense affected or was in interstate or foreign commerce.[27] Additionally, this offense is not death-eligible.[28] Prosecutors charging some

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[24] 18 U.S.C. § 249; *see* Bosserman & Miller, *supra* note 11, at 128–36 (providing a detailed overview of the elements of section 249).

[25] 18 U.S.C. § 249; *see* Bosserman & Miller, *supra* note 11, at 128. Following the Supreme Court's decision in Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020), which held that sex discrimination includes discrimination based on sexual orientation and gender identity, the Department has taken the position that 42 U.S.C. § 3631, an earlier-enacted hate crime statute that criminalizes housing-related violence committed because of a person's sex (among other protected characteristics), also prohibits violence committed because of a person's sexual orientation and gender identity. *See, e.g.*, Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021) ("Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including . . . the Fair Housing Act . . . (42 U.S.C. [§] 3601 *et seq.*)—prohibit discrimination on the basis of gender identity or sexual orientation . . . .") [hereinafter Executive Order]; *Civil Rights: LGBTQ+*, Off. of Just. Programs, U.S. Dep't of Just. (June 24, 2022), https://www.ojp.gov/program/civil-rights/lgbtq (providing examples of Department guidance documents outlining expanded legal protections against discrimination on the basis of sexual orientation and gender identity in light of *Bostock*).

[26] Bosserman & Miller, *supra* note 11, at 128.

[27] *Compare* 18 U.S.C. § 249(a)(2)(B) (requiring proof of a connection to interstate or foreign commerce), *with* 18 U.S.C. § 249(a)(1) (omitting a commerce-related element); *see also* Bosserman & Miller, *supra* note 11, at 131 (explaining that because the Thirteenth Amendment granted Congress the power to remedy the badges and incidents of slavery, Congress has the authority to enact statutes prohibiting race-based violence; thus, crimes motivated by protected characteristics that were considered racial at the time the Thirteenth Amendment was ratified require no additional jurisdictional element; crimes committed because of a protected characteristic that was *not* considered racial at the time the Thirteenth Amendment was ratified, however, *do* require proof of an additional jurisdictional element—that the crime was in or affected interstate or foreign commerce—because Congress enacted these provisions of section 249 using its power under the Commerce Clause).

[28] 18 U.S.C. § 249(a)(1)(B), (a)(2)(A)(ii) (if death results, or if the defendant's actions include kidnapping or attempted kidnapping, sexual abuse or attempted sexual abuse,

of the most serious DT crimes, such as cases of ideologically motivated mass murder, have therefore charged section 249 offenses alongside other death-eligible offenses. For example, the defendant who killed 23 people at the El Paso Walmart and wounded 22 more was charged with 55 counts of violating section 249 and 55 counts of firearms offenses, including 23 counts of capital firearm offenses.[29]

B. The Church Arson Prevention Act, 18 U.S.C. § 247

The Church Arson Prevention Act, 18 U.S.C. § 247, prohibits (1) using force or threats of force to interfere with a person's free exercise of religion, and (2) destroying or damaging houses of worship or other religious real property because of the religious nature of the property or the race, color, or ethnic characteristics of those associated with the property.[30] Although it is called the Church Arson Prevention Act, the statute applies to all religions and houses of worship, not just churches, and includes all intentional damage to religious real property, not just that caused by arson.[31]

Section 247 can be charged as either a misdemeanor offense[32] or as a felony, with the maximum statutory penalty ranging from any term of years to life imprisonment, depending on the offense characteristics. If the offense involves more than $5,000 damage to real property, the offense is punishable by a maximum of three years' imprisonment.[33] An offense that results in bodily injury or involves a dangerous weapon, fire, or explosives is subject to a 20-year penalty; an offense that results in bodily injury *and* involves fire or an explosive is subject to a 40-year penalty.[34] If death results, the statute is a capital offense.[35]

Prosecutors have charged section 247 offenses in a number of recent, high-profile acts of racially or ethnically motivated domestic terrorism. The defendant who murdered 9 parishioners and attempted to kill 3 more during a Bible study at the Emanuel African Methodist Episcopal Church ("Mother Emanuel") in Charleston, South Carolina, was charged with 12

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or an attempt to kill, the offense is punishable by imprisonment for any term of years or for life); *see also* Bosserman & Miller, *supra* note 11, at 130.

29 Superseding Indictment, United States v. Crusius, No. 20-cr-389 (W.D. Tex. July 9, 2020); *see also* 18 U.S.C. §§ 924(c), 924(j).

30 Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat 1392 (codified at 18 U.S.C. § 247).

31 *Id.*; *see also* Bosserman & Miller, *supra* note 11, at 144.

32 18 U.S.C. § 247(d)(5).

33 18 U.S.C. § 247(d)(4).

34 18 U.S.C. § 247(d)(2) and (3).

35 18 U.S.C. § 247(d)(1).

counts of violating section 247, for obstructing the victims' religious exercise.[36] Evidence at trial suggested that the shooter had planned the attack in the hopes of "start[ing] a race war" and selected Mother Emanuel because it was a historically significant Black church.[37] The shooter was also charged with 12 counts of violating section 249 and related firearms charges.[38] After a one-week trial, a jury convicted him on all counts.[39] Likewise, prosecutors convicted the defendant accused of murdering 11 congregants during Shabbat services at the Tree of Life Synagogue in Pittsburgh, Pennsylvania, of violations of both sections 247 and 249.[40]

C. Federally protected activities, 18 U.S.C. § 245(b)(2)

18 U.S.C. § 245(b)(2) criminalizes the use of force or threats of force to interfere with a range of federally protected activities because of race, color, religion, or national origin.[41] Before the enactment of the HCPA, section 245 was the federal hate crime statute that covered the broadest range of conduct.[42] Now, section 249 is typically used to prosecute hate crimes cases involving the use of force. Section 245(b)(2) remains useful when prosecuting threats, which section 249 does not cover. However, section 245(b)(2), which was enacted in 1968, offers no protections from violence or threats of violence motivated by gender, gender identity, sexual

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36 United States v. Roof, 10 F.4th 314, 331 (4th Cir. 2021).

37 *Id.* at 332.

38 *Id.* at 331.

39 *Id.*

40 United States v. Bowers, 495 F. Supp. 3d 362, 365 (W.D. Pa. 2020); Press Release, U.S. Dep't of Justice, Jury Recommends Sentence of Death for Pennsylvania Man Convicted for Tree of Life Synagogue Shooting (Aug. 2, 2023).

41 18 U.S.C. § 245(b)(2). Section 245(b)(1) prohibits the interference, by force or threat of force, with certain federal rights that are protected regardless of the defendant's motivation. These rights include voting and campaigning for elective office; participating in any program, facility, or activity administered by the United States; enjoying federal employment; serving as a juror or grand juror in federal court; and enjoying programs or activities that receive federal financial assistance. Section 245(b)(4)(A) prohibits the use of force or threats of force to interfere with individuals because they are participating without discrimination in any of the federally protected activities listed in the statute. Section 245(b)(4)(B) prohibits the use of force or threats of force to interfere with individuals because they are affording others the opportunity to participate in federally protected activities without discrimination. Section 245(b)(5) prohibits the use of force or threats of force to interfere with individuals because they are aiding or encouraging another to participate in federally protected activities. *See* Bosserman & Miller, *supra* note 11, at 142–44 for further discussion of these less-frequently charged subsections of section 245.

42 Bosserman & Miller, *supra* note 11, at 140.

orientation, or disability.[43] There is currently no hate crime statute that covers threats of violence motivated by these characteristics,[44] although 18 U.S.C. § 875(c), the federal statute criminalizing interstate threats, reaches such conduct directly.[45]

To establish a violation of section 245(b)(2), the United States must prove that the defendant (1) used force or the threat of force; (2) willfully injured, intimidated, or interfered with a person, or attempted to do so; (3) acted because of that person's race, color, religion, or national origin; and (4) acted because that person was enjoying a federally protected right included in the statute.[46] These rights include attending or enrolling in public school or college; participating in or enjoying a benefit, program, facility, or activity provided or administered by a state or its subdivision; applying for or enjoying state or private employment; serving on a state jury; traveling or using a facility of interstate commerce; or enjoying a place of public accommodation.[47] This list demonstrates that the statute, although limited in the protected characteristics it covers, still offers broad protections: For example, both private and public (state) employment are protected activities. The statute and case law interpreting "public accommodations" have defined it to include hotels, restaurants, concert halls, sports arenas, malls, and more.[48] Likewise, courts have held that programs, facilities, or activities that a state administers include the use of public parks, streets, and sidewalks.[49]

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43 *Id.*

44 As discussed in note 25 *supra*, the Department interprets the term "sex" in 42 U.S.C. § 3631 to include sexual orientation and gender identity. Section 3631, a provision of the Fair Housing Act, therefore can be used to prosecute housing-related threats of violence motivated by these protected characteristics.

45 Bosserman & Miller, *supra* note 11, at 140.

46 18 U.S.C. § 245(b).

47 18 U.S.C. § 245(b)(2)(A)–(F).

48 18 U.S.C. § 245(b)(2)(F) (listing, among others, the following as places of public accommodation: "any inn, hotel, motel, . . . any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, . . . any gasoline station, . . . any motion picture house, theater, concert hall, sports arena, stadium, . . . or []any other establishment which serves the public"); *e.g.*, United States v. Allen, 341 F.3d 870, 876–78 (9th Cir. 2003) (local public park is a public accommodation under section 245(b)(2)(F)); United States v. Nelson, 277 F.3d 164, 193 (2d Cir. 2002) (holding that "the term 'facility' clearly and unambiguously includes city streets within its meaning," and "unambiguously falls within the clear meaning of the text of § 245(b)(2)(B)"); United States v. Baird, 85 F.3d 450, 451 (9th Cir. 1996) (convenience store); United States v. White, 846 F.2d 678, 694–95 (11th Cir. 1988) (parade); United States v. Three Juveniles, 886 F. Supp. 934, 946 (D. Mass. 1995) (a mall and a garage are places of public accommodation within the meaning of section 245(b)(2)(F)).

49 *E.g.*, *Allen*, 341 F.3d at 876–78 (local public park, even when closed, is a public

Section 245(b)(2) can be charged as a misdemeanor violation; proof that the offense resulted in bodily injury or involved the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire results in a felony punishable by ten years' imprisonment.[50] The offense is punishable by a maximum of life imprisonment where it involves kidnapping, an attempt to kidnap, aggravated sexual abuse, an attempt to kill, or where death results.[51] It can also be charged as a capital crime where death results.[52]

Section 245 has been charged in recent prosecutions involving DVE conduct where defendants, motivated by bias, terrorized victims using threats of force. The statute was used in conjunction with section 249, for example, to charge the white supremacist who drove his car into a crowd of people counter-protesting the 2017 "Unite the Right Rally" in Charlottesville, Virginia.[53] It was also used to charge the three men responsible for killing Ahmaud Arbery, who was jogging in a residential neighborhood in Georgia when the men followed him in a truck, cut him off, and threatened him with firearms before one of the men shot and killed him. Following a two-week jury trial in 2022, all three men were convicted of using force and threats of force to interfere with Arbery's right to use a public street because of his race, resulting in his death, in violation of section 245(b)(2).[54] The evidence at trial established that had Arbery not been a Black man, the defendants would not have chased and threatened him.[55]

D. Criminal provision of the Fair Housing Act, 42 U.S.C. § 3631

The criminal provision of the Fair Housing Act of 1968, 42 U.S.C. § 3631, prohibits housing-related violence and threats of violence motivated by

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facility under section 245(b)(2)(B)); United States v. Franklin, 704 F.2d 1183, 1192 (10th Cir. 1983) (public park); *Three Juveniles*, 886 F. Supp. at 945–46 (streets and sidewalks are public facilities within the meaning of section 245(b)(2)(B)).

50 18 U.S.C. § 245(b).

51 *Id.*

52 *Id.*

53 Indictment, United States v. Fields, No. 3:18-cr-11 (W.D. Va. 2018).

54 Press Release, U.S. Dep't of Just., Three Georgia Men Charged with Federal Hate Crimes and Attempted Kidnapping in Connection with the Death of Ahmaud Arbery (Apr. 28, 2021); Press Release, U.S. Dep't of Just., Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery (Feb. 22, 2022) [hereinafter Conviction of Arbery Defendants Press Release].

55 Conviction of Arbery Defendants Press Release, *supra* note 54.

race, color, religion, sex,[56] disability,[57] familial status, and national origin.[58] The statute is narrow in its protections in that it applies only to violent interference with housing rights. But it does prohibit violent housing-related conduct based on more protected characteristics than any statute other than the HCPA. Like many of the earlier-enacted hate crime statutes, it criminalizes both the use of force and threats of force. To prove a violation of the statute, the government must establish that (1) the defendant used or threatened force; (2) willfully injured, intimidated, or interfered with (or attempted to do so); (3) because of the victim's protected characteristic; and (4) because the victim was enjoying a housing right.[59] The housing rights that the statute protects include buying, selling, renting, and occupying a home; contracting or negotiating to do so; and helping or encouraging others to do so.[60]

The penalties for violating section 3631 range from a misdemeanor punishable by up to one year in prison through a felony punishable by life imprisonment.[61] If bodily injury results or the offense includes the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, the violation is punishable by a maximum of 10 years' imprisonment.[62] If death results, or the offense includes kidnapping, aggravated sexual abuse, or an attempt to kidnap, commit aggravated sexual abuse, or kill, the statutory maximum punishment is life in prison.[63] Given that this statute relates to housing rights, it is less likely to be the source of a DT-related charge, as typically those attempting to "intimidate or coerce a civilian population" in order to advance their ideological agendas seek to carry out their crimes in public spaces—where they are more likely to cause the greatest damage in a short time—rather than against victims in their homes.

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56 The term "sex" as used in section 3631 of the Fair Housing Act includes gender identity and sexual orientation. *See* notes 25 & 44, *supra*; *see also* Executive Order, *supra* note 25.

57 The term used in the statute is "handicap," which is defined in the statute at 42 U.S.C. § 3602. Protections on the basis of "handicap" and "familial status" were added to the statute by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 9, 102 Stat. 1619, 1622 (1988). "Familial status" is also defined at 42 U.S.C. § 3602 and generally prohibits discrimination based on having children under the age of 18 in the home. *See also* note 12, *supra*.

58 42 U.S.C. § 3631.

59 Bosserman & Miller, *supra* note 11, at 136.

60 *See* 42 U.S.C. § 3631(a) and (c).

61 *See* 42 U.S.C. § 3631(c).

62 *Id*.

63 *Id*.

E. Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248

The FACE Act, 18 U.S.C. § 248, prohibits violence or threats directed at reproductive health services providers, including abortion providers. It prohibits the use of force, threats of force, or physical obstruction to injure, intimidate, or interfere with a person who seeks or provides reproductive health services.[64] The Act also punishes intentionally damaging or destroying a facility because the facility provides reproductive health services.[65] The statute defines "reproductive health services" broadly, to include all types of reproductive health care, including breast and cervical cancer screenings, infertility treatments, prenatal care, gynecological examinations, pregnancy counseling services, and abortion services.[66] It is viewpoint neutral because the statute protects both people and facilities that provide abortion services and those that counsel alternatives to abortion.[67] The statute's penalty provisions range from a six-month misdemeanor for a non-violent physical obstruction offense to a maximum of life imprisonment if death results from the offense.[68] Where bodily injury results, a violation of section 248 is a 10-year felony.[69]

Congress enacted the FACE Act in 1994 in response to escalating violence targeting reproductive healthcare providers.[70] The Supreme Court's 1973 decision in *Roe v. Wade*,[71] which recognized the constitutional right to abortion, ignited protests and actions designed to deter and dissuade

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64 18 U.S.C. § 248(a)(1).

65 18 U.S.C. § 248(a)(3).

66 *See* Sanjay Patel, *FACE Off with Anti-Abortion Extremism—Criminal Enforcement of 18 U.S.C. § 248 (FACE Act)*, 70 DOJ J. Fed. L. & Prac., no. 2, 2022, at 279–88 (providing a detailed overview of the elements of section 248 and defining the statutory terms).

67 *Id.* at 280; *see, e.g.*, United States v. Weslin, 156 F.3d 292, 296–97 (2d Cir. 1998); United States v. Wilson, 154 F.3d 658, 663 (7th Cir. 1998).

68 Patel, *supra* note 66, at 288–89 & n.59.

69 18 U.S.C. § 248(b); Patel, *supra* note 66, at 288–89. Unlike the hate crime statutes discussed above, the FACE Act does not provide enhanced penalties where the offense involved the use, attempted use, or threatened use of a dangerous weapon, fire, or explosives. There are, of course, other federal statutes that may be used to prosecute such conduct, where appropriate. *See id. at 289, 291–93* (discussing 18 U.S.C. § 844(i) (damage or destruction of property used in interstate commerce); 18 U.S.C. § 844(h) (use of fire or an explosive in the commission of a felony offense); 18 U.S.C. § 844(e) (use of the mail or commerce for bomb or fire threats); 18 U.S.C. §§ 875, 876 (threats made by use of interstate or foreign commerce); 18 U.S.C. § 2332a (use of weapons of mass destruction).

70 Patel, *supra* note 66, at 279–80.

71 410 U.S. 113 (1973).

patients and healthcare professionals from seeking and providing abortions. Although most protestors engaged in non-violent, First Amendment-protected activity, some anti-abortion activists physically blockaded clinics and committed acts of violence, including bombing and burning clinics, butyric acid attacks, anthrax threats, and assaults against healthcare providers and others involved in staffing reproductive health clinics.[72] In March 1993, an anti-abortion extremist fatally shot a doctor outside his Florida clinic, committing the first known murder of an abortion provider in the United States.[73] In response to these actions, Congress created criminal penalties for violence, threats of violence, and physical obstruction directed at reproductive health facilities, providers, and patients, whether or not they perform or are seeking abortions.[74] It is thus a useful statute to consider when investigating acts of violence connected to abortion-related violent extremism, one of the FBI's DT threat categories.

Since *Roe*, the majority of abortion-related violent extremism has come from those espousing anti-abortion beliefs,[75] and since 1994, the FACE Act has been used successfully to prosecute some of the most serious of those acts.[76] Following the leak and subsequent release of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[77] there was an uptick in criminal property damage directed at pregnancy crisis centers, other reproductive health facilities, and organizations that counsel or advocate alternatives to abortion.[78] Law enforce-

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72 Patel, *supra* note 66, at 278.

73 Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015).

74 *See* S. Rep. No. 103-117, at 3 (1993) (stating that federal legislation "is urgently needed" to respond to "[a] nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence" that "is barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work there and the patients who seek their services"). The Senate Report noted that "[f]rom 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States." *Id.*

75 *See generally id.*; Patel, *supra* note 66, at 278–79.

76 *See, e.g.*, Michael Beebe, *Kopp Gets Life Without Parole in Slepian Killing*, The Buffalo News (June 20, 2007) (reporting that defendant James Charles Kopp was sentenced to life imprisonment following his FACE Act conviction for assassinating Dr. Barnett A. Slepian, a doctor in Buffalo, New York); *see also* United States v. Hart, 212 F.3d 1067, 1072–74 (8th Cir. 2000) (affirming defendant's FACE conviction for threatening abortion clinics in Little Rock, Arkansas, by parking Ryder trucks at the clinics two years after the fatal bombing of a federal building in Oklahoma City, Oklahoma, which involved a Ryder truck).

77 142 S. Ct. 2228 (2022).

78 *See, e.g.*, Ivana Saric & Herb Scribner, *Two Molotov Cocktails Found in Office of Wisconsin Anti-Abortion Group, Police Say*, Axios (May 9, 2022); *Molotov Cocktails*

ment has investigated and charged these actions as FACE violations where subjects have been identified and the evidence supports it.[79] Post-*Dobbs*, the FACE Act remains available for use in investigating and prosecuting abortion-related violent extremism by those for and against the existence of a constitutional right to access abortion.

III. Ancillary considerations in prosecuting domestic terrorism using civil rights charges

When determining whether to bring civil rights charges as part of a DVE prosecution (and after reviewing the available charges and the possible evidentiary support for them), there are some additional categories of information prosecutors may want to consider. These categories relate to (1) evidence—specifically, what evidence is required to prove the charges, how to locate that evidence, and what evidence will be admissible at trial; (2) sentencing considerations; and (3) the impact on victims and the broader community. Each of these categories is discussed briefly below.

A. Evidence

Most federal hate crime statutes require evidence of bias motivation. The FACE Act requires evidence that the defendant interfered with a victim because the victim is or has been obtaining or providing reproductive health services.[80] Thus, the FACE Act, although not a hate crime statute, also requires proof of the defendant's motive. Each of these statutes specifically requires the government to prove that the defendant acted *because of* the defendant's bias (or a similar reproductive health-related purpose)—in other words, that this animus was the but-for cause of the of-

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Thrown at Oregon Anti-Abortion Office, AP News (May 9, 2022); *Women's Clinic in Northern Virginia Vandalized, Police Say*, WUSA9 (May 10, 2022); Madeleine List, *Vandals Leave Bloody Trail, Red Graffiti at Pregnancy Clinic, North Carolina Cops Say*, Charlotte Observer (June 7, 2022); Ryan Nelson, *If Abortions Aren't Safe, Neither Are You: Hialeah Clinic Vandalized*, NBC Miami (July 5, 2022).

[79] *See, e.g.*, Press Release, U.S. Dep't of Just., Two Defendants Indicted for Civil Rights Conspiracy and FACE Act Offenses Targeting Pregnancy Resource Centers (Jan. 24, 2023); *Recent Cases on Violence Against Reproductive Health Care Providers*, Nat'l Task Force on Violence Against Reproductive Health Care Providers, U.S. Dep't of Just., https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers (last updated May 30, 2023).

[80] 18 U.S.C. § 248(a)(1). Section 248(a)(3) criminalizes intentionally destroying a "facility . . . *because* such facility provides reproductive health services" (emphasis added). That subsection thus also requires proof of the defendant's motive.

fense.[81] Because the motivation of the defendant is therefore an essential element of the offense, the government is required—and courts permit the government—to introduce evidence of the defendant's bias or animus at trial in its case-in-chief. Further, this evidence comes in as direct evidence of the offense charged, not as "other acts" evidence, admissible only for a limited purpose under Federal Rule of Evidence 404(b).[82]

Admissible bias evidence may include racist song lyrics that a defendant has played or sung;[83] previous bias-motivated conduct or crimes;[84] tattoos;[85] membership in extremist groups or organizations motivated by animus;[86] and racial epithets a defendant has used,[87] racially insensitive comments a defendant has made,[88] or any other of a defendant's statements evincing bias.[89] Because the evidence is usually far more probative than prejudicial, it will likely survive defense motions for exclusion under Federal Rule of Evidence 403.[90] A defendant may object to being linked to his own hateful or biased views, but it is precisely the conduct motivated by those views that gives rise to hate crime charges.

Prosecutors and investigators should seek this bias-motivation evidence during their investigation by expanding the use of search warrants and the scope and universe of witness interviews. Investigators may seek search warrants for electronic evidence, including searches of computers, cell phones, social media accounts, and internet activity. These searches may uncover, for example, a subject's views that motivated the act of violence being investigated. These views may be reflected in social media posts, electronically stored or published manifestos, online chats with similarly minded individuals, or screeds or threats against those against

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81 Burrage v. United States, 571 U.S. 204, 214 (2014).

82 *See* Fed. R. Evid. 404(b)(2) (evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

83 *E.g.*, United States v. Magleby, 241 F.3d 1306, 1319 (10th Cir. 2001).

84 *E.g.*, United States v. Franklin, 704 F.2d 1183, 1187–88 (10th Cir. 1983).

85 *E.g.*, United States v. Allen, 341 F.3d 870, 885–86 (9th Cir. 2003).

86 *E.g.*, United States v. Dunnaway, 88 F.3d 617, 618 (8th Cir. 1996); United States v. Stewart, 65 F.3d 918, 930 (11th Cir. 1995).

87 *E.g.*, United States v. Whitney, 229 F.3d 1296, 1303 (10th Cir. 2000).

88 *E.g.*, *Franklin*, 704 F.2d at 1187; United States v. Piekarsky, 687 F.3d 134, 148 (3d Cir. 2012).

89 *E.g.*, United States v. Craft, 484 F.3d 922, 926 (7th Cir. 2007); United States v. Pospisil, 186 F.3d 1023, 1028–29 (8th Cir. 1999); *Dunnaway*, 88 F.3d at 619; United States v. White, 788 F.2d 390, 392–93 (6th Cir. 1986).

90 *See* Fed. R. Evid. 403 (permitting courts to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative evidence").

whom the defendant bears animus. Searches of residences, vehicles, or storage facilities may result in evidence in the form of books, magazines, the subject's own writings, photographs, posters, or other objects reflecting a subject's bias-motivation.

Similarly, investigators and prosecutors can develop bias-motivation evidence by interviewing the subject's family members, friends, coworkers, schoolmates, religious leaders, and other associates. These people may be able to shed light on the subject's personal history, views, and beliefs, even if they may have no knowledge of the subject's criminal acts. An investigation that examines and collects evidence of the subject's bias motivation can provide a more complete picture of the subject and place his violent conduct in its proper context—demonstrating, as often is the case, that the defendant's violence was not random or spontaneous, but rather arose out of long-held and firm racist or hate-filled beliefs.[91]

B. Sentencing

The federal civil rights statutes discussed allow for a range of sentencing options, including maximum penalties of up to life imprisonment where the appropriate aggravating factors are charged and proved.[92] Two statutes, 18 U.S.C. §§ 245 and 247, are capital offenses when death results.[93]

Additionally, DVE conduct prosecuted as a hate crime will often be eligible for certain sentencing enhancements that increase the applicable United States Sentencing Guidelines (U.S.S.G.) range. The U.S.S.G. notes, for example, that the hate crime motivation enhancement, section 3A1.1, which provides for a three-level increase, applies to hate crime offenses.[94] Applying section 3A1.1 is appropriate where the defendant "intentionally selected any victim or any property . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person."[95]

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91 For additional discussion, see Gegenheimer, *supra* note 10.

92 *See* 18 U.S.C. § 245(b); 18 U.S.C. § 247(d)(1); 18 U.S.C. § 249(a)(1)(B), (a)(2)(A)(ii), and (a)(3); 18 U.S.C. § 248(b)(2); 42 U.S.C. § 3631.

93 *See* 18 U.S.C. §§ 245(b), 247(d)(1). Sections 245 and 247 also state that they carry the possibility of capital punishment where certain other serious aggravating factors are present, including kidnapping or its attempt, aggravated sexual abuse or its attempt, or the attempt to kill. Other laws, however, generally operate to make such conduct ineligible for capital punishment. *See* 18 U.S.C. § 3591 (threshold intent factors for capital punishment); 18 U.S.C. § 3592 (aggravating and mitigating factors bearing on capital punishment).

94 U.S. Sent'g Guidelines Manual § 3A1.1(a), cmt. n.1 (U.S. Sent'g Comm'n 2021) [hereinafter U.S.S.G.].

95 U.S.S.G. § 3A1.1(a).

The terrorism sentencing enhancement may also apply to bias-motivated DVE crimes charged as federal civil rights offenses. Under U.S.S.G. § 3A1.4, a defendant's guideline range should increase by 12 levels for any "felony that involved, or was intended to promote, a federal crime of terrorism."[96] The term "federal crime of terrorism" in the U.S.S.G. has the same definition as in 18 U.S.C. § 2332b(g)(5)[97] : It must therefore be both "calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct" and violate a specific federal statute listed in that provision.[98] The same guideline also increases the defendant's criminal history category to Category IV, regardless of what the defendant's criminal history had been before the operation of the enhancement.[99]

Although the federal civil rights statutes are not enumerated predicates for the terrorism sentencing enhancement, RMVE prosecutions may—and have in the past—included both civil rights charges and charges on which a terrorism sentencing enhancement may be based. For example, in June 2016, three local militia members planned a violent attack on an apartment complex and mosque in Garden City, Kansas, where a large number of Somali-Muslim immigrants lived and worshipped.[100] The militia members intended to retaliate for the June 12, 2016, mass shooting at the Pulse nightclub in Orlando, Florida, which had been committed by an American citizen who had pledged allegiance to the Islamic State of Iraq and Syria (ISIS).[101] The militia members were also motivated by numerous grievances against the U. S. government, including for "illegally bringing in Muslims by the thousands" and not enforcing the borders.[102] The militia members planned to fill four vehicles with explosives and detonate them around the targeted building in order to level it and kill its occupants. They were charged with conspiring to use a weapon of mass destruction and conspiring to violate the civil rights of their intended victims, among other charges, and were convicted following a jury trial. At sentencing, the court applied both the hate crime and terrorism sentencing enhancements, and sentenced each of the defendants to between 25

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96 U.S.S.G. § 3A1.4(a).

97 U.S.S.G. § 3A1.4 cmt. n.1.

98 18 U.S.C. § 2332b(g)(5)(B).

99 U.S.S.G. § 3A1.4(b).

100 United States v. Stein, 985 F.3d 1254, 1261 (10th Cir. 2021); Press Release, U.S. Dep't of Just., Three Southwest Kansas Men Sentenced to Prison for Plotting to Bomb Somali Immigrants in Garden City (Jan. 25, 2019) [hereinafter Garden City Press Release].

101 *Stein*, 985 F.3d at 1261; Garden City Press Release, *supra* note 100.

102 United States v. Allen, 364 F. Supp. 3d 1234, 1247 (D. Kan. 2019).

and 30 years in prison.[103]

As demonstrated in the Garden City prosecution, both sentencing enhancements may be applied where the evidence supports them—they are not mutually exclusive.[104] Multiple goals can motivate a defendant at once, and these may include both a bias motive that supports applying the hate crimes enhancement and the desire to influence or retaliate against government conduct.[105]

Where no predicate charge for the terrorism enhancement exists, the U.S.S.G. nonetheless allow for an upward departure at sentencing where an offense meets one portion, but not the other, of the two "federal crime of terrorism" definition components.[106] An upward departure may be warranted, for instance, where an offense was calculated to influence the government but did not involve an enumerated offense under § 2332b(g)(5); alternatively, an upward departure would be permissible where an enumerated offense was charged but the defendant sought to intimidate or coerce a *civilian* population, rather than government conduct.[107]

Applying these two sentencing enhancements together, in combination with the statutory aggravators, can result in the imposition of a serious sentence reflecting the equally serious nature, circumstances, and impact of RMVE violence.

C. Victim and community impact

Even one act or threat of bias-motivated violence can have an immediate, devastating impact. The victims of such conduct include not just the individuals directly targeted but also their family members and friends, as well as the local, national, and international communities to which they belong. This broader impact stems, in part, from the fear that others, too, "could be threatened, attacked, or forced from their homes, because of what they look like, who they are, where they worship, whom they love, or whether they have a disability."[108]

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103 *Stein*, 985 F.3d at 1266–67.

104 *See id.* at 1267 (citing United States v. Van Haften, 881 F.3d 543, 545 (7th Cir. 2018)); s*ee also* United States v. Wright, 747 F.3d 399, 408 (6th Cir. 2014); United States v. Awan, 607 F.3d 306, 317 (2d Cir. 2010).

105 *See Allen*, 364 F. Supp. 3d at 1243–50 (discussing and overruling defense objections to the application of the hate crime motivation and terrorism enhancements).

106 U.S.S.G. § 3A1.4 cmt. n.4.

107 *Id.*; s*ee* United States v. Jordi, 418 F.3d 1212, 1217 (11th Cir. 2005) (finding upward departure applicable).

108 *Hate Crimes Prosecutions: What Are Hate Crimes?*, U.S. Dep't of Just., https://www.justice.gov/crt/hate-crimes-prosecutions#hatecrimes (last visited June 5, 2023).

By recognizing the bias motivations underlying some acts of DVE and, where appropriate, prosecuting those acts as hate crimes, the Department can demonstrate to the victims that it recognizes the devastating effect such crimes have on them and their communities, and send a clear and consistent message that bias-motivated violence has no place in our nation and will not be tolerated.

IV. Conclusion

Investigators and prosecutors working DT cases should consider investigating and charging bias-motivated and abortion-related DVE incidents as civil rights violations where appropriate. The civil rights statutes will frequently apply to conduct that falls within the scope of DVE, offering charging options that allow for the gathering and introduction of compelling bias-motivation evidence and provide an appropriate range of sentences. Moreover, addressing and naming bias-based violence for what it is—hate crimes *and* domestic terrorism—and prosecuting them as such helps acknowledge the broader impact that these crimes can have on the affected community while communicating that the Department is committed to using "every tool and resource at our disposal to combat" these crimes in all their forms.[109]

About the Authors

Julia Gegenheimer is a Special Litigation Counsel for the Criminal Section of the Civil Rights Division. She prosecutes bias-motivated crimes and official misconduct cases across the country, with a focus on complex cases involving violence or threats against victims because of race, color, religion, sex, sexual orientation, and gender identity. Ms. Gegenheimer formerly served as the Criminal Section's coordinator on domestic terrorism and national security matters, and her work in this area included federal hate crime cases involving domestic violent extremism. Ms. Gegenheimer joined the Department in 2011. She earned her J.D. *cum laude* from Harvard Law School and her B.A. *magna cum laude* from Yale University.

Samantha Trepel is a Special Litigation Counsel for the Criminal Section of the Civil Rights Division, where she prosecutes bias-motivated crimes and deprivations of rights under color of law, with a primary focus on law enforcement misconduct cases. Ms. Trepel also currently serves

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109 *See* Press Release, U.S. Dep't of Just., Associate Attorney General Vanita Gupta Issues Statement on the FBI's Supplemental 2021 Hate Crime Statistics (Mar. 13, 2023).

as the Criminal Section's liaison to the Department's National Security Division on matters involving the intersection of domestic terrorism and federal hate crimes. Before joining the Criminal Section, she served as a Trial Attorney in the Special Litigation Section of the Civil Rights Division, enforcing civil rights statutes with an emphasis on discriminatory policing and excessive force by law enforcement agencies. She is also an Adjunct Professor of Law at George Mason University's Antonin Scalia Law School.

Prosecuting Domestic Terrorism Cases Using 18 U.S.C. § 2339A

Jessica W. Knight
Assistant U.S. Attorney
Southern District of Ohio

Justin T. Sher
Trial Attorney
Counterterrorism Section
National Security Division

Michael Dittoe
Trial Attorney
Counterterrorism Section
National Security Division

Chris Deucher
Law Clerk
Southern District of Ohio

Rebecca Campbell
Legal Extern
National Security Division

I. Introduction

Title 18, United States Code, section 2339A, is a statute that prohibits providing material support to "terrorists." In context, the term "terrorist" is an idiomatic expression meaning persons who are engaged in certain specified crimes enumerated in the statute.[1] This provision is a useful legal tool not only in prosecuting international terrorism but also in attacking domestic terrorism. Unlike its companion statute 18 U.S.C. § 2339B, which proscribes providing material support to any designated Foreign Terrorist Organization, section 2339A prohibits providing material support (along with attempting or conspiring to do so) to any person involved in preparing for, carrying out, attempting to commit, or conspiring to commit a wide variety of listed federal predicate offenses.[2] These predicate

[1] The United States Code does not define the term "terrorist," and any attempt to prohibit a person from being a "terrorist" would raise serious constitutional issues involving status crimes. *See generally* United States v. Robel, 389 U.S. 258 (1967); Robinson v. California, 370 U.S. 660 (1962).

[2] The statute also proscribes providing material support to someone who is concealing a person escaping from the commission of a predicate offense as well as concealing resources used to commit an offense. 18 U.S.C. § 2339A(a). The definition of material support is the familiar one contained at 18 U.S.C. § 2339A(b)(1), which is also incorporated into section 2339B itself. 18 U.S.C. § 2339B(g)(4).

crimes include the murder of a federal official,[3] the destruction of an airport facility,[4] the destruction of federal property,[5] and a wide panoply of other federal crimes. Thus, section 2339A—in a manner somewhat analogous to the organized crime statutes such as the Racketeer Influenced and Corrupt Organizations (RICO) statute[6] and the Violent Crimes in Aid of Racketeering (VICAR) statute[7]—imposes criminal liability on those who provide material support (or attempt or conspire to do so) to persons involved in the predicate crimes. Unlike RICO and VICAR, however, section 2339A does not list any state crimes as predicate offenses. Nevertheless, it is a useful tool in both domestic and international terrorism prosecutions.[8]

II. An overview of section 2339A

Before considering the use of section 2339A in domestic terrorism cases, it is helpful to review briefly how the United States Code defines domestic terrorism.

A. Defining domestic terrorism

Federal law defines domestic terrorism in 18 U.S.C. § 2331(5) 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.[9]

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[3] 18 U.S.C. § 1114.

[4] 18 U.S.C. § 32.

[5] 18 U.S.C. § 1361.

[6] 18 U.S.C. § 1961, *et seq.*

[7] 18 U.S.C. § 1959.

[8] Both RICO and VICAR are also useful statutes that may be used to prosecute crimes involving domestic terrorism; such a discussion, however, is beyond the scope of this article.

[9] 18 U.S.C. § 2331(5).

Because section 2331(5) is solely definitional, federal prosecutors must rely on statutes with criminal penalties to charge individuals whose underlying criminal activity meets the federal definition of domestic terrorism. One such statute is section 2339A, which criminalizes material support to persons involved with the listed predicate crimes.[10] Although often used to charge conduct associated with international terrorism, section 2339A does not require that the beneficiary of the material support be a designated terrorist group or member of that group.[11] Consequently, section 2339A is applicable to cases involving domestic terrorism.[12]

B. The scope and structure of section 2339A

Following the 1993 World Trade Center bombing, Congress first enacted section 2339A as part of the Violent Crime Control and Law Enforcement Act of 1994.[13] The statute criminalizes providing "material support or resources" or concealing or disguising "the nature, location, source, or ownership of material support or resources" while "knowing or intending that they are to be used in preparation for, or in carrying out, a violation" of enumerated federal predicate offenses.[14] In 1996, Congress amended the statute with the Antiterrorism and Effective Death Penalty Act of 1996 by expanding the list of terrorism-related predicate offenses.[15] The more commonly used predicate offenses are set forth in the chart below.

Section 2339A Predicate Offenses Chart

Predicate Offense	**Offense Description**	**Maximum Penalty**
18 U.S.C. § 32	Destruction of aircraft or aircraft facilities	20 years' imprisonment

10 18 U.S.C. § 2339A.

11 *See* United States v. Mustafa, 753 F. App'x 22, 30 n.3 (2d Cir. 2018) (not precedential).

12 Unlike its statutory companion 18 U.S.C. § 2339B, section 2339A criminalizes material support directed towards terrorist activities rather than towards specific foreign terrorist organizations.

13 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022–23 (codified as amended at 18 U.S.C. § 2339A (2000)).

14 18 U.S.C. § 2339A.

15 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (adding sections 56 and 2332b to the list of offenses for which an individual can be prosecuted for providing material support).

Predicate Offense	**Offense Description**	**Maximum Penalty**
18 U.S.C. § 37	Violence at international airports	20 years' imprisonment; death of life imprisonment if death results
18 U.S.C. § 81	Arson within special maritime and territorial jurisdiction	25 years' imprisonment, unless life is placed in jeopardy, then imprisoned for any term of years or for life, or both
18 U.S.C. § 175	Biological weapons offenses	Life or any term of years, or both
18 U.S.C. § 229	Prohibitions on the development, production, acquisition, or transfer of any chemical weapon	Any term of years; death or life imprisonment if death results
18 U.S.C. § 351	Assassination, kidnaping, or assault upon Members of Congress, etc.	Any term of years or life imprisonment; death, imprisonment for any term of years, or for life if death results to such individual
18 U.S.C. § 831	Nuclear material offenses	Various
18 U.S.C. § 842(m) or (n)	Plastic explosives offenses	Various
18 U.S.C. § 844(f) or (i)	Bombing federal property or property in or affecting commerce	No fewer than 5 years and not more than 20 years' imprisonment
18 U.S.C. § 930(c)	Homicide with dangerous weapon in a federal facility	Various
18 U.S.C. § 956	Conspiracy to commit certain violent crimes in a foreign country	Life imprisonment if conspiracy to murder or kidnap; 35 years' imprisonment if conspiracy to maim
18 U.S.C. § 1091	Genocide	Death or life imprisonment

Predicate Offense	**Offense Description**	**Maximum Penalty**
18 U.S.C. § 1114	Murder of a federal officer or employees	Various
18 U.S.C. § 1116	Murder or manslaughter of a foreign dignitary	Various
18 U.S.C. § 1203	Hostage taking	Any term of years or life imprisonment; death or life imprisonment if death results
18 U.S.C. § 1361	Destruction of federal property	10 years' imprisonment
18 U.S.C. § 1362	Destruction of communications property	10 years' imprisonment
18 U.S.C. § 1363	Destruction of property within a federal enclave	5 years' imprisonment; 20 years' imprisonment if the building is a dwelling, or the life of any person is placed in jeopardy
18 U.S.C. § 1366	Destruction of an energy facility	20 years' imprisonment, if loss over $100,000 or significant interruption or impairment of function; 5 years' imprisonment, if loss over $5,000; if death results, any term of years or life imprisonment
18 U.S.C. § 1751	Assassination, kidnaping, or assault of the President, *inter alia*	Any term of years or life imprisonment; death or life imprisonment if death results
18 U.S.C. § 1992	Violent attacks on mass transit	Any term of years or life imprisonment; death or life imprisonment if death results
18 U.S.C. § 2155	Destruction of national defense material	20 years' imprisonment; life imprisonment if death results

Predicate Offense	**Offense Description**	**Maximum Penalty**
18 U.S.C. § 2156	Production of defective national defense material	10 years' imprisonment
18 U.S.C. § 2280	Violence against maritime navigation	20 years' imprisonment; death or life imprisonment if death results
18 U.S.C. § 2281	Violence against maritime fixed platforms	20 years' imprisonment; death or life imprisonment if death results
18 U.S.C. § 2332	Violence against Americans outside the United States	Various
18 U.S.C. § 2332a	Weapons of mass destruction offenses	Any term of years or life imprisonment; death or life imprisonment if death results
18 U.S.C. § 2332b	Multinational terrorism	Various
18 U.S.C. § 2332f	Bombing public places or facilities	Any term of years or life imprisonment; death or life imprisonment if death results
18 U.S.C. § 2340A	Torture	20 years' imprisonment; death or life imprisonment if death results
18 U.S.C. § 2442	Recruitment or use of child soldiers	20 years' imprisonment; death or life imprisonment if death results
42 U.S.C. § 2284	Sabotage of nuclear facilities or fuel	20 years' imprisonment; any term of years or life imprisonment if death results
49 U.S.C. § 46502	Aircraft piracy	Not less than 20 years' imprisonment; death or life imprisonment if death results

Predicate Offense	Offense Description	Maximum Penalty
49 U.S.C. § 60123(b)	Violence against interstate gas pipeline or hazardous liquid pipeline facility	20 years' imprisonment; any term of years or life imprisonment if death results
An offense listed under 18 U.S.C. § 2332b(g)(5)(B) except for sections 2339A and 2339B	Varies by listed crime	Varies by listed crime

After the terrorist attacks of September 11, 2001, Congress again amended section 2339A under the USA PATRIOT Act of 2001 by increasing the maximum term of imprisonment from 10 to 15 years for substantive offenses as well as attempts and conspiracies.[16] If the death of any person results, the punishment is imprisonment for any term of years or for life.[17] Section 2339A(b)(1) further defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or other financial securities, financial services, lodging, training,[18] expert advice or assistance,[19] safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[20]

In the aftermath of the September 11, 2001 attacks, "expert advice or assistance" was added to the statute's definition of material support.[21]

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16 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 810(c), (d), 115 Stat. 272, 380.

17 18 U.S.C. § 2339A.

18 "Training" is defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2).

19 "Expert advice or assistance" is defined as "advice or assistance derived from scientific, technical[,] or other specialized knowledge." 18 U.S.C. § 2339A(b)(3).

20 18 U.S.C. § 2339A(b)(1).

21 USA PATRIOT ACT § 805(a).

Because section 2339A can punish individuals who engage in the ultimate act of violence as well as individuals who provide assistance to such venture, the statute operates as an effective tool for prosecutors not only to disrupt acts of domestic terrorism, but also to deter support for such activities.[22]

III. Examples of domestic terrorism prosecutions using section 2339A

Although section 2339A has been primarily used against those involved in international terrorism, it has also been used in various domestic terrorism prosecutions. Section 2339A was first successfully charged in the domestic-terrorism context in 1996 against Floyd Looker and James Rogers.[23] These co-defendants were members of the West Virginia Mountaineer Militia[24] and exemplify the threat posed by anti-government and anti-authority violent extremists. They manufactured explosives and obtained blueprints for a Federal Bureau of Investigation facility that they planned to attack "in the event of armed confrontation between the militia and the federal government."[25] One thousand of these improvised explosive devices—along with the blueprints—were then sold to an undercover agent whom the defendants believed to be a broker who would resell the items to terrorist organizations.[26] Law enforcement foiled the plot before any violence occurred. A jury convicted Looker of conspiring to manufacture explosives, in violation of 18 U.S.C. § 371.[27] Looker then pleaded guilty to transporting unregistered firearms (destructive devices), in violation of 26 U.S.C. § 5861(j); conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 371; and providing material support to terrorists, in violation of 18 U.S.C. § 2339A.[28] A jury convicted Rogers

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22 18 U.S.C. § 2339A.

23 *See* Richard A. Serrano, 7 *Militiamen Held in Plot to Blow Up FBI Facility*, L.A. Times (Oct. 12, 1996), https://www.latimes.com/archives/la-xpm-1996-10-12-mn-53161-story.html; Dennis Cauchon, *Militiaman Convicted Under Anti-Terrorism Law*, USA Today (Aug. 26, 1997), https://www.fpparchive.org/media/documents/war_on_terrorism/Militiaman%20Convicted%20Under%20Anti-Terrorism%20Law_Dennis%20Cauchon_Aug.%2026,%201997_USA%20Today.pdf.

24 United States v. Looker, No. 98-4291, 1998 WL 911715, at *1–3 (4th Cir. Dec. 30, 1998).

25 *Id.* at *1–2.

26 *Id.*

27 *Id.* at *1.

28 *Id.*

of providing material support to terrorists.[29]

Another example of using section 2339A to combat domestic terrorism stems from racially motivated violent extremists. In the Northern District of New York, Eric Feight pleaded guilty in 2014 to a section 2339A charge for helping Glendon Crawford, a Ku Klux Klan member, build a radiation device intended to kill Muslims.[30] The co-defendants designed the device, ordered the necessary parts, and then built and tested the device.[31] Although Crawford was not charged with violating section 2339A, a jury convicted him of attempting to produce and use a radiological dispersal device, in violation of 18 U.S.C. § 2332(h); distributing information relating to weapons of mass destruction, in violation of 18 U.S.C. § 842(p); and conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a.[32] This latter offense served as the predicate offense for Feight's section 2339A charge.

Furthermore, section 2339A may be helpful in addressing the plague of mass shootings engulfing our nation. Elizabeth Lecron pleaded guilty in 2019 to a section 2339A conspiracy charge after she—along with her co-defendant Vincent Armstrong—conspired to perpetrate a mass shooting at a bar in Toledo, Ohio.[33] The pair was motivated by a mix of anti-government beliefs and an admiration for mass shootings.[34] To prepare for the attack, they acquired firearms, trained at a shooting range, and bought components to make explosives.[35] Lecron pleaded guilty to conspiring to provide material support to terrorists knowing and intending that they be used to prepare for and carry out violations of 18 U.S.C. § 844(i) (malicious damage and destruction of property by fire and explosive materials) and 18 U.S.C. § 2332a (use of weapons of mass destruction), in violation of 18 U.S.C. § 2339A, as well as transporting explosives in interstate commerce, in violation of 18 U.S.C. § 844(d).[36] Armstrong pleaded

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29 Cauchon, *supra* note 23.

30 *See* Press Release, U.S. Dep't of Just., Upstate New York Man Sentenced to over Eight Years in Prison for Providing Material Support to Terrorists (Dec. 16, 2015).

31 *See* Press Release, U.S. Dep't of Just., Saratoga County Man Sentenced to 30 Years for Plot to Kill Muslims (Dec. 19, 2016).

32 *See id.*

33 *See* Press Release, U.S. Att'y's Off. for the N. Dist. of Ohio, Toledo Woman Sentenced for Planning Two Terrorist Attacks (Nov. 20, 2019) [hereinafter Toledo Woman Sentenced].

34 *See Would-Be Mass Shooters Sentenced,* FBI (Jan. 31, 2020), https://www.fbi.gov/news/stories/couple-sentenced-for-planning-mass-shooting-013120.

35 *See* Toledo Woman Sentenced, *supra* note 33.

36 *See* Press Release, U.S. Att'y's Off. for the N. Dist. Of Ohio, Toledo Woman Pleaded Guilty to Terrorism Charges Related to Her Role in a Conspiracy to Launch an Attack on a Bar in Toledo (Aug. 29, 2019).

guilty to conspiring to transport explosive material with the intent to kill, injure, or intimidate, and maliciously damage or destroy property by explosion, in violation of 18 U.S.C. § 844 (but not to 18 U.S.C. § 2339A).[37]

Additionally, *United States v. Cook* in the Southern District of Ohio provides a recent example of the successful use of section 2339A to prosecute domestic terrorism. In February 2022, Christopher Cook, Jackson Sawall, and Jonathan Frost pleaded guilty to conspiring to provide material support to terrorists, in violation of section 2339A.[38] The underlying predicate offense was 18 U.S.C. § 1366(a), destruction of an energy facility.[39] The actions of these three co-conspirators were inexorably tied to the singular goal that motivated the conspiracy: the propagation of white-supremacist ideology.[40]

According to the government's sentencing memorandum, the co-defendants targeted power substations around the country precisely because—in their estimation—the attack would lead to confusion, unrest, economic disaster, and a ripe opportunity for so-called white leaders to take control of the country and the government.[41] The three co-defendants desired to undertake criminal acts in order to instigate a race war that would trigger an economic depression leading to a societal collapse. Cook and his co-defendants acknowledged that people would die if they achieved a widespread power outage.

Like many cases involving extremist ideology, Cook, Sawall, and Frost shared their white-supremacist ideas online. According to the statement of facts filed with the plea agreements, they recruited others to join their white-supremacist cause, known as "The Front."[42] Cook specifically sought out juveniles and other younger recruits because he believed they were less likely to be informants working for law enforcement. As part of their initiation into the group, new recruits were expected to read books espousing white supremacy and Neo-Nazism from a designated reading list. Cook circulated a reading list that promoted white supremacy and

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37 *See* Press Release, U.S. Dep't of Just., Toledo Man Sentenced for Planning Terrorist Attack in Toledo's Entertainment District (Dec. 10, 2019).

38 *See* Press Release, U.S. Dep't of Just., Three Men Plead Guilty to Conspiring to Provide Material Support to a Plot to Attack Power Grids in the United States (Feb. 23, 2022).

39 Information, United States v. Cook, No. 2:22-cr-19 (S.D. Ohio Feb. 7, 2022), ECF No. 3.

40 Sentencing Memorandum, United States v. Cook, No. 2:22-cr-19 (S.D. Ohio Oct. 28, 2022), ECF No. 83.

41 *Id.*

42 Plea Agreements, United States v. Cook, No. 2:22-cr-19 (S.D. Ohio Feb. 7, 2022), ECF Nos. 4–6.

Neo-Nazism ideology, including works entitled "Siege" and "A Squires Trial," both of which encourage aggrandizing power through violence. Cook and Sawall further vowed their allegiance to the cause by stating their willingness to die for it. As part of preparing for the attacks, Cook, Sawall, and Frost convened in Columbus, Ohio. There, the three organized logistics for the attacks, propagandized their cause by painting a swastika and "JOIN THE FRONT" under a bridge, and posed for a photo next to this image.

The conspiracy soon advanced from a simple meeting of the minds to overt acts in furtherance of the criminal scheme. As the government's sentencing memorandum explains, after researching previous attacks on substations, such as the 2013 attack on the Metcalf Transmission Substation near San Jose, California, the co-defendants planned to attack substations with powerful rifles.[43] Frost obtained several untraceable AR-47 rifles, sold one to Cook, and trained him at a shooting range. Sawall pledged funding for additional weapons. Moreover, the three planned to use explosives as distractions during the attacks to impede law enforcement's response time. Cook shared a video link of an explosive to be used for this purpose, while Frost purchased the materials for building explosives and subsequently tested one such device at least once.

In August 2020, law enforcement executed search warrants on Cook's, Sawall's, and Frost's residences, which revealed the extent of the defendants' white-supremacy ideology and their attack plan.[44] The agents found the following items in the various residences: firearms, a copy of the book "Siege," racially motivated violent extremism Nazi material, cell phones used to communicate with co-conspirators, tactical magazines, camouflage clothing, chemicals and components capable of building explosives, information about U.S. power infrastructure and substations, and propaganda posters and photos. A message written on a memo pad in Sawall's home encapsulates the co-conspirators' state of mind and a recurring theme in their communications: "Revolution is our solution."

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[43] Sentencing Memorandum, *supra* note 40.
[44] *Id.*

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On February 7, 2022, the United States Attorney for the Southern District of Ohio filed a one-count information charging Cook, Frost, and Sawall with conspiracy to provide material support to terrorists.[46] On February 23, 2022, the defendants each pleaded guilty to the charges in the information.[47]

IV. Legal considerations in charging section 2339A in domestic terrorism cases

This Part considers common legal issues involved in charging section 2339A in the domestic-terrorism context and proposes considerations for prosecutors to weigh in deciding how to charge a case. It examines the predicate offenses, the mens rea requirement, the importance of defining and charging a terrorism-related offense, and the intersection between the terrorism enhancement and section 2339A.

A. Advantages of charging section 2339A

As with RICO and VICAR, the key to a successful prosecution under section 2339A is an examination of the predicate offenses. The predicate offense, of course, need not be carried out, but there must be evidence showing that a charged defendant intended his or her support to "be used in preparation for, or in carrying out" the predicate crime.[48] In this regard, note that section 2339A has some particularly broad text, and the precise contours have not been fully developed by litigation. For example, section 2339A proscribes providing material support knowing that those resources are to be used in "prepar[ing]" to commit one of the predicate offenses. This prohibition is broader than the text of section 2339B,

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[45] *Id.*
[46] Information, *supra* note 39.
[47] Plea Agreements, *supra* note 42.
[48] *See* 18 U.S.C. § 2339A(a).

which does not include any form of the phrase "preparing."[49] There could, of course, be constitutional issues associated with this broad definition, which encompasses conduct that falls short of the classic definition of an attempt as a substantial step beyond mere preparation. Although the full import of this preparation provision is beyond the scope of this article,[50] the authors note its potential applicability.

One of the primary advantages to charging a section 2339A offense, as distinguished from just the predicate offenses themselves, is that charging section 2339A—as with RICO or VICAR—allows the prosecution to show the full nature and extent of the criminal activity. The prosecution, therefore, can more easily overcome objections by defense counsel that the court should exclude an item of proffered evidence. A properly charged section 2339A conspiracy would also facilitate the admissibility of a wide variety of evidence under the co-conspirator exception to the hearsay rule.[51] In addition, a conspiracy under section 2339A provides for a substantially longer maximum period of incarceration than does the general conspiracy statute.[52]

Prosecutors do not need to make these charging decisions alone; they should consult with the National Security Division, which has approval authority over 18 U.S.C. § 2339A. In November 2022, section 9-2.137 of the Justice Manual was updated to include consultation and approval requirements in matters involving domestic violent extremism and domestic terrorism.[53]

B. Scienter requirement for section 2339A

Section 2339A requires that the defendant know or intend that the provided material support or resources are to be used in preparation for, or in carrying out, a predicate offense.[54] This standard is different than the mens rea required for a section 2339B prosecution. Under section 2339B, the government must prove that the defendant "knowingly provide[d] material support or resources to a foreign terrorist organization

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49 *See* 18 U.S.C. § 2339B.

50 *See, e.g.*, United States v. Perez-Rodriguez, 13 F.4th 1, 13 (1st Cir. 2021).

51 Fed. R. Evid. 801(d)(2)(E); *see generally* Bourjaily v. United States, 483 U.S. 171 (1987).

52 *Compare* 18 U.S.C. § 371 (five years of incarceration), *with* 18 U.S.C. § 2339A (15 years of incarceration, and if death results, life imprisonment).

53 *See* U.S. Dep't of Just., Justice Manual 9-2.137(B). The Justice Manual defines "domestic violent extremism" as "all matters related to violent criminal acts in furtherance of ideological goals stemming from domestic influences, such as racial bias, anti-authority, and anti-government sentiment." *Id.*

54 18 U.S.C. § 2339A(a).

. . . ."[55] The government need not prove that the defendant knew or intended the support to aid a specific underlying offense by the foreign terrorist organization.[56] In a prosecution under section 2339A, however, the defendant's intent must extend "both to the support itself, and to the underlying purposes for which the support is given."[57]

As the Criminal Resource Manual had pointed out, though, "[s]ection 2339A, unlike the aiding and abetting statute (18 U.S.C. § 2), does not require that the supplier also have whatever specific intent the perpetrator of the actual terrorist act must have to commit one of the specified offenses."[58] From this perspective, the statute can be used to address conduct more remote from that involving the direct commission of a predicate crime.[59] Moreover, section 2339A makes the provision of material support itself a substantive offense carrying a significant statutory maximum penalty, but it does not require the predicate offense for which the aid was provided to have been consummated.[60] Additionally, because section 2339A contains its own conspiracy and attempt provisions, there is no need to rely on traditional conspiracy statutes as applied to the predicate offenses. These traditional conspiracy statutes would require proving the supplier shared the specific intent for the actual terrorist act.

C. The terrorism enhancement and domestic terrorism

The terrorism sentencing enhancement is another powerful tool at prosecutors' disposal that applies in both international and domestic terrorism cases.[61] The terrorism enhancement increases the offense level by 12 (or to a minimum offense level of 32) and raises the defendant's criminal history category to Category VI when "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism."[62]

The enhancement uses the definition of "federal crime of terrorism" found at 18 U.S.C. § 2332b(g)(5). But its application is even more versatile. Importantly, the commentary to this enhancement provides for an

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[55] 18 U.S.C. § 2339B(a)(1).

[56] *See generally* United States v. Dhirane, 896 F.3d 295 (4th Cir. 2018).

[57] United States v. Mehanna, 735 F.3d 32, 43 (1st Cir. 2013) (quoting United States v. Stewart, 590 F.3d 93, 113 n.18 (2d Cir. 2009)).

[58] U.S. Dep't of Just., Crim. Res. Manual § 15 (2020) (archived).

[59] Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. Nat'l Sec. L. & Pol'y 5, 6 (2005).

[60] *Id.* at 9–11.

[61] *See* U.S. Sent'g Guidelines Manual § 3A1.4 (U.S. Sent'g Comm'n 2021) [hereinafter U.S.S.G.].

[62] U.S.S.G. § 3A1.4(a)–(b).

upward departure for offenses beyond this definition in two situations: (1) "the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, *an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)-(5)(B)*" or (2) "the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population...."[63]

Consequently, the terrorism enhancement is an adaptable tool that does not distinguish between domestic and international terrorism. But it is not a panacea for the prosecutor seeking to label defendants' actions as supporting or constituting domestic terrorism. The enhancement places significant discretion in the hands of the judge in deciding whether to apply it. In contrast, the decision to charge section 2339A is squarely one of prosecutorial discretion. If the defendant knowingly provided material support for a predicate offense, prosecutors could bring the charge of material support to terrorists. Thus, for prosecutors who place great weight on calling domestic terrorism what it is, section 2339A is a valuable charging instrument. In addition, the terrorism enhancement is not mutually exclusive with section 2339A; it complements it. In *United States v. Cook*, for example, the defendants agreed in their plea agreements, which outlined their racially motivated violent extremism, that the terrorism enhancement should apply.

V. Conclusion

Historically, most section 2339A charges have involved international terrorism cases; however, section 2339A serves as a significant and valuable charge for defendants who provide material support in the context of domestic terrorism. Although section 2339A is inherently limited by its predicate offenses, prosecutors should carefully consider using this valuable statute in the domestic terrorism context.

About the Authors

Jessica W. Knight is an Assistant United States Attorney in the Southern District of Ohio, where she serves as the Anti-Terrorism Advisory Council Coordinator (ATAC). In 2010, she joined the Department of Justice in the Tax Division, Criminal Enforcement Section, through the Attorney General's Honors Program. For more than seven years, she has prosecuted both domestic and international terrorism cases, including

63 *Id.* § 3A1.4 cmt. n.4 (emphasis added).

two cases that charged 18 U.S.C. § 2339A. She holds a law degree from The University of Toledo, College of Law, a master's degree from The University of Maryland, and a bachelor's degree from Denison University. She also serves as an adjunct professor at The Ohio State University, Moritz College of Law.

Justin T. Sher is a Trial Attorney with the Counterterrorism Section, National Security Division, Department of Justice, where he serves as a Domestic Terrorism Coordinator and previously worked as an Anti-Terrorism Advisory Council Coordinator. In 2010, he worked with the Office of the Chief Prosecutor, Office of Military Commissions, where he prosecuted the mastermind of the attack on the USS COLE. For more than ten years, he has prosecuted both domestic and international terrorism cases, including cases charging 18 U.S.C. § 2339A. Mr. Sher holds a law degree from The University of Virginia School of Law and a bachelor's degree from Union College.

Michael Dittoe is a Trial Attorney with the Counterterrorism Section (CTS) and is one of the national security regional coordinators in CTS. He has been a prosecutor for more than 30 years and previously served as an Assistant United States Attorney in the Southern District of Florida and the Western District of Missouri. He has been posted abroad as a Resident Legal Advisor in three different countries: Iraq from 2003 to 2004; Kosovo from 2002 to 2003; and Russia from 1995 to 1996. Mr. Dittoe graduated with honors from St. Louis University School of Law in 1983 and served as a Judicial Clerk for a United States District Judge from 1983 to 1985. Before becoming a federal prosecutor, he was in private practice.

Chris Deucher is a Law Clerk with the United States Attorney's Office in the Southern District of Ohio. He has served in this position since May 2022. Mr. Deucher is pursuing his law degree at The Ohio State University Moritz College of Law, Class of 2023, and holds a bachelor's degree from Villanova University.

Rebecca Campbell is a Legal Extern with the National Security Division, Counterterrorism Section of the Department of Justice. Ms. Campbell has previously worked on matters involving domestic terrorism while working as a Legal Extern at the United States Attorney's Office of the Central District of California and before law school as an intern for the Anti-Defamation League's Center on Extremism. She is pursuing her law degree at Georgetown University Law Center and completed her undergraduate education at the University of California, Los Angeles.

Using Federal Firearm Statutes to Prosecute Domestic Terrorists

Angela Walker Woolridge
Senior Attorney
Office of Chief Counsel, Firearms and Explosives Law Division
Bureau of Alcohol, Tobacco, Firearms and Explosives

I. Introduction

The various criminal statutes applicable to firearms, explosives, and related weapons violations can often be useful to federal prosecutors evaluating potential charges in domestic terrorism cases. This article discusses offenses under the Gun Control Act of 1968 (GCA)[1] and the National Firearms Act of 1934 (NFA)[2], as well as other United States Code provisions that involve the unlawful use of weapons. The article also highlights important recent changes in firearms laws with the passage of the Bipartisan Safer Communities Act (BSCA)[3] in June 2022, discusses the proliferation of privately made firearms ("ghost guns"), and provides guidance on how such offenses may be used to hold domestic terrorists accountable for their criminal acts.

II. Framework of firearms laws

The primary purpose of the GCA is to support law enforcement officials in their fight against crime and violence. The GCA prohibits the possession of firearms by certain persons, the possession of certain firearms, and the possession of firearms in certain places. Furthermore, the GCA makes it unlawful to provide false information when acquiring firearms from licensed dealers and imposes restrictions on selling, transferring, and importing firearms.

The NFA defines several categories of particularly dangerous weapons and prohibits possessing and transferring such weapons unless properly registered in the National Firearms Registration and Transfer Record

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[1] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.
[2] National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236.
[3] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

(NFRTR).

Various provisions within Titles 18, 22, and 50 of the United States Code prohibit unlicensed importation and exportation of firearms and other weapons. These provisions, along with the GCA and the NFA, can apply in many domestic terrorism investigations because such criminal conduct often involves acquiring, possessing, transferring, or transporting firearms, explosives, or other weapons. Depending on the facts of a particular case, these weapons violations may be more readily provable than the underlying terrorism offenses, and such charges may provide a viable avenue by which to hold accountable individuals engaged in terrorist activity.

A. Definitions

Before discussing criminal offenses involving firearms and related weapons, it is important to understand the definitions of applicable terms.

1. GCA firearms

"Firearm" is defined in the GCA as any weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."[4] This definition covers most commonly known firearms including revolvers, pistols, rifles, and shotguns. The definition also includes frames or receivers of firearms, firearm silencers, and destructive devices, each of which will be addressed herein. The definition, however, excludes antique firearms—those manufactured in or before 1898—replicas thereof, and black powder firearms.[5]

A firearm frame is the part of a handgun that houses the component designed to hold back the hammer, striker, or bolt before firing.[6] A firearm receiver is the part of a rifle or shotgun that houses the component designed to block the breech before firing.[7] The frame or receiver is the portion of the firearm that must be marked with a serial number.[8] Interpretation of the term "frame or receiver" as it applies to certain firearms has been the subject of much debate, resulting in the recent issuance of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Final Rule 2021R-05F, which this article will further discuss.[9]

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[4] 18 U.S.C. § 921(a)(3).
[5] 18 U.S.C. § 921(a)(16).
[6] 27 C.F.R. § 478.12(a)(1).
[7] 27 C.F.R. § 478.12(a)(2).
[8] 27 C.F.R. § 478.12 (f)(1).
[9] Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. §§ 447, 478, 479).

A firearm silencer or muffler is any device for silencing or diminishing the report of a firearm, as well as any combination of parts designed and intended for use in making a silencer.[10] Additionally, a single part is considered a silencer if intended solely for use in creating a silencer.[11]

The definition of "destructive device" covers a wide range of items and encompasses explosive, incendiary, or poison gas: bombs, grenades, rockets, missiles, mines, and similar devices.[12] The definition also includes combinations of parts from which a destructive device may be readily assembled.[13]

2. NFA firearms

The NFA contains a distinct definition of "firearm," the provisions of which apply only to specifically enumerated weapons subject to registration requirements. While the NFA firearm definition is generally viewed as more restrictive than its GCA counterpart, it is broader in certain respects, such as the inclusion of conversion parts and weapons that do not function by means of explosion. For example, a machine gun conversion device, which modifies a firearm to become fully automatic, would—in and of itself—constitute a firearm under the NFA. "The term 'machinegun' means . . . any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun."[14] Similarly, a silencer—in and of itself—qualifies as a firearm under the NFA.[15] Thus, when determining whether a weapon is a firearm, it is necessary first to identify which statutory offense or offenses may have been committed. Most weapons will fall within both the GCA and the NFA definitions and therefore support multiple criminal charges. NFA firearms include short-barreled shotguns, rifles, machine guns, silencers, and destructive devices. Like the GCA, the NFA excludes antique firearms[16] and collectors' items not likely to be

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[10] 18 U.S.C. § 921(a)(25).

[11] *Id.*

[12] 18 U.S.C. § 921(a)(4).

[13] *Id.*

[14] 26 U.S.C. § 5845(b).

[15] 26 U.S.C. § 5845(a)(7).

[16] While similar in some respects, the GCA and NFA definitions of "antique firearm" are distinct:

18 U.S.C. § 921(a)(16): The term "antique firearm" means—(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (B) any replica of any firearm described in subparagraph (A) if such replica—(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is

used as weapons.[17]

Silencers and destructive devices are essentially defined identically in the GCA and the NFA.[18] Shotguns encompassed by the NFA must have either a barrel fewer than 18 inches long or an overall length fewer than 26 inches, and rifles must have either a barrel fewer than 16 inches long or an overall length fewer than 26 inches.[19] A machine gun is defined as any weapon that shoots more than one shot by a single function of a trigger, and this definition includes the frame or receiver of a machine gun, and any part or combination of parts either designed and intended to convert a weapon into a machine gun or from which a machine gun can be assembled.[20]

The NFA firearm definition also includes the "any other weapon" category, which is further defined as any weapon (other than a pistol or revolver) capable of being concealed on a person from which a shot can be discharged through the energy of an explosive, a pistol or revolver with a smooth-bore barrel designed to fire a shotgun shell, and weapons with a combination of shotgun and rifle barrels at least 12 but fewer than 18 inches in length.[21] This provision is commonly applied to improvised and disguised firearms (zip guns) and pistol-grip shotguns with an overall length of fewer than 26 inches.

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not readily available in the ordinary channels of commercial trade; or (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

26 U.S.C. § 5845(g): The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

[17] 26 U.S.C. § 5845(a).

[18] *Compare* 18 U.S.C. § 921(a)(4), (25), *with* 26 U.S.C. § 5845(a), (f).

[19] 26 U.S.C. § 5845(a).

[20] 26 U.S.C. § 5845(b).

[21] 26 U.S.C. § 5845(e).

3. Privately made firearms

With the GCA and the NFA definitions of a firearm in mind, it is important to understand how privately made firearms (PMFs) fit into the legal framework. A PMF—commonly referred to as a "ghost gun"—is a firearm, including a frame or receiver, produced by someone other than a licensed manufacturer (or made "off-the-books" by a licensed manufacturer, not in compliance with federal regulations) without a serial number.[22] ATF Final Rule 2021-05F, effective August 24, 2022, amends the Code of Federal Regulations (CFR) both to define the term "Privately Made Firearm" and to require licensed firearm dealers to mark any PMF taken into their inventory.[23] Rule 2021-05F also explicitly incorporates weapons parts kits into the definition of "firearm" under the GCA.[24]

4. Ammunition

Ammunition, as defined in the GCA, includes not only ammunition designed for use in any firearm, but also cartridge cases, primers, bullets, or propellent powder.[25] Thus, criminal charges involving ammunition can be brought for offenses involving ammunition components; complete ammunition rounds are not required. Nor is there any minimum threshold for the number of rounds or amount of components for such offenses.

5. Explosives

Explosive materials are defined as explosives, blasting agents, and detonators.[26] Explosives are further described as any chemical compound mixture or device with the primary purpose to function by explosion.[27] This description includes dynamite, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cords, igniter cords, and igniters. The term "blasting agents" encompasses any material

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22 *See* 27 C.F.R. § 478.11.

23 Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, 479).

24 *Id.*

25 18 U.S.C. § 921(a)(17)(A).

26 18 U.S.C. § 841(c). For further guidance on classifying explosive materials, ATF publishes the Annual List of Explosive Material (commonly referred to as the Explosives List) in the Federal Register. *E.g.*, 2022 Annual List of Explosive Materials, 87 Fed. Reg. 77,888 (Dec. 20, 2022). This list is a comprehensive (although not all-inclusive) record of materials that have been determined to fall under the statutory definition. *What Is the Explosives List?*, Bureau of Alcohol, Tobacco, Firearms and Explosives (Mar. 16, 2022), https://www.atf.gov/explosives/qa/what-explosives-list.

27 18 U.S.C. § 841(d).

or mixture consisting of fuel and oxidizer that is intended for blasting.[28] A detonator is any device with a detonating charge used for initiating detonation in an explosive.[29] There is no statutory minimum threshold for amount of explosive material necessary for criminal explosive offenses.

III. Criminal offenses

A. Prohibited persons

In furtherance of its aim to keep firearms and ammunition out of the hands of dangerous individuals, the GCA identifies several categories of prohibited persons who may not lawfully acquire or possess firearms or ammunition. Section 922 penalizes, by up to 15 years' imprisonment, not only prohibited persons who unlawfully possess firearms and ammunition, but also individuals who provide prohibited persons with such weapons.[30]

Federal law enumerates nine categories of individuals who may not possess, receive, ship, or transport firearms or ammunition. These categories encompass any person who—

(1) has been convicted of a crime punishable by more than one year's imprisonment (generally, any state or federal felony offense);

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to a controlled substance;

(4) has been adjudicated as a mental defective or committed to a mental institution;

(5) is an alien either illegally present in the United States or admitted under a nonimmigrant visa;

(6) has been dishonorably discharged from the U.S. armed forces;

(7) has renounced U.S. citizenship;

(8) is subject to a domestic violence protective order;[31] or

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[28] 18 U.S.C. § 841(e).

[29] 18 U.S.C. § 841(f).

[30] For violations of 18 U.S.C. § 922(d) or (g) occurring before June 25, 2022 (the date of the BSCA's implementation), the maximum term of imprisonment is 10 years.

[31] 18 U.S.C. § 922(g)(8) narrowly circumscribes which court orders will confer prohibited status. To qualify, the order must be issued after a hearing of which the person received notice and had an opportunity to participate; must restrain the person from harassing, stalking, threatening, or placing in reasonable fear of bodily injury an intimate partner or child of intimate partner; and must either include a finding that the person is a credible threat to the safety of the intimate partner or child, or explicitly prohibit the use, attempted use, or threatened use of physical force against the inti-

(9) has been convicted of a misdemeanor crime of domestic violence.[32]

Such persons may not knowingly possess any firearms or ammunition "in or affecting commerce."[33] The commerce requirement of section 922(g), often referred to as the "nexus element," is satisfied so long as the firearm was transported from another state or foreign country into the state in which the person possessed it.[34] It is not necessary that the prohibited possessor have personally transported the firearm. Instead, the nexus element is often met by proving that the firearm was manufactured in a different state or country, thereby necessarily having moved in interstate or foreign commerce before the prohibited person possessed it. An ATF Special Agent trained and certified as an interstate nexus expert can examine the firearm and determine whether the particular item was in fact manufactured out of state.

In the rare case where the subject firearm was manufactured in the same state in which the prohibited person possessed it, the nexus element may be met by other evidence that the firearm had been transported across state lines at some point before possession (for example, out-of-state registration of the firearm as state or local law required). While beyond the scope of this article, a more complex means of establishing federal or interstate commerce nexus is also available; consult with ATF for further guidance before proceeding in cases with firearms manufactured in-state.

The prohibited person must knowingly possess the firearm to commit a violation; mere presence in the vicinity of the firearm is insufficient. Actual physical possession, however, is not necessary. A person constructively possesses a firearm if he or she knows of the firearm and can exercise control over it. Furthermore, more than one person may possess a firearm, so long as each has knowledge of it and the ability to control it.

Following the Supreme Court's decision in *Rehaif v. United States*, a prohibited person must also know of his or her prohibited status in order to violate 18 U.S.C. § 922(g).[35] For example, in charging a convicted felon with unlawfully possessing a firearm, the government must prove that the felon knew he had been convicted of a crime punishable by more than one year's imprisonment. In this example, such proof can usually

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mate partner or child. As a result of these restrictive requirements, many state and local protective orders will not confer federal prohibited status.

[32] 18 U.S.C. § 922(g) (paraphrased).

[33] *Id.*

[34] For the sake of brevity, use of the term "firearm" for the remainder of this section will encompass both firearms and ammunition.

[35] Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019).

be readily obtained through court documents showing that the defendant was sentenced (or informed that he could be sentenced) to more than one year in prison.

Proof of knowledge becomes more difficult, however, with other status categories not often subject to common knowledge. The defendant in *Rehaif*, for instance, was a noncitizen admitted into the United States under a non-immigrant visa that had subsequently been terminated; he was charged with possessing a firearm while unlawfully present in the United States.[36] The average individual—and in particular, a foreign citizen who may speak limited or no English—is not likely to know or understand the nuances in different immigration classifications. By way of another example, a mentally deficient defendant may lack the ability to understand that she has been adjudicated as mentally deficient. While it is not necessary that a prohibited possessor specifically know that he or she is prohibited by law from possessing firearms, in some cases the knowledge-of-status requirement may present a formidable obstacle whereby state prosecution becomes a more viable option.

A separate restriction codified in 18 U.S.C. § 922(n) makes it unlawful for a person under indictment for a felony offense (punishable by more than one year's imprisonment) to receive, ship, or transport a firearm or ammunition.[37] This provision is distinguishable from section 922(g) in that an individual who already possesses a firearm and is then indicted does not violate section 922(n). Rather, the statute prohibits receiving (and shipping or transporting) firearms after indictment.[38] As with section 922(g), the suspect must know that he or she is under indictment, and a similar federal nexus provision exists for this violation as well. This offense carries a maximum prison term of five years.

Finally, it is unlawful for any person (whether or not themselves a prohibited possessor) to sell or transfer a firearm to a prohibited possessor if that person knows or has reason to believe the recipient falls within either of the section 922(g) or (n) status categories.[39] Just as with section 922(g), it is not necessary that the seller or transferor of the firearm know that the recipient is prohibited by law from possessing firearms, but instead must know or have reason to believe the recipient is a convicted felon, fugitive, etc.

On June 25, 2022, the BSCA added two additional provisions to section 922(d) that may apply particularly to domestic terrorism cases. For

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[36] *Id.* at 2194.
[37] 18 U.S.C. § 922(n).
[38] *Id.*
[39] 18 U.S.C. § 922(d)(1)–(9).

acts occurring after the effective date of the BSCA, a person who sells or transfers a firearm to another person knowing that the recipient intends to further sell or transfer it in furtherance of a felony, a federal crime of terrorism, or a drug trafficking offense faces up to 15 years' imprisonment.[40] A person who sells or transfers a firearm, knowing the recipient intends to further sell or transfer the firearm to a prohibited person, faces the same penalty.[41] The BSCA also extended the 18 U.S.C. § 922(d) prohibited recipient categories to juveniles.[42]

While these new provisions, particularly section 922(d)(10), provide useful charging options in cases involving persons who enable terrorists by providing weapons, caution is advised given the recency of their enactment and the lack of caselaw and other guidance on such offenses. As of the date of this publication, no published decision of a federal district or appellate court has addressed either section 922(d)(10) or (11). It is recommended that prosecutors consult with the applicable circuit caselaw applying the "knowing or having reason to know" mens rea requirement to subsections (1) through (9) of section 922(d), as well as caselaw delineating the various classes of prohibited possessors.

B. False statements in connection with firearm purchases ("straw purchase" and "lie and buy")

Federally licensed firearms dealers (FFLs) are required by law to keep records of each firearm sale they conduct in the course of their business. This record, ATF Form 4473, must be completed in part by the firearm purchaser.[43] The purchaser must provide a form of identification and certain biographical data, and must attest that he or she is the actual purchaser of the firearm and is not acquiring the firearm on behalf of another person. The purchaser's answers on ATF Form 4473 are critical for the FFL's use in conducting a background check (also referred to as a National Instant Criminal Background Check System (NICS) or Brady[44]

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40 18 U.S.C. § 922(d)(10).

41 18 U.S.C. § 922(d)(11).

42 While most prohibited recipient categories now apply to any individuals under the age of 18, 18 U.S.C. § 922(d)(4) is limited to individuals who have been adjudicated as suffering from a mental defect or have been committed to any mental institution at 16 years of age or older.

43 Bureau of Alcohol, Tobacco, Firearms and Explosives, Firearms Transaction Record: ATF Form 4473 (2022).

44 Named after James Brady, President Ronald Reagan's press secretary who was shot in the head and wounded during an assassination attempt, the Brady Handgun Violence Prevention Act went into effect in 1994 and requires backgrounds checks—conducted via NICS since its implementation in 1998—to be conducted before

check) to ensure the purchaser is not prohibited from acquiring or possessing firearms. Therefore, if a person claims to be the actual purchaser but in fact is buying the firearm for someone else, the FFL cannot complete the background check on the actual purchaser of the firearm, and the entire purpose of the check is thwarted.

This conduct, commonly referred to as a "straw purchase," is prohibited by 18 U.S.C. § 922(a)(6), which makes it unlawful for any person to knowingly make a false statement or provide misrepresented identification intended or likely to deceive an FFL regarding a fact material to the lawfulness of the sale of a firearm. Making such a false statement is punishable by up to 10 years' imprisonment.

It is not necessary that the person falsely claiming to be the actual purchaser actually acquire the firearm; the crime occurs upon making the false statement—answering "yes" to this question: "Are you the actual purchaser of the firearm(s)." It is also not necessary that the recipient (or intended recipient) of the firearm be prohibited from possessing the firearm. Falsely claiming to be the actual purchaser of a firearm is material to the lawfulness of the sale regardless of the intended use, destination, or recipient of the firearm because such misrepresentation prevents the appropriate background verification process.

Occasionally, 18 U.S.C. § 922(a)(6) violations also occur when individuals who are prohibited from possessing firearms nonetheless acquire or attempt to acquire them from licensed dealers. ATF Form 4473 requires the purchaser to certify that he or she does not fall within any of the categories of individuals who are prohibited by section 922(g) and (n) from possessing firearms. A person who does have prohibited status—such as a convicted felon[45]—but claims not to on ATF Form 4473 makes a materially false statement because the statement is intended to or likely to deceive the firearms dealer into believing the person can lawfully purchase the firearm. Even if the background check reveals the person's prohibited status and the dealer denies the sale, the crime has been completed upon

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a person may purchase a firearm from an FFL.

[45] While the background check will likely reveal prior felony convictions, if a conviction is not properly entered into the NICS database, it may not appear. The check also cannot uncover certain other categories of prohibited status; for example, there is no "database" of drug users. Additionally, the "Instant" in NICS is somewhat of a misnomer; while the majority of checks quickly provide direction to the FFLs to "proceed" with or "deny" the sale, some checks require additional time for the Federal Bureau of Investigation to investigate, resulting in a response of "delay" to the FFLs. By law, however, the FFLs may transfer the firearm to the purchaser if a "deny" response is not received after three days following a "delay" response. Unfortunately, this scenario can result in the transfer of firearms to prohibited individuals because not all checks are completed within three days, and some may take much longer.

making the false statement.

Note, however, that this offense only applies to purchases from FFLs. A person may acquire a firearm from a private seller on behalf of another individual. Private sellers are not regulated by ATF and therefore do not have to keep records of their firearm sales; as discussed above, however, these sellers violate 18 U.S.C. § 922(a)(1)(A) if their conduct constitutes "engag[ing] in the business" of dealing in firearms without a license.[46] Additionally, as further discussed above, a private seller violates 18 U.S.C. § 922(d) if he or she knowingly sells a firearm to a prohibited person.

A similar statutory provision, 18 U.S.C. § 924(a)(1)(A), prohibits making false statements to FFLs that in and of themselves may not be material to the lawfulness of a firearm sale (commonly referred to as "lying and buying"). By way of example, individuals engaged in or intending to commit other criminal activity involving a firearm may provide false identifying information (such as an address) on ATF Form 4473 to prevent law enforcement from locating them or discovering their crimes. Section 924(a)(1)(A) provides that any false statement or representation in the record of an FFL is punishable by up to five years' imprisonment. As with section 922(a)(6), it is not necessary that the suspect successfully acquire the firearm to violate section 922(a)(1)(A); the crime is completed once the false statement is made.

Perhaps viewed as merely a "paper violation," this crime usually signals other underlying illegal activity as the motivation for making the false statement. Furthermore, violations of 18 U.S.C. § 924(a)(1)(A) are often more readily provable than the underlying criminal conduct. While the statutorily proscribed punishment may seem relatively minor, such charges are nonetheless worthy of consideration because the federal felony conviction will prevent the offender from acquiring firearms from licensed dealers in the future, thereby potentially preventing or stymying the greater underlying crimes. Additionally, the U.S. Sentencing Guidelines (U.S.S.G.) provide enhancements when such false statements are made in relation to certain other criminal activity, thereby potentially increasing the probability of a meaningful prison sentence.

For prosecutors contemplating charging individuals with violations of either 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A), ATF Field Operations can assist with obtaining copies of the ATF Forms 4473. These forms are required to be physically retained in the FFL's records and are the FFL's property until it ceases business, at which point the records are physically transferred to ATF's possession. For cases that proceed to trial, testimony

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[46] *See* 18 U.S.C. § 922(a)(1)(A).

from an ATF Special Agent, ATF Industry Operations Investigator, or FFL will help educate the jury as to the significance of the form and the background check process. It can also be useful in underscoring the importance of the offense as not simply a paper violation but rather a crime involving a deadly weapon.

Before the enactment of the BSCA, no specific "straw purchase" crime existed under federal law. For conduct occurring after June 25, 2022, 18 U.S.C. § 932(b) can be charged when an individual knowingly purchases or conspires to purchase a firearm for another person, knowing or having reason to believe that the other person either falls within one the categories enumerated in section 922(d); intended to use the firearm in furtherance of a felony, federal crime of terrorism, or drug trafficking crime; or intended to sell the firearm to any person who falls within either of the aforementioned categories.[47] As this new provision explicitly applies to firearms intended to be used in facilitating terrorism crimes, 18 U.S.C. § 932(b) is a useful tool to hold accountable those individuals who buy firearms on behalf of domestic terrorists. The maximum term of imprisonment for this violation is 15 years.

As with other statutory provisions added because of the BSCA, caution is advised given the lack of caselaw and other guidance. As of the date of this publication, no published decision of a federal district or appellate court has directly addressed section 932(b). It is recommended that prosecutors consult with the applicable circuit caselaw interpreting the "knowing or having reason to know" mens rea element of section 922(d), as well as caselaw discussing the "in furtherance" provision of section 924(d).

C. Conducting unlicensed business in firearms and ammunition

The GCA restricts the business of importation, manufacture, and dealing in firearms to FFLs who are licensed to do so. An unlicensed individual who engages in such business, or who ships, transports, or receives a firearm in interstate commerce in the course of such business, violates 18 U.S.C. § 922(a)(1)(A) and faces up to five years' imprisonment. Engaging in the business of importing or manufacturing ammunition without a license is also punishable by five years' imprisonment.[48] As with most firearm offenses, U.S.S.G. enhancements apply when certain criminal ac-

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[47] Note that 18 U.S.C. § 922(a)(6) does not require a prohibited recipient of the firearm or unlawful use of the firearm. For cases lacking proof of an intended prohibited recipient or criminal purpose, section 922(a)(6) remains a viable charging option.

[48] 18 U.S.C. §§ 922(a)(1)(B), 924(a)(1)(D).

tivity underlies such unlawful business conduct, thus potentially increasing prison sentences for individuals who deal firearms in connection with terrorism.

The prevalent challenge prosecutors face when charging violations of 18 U.S.C. § 922(a)(1) is the absence of a quantitative threshold for the term "engage in the business." Instead, the term is defined as devoting time, attention, and labor to manufacturing or importing firearms or ammunition as a regular course of business with the principal objective of profit.[49] As applied to dealing in firearms, the term requires the predominant intent to earn a profit through the repetitive purchase and resale of firearms, and excludes persons who make occasional sales or purchases of firearms as a hobby or for enhancing or disposing of a personal collection.[50]

Because there is no numerical threshold for the number of firearms (or rounds of ammunition), amount of profit, timing of purchases and sales, or any other quantitative analysis to constitute a violation of 18 U.S.C. § 922 (a)(1), prosecutors instead must look to evidence of the person's intent in order to prove such crimes. While numerous firearms or large amounts of ammunition, significant profit, and frequent purchases followed closely in time with sales may provide strong circumstantial evidence of the requisite intent, such quantitative measures are neither dispositive nor exhaustive.[51] Statements by suspects can be particularly useful, as can a thorough financial investigation and evidence of efforts to conceal firearm-related activity.

A related challenge arises from the willful mens rea required to prove crimes of engaging in unlicensed firearms and ammunition business. Absent a suspect's admission of knowledge of the licensing requirement for his or her conduct, such evidence again will likely be circumstantial. Here, forensic analysis can be utilized to identify any efforts by a suspect to re-

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[49] 18 U.S.C. § 921(a)(21)(A), (B), (E), (F).

[50] 18 U.S.C. § 921(a)(21)(C). Before the BSCA, unlicensed firearms dealing required the same "principal objective of livelihood or profit" intent applicable to unlicensed manufacturing and importing. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1324 (2022). For unlicensed dealing after June 25, 2022, section 921(a)(21) instead requires that profit be a predominant, rather than a principal, motive.

[51] On March 14, 2023, President Biden issued an executive order directing the Attorney General to "clarify the definition of who is engaged in the business of dealing in firearms, and thus required to become Federal firearms licensees . . . ." Exec. Order No. 14,092, 88 Fed. Reg. 16,527 (Mar. 17, 2023). At the time of publication, it is anticipated that such clarification may be forthcoming. If implemented, prosecutors are encouraged to consult any such clarification when considering 18 U.S.C. § 922(a)(1) violations.

search the applicable laws and regulations for his or her conduct, as well as efforts to conceal such conduct from detection by law enforcement.

The Industry Operations Branch of ATF can confirm that an identified suspect did not possess the requisite license to manufacture, import, or deal in firearms (or manufacture or import ammunition) during the time frame of the suspected offense.

D. Use of firearms in drug trafficking crime or crimes of violence

As domestic terrorism cases may involve violent acts, and on occasion be connected to drug trafficking activity, charging 18 U.S.C. § 924(c) can provide a mechanism for obtaining substantial prison penalties where appropriate. Under this statute, a person who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of such a crime, faces a minimum of five years' imprisonment consecutive to the penalty for the underlying crime. The term of imprisonment increases with the severity of the crime to 7 years if the firearm is brandished; 10 years if the firearm is discharged, is a short-barreled rifle or shotgun, or is a semiautomatic assault weapon; and 30 years if the firearm is a machine gun, destructive device, or equipped with a silencer.

What constitutes a "crime of violence" under section 924(c) has been the subject of much litigation, as federal prosecutors who practice in either violent crime or appeals are well aware. In *United States v. Davis*, the Supreme Court invalidated the residual clause of section 924(c) as unconstitutionally vague.[52] The residual clause, section 924(c)(3)(B), defined a crime of violence as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[53] Federal prosecutors are now left with only the elements clause of section 924(c)(3)(A), which defines a crime of violence as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[54] Prosecutors are advised to consult the current precedent in their circuit when determining whether a conviction meets this definition.

For national security prosecutors, using section 924(c) for some traditional terrorism offenses under Title 18 remains a viable option. For example, in *United States v. Khatallah*, the D.C. Circuit recently upheld

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[52] United States v. Davis, 139 S. Ct. 2319, 2336 (2019).
[53] 18 U.S.C. § 924(c)(3)(B).
[54] 18 U.S.C. § 924(c)(3)(A).

a section 924(c) conviction premised on a violation of 18 U.S.C. § 1363, which proscribes "willfully and maliciously destroy[ing] or injur[ing] any structure, conveyance, or other real or personal property, or attempt[ing] or conspir[ing] to do such an act" within the special maritime and territorial jurisdiction of the United States.[55] The D.C. Circuit upheld the defendant's conviction, holding that section 1363 "is divisible" and that a "properly instructed jury would have convicted Khatallah of the substantive offense."[56]

A case-by-case analysis is also required to determine whether the particular facts and circumstances establish the "use or carry during and in relation to" or "possess in furtherance" element. While not yet having delineated conduct that satisfies the "possess in furtherance of" provision, the Supreme Court has provided useful guidance on the "use or carry" provision. When proving a section 924(c) violation under this theory, it is not required that the suspect actually use the firearm as a weapon during the underlying drug trafficking crime or crime of violence. Instead, at a minimum, the firearm must have some purpose or effect with respect to such crime. The presence of the firearm cannot merely be coincidental or accidental; it must either facilitate or have the potential of facilitating the underlying crime.[57]

E. Trafficking in firearms

The federal criminal code did not contain a provision for firearms trafficking until the enactment of the BSCA on June 25, 2022. For conduct that postdates this enactment, prosecutors may bring charges under 18 U.S.C. § 933(a)(1) against a person who ships, transports, transfers, or otherwise disposes of a firearm to another person, knowing or having reason to believe that the use, carrying, or possession of the firearm by the recipient would constitute a felony. The conduct must affect interstate or foreign commerce, which can be established by transportation of the firearm across state lines, or the "traditional" nexus method of proving the firearm was manufactured outside of the state in which it was pos-

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55 United States v. Khatallah, 41 F.4th 608, 632 (D.C. Cir. 2022).

56 *Id.* at 634. In other words, that "Khatallah himself used a firearm while committing a substantive offense of injuring property within the special maritime and territorial jurisdiction of the United States, which would make him directly liable for violating Section 924(c), or that one of his co-conspirators did so foreseeably and within the scope of the material-support conspiracy, which would make Khatallah liable for the coconspirator's violation of Section 924(c) under *Pinkerton*." *Id.* The Court found that "[a]mple evidence existed to support a conviction for a substantive Section 1363 offense under *Pinkerton*." *Id.*

57 Smith v. United States, 508 U.S. 223, 236–39 (1993).

sessed. In cases lacking such proof, as mentioned above, ATF can assist with a more complex "otherwise affecting" commerce determination.[58]

After June 25, 2022, it is also a federal felony offense to receive a firearm from another person knowing or having reason to believe that such receipt constitutes a felony. Again, such conduct must affect interstate or foreign commerce.[59] Additionally, 18 U.S.C. § 933(a)(3) prohibits attempts and conspiracies to violate either section 933(a)(1) or (2). Violating any of these provisions is punishable by up to 15 years' imprisonment.

Section 933 provides a useful mechanism by which to hold individuals accountable for aiding terrorism activity by providing or assisting in transferring weapons. Given the recency of this statute's enactment and the lack of caselaw and other guidance on such offenses, however, caution is advised. As of the date of this publication, no published decision from a federal district or appellate court has addressed section 933. Prosecutors have begun bringing such charges in district courts, however; thus, appellate litigation is undoubtedly forthcoming.

Before the enactment of 18 U.S.C. § 933, and for certain weapons trafficking conduct falling outside its reach, several additional charging options exist. The Arms Export Control Act (AECA) prohibits trafficking certain weapons to and from the United States without the proper license or authority.[60] A person who engages in the business of manufacturing, exporting, or importing defense articles or services without obtaining authority to do so from the U.S. government faces up to 20 years in prison and a $1 million fine. Regarding exportation, the items that qualify as defense articles and services are contained in the United States Munitions List (USML),[61] which includes most NFA firearms, high-caliber (over .50) firearms, high-capacity drum magazines, and technical data related to such items. For importation, consult the United States Munitions Import List (USMIL),[62] which also encompasses NFA and high-caliber firearms as well as insurgency-type firearms and other military weapons. Section 2778 encompasses not only acts of importation or exportation of enumerated items, but also brokering activities that facilitate the manufacture, import, or export of defense articles or services. It also criminalizes making materially false statements and omissions of fact in connection with the registration, license application, or reporting requirements set forth

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58 18 U.S.C. § 933(a)(1).
59 18 U.S.C. § 933(a)(2).
60 22 U.S.C. § 2778.
61 22 C.F.R. § 121.1.
62 27 C.F.R. § 447.21.

in section 2778(b).

In domestic terrorism cases involving offenders who unlawfully import their weapons into the United States from another country, the penalty provisions of 22 U.S.C. § 2778 make it an attractive charging option. Such a violation, however, requires willful conduct. Proving that a suspect was aware that he or she was violating import or export law and intended to do so may present a daunting challenge without statements or other evidence of knowledge and intent. Often, forensic examination of electronic devices and online activity can be very useful in overcoming this obstacle by revealing circumstantial evidence of mens rea.

Additionally, when considering section 2778 charges, it is important to determine whether a particular weapon falls within the purview of the USML. Following the migration of most common categories of weapons from the USML to the Commerce Control List (CCL) on March 9, 2021, the USML became limited in scope to those weapons determined to provide a critical military or intelligence advantage, or to have an inherently military function. The Department of State can provide an official determination and certification that an item meets the USML classifications.[63]

For firearms and other weapons now contained in the CCL, such as all non-fully automatic firearms up to .50 caliber, and parts or ammunition for such firearms, 50 U.S.C. § 4819 provides a charging option similar to 22 U.S.C. § 2778 but applicable to all items on the CCL (which is not limited to weapons). Section 4819 makes it unlawful to violate the Export Administration Regulations (EAR), and such violations carry a maximum penalty of 20 years in prison and a $1 million fine. This statute also encompasses a broad range of conduct, including attempt and conspiracy to violate the EAR. It applies as well to offenders who aid, abet, counsel, command, induce, procure, permit, solicit, or approve acts in violation of the EAR. Included in such prohibited conduct is ordering, buying, concealing, using, selling, transferring, financing, or negotiating for any item on the CCL to be exported from the United States in violation of the EAR. Through this wide net that section 4819 casts, prosecutors can pursue serious criminal charges against virtually all participants in unlawful export activity.

This statute may not be as applicable to domestic terrorism cases, however, which are more likely to involve importation (or solely domestic) transactions rather than exportation. Additionally, while applicable to a broader range of conduct than 22 U.S.C. § 2778, 50 U.S.C. § 4819

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63 Department of Justice policies also require such certification, as well as approval by the Counterintelligence and Export Control Section, be obtained before bringing charges of 22 U.S.C. § 2778 violations.

violations also require the challenging mens rea of willfulness. Where such charges are viable, the Department of Commerce can provide an official determination and certification that an item meets the CCL classifications.

For domestic terrorism cases involving unlawful importation of weapons that are not contained on the USMIL, or where the facts are insufficient to meet the requirements of 22 U.S.C. § 2778, 18 U.S.C. § 545 offers an alternative potential charge. This statute provides for up to 20 years' imprisonment for fraudulently or knowingly importing into the United States any merchandise (including but not limited to weapons) contrary to law. It also encompasses acts of concealing, buying selling, transporting, and facilitating. Prosecutors must prove that the offender knew that the importation was contrary to law, but need not show that he or she knew the exact law being violated. Therefore, any conduct undertaken to disguise or conceal the importation of a firearm will often be probative of this element. Furthermore, the statute provides that a defendant's possession of unlawfully imported goods is sufficient to support conviction at trial, unless explained to the satisfaction of the jury.

The companion statute to 18 U.S.C. § 545 for smuggling goods out of the United States is found at 18 U.S.C. § 554. It covers essentially the same scope of conduct, requires the same mens rea, and applies where a suspect was involved in smuggling items (including weapons) from, rather than to, the United States. The penalty for a section 554 violation is 10 years' imprisonment. Like exportation offenses, outbound smuggling crimes are likely to be less applicable to domestic terrorism cases than importation or inbound smuggling, but may nonetheless be appropriate in the occasional case.

F. Other GCA violations

Section 922 codifies several prohibitions involving firearms and ammunition, many of which apply only to license holders or are otherwise not likely to be encountered in terrorism investigations and thus will not be discussed herein. Among the additional provisions that prosecutors may wish to consider in such cases are prohibitions of certain weapons: stolen firearms,[64] firearms with obliterated or altered serial numbers,[65] firearms imported into the United States in violation of law,[66] machine guns manu-

[64] 18 U.S.C. § 922(j).
[65] 18 U.S.C. § 922(k).
[66] 18 U.S.C. § 922(l).

factured after 1986,[67] and firearms that metal detectors or X-rays cannot detect.[68]

The GCA also prohibits possessing firearms in certain places: common carriers such as airports and airplanes or trains,[69] school zones,[70] and federal buildings and court facilities.[71] Finally, it prohibits certain conduct involving firearm theft, such as stealing a firearm from an FFL,[72] stealing a firearm that has moved in interstate commerce,[73] transporting a stolen firearm across state lines,[74] and selling or transferring a stolen firearm.[75]

G. NFA violations

Charges under the NFA have been an effective tool for combatting domestic terrorism activity.[76] As previously mentioned, the NFA defines several categories of particularly dangerous weapons and prohibits possessing and transferring such weapons unless properly registered in the NFRTR. NFA firearms include short-barreled shotguns, short-barreled rifles, machine guns, silencers, and destructive devices.[77] Section 5861(d) prohibits receiving or possessing an NFA firearm without prior registration in the NFRTR. Violating section 5861(d) carries a penalty of up to 10 years' imprisonment.[78] As individuals involved in domestic terrorism offenses may possess weapons such as silencers and bombs, this provi-

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67 18 U.S.C. § 922(o). Enacted pursuant to the Firearm Owners' Protection Act of 1986, this prohibition is not retroactive and thus does not criminalize possessing machine guns made before 1986. The NFA, however, does apply to pre-1986 machine guns and therefore 26 U.S.C. § 5861(d) charges (discussed *infra*) may be pursued for the unregistered possession of such firearms.

68 18 U.S.C. § 922(p). Enacted pursuant to the Undetectable Firearms Act of 1988, this prohibition contains a sunset provision and is currently set to be repealed on December 21, 2023, if Congress does not reauthorize it.

69 18 U.S.C. § 922(e).

70 18 U.S.C. § 922(q)(2)(A).

71 18 U.S.C. § 930.

72 18 U.S.C. §§ 922(u), 924(m).

73 18 U.S.C. § 924(l).

74 18 U.S.C. § 922(i).

75 *Id.*

76 *See, e.g.*, Press Release, U.S. Dep't of Just., Jefferson County Man Sentenced for Unlawful Possession of a Firearm Silencer (Oct. 13, 2021); Press Release, U.S. Dep't of Just., Christopher Hasson Sentenced to More Than 13 Years in Federal Prison on Federal Charges of Illegal Possession of Silencers, Possession of Firearms by an Addict to and Unlawful User of a Controlled Substance, and Possession of a Controlled Substances (Jan. 31, 2020); United States v. Hasson, 26 F.4th 610 (4th Cir. 2022).

77 26 U.S.C. § 5845.

78 26 U.S.C. § 5871.

sion applies and may be especially useful when proof of the underlying terrorism acts or conspiracy is insufficient.[79]

A conviction for violating section 5861(d) requires proof that the defendant possessed a weapon that meets one of the NFA definitions under section 5845, that the defendant had not registered the weapon in the NFRTR, and that the defendant knew of the characteristics of the weapon that brought it within the NFA definition. Experts from the ATF NFA Division can confirm and certify (as well as testify at trial if needed) that a particular weapon meets the NFA definition of firearm and was not registered to the suspect in the NFRTR.

The third element of section 5861(d) is often the most difficult to prove. While this offense is not willful—it is not necessary the defendant knew that the weapon met the applicable statutory definition or that it was unlawful to possess if unregistered—the government must show the defendant was aware that, for example, the subject machine gun functioned as a fully automatic firearm, the subject silencer was for diminishing the sound of a firearm, etc.[80] Admissions are often the most useful source of such evidence, but obvious characteristics of the firearm—such as a shotgun barrel with visible saw marks where it had been shortened—may help meet this element. A trace of the firearm can confirm whether the suspect purchased it in a non-NFA configuration, thereby showing that he or she either personally modified it or had it modified while it was in his or her possession. Tools or other items within the suspect's possession and capable of making the modifications may also provide useful evidence.

The NFA also prohibits receiving an NFA firearm before registration in the NFRTR,[81] transferring an NFA firearm to another person to whom

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[79] For offenses involving possession of unregistered pre-1986 machine guns, Department of Justice policy requires that prosecutors bring charges under 18 U.S.C. § 922(o) rather than 26 U.S.C. § 5861(d).

[80] Most circuits have held that operability of the subject firearm is not necessary for a conviction under 26 U.S.C. § 5861(d); instead, the inquiry is whether the firearm was intended to function in a manner consistent with the applicable definition. *See, e.g.*, United States v. Carter, 465 F.3d 658, 666–67 (6th Cir. 2006); United States v. Rogers, 270 F.3d 1076, 1081 (7th Cir. 2001); United States v. Ferguson, 138 F. App'x. 568, 570 (4th Cir. 2005) (not precedential); United States v. Kent, 175 F.3d 870, 874–75 (11th Cir. 1999); United States v. Kuzma, 967 F.3d 959, 973–74 (9th Cir. 2020); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977). The Eighth Circuit, however, has held that capability of operating as designed is an essential element of section 5861(d) (United States v. Dukes, 432 F.3d 910, 915 (8th Cir. 2006); United States v. Hall, 171 F.3d 1133, 1151 (8th Cir. 1999)), even though it has also held (albeit in context of the GCA) that an inoperable firearm is nonetheless a firearm (United States v. York, 830 F.2d 885, 891 (8th Cir. 1987)).

[81] 26 U.S.C. § 5861(d).

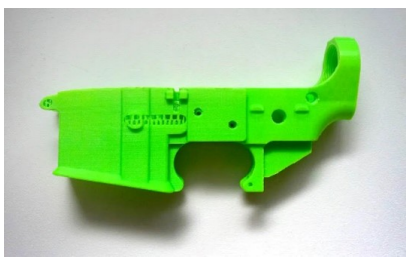
the firearm is not registered,[82] and making an NFA firearm without the proper license and registration,[83] as well as other conduct involving NFA firearms. Consult section 5861 and seek assistance from ATF for any terrorism investigation involving a suspected NFA firearm to determine whether and which NFA charges are appropriate.

H. Offenses involving PMFs

The prevalence of PMFs has sharply increased in recent years, and the number of these weapons—both in existence and involved in crime—is expected to continue to rise. Advances in technology—such as 3D printers—allow PMFs to become easier and less expensive to make than purchasing a complete firearm. Often, an individual buys an unfinished frame or receiver (sometimes referred to as an "80%") or parts kit and completes the assembly of the firearm.

Additionally, because they lack serial numbers, PMFs are extremely difficult—if not impossible—to trace when recovered in connection with criminal activity. National Counterterrorism Center (NCTC) intelligence reports reveal that the prevalence and availability of untraceable PMFs pose a significant homeland security threat.

Fortunately, while it remains lawful for individuals who are not otherwise prohibited from possessing firearms to own PMFs without any markings or serial number, the ATF Final Rule 2021-05F amendments to 27 C.F.R. § 478.11 allow prosecutors to pursue GCA and NFA charges where the firearm involved in a criminal offense is a PMF, an incomplete firearm, or an unassembled parts kit (so long as it includes the frame or receiver for the firearm).[84] By requiring FFLs to mark any PMF taken into their inventory, the amendments also give law enforcement greater—albeit still limited—ability to regulate and trace PMFs.



3D Printed AR-15 Type Receiver[85]

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[82] 26 U.S.C. § 5861(e).

[83] 26 U.S.C. § 5861(f).

[84] Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. §§ 447, 478, 479).

A 3D printed frame or receiver is—in and of itself—a firearm under the definition of that term as amended by Rule 2021-05F. Therefore, just as with offenses involving complete serialized firearms, offenses involving 3D printed frames or receivers are subject to prosecution under the GCA and the NFA. By way of example, an unlicensed individual who uses a 3D printer to repeatedly make AR-type receivers (as depicted above) and sells them online with the principal objective of profit is subject to prosecution under 18 U.S.C. § 922(a)(1) for engaging in the business of manufacturing and dealing firearms without a license, and faces up to five years' imprisonment.

For domestic terrorism cases involving PMFs, incomplete firearms, or parts kits, the ATF Firearms and Ammunition Technology Division can assist in examining the items and determining whether they meet the statutory definition of "firearm," thereby allowing for criminal GCA or NFA charges to be pursued.

IV. Explosives offenses

In addition to the NFA prohibitions applicable to unregistered destructive devices, criminal offenses involving explosives can be found in 18 U.S.C. § 842. Many of the same categories of individuals who are prohibited by 18 U.S.C. § 922(g) from possessing firearms and ammunition are also prohibited from possessing explosives.[86] The exceptions are persons subject to domestic violence protective orders or convicted of a misdemeanor crime of domestic violence; these categories are not prohibited under explosives laws. The same interstate nexus element applies to unlawful possession of explosives by prohibited persons; thus, as with firearms or ammunition, the government must prove the explosives affected interstate or foreign commerce or were shipped in commerce. The ATF Explosives Enforcement Division can assist with this nexus determination, as well as confirm whether certain items qualify as explosives under the statutory definitions. Unlawfully possessing explosives carries a penalty of up to 10 years' imprisonment.[87]

Much as section 922(d) prohibits transferring firearms or ammunition to persons who fall within one of the prohibited categories, section 842(d) prohibits transferring explosives to prohibited persons, as well as to persons under the age of 21. In addition, mirroring section 922(a)(1), section 842(a)(1) provides that it is unlawful to engage in the business of importing, manufacturing, or dealing in explosive materials without a license. All above-referenced explosives offenses carry a penalty of up to 10 years'

[86] 18 U.S.C. § 842(i).
[87] 18 U.S.C. § 844(a)(1).

imprisonment.[88]

As discussed, the NFA definition of firearm encompasses destructive devices, which include certain explosive devices.[89] Therefore, NFA charges may also be appropriate for individuals who possess or transfer explosives not registered in the NFRTR. The ATF NFA Division can confirm that a particular explosive device qualifies as an NFA "firearm," as well as certify that the device was not registered to the suspect in the NFRTR. As with offenses involving other NFA weapons, explosive offenses have also proven to be useful for federal prosecutors in combatting domestic terrorists.[90]

Section 842 prohibits several other activities involving explosives, many of which involve violations that licensees committed or which are otherwise not likely to apply to domestic terrorism offenses. As terrorist activity often involves explosive materials, however, the above-referenced criminal charges for unlawful possession, transportation, and transfer of explosives may provide a viable option for prosecuting individuals involved in such activity—including planning and preparation for acts of terrorism even when the act itself is not carried out. One additional such provision is 18 U.S.C. § 842(p)(2), which provides for up to 20 years in prison for individuals who teach or demonstrate the making or use, or distribute information for the manufacture or use, of an explosive, destructive device, or weapon of mass destruction, with the intent to further a federal crime of violence or with the knowledge that another person intends to use such teaching or information to further a federal crime of violence.

Section 844 also contains several prohibitions involving explosives, some of which provide substantial prison sentences for conduct related to domestic terrorism. Transporting or receiving an explosive with the intent to kill, injure, or intimidate a person, or to damage or destroy property, is punishable by 10 years' imprisonment (20 years if resulting in injury, and life imprisonment or the death penalty if resulting in death).[91] Possessing a bomb in an airport is punishable by up to five years in prison,[92] and making a false bomb threat is punishable by 10 years in prison.[93] Mali-

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88 *Id.*

89 26 U.S.C. § 5845(a).

90 *See, e.g.*, Press Release, U.S. Dep't of Just., Neo-Nazi Leader Sentenced to Five Years in Federal Prison for Explosives Charges (Jan. 9, 2018); Press Release, U.S. Dep't of Just., Former Fort Riley Soldier Sentenced for Distributing Info on Napalm, IEDs (Aug. 19, 2020).

91 18 U.S.C. § 844(d).

92 18 U.S.C. § 844(g).

93 18 U.S.C. § 844(e).

ciously damaging or destroying either U.S. property or property used in commerce—or attempting to do so—carries a sentence of 5 to 20 years in prison (7 to 40 years if injury results, and 20 years to life if death results).[94] Finally, as discussed above 18 U.S.C. § 924(c) provides for a minimum consecutive term of 30 years in prison for using a destructive device in relation to a crime of violence or drug trafficking crime, or possessing a destructive device in furtherance of such a crime.

V. State regulatory schemes

For domestic terrorism cases involving firearms in which prosecuting federal charges discussed herein is not feasible—for example, lack of proof of knowledge of prohibited status post-*Rehaif*, difficulty proving interstate or foreign commerce nexus, etc.—or federal prosecution is otherwise inadvisable, state prosecution may provide a viable alternative. Most states have laws prohibiting the possession of firearms by certain categories of prohibited possessors, possession of particular weapons, possession of firearms in restricted locations, or other criminal conduct involving firearms.

Additionally, many states have what are commonly referred to as "red flag laws," which prevent or restrict persons determined to be violent or dangerous from possessing or acquiring firearms. For example, in California a concerned citizen may petition the court for a gun violence restraining order.[95] Following a hearing, if a judge determines that a person is a threat to themselves or others, the order will permit law enforcement to remove any firearms from that person and will prevent the person from obtaining additional firearms. Currently, 19 states and the District of Columbia have enacted red flag laws.[96]

Prosecutors are advised to contact their state law enforcement and prosecutorial counterparts to explore state charging options or state firearm restrictions in cases involving dangerous firearm-related conduct where federal statutes may be inapplicable or inappropriate.

VI. Conclusion

In summary, federal firearms, explosives, and other weapons statutes provide various charging options that may apply to domestic terrorist activity. Prosecutors should consider these offenses in connection with

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94 18 U.S.C. § 844(f), (i).

95 Cal. Penal Code §§ 18170-18197.

96 *See* Press Release, The White House, FACT SHEET: President Biden Announces New Actions to Reduce Gun Violence and Make Our Communities Safer (Mar. 14, 2023).

terrorism investigations, as they can constitute useful tools by which to hold individuals accountable for committing weapons misconduct in furtherance of terrorism. For such offenses, ATF can provide support and resources to assist in investigating and prosecuting worthy offenders.

About the Author

Angela W. Woolridge is a Senior Attorney with the Office of Chief Counsel, Firearms and Explosives Law Division, for the Bureau of Alcohol, Tobacco, Firearms and Explosives. Before working for the ATF, she served as an Assistant United States Attorney for the District of Arizona for sixteen years, during which she focused on prosecuting weapons offenses. In this capacity, she completed over 60 trials and was involved in significant appellate practice involving weapons crimes. She also regularly provides training on firearm and explosives laws, weapons trafficking, and related offenses. She graduated from the University of Wisconsin and the University of Arizona College of Law, where she taught Advanced Criminal Procedure for the past six years.

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Prosecuting Juveniles in Domestic Terrorism Matters

Bridget Behling
Deputy Chief
Counterterrorism Section
National Security Division

I. Introduction

In early 2022, a series of bomb threats were issued nationwide to Historically Black Colleges and Universities (HBCUs) and houses of worship. The Federal Bureau of Investigation (FBI) announced that it was investigating the threats as racially or ethnically motivated violent extremism and hate crimes.[1] Although no explosive devices were found at any of the locations that the threats targeted, the FBI stated that it "takes all threats with the utmost seriousness" and that, as of February 2022, the investigation spanned at least 20 FBI field offices.[2]

Months later, at a congressional hearing in November 2022, FBI Director Christopher Wray stated that one juvenile would face state charges related to the bomb threats. Specifically, the Director said, "[W]ith respect to the first big tranche of the threats, the investigation has identified an underage juvenile subject, and because of the federal limitations on charging juveniles with federal crimes, we have worked with state prosecutors to ensure that that individual is charged under various other state offenses, which will ensure some level of restrictions and monitoring and disruption of his criminal behavior."[3]

In February 2022, an 18-year-old was arrested in the District of Maine after he conspired with two juveniles—ages 15 and 17—to carry out a violent attack at a mosque in the Chicago area.[4] The superseding indictment filed against the adult defendant charged him with one count

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[1] Press Release, FBI, FBI Statement on Investigation into Bomb Threats to Historically Black Colleges and Universities and Houses of Worship (Feb. 2, 2022).
[2] *Id.*
[3] *House Homeland Security Hearing on Global Terror Threats Before the H. Homeland Sec. Comm.*, 117th Cong. 41:31-42:04 (2022) (statement of Christopher Wray, Dir., FBI) (paraphrasing in part).
[4] Sonia Moghe, *Maine Teen Accused of Plotting to Attack a Chicago Area Mosque*, CNN (Mar. 25, 2022), https://www.cnn.com/2022/03/25/us/chicago-mosque-attack-plot/index.html.

of conspiracy to provide material support to terrorists, in violation of 18 U.S.C. § 2339A, and one count of unregistered possession of firearms, specifically destructive devices, in violation of 26 U.S.C. § 5861(d).[5] A search of the adult defendant's residence recovered three items that appeared to be handmade explosive devices, with each consisting of several firework items bundled together with tape.[6] In the opinion of an FBI Special Agent Bomb Technician, the staples, pins, and thumb tacks that had been inserted into the devices were "designed to increase the amount of shrapnel propelled by an explosion if the devices were detonated."[7] According to one of the juvenile's statements, the three planned to "enter the Shia mosque and separate the adults from the children, then murder the adults. If they had not encountered law enforcement at that point, they would continue on to another Shia mosque or Jewish synagogue and execute the same plan. They did not have a plan to escape but rather their plan ended with them being shot by law enforcement."[8] From this juvenile's residence, the government seized a Remington pump shotgun, swords, knives, a bow and arrows, and multiple homemade ISIS flags.[9]

The threats to HBCUs, as well as the plot to attack a Chicago mosque, serve as just two recent examples of increasing involvement by juveniles in domestic and international terrorism. In early 2023, while meeting with local sheriffs to discuss federal and state partnerships, Director Wray cited among his top concerns the "rise in radicalized juveniles inspired by violent radical ideologies and extremist groups."[10] The media has also reported on a recent surge in the activity of young people in connection with transnational violent extremism.[11]

The juvenile justice system is designed to focus primarily on rehabilitation of young individuals who are still maturing. The rise in juvenile involvement in terrorism, however, highlights the need for the system

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[5] Superseding Indictment, United States v. Pelkey, No. 1:22-cr-50 (D. Me. Nov. 9, 2022), ECF No. 50.

[6] Affidavit in Support of Complaint at 2, United States v. Pelkey, No. 1:22-cr-50 (D. Me. Feb. 11, 2022), ECF No. 1.

[7] *Id.* at 3.

[8] Declaration in Support of Government's Motion for Detention at 2, United States v. Pelkey, No. 1:22-cr-50 (D. Me. Feb. 21, 2022), ECF No. 20.

[9] *Id.*

[10] *See Director Wray Meets with Sheriffs to Discuss Partnerships, Progress, and Challenges*, FBI (Feb. 9, 2023), https://www.fbi.gov/news/stories/director-wray-meets-with-sheriffs-to-discuss-partnerships-progress-and-challenges (discussing and summarizing Director Wray's concerns).

[11] *See generally* Bryan Bender, *"I Mean You No Harm": From Troubled Teen, to Neo-Nazi Foot Soldier*, POLITICO (July 16, 2022), https://www.politico.com/news/2022/07/16/neo-nazi-white-supremacist-teenagers-00045589.

to adequately address public safety. This article will discuss the process used to bring charges against juveniles in the federal system under the federal Juvenile Justice and Delinquency Prevention Act of 1974 ("JDA" or "the Act"). Specifically, the article will address (1) the background of the JDA; (2) the framework of the JDA and the procedure for charging juveniles with federal offenses; (3) the procedure for transferring juveniles to adult status for prosecution; (4) sentencing considerations; (5) recent Supreme Court developments that have impacted federal juvenile prosecutions; and (6) state prosecutions of juveniles.

II. The Juvenile Justice and Delinquency Prevention Act

The JDA was enacted in 1974.[12] Although other federal legislative efforts to address juvenile delinquency preceded it, the JDA provided "for the first time, a unified national program to deal with juvenile delinquency prevention and control within the context of the total law enforcement and criminal justice effort."[13] The United States Code defines juvenile delinquency as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."[14] A juvenile is defined as "a person who has not attained his eighteenth birthday," or otherwise a person who is under the age of 21 and undergoes proceedings and disposition under the JDA for an alleged act of juvenile delinquency.[15] Once a person has reached the age of 21, he is prosecuted as an adult, regardless of when the alleged offense occurred.[16]

The JDA aims to be rehabilitative in nature. When the statute was enacted, the Senate Judiciary Committee stated that the legislation was a "turning point" in which the country would "devote its resources and

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[12] Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 18 U.S.C. §§ 5031–5042 (2009)).

[13] Off. of Just. Programs, U.S. Dep't of Just., The Juvenile Justice and Delinquency Prevention Act of 1974: Prior Federal Juvenile Delinquency Activity 2, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/jjdpchronology.pdf (last visited June 7, 2023).

[14] 18 U.S.C. § 5031.

[15] *See id.*

[16] *See* United States v. Hoo, 825 F.2d 667, 670–71 (2d Cir. 1987) (concluding that the Due Process Clause "does not require that decisions to prosecute be subjected to pre-indictment judicial inquiry simply because the timing of the decision affects the availability of juvenile procedures," and finding that the defendant's constitutional rights were not deprived because there was no showing of an improper prosecutorial motive).

talents to resolving the legal and social issues involved in the prevention and control of delinquency."[17] Rather than focus on imprisonment and alienation, the goal was to "develop new methods of redirecting behavior that endangers society, unhampered by the forms and restrictions of our traditional juvenile correctional system."[18] The rehabilitative aims of the JDA are reflected in the terminology it uses. Juveniles are not referred to in the Act as defendants. Instead, they are referred to as "alleged delinquents" before adjudication, and as "adjudicated delinquents" if their delinquency is proven.[19] Furthermore, an adjudication of delinquency is not equivalent to a criminal conviction.[20] Therefore, in many jurisdictions, a juvenile who is adjudicated delinquent does not become a prohibited person for purposes of unlawful possession of a firearm under 18 U.S.C. § 922(g), even if he is adjudicated delinquent on a serious felony charge.[21]

Courts have recognized that a major purpose of the JDA is to provide an alternative to the criminal process. Adjudication under the JDA not

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17 S. Rep. No. 93-1011, at 5318 (1974).

18 *Id.*

19 *See* 18 U.S.C. § 5035. The Supreme Court has held that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violations of criminal law. *In re* Winship, 397 U.S. 358, 368 (1970).

20 *See* United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) ("Under [the JDA], prosecution results in an adjudication of status–not a criminal conviction."); United States v. Gonzalez-Cervantes, 668 F.2d 1073, 1075–76 (9th Cir. 1981) ("Appellants were not charged with a crime, however, they were charged with being juvenile delinquents, which is neither a misdemeanor nor a felony. Adjudication of juvenile delinquency is not a conviction of a crime, but rather, a determination of a juvenile's status. It is a civil rather than a criminal prosecution."); Fagerstrom v. United States, 311 F.2d 717, 720 (8th Cir. 1963) ("The Act does not provide for [a juvenile's] commitment to the custody of the Attorney General as a punishment for crime, but as a means looking toward their rehabilitation."); United States v. King, 482 F.2d 454, 456 (6th Cir. 1973) (stating that the purpose of the JDA is not criminal punishment but rather rehabilitation, resulting in an adjudication of status instead of a criminal conviction and attendant stigma).

21 *See, e.g.,* United States v. Walters, 359 F.3d 340, 343–44 (4th Cir. 2004) (vacating three juveniles' convictions in violation of 18 U.S.C. § 922(g)(1) because they were based upon adjudications in state court); United States v. Gauld, 865 F.3d 1030 (8th Cir. 2017) (en banc) (finding that state juvenile delinquency adjudication did not constitute a "prior conviction" that would result in higher mandatory minimum sentence for adult offender); United States v. Nielsen, 694 F.3d 1032, 1037 (9th Cir. 2012) (finding that juvenile adjudication does not qualify as prior conviction for purposes of U.S. Sentencing Guideline (U.S.S.G.) § 4B1.5(a)). *But see* United States v. Mendez, 765 F.3d 950, 952–53 (9th Cir. 2014) (finding that after a juvenile reaches adulthood, a state-level juvenile adjudication may be treated as a conviction of a crime and consequently may prevent the defendant from lawfully possessing a firearm under section 922(g)).

only allows the juvenile to avoid the stigma of a prior criminal conviction, but also encourages treatment and rehabilitation.[22] The statute's legislative history reveals an effort to provide a "continuum" of responses that includes "the utilization of resources outside the formal system of police, courts, and corrections," to "assist youth in becoming productive members of our society."[23]

The drafters of the JDA, however, also recognized public safety concerns. For example, the statute provides for pre-trial detention in some situations, even though the presumption is that juveniles will *not* be detained during the proceedings.[24] And the JDA also provides that in certain circumstances, juveniles may be transferred to adult status for prosecution—a mechanism that requires the court to consider whether the transfer will be in the "interest of justice."[25] As one district court noted, the "interest of justice" standard "should be informed both by an awareness of the goal of rehabilitation and the premises underlying the rehabilitative ideal and by an awareness of the congressional concern about the threat to society posed by juvenile crime"; these are "sometimes competing[] concerns."[26]

III. Charges and delinquency proceedings under the JDA

The JDA sets forth certain requirements that must be met before a juvenile can be charged under the statute. An article published in a prior

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[22] *See, e.g.*, United States v. Angelo D., 88 F.3d 856, 858 (10th Cir. 1996) (citing *Brian N.*, 900 F.2d at 220); United States v. J.D., 525 F. Supp. 101, 103 (S.D.N.Y. 1981); Nieves v. United States, 280 F. Supp. 994, 1000 (S.D.N.Y. 1968) ("Rehabilitation rather than punishment is envisioned for youths sentenced under the Act."); United States v. Borders, 154 F. Supp. 214, 216 (N.D. Ala. 1957) ("[S]pecial procedures for which provisions are made in the Act are calculated to reclaim young offenders against Federal laws, for lives of useful citizenship.").

[23] S. Rep. No. 93-1011, at 5286 (1974).

[24] *See* 18 U.S.C. § 5034 (providing that "[i]f the juvenile has not been discharged before his initial appearance before the magistrate judge, the magistrate judge shall release the juvenile to his parents, guardian, custodian, or other responsible party . . . upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate judge determines . . . that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others"); *see also* S. Rep. No. 93-1011, at 5320 (1974) (noting an amendment to the JDA that "establishes a presumption for release of the juvenile").

[25] See discussion *infra* of transfers to adult status under 18 U.S.C. § 5032.

[26] *J.D.*, 525 F. Supp. at 103.

issue of this Journal provides an in-depth discussion of these procedures.[27] All juveniles are initially charged by information under the Act as alleged juvenile delinquents. In certain circumstances, the juvenile may be transferred to adult status to be prosecuted criminally. If the juvenile is not transferred to adult status, then a juvenile delinquency proceeding takes place.

For a juvenile to be charged under the JDA, the Attorney General[28] must certify to the appropriate district court that—

> (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency,
>
> (2) the State does not have available programs and services adequate for the needs of juveniles, or
>
> (3) the offense charged is a crime of violence that is a felony or is one of the following enumerated offenses: 21 U.S.C. §§ 841, 952(a), 953, 955, 959, 960(b)(1), (2), or (3); 18 U.S.C. § 922(x), or 18 U.S.C. § 924(b), (g), or (h).[29]

Additionally, there must be "a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction."[30]

The certification process has been viewed as a measure to limit the number of cases that are brought into the federal system. For instance, in *United States v. Sechrist*, the Seventh Circuit stated that the certification procedure "was designed to ensure that only where jurisdiction existed nowhere but in the federal courts or where the particular state did not have available programs and services adequate for the needs of juveniles were the federal courts to intrude in a juvenile case."[31]

Indeed, the certification process ensures that the United States Attorney personally reviews the matter before seeking federal charges—a step that could be viewed as encouraging restraint. Notably, the language in section 5032 has also raised questions about whether prosecutors should

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[27] *See generally* David Jaffe & Darcie McElwee, *Federally Prosecuting Juvenile Gang Members*, 68 DOJ J. Fed. L. & Prac., no. 5, 2020, at 15.

[28] The authority to proceed with this certification has been delegated to United States Attorneys. *See* 28 C.F.R. § 0.57; U.S. Dep't of Just., Justice Manual 9-8.110 (citing memorandum from then-Assistant Attorney General Jo Ann Harris, dated July 20, 1995).

[29] 18 U.S.C. § 5032.

[30] *Id.*

[31] United States v. Sechrist, 640 F.2d 81, 84 (7th Cir. 1981).

be the sole party responsible for determining whether there is jurisdiction at the state level. In at least one case, a court dismissed a charging document in a federal juvenile delinquency proceeding because the certification that the United States Attorney filed relied upon the representations of the Deputy District Attorney in the county, rather than the juvenile court.[32]

Despite the additional layers of review that the certification requirement imposes, it is quite straightforward to proceed against juveniles federally under the JDA when they are charged with certain enumerated offenses. It appears that when the JDA was drafted, Congress recognized that certain offenses are inherently appropriately handled at the federal level in juvenile prosecutions. The enumerated offenses in section 5032 relate to (1) the manufacture, distribution, dispensation, or possession of controlled substances;[33] (2) possession of a firearm by a juvenile;[34] and (3) the shipping, transport, or receipt of a firearm in interstate commerce with the intent to commit a felony punishable by more than one year in prison, or with knowledge that such a crime will be committed.[35]

Commonly charged terrorism crimes are notably absent from the list of enumerated offenses.[36] If a juvenile commits an act of terrorism that meets the definition of a crime of violence, then he or she may be charged under the JDA. If, however, the investigation has established the juve-

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[32] United States v. Juvenile, 599 F. Supp. 1126, 1130–31 (D. Or. 1984). *But see* United States v. Ramapuram, 432 F. Supp. 140, 142 (D. Md. 1977) (accepting a certification that relied upon the representations of the Baltimore County State's Attorney and finding that "[a]lthough the statute literally requires certification of the fact that an appropriate state court refuses to assume jurisdiction, this court does not believe the statute demands literal compliance." The court continued, stating that "[a]s long as the state refusal to exercise jurisdiction originates from a state official having ultimate authority to assume or refuse jurisdiction, it is pointless to require that the refusal originate in the state courts").

[33] 21 U.S.C. § 841(a).

[34] 18 U.S.C. § 922(x).

[35] 21 U.S.C. §§ 952(a), 953, 955, and 959 relate to importing and exporting controlled substances, bringing controlled substances on board vessels or aircraft that are arriving in or departing from the United States, and manufacturing controlled substances outside of the United States, for purposes of importing into the United States. 18 U.S.C. § 924(b), (g), and (h) relate to the transport or receipt of firearms or ammunition with the intent to commit a felony, and acquiring a firearm with intent to engage in certain offenses.

[36] Note that some commonly charged terrorism offenses were enacted after 1974. For instance, 18 U.S.C. § 2339B (providing material support or resources to designated foreign terrorist organizations) was enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act of 1996. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1250.

nile's involvement in a terrorism conspiracy, and the act of terrorism has not yet occurred, then the offense might not yet qualify as a crime of violence. If no crime of violence can be charged, then the options to charge the juvenile under the JDA are more limited: A federal charge may be brought against the juvenile only if the state does not have (or refuses to assert) jurisdiction over the offense, or if the state does not have available programs and services adequate for the needs of juveniles.[37]

If the juvenile is not transferred to adult status, then a delinquency proceeding ensues. The proceeding is a bench trial, as the JDA does not provide for a jury. The proceedings are sealed.[38] There are also strict rules related to speedy trial: If the juvenile is detained after arrest, the delinquency proceeding must take place within 30 days.[39] In some circumstances, this deadline can be extended if the juvenile or his counsel causes or consents to the delay. The remedy for failure to comply with the speedy trial constraints, however, is dismissal of the charges, with prejudice.[40] Tolling for litigation under the Classified Information Procedures Act (CIPA) has not been accounted for in the JDA, and prosecutors who file motions to protect classified information will need to seek a continuance based on an "interest of justice" argument.[41]

During a juvenile delinquency proceeding, as well as at the conclusion of the proceeding, the JDA protects the juvenile's privacy by strictly prohibiting the disclosure of the juvenile's identity. In limited circumstances, information about the proceeding may be released to (1) other courts of law; (2) the agency preparing a presentence report; (3) certain law enforcement agencies (when the law enforcement agency requests information related to the investigation of a crime or a position within that agency); (4) the director of a treatment center or facility where the court has committed the juvenile; (5) an agency considering the person for a position immediately and directly affecting the national security; and (6) inquiries from any victim of such juvenile delinquency (or the victim's family if the victim is deceased) related to the court's final disposition of the juvenile.[42] Law enforcement can and must keep these prohibitions in mind when sharing intelligence information or disseminating other internal government reporting about juvenile offenders.

At the conclusion of a juvenile delinquency proceeding, information

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[37] 18 U.S.C. § 5032.
[38] 18 U.S.C. § 5038.
[39] 18 U.S.C. § 5036.
[40] *Id.*
[41] *Id.*
[42] 18 U.S.C. § 5038.

about the juvenile record "may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege."[43]

IV. Transfer to adult status under the JDA

In certain circumstances, juveniles may be transferred to adult status for prosecution. This can happen under three circumstances: (1) the juvenile may waive prosecution as a juvenile; (2) there may be a basis for a mandatory transfer; or (3) the government may file a motion seeking to transfer the juvenile to adult status.[44]

If the juvenile wishes to waive prosecution as a juvenile, he must file such waiver in writing and on advice of counsel.[45] Alternatively, a juvenile "shall" be transferred to adult status for criminal prosecution if he—

> (1) is alleged to have committed an act after his sixteenth birthday;
>
> (2) is alleged to have committed a crime with an element of violence or the attempt or threat of violence against another, or an offense enumerated in 18 U.S.C. § 5032; and
>
> (3) has previously been found guilty of committing a crime of violence or the attempt or threat of violence or one of the enumerated offenses, or has been found guilty of violating a state felony statute that would have been such an offense if circumstances giving rise to federal jurisdiction had existed.[46]

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[43] *Id.* "Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding."

[44] If criminal activity begins when the juvenile is under 18, but continues after his eighteenth birthday, the government may include his pre-18 conduct in criminal charges against him. *See* United States v. Delatorre, 157 F.3d 1205, 1210–11 (10th Cir. 1998) ("[W]e agree with the First, Fifth, Seventh, and Eleventh Circuits that where an adult defendant is properly charged with a continuing crime, that defendant's pre-majority conduct is admissible on the same basis as post-majority conduct."); United States v. Wong, 40 F.3d 1347, 1365 (2d Cir. 1994) ("We conclude that the defendant's age at the time the substantive RICO or RICO conspiracy offense is completed is the relevant age for purposes of the JDA, and that an adult defendant may properly be held liable under RICO for predicate offenses committed as a juvenile.").

[45] 18 U.S.C. § 5032.

[46] *Id.* The enumerated offenses that give rise to mandatory transfer are 18 U.S.C. §§ 32, 81, 844(d), (e), (f), (h), (i), or 2275, subsection (b)(1)(A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act, or section 1002(a), 1003, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 953, 959, 960(b)(1), (2), (3)).

A third option permits the government to ask the court to transfer the juvenile to adult status if the juvenile committed an act after his fifteenth birthday, which, if committed by an adult, would be a felony that is a crime of violence, or that is one of the enumerated statutes that allows for a juvenile to be charged under the JDA.[47] If, however, the crime of violence falls under a list of enumerated offenses,[48] or if the juvenile possessed a firearm during the commission of certain offenses,[49] then the act need only be committed after the juvenile's thirteenth birthday in order for the juvenile to qualify for potential transfer to adult status.[50]

The JDA provides that the court should consider six factors when determining whether a transfer to adult status would be in the interests of justice: (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile's prior delinquency record; (4) the juvenile's present intellectual development and psychological maturity; (5) the nature of and juvenile's response to past treatment efforts; and (6) the availability of programs designed to treat the juvenile's behavioral problems.[51]

If the juvenile is ultimately transferred to adult status, the government seeks a grand jury indictment. The juvenile is now called a defendant, and the case proceeds as any other federal criminal prosecution would. Why is transfer to adult status significant? First, the proceedings are now public, unlike the sealed proceedings that take place under the JDA. Second, a guilty plea or a finding of guilt by a jury will result in a conviction, unlike a juvenile adjudication, which does not carry the same weight. And finally, if the defendant is found guilty, he is exposed to the same sentencing penalties that would apply to any adult who committed the same offense.

V. Sentencing considerations

Sentencing is an important factor to consider when comparing juvenile proceedings to adult prosecutions. The United States Sentencing Guidelines do not apply to juveniles sentenced under the JDA.[52] However, the JDA contains provisions stating that the sentence imposed on a criminal defendant cannot exceed certain limits, including the maximum of the guideline range applicable to an otherwise similarly situated adult defen-

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47 *See* list of these statutes cited *supra* notes 33–35.
48 18 U.S.C. §§ 113(a), 113(b), 113(c), 1111, or 1113.
49 18 U.S.C. §§ 2111, 2113, 2241(a), or 2241(c).
50 18 U.S.C. § 5032.
51 18 U.S.C. § 5032.
52 U.S.S.G. § 1B1.12.

dant, unless the sentencing court finds an aggravating factor sufficient to warrant an upward departure for that guideline range.[53] Therefore, the appropriate guideline range must be calculated in order to serve as a reference point.

If a juvenile is not transferred to adult status and is adjudicated delinquent, the court is far more limited in the length of sentence it may impose:

- If a juvenile is under 18 at the time of sentencing, the sentence may not extend beyond the lesser of (1) the juvenile's twenty-first birthday, (2) the maximum of the sentencing guidelines range (as described in the preceding paragraph), or (3) the statutory maximum.
- If a juvenile is between the ages of 18 and 21 at the time of sentencing, and has been convicted of an offense that would constitute a Class A, B, or C felony, then the sentence cannot extend beyond the lesser of (1) five years, (2) the maximum guideline range, or (3) the statutory maximum.
- If a juvenile is between the ages of 18 and 21 at the time of sentencing, and has been convicted of any other offense, then the sentence cannot extend beyond the lesser of (1) three years, (2) the maximum guideline range, or (3) the statutory maximum.[54]

Juveniles may be sentenced to probation and may also be placed on juvenile delinquent supervision, which is akin to supervised release. If the juvenile violates conditions of supervision, the court may, after a dispositional hearing, revoke the term of supervision and order a term of official detention. Depending on the age of the juvenile at the time of revocation and the nature of the offense committed, however, the term of detention may not extend beyond the juvenile's twenty-sixth birthday.

Thus, when a juvenile is not transferred to adult status and is instead tried in a delinquency proceeding, the JDA places considerable limits on the length of the sentence. This is the case even when the juvenile is adjudicated delinquent for committing a serious or violent crime.

In addition to the limits on the length of sentence that the courts may impose, there are strict rules about the facilities where juveniles under the age of 18 may be held.

If a juvenile is detained before trial proceedings, he may be detained—

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53 *Id.*; 18 U.S.C. § 5037.
54 18 U.S.C. § 5037.

> only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.[55]

If a juvenile who has not yet reached his eighteenth birthday is found guilty—either as a juvenile delinquent or as an adult—he may not be placed in an adult jail or correctional institution in which he has regular contact with adults.[56] "Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community."[57] Additionally, "[a] juvenile who has not attained his or her 18th birthday is to be placed in a juvenile facility which has an appropriate level of programming and security."[58] If the juvenile is at least 18-years-old but not yet 21-years-old at the time of confinement, the requirements vary. And the requirements change again when the juvenile reaches the age of 21. These restrictions might have a practical impact at sentencing: The availability of facilities that can hold the juvenile, the location of those facilities, the programs offered by those facilities, and the conditions the juvenile will face while incarcerated are all factors that a judge might consider when deciding what the length of the sentence should be, and whether time in detention is warranted.

VI. The impact of recent Supreme Court decisions on juvenile prosecutions

Under the JDA, crimes of violence play an important role in determining whether a juvenile can be charged at the federal level in the first place, and whether the juvenile can be transferred to adult status. If a juvenile does *not* commit a crime of violence, then charging options are more limited, transfer to adult status is unlikely, proceedings remain sealed, and sentencing options are limited.

That is why, when the Supreme Court issued an opinion in 2018 that narrowed the definition of "crime of violence," the landscape of federal

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[55] 18 U.S.C. § 5035.
[56] 18 U.S.C. § 5039.
[57] *Id.*
[58] Fed. Bureau of Prisons, Program Statement 5216.05: Juvenile Delinquents 3 (1999).

juvenile prosecutions changed dramatically. In *Sessions v. Dimaya*, the Court held that the residual clause in the definition of crime of violence, codified at 18 U.S.C. § 16(b), was unconstitutionally vague.[59] The residual clause defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[60]

Following *Dimaya*, the definition of crime of violence is now limited only to the language in 18 U.S.C. § 16(a), which states that a crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[61]

Many criminal statutes directly incorporate section 16's definition of "crime of violence," while others refer to "crime of violence" without defining the terms. Because the definition in section 16 is a general provision, its definition is incorporated wherever the term "crime of violence" is used and no separate definition is provided. Thus, the Supreme Court's decision has had a broad impact across the criminal justice system, and not just with respect to juveniles.

When determining whether an offense is a crime of violence, courts apply the "categorical approach," which evaluates the statute as a whole, rather than looking to the defendant's specific offense conduct. Following *Dimaya* and the Court's related holdings in *Johnson v. United States*[62] and *United States v. Davis*,[63] the categorial approach focuses on whether the offense has "as an element the use, attempted use, or threatened use of physical force."[64] Answering this question "does not require—in fact, it

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59 138 S. Ct. 1204, 1213–15 (2018).

60 18 U.S.C. § 16(b).

61 18 U.S.C. § 16(a).

62 135 S. Ct. 2551, 2562–63 (2015) (holding that the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague). Section 924(e)(2)(B)(ii) provides that a violent felony is defined, in part, as conduct that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555–56.

63 139 S. Ct. 2319, 2336 (2019) (holding that the residual clause of the definition of crime of violence in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague). Section 924(c)(3) provides, "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 2339 n.3 (Kavanaugh, J., dissenting).

64 *See Dimaya*, 138 S. Ct. at 1223 (striking down the residual clause in

precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force."[65] In other words, if there is any possible way for the defendant to commit the crime without using, attempting to use, or threatening to use physical force, then the offense is not a crime of violence, *even if* the defendant, in the case being evaluated, used force or violence. For example, kidnapping is defined as one who "seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away" a person.[66] "[A]nd because 'inveigling' or 'decoying' may be accomplished without force, the government is compelled to concede that kidnapping is not categorically a 'crime of violence' under section 924(c). Because it might be committed without violence, no kidnapping offense qualifies, even if the only ones the government prosecutes involve actual violence."[67]

The impact of the decisions in *Dimaya*, *Davis*, and *Johnson* has been sweeping, and several statutes have been affected. For instance, conspiracy offenses generally do not qualify as crimes of violence because they do not necessarily require the use, attempted use, or threatened use of force. Nor do the material support statutes that are frequently charged in terrorism cases.[68] These offenses criminalize the provision of material support, which is defined in section 2339A as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials" and therefore do not require proof of the use, attempted use, or threatened use of physical force.[69] Before the Court's decision in *Dimaya*, section 2339B was viewed as a crime of violence under 18 U.S.C. § 16(b) and therefore could serve as a basis to charge a juvenile under the JDA, or to seek a transfer to adult status.

Arson and the use of weapons of mass destruction are two offenses

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18 U.S.C. § 16(b) for vagueness).

65 United States v. Taylor, 142 S. Ct. 2015, 2020 (2022).

66 18 U.S.C. § 1201(a).

67 Robert A. Zauzmer, *Fixing the Categorical Approach "Mess,"* 69 DOJ J. Fed. L. & Prac., no. 5, 2021, at 12.

68 Providing material support to terrorists, in violation of 18 U.S.C. § 2339A, and providing material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B.

69 *See* 18 U.S.C. § 2339A.

that are commonly charged in domestic terrorism matters, but they are not crimes of violence under the categorical approach. Arson, in violation of 18 U.S.C. § 844(i), criminalizes maliciously damaging or destroying, by means of fire or an explosive, "any building, vehicle, or other real or personal property used in interstate or foreign commerce."[70] Because this definition could include arson of a defendant's own property, it does not categorically require the use of physical force against the person or property "of another."[71] Similar logic has been applied to the use of weapons of mass destruction, in violation of 18 U.S.C. § 2332a. In *United States v. Abu Mezer*, the district court held that neither the defendant's conviction for conspiracy to violate section 2332a nor his substantive violation of section 2332a were categorically crimes of violence because section 2332a lacks the categorical requirement that the force be directed at the person or property "of another."[72]

Cases in which death results from the conspiracy have seen mixed reactions. In the Boston Marathon bombing case, the First Circuit found that conspiracy to use a weapon of mass destruction resulting in death (in violation of 18 U.S.C. § 2332a) and conspiracy to bomb a place of public use resulting in death (in violation of 18 U.S.C. § 2332f) qualified as predicate crimes of violence for an enhanced sentence; the court applied the modified categorical approach and determined that "death results" was an element of the crimes.[73] In a separate case, conspiracy to commit murder-for-hire in which death resulted (in violation of 18 U.S.C. § 1958(a)) was found to be a section 924(c) crime of violence in the Fourth Circuit,[74] but not in the Second Circuit.[75] In the Eighth Circuit, kidnapping resulting in death was found to qualify as a section 924(c) crime of violence.[76]

Before the *Dimaya* decision, some of the statutes that are commonly used in terrorism cases were considered crimes of violence under the

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70 18 U.S.C. § 844(i).

71 *See* United States v. Davis, 53 F.4th 168, 173 (4th Cir 2022);*see also* United States v. Salas, 889 F.3d 681, 684 (10th Cir. 2018). Furthermore, the First Circuit found that section 844(i) is not a crime of violence for purposes of the elements clause in section 924(c) because it contains a mens rea of "maliciously," which includes "both intentional and reckless acts." United States v. Tsarnaev, 968 F.3d 24, 101–02 (1st Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1024 (2022).

72 United States v. Abu Mezer, 2023 WL 451036 at *3–4 (E.D.N.Y. 2023).

73 *Tsarnaev*, 968 F.3d at 104–05.

74 United States v. Runyon, 994 F.3d 192, 200–04 (4th Cir. 2020).

75 *See* Fernandez v. United States, 569 F. Supp. 3d 169, 178 (S.D.N.Y. 2021) ("requirement that 'death results' does not elevate the act of traveling, using the mail, or conspiring to do the foregoing to an act involving physical force" (quoting Qadar v. United States, 2020 WL 3451658, at *2 (E.D.N.Y. June 24, 2020))).

76 United States v. Ross, 969 F.3d 829, 837–40 (8th Cir. 2020).

residual clause in 18 U.S.C. § 16(b). The offense of providing material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B, is one such example. This statute has been relied upon as a crime of violence that would allow for prosecution of a juvenile under the JDA. For example, in *United States v. Doe*, the government charged a juvenile with one count of conspiracy to provide material support to a designated foreign terrorist organization—the Islamic State in Iraq and Syria (ISIS)—in violation of 18 U.S.C. § 2339B.[77] The government then moved to transfer the juvenile to adult status, and the district court held an evidentiary hearing and granted the government's motion.[78] The government alleged in its case that the juvenile had conspired with adult co-defendant Munther Omar Saleh to "prepare an explosive device for detonation in the New York area."[79] Saleh emailed himself information about constructing a pressure cooker bomb, and the juvenile accessed an internet marketplace and viewed items such as a sewing machine, chemistry model, drill, lava lamp, "FDA approved" work gloves, and an "Instant Pot" pressure cooker with an electronic timer.[80] In addition, the government alleged that the juvenile's banking records showed that the juvenile was "support[ing] Saleh financially in Saleh's efforts to acquire the components for an explosive device."[81] When the court granted the government's motion to transfer, it agreed that, as applied to the case, section 2339B was a crime of violence under 18 U.S.C. § 16(b).[82]

In a separate pre-*Dimaya* case, the Second Circuit upheld a district court decision that under section 16(b), a juvenile could be transferred to adult status on charges under the Racketeer Influenced and Corrupt Organizations (RICO) Act.[83] The juvenile was alleged to have participated with ten other defendants in crimes involving robbery and extortion, in violation of RICO and the Hobbs Act.[84] The defendants were part of a gang known as "Born to Kill." The gang was alleged to have engaged

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77 United States v. Doe, 145 F. Supp. 3d 167, 170 (E.D.N.Y. 2015).

78 *Id.*

79 *Id.* at 172.

80 *Id.*

81 *Id.*

82 *Id.* at 179–80. The juvenile defendant later pleaded guilty, as an adult, to one count of conspiracy to impede federal officers. As part of his plea agreement, he agreed to forego an appeal of the ruling on the crime of violence issue. Nate Raymond, *New York Teen Pleads Guilty to Non-Terrorism Charge in Islamic State Case*, Reuters (Apr. 12, 2016), https://www.reuters.com/article/us-new-york-security-islamic-state-idUSKCN0X91XW.

83 United States v. Doe, 49 F.3d 859, 869 (2d Cir. 1995).

84 *Id.* at 861.

in numerous acts of robbery, extortion, and murder. The juvenile being prosecuted was alleged to have participated in the conspiracy in general, in the gang's robbery of a jewelry store, and in the gang's extortion of services from an electronics firm.[85] The RICO conspiracy—

> alleged as predicate acts many acts of robbery, assault, murder, and extortion; the [district] court reasoned that a RICO conspiracy involves a substantial risk that physical force will be used where, as here, the predicate acts are crimes of violence. . . .
>
> . . . [T]he nature of the conspiracy's substantive objective may provide an indication as to whether the conspiracy creates the substantial risk that physical force against the person or property of another may be used in the offense. Conspiracies that may properly be deemed crimes of violence include those whose objectives are violent crimes or those whose members intend to use violent methods to achieve the conspiracy's goals."[86]

Similarly, the Ninth Circuit held that a RICO conspiracy to commit Hobbs Act robberies was a crime of violence that would allow for a juvenile to be transferred to adult status, stating that "conspiracy to rob in violation of § 1951 [Hobbs Act robbery] 'by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.'"[87] In both *Doe* and *Juvenile Male*, the court relied on the language in section 16(b) when ruling that the offense at issue was a crime of violence.

Before *Dimaya*, prosecutions of juveniles under the JDA were more common. As a result, there were juveniles who elected to plead guilty as adults to violations of the material support statute before they reached the age of 18.

In 2017, Santos Colon, at age 17, pleaded guilty as an adult in federal district court, to one count of attempting to provide material support to

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85 *Id.*

86 *Id.* at 863, 866.

87 United States v. Juvenile Male, 118 F.3d 1344, 1350 (9th Cir. 1997) (alterations in original) (citing United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993) and quoting 18 U.S.C. § 924(c)(3)(B)). The Ninth Circuit in *Juvenile Male* also cited United States v. Chimurenga, 760 F.2d 400, 404 (2d Cir. 1985) and United States v. Doe, 49 F.3d 859, 866 (2d Cir. 1995) (concluding that RICO conspiracy to commit robbery is a crime of violence within the meaning of the JDA and noting that "the nature of the conspiracy's substantive objective may provide an indication as to whether the conspiracy creates the substantial risk that physical force against the person or property of another may be used in the offense").

terrorists, in violation of 18 U.S.C. § 2339A.[88] Colon admitted that in 2015, he devised a plan to conduct an attack in Philadelphia, Pennsylvania, during the September 2015 visit by the Pope. "The plot involved utilizing a sniper to shoot the Pope during his Papal mass and setting off explosive devices in the surrounding areas."[89] Colon engaged someone he believed would be the sniper, who was actually an undercover FBI employee. "Colon engaged in target reconnaissance with an FBI confidential source and instructed the source to purchase materials to make explosive devices."[90]

In a separate case in 2015, Ali Shukri Amin, at age 17, pleaded guilty as an adult in federal district court to one count of conspiring to provide material support and resources to ISIS, in violation of 18 U.S.C. § 2339B.[91] He was sentenced to 136 months in prison and lifetime supervised release. Amin admitted to using Twitter to provide advice and encouragement to ISIS and its supporters.[92] He provided instruction on how to use Bitcoin to mask the provision of funds to ISIS, as well as facilitation to ISIS supporters seeking to travel to Syria to fight with ISIS.[93] Amin also admitted that he facilitated travel for an adult co-conspirator who ultimately traveled from the United States to Syria to join ISIS.[94] The Colon and Amin cases are examples of guilty pleas that would be unlikely to occur in today's post-*Dimaya* landscape.

Under the JDA, it is the court who serves as the neutral arbiter and who ultimately decides whether a transfer to adult status is in the "interest of justice." As a result of *Dimaya*, however, there are far fewer cases that will be eligible for the courts' consideration. Because the JDA places so much emphasis on crimes of violence, there will be limited federal prosecution options under the JDA in most conspiracy matters. This creates challenges in the context of both domestic and international terrorism matters, where the government has an interest in prevention and disruption. The *Pelkey* case, described above in the introduction to this article, is an example. The adult defendant in *Pelkey* was charged with violations of conspiracy to provide material support to terrorists, in violation of 18 U.S.C. § 2339A, and unlawful possession of destructive devices, in

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88 Press Release, U.S. Dep't of Just., New Jersey Resident Pleads Guilty to Attempting to Provide Material Support to Terrorists (Apr. 3, 2017).
89 *Id.*
90 *Id.*
91 Press Release, U.S. Dep't of Just., Virginia Man Sentenced to More Than 11 Years for Providing Material Support to ISIL (Aug. 28, 2015).
92 *Id.*
93 *Id.*
94 *Id.*

violation of 26 U.S.C. § 5861.[95] Neither of these violations is a crime of violence that would provide a basis to charge the juvenile co-conspirators in the case under the JDA. And even if the government relied upon other authority to charge the case federally, there would be no crime of violence that would provide for the juvenile to be transferred to adult status. Thus, in a serious matter in which three co-conspirators discussed a deadly attack at a mosque, the government's options appear to be limited with respect to the two juvenile co-conspirators.

VII. State prosecutions

When a federal prosecution under the JDA is not possible or practical, charges at the state level may be a viable alternative. In some cases, a state prosecution provides an avenue for a juvenile under the age of 18 to be prosecuted as an adult. In May 2018, federal and state authorities in Dallas, Texas, announced that 17-year-old Matin Azizi-Yarand had been arrested in Collin County, Texas, and charged with criminal solicitation of murder and making a terrorist threat.[96] According to the criminal complaint, Azizi-Yarand was inspired by ISIS and planned to carry out a mass shooting at a local shopping mall.[97] He solicited other individuals to assist him in conducting the attack.[98] At 17-years-old, Azizi-Yarand was considered an adult under Texas state law, and no additional procedures were required to transfer him to adult status.[99] In April 2019, Azizi-Yarand pleaded guilty to both charges.[100] He was sentenced to 20 years in prison for the solicitation charge and 10 years in prison for the terroristic threats charge, with the sentences to run concurrently; Azizi-Yarand will be eligible for parole after serving 10 years in prison.[101]

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95 Superseding Indictment, *supra* note 5.

96 Press Release, Collin Cnty., Tex., Plano Man Arrested for Soliciting Others to Help Commit ISIS-Inspired Mass Shooting at Local Mall (May 2, 2018) [hereinafter Plano Man Arrested]; Press Release, U.S. Att'y's Off. E. Dist. of Tex., Regarding Prosecution of Matin Azizi-Yarand (May 2, 2018) [hereinafter Regarding Prosecution].

97 *See* Valerie Wigglesworth, *Plano Teen Arrested in ISIS-inspired Plot to Commit Mass Shooting at Frisco's Stonebriar Mall*, Dallas Morning News (May 2, 2018), https://www.dallasnews.com/news/crime/2018/05/03/plano-teen-arrested-in-isis-inspired-plot-to-commit-mass-shooting-at-frisco-s-stonebriar-mall/; *see also* Seelye Aff., Affidavit for Arrest Warrant in the Name and by the Authority of the State of Texas (Apr. 30, 2018).

98 Plano Man Arrested, *supra* note 96.

99 Regarding Prosecution, *supra* note 96.

100 Press Release, U.S. Att'y's Off. E. Dist. of Tex, Collin County Teen Sentenced for Plotting Terrorist Attack at Frisco Mall (Apr. 8, 2019).

101 *Id.*

The Azizi-Yarand case is an example of a state-level prosecution that disrupted a mass shooting before it occurred. But it is not the type of outcome we can expect to see in every juvenile matter. Not all juveniles who commit these types of offenses will be old enough to immediately qualify for prosecution as adults. Furthermore, prosecuting juveniles at the state level in terrorism matters comes with its own challenges, such as the unavailability of CIPA, which only applies at the federal level.

In the post-*Dimaya* world, prosecutors need to consider all available juvenile prosecution options at both the state and federal levels. If they pursue a state-level prosecution, they will also need to closely evaluate the applicable discovery rules in the jurisdiction, particularly for any classified information that may have been collected in a federal terrorism investigation. CIPA—which is used to protect classified information during criminal proceedings—does not apply at the state level. Navigating the challenges related to charging options, discovery, and sentencing will be crucial to the success of the case.

VIII. Conclusion

Rehabilitation is part of the DNA of the Juvenile Justice and Delinquency Prevention Act. And while there are benefits to rehabilitation in many juvenile proceedings, the statute also recognizes the need for a more stringent response when certain crimes are alleged: The statute provides a list of enumerated drug and firearms offenses that automatically provide a basis for charging or transferring to adult status. Notably absent from this list are terrorism offenses. While crimes of violence also provide a basis to charge or transfer to adult status, conspiracies (including conspiracies to commit terrorism offenses) are also notably not included in the definition of crime of violence. As a result, prosecutors who investigate juveniles in terrorism matters, and who seek to disrupt and prevent acts of terrorism, will need to find creative and effective solutions to ensure that juvenile offenders are appropriately disrupted and hopefully set on a productive path that will also keep our communities safe.

About the Author

Bridget Behling is a Deputy Chief in the National Security Division, Counterterrorism Section (CTS). She joined the Section in 2009 through the Attorney General's Honors Program. During her time with CTS, she has served as a Regional Anti-Terrorism Advisory Council Coordinator, and completed a year-long detail assignment to the Office of the Assistant Attorney General for National Security. She also completed two detail assignments to the United States Attorney's Office for the Dis-

trict of Columbia. She graduated from Tufts University and American University's Washington College of Law.

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Transnational Violent Extremism: A Global and Local Problem

Jacob Warren and Thomas E. Brzozowski
Counterterrorism Section
National Security Division

I. Introduction

The phrase "lone wolf attacker" has become a term of morbid familiarity to most people. Both the United States and other countries have experienced domestic terrorism attacks by individuals seemingly acting alone. The Federal Bureau of Investigation's (FBI) own risk assessment is that terrorist attacks from lone actors pose the greatest national security threat to the United States.[1] As FBI Director Christopher Wray testified on September 21, 2021:

> Preventing terrorist attacks remains our top priority—both now and for the foreseeable future. Today, the greatest terrorist threat we face here in the U.S. is from what are, in effect, lone actors. Because they act alone and move quickly from radicalization to action—often using easily obtainable weapons against soft targets—these attackers don't leave a lot of "dots" for investigators to connect, and not a lot of time in which to connect them. We continue to see individuals radicalized here at home by jihadist ideologies espoused by foreign terrorist organizations like ISIS and al Qaeda—what we would call homegrown violent extremists. But we're also countering lone domestic violent extremists radicalized by personalized grievances ranging from racial and ethnic bias to anti-government, anti-authority sentiment to conspiracy theories. There is no doubt about it, today's threat is different from what it was 20 years ago—and it will almost certainly continue to change. And to stay in front of it, we've got to adapt, too. That's why, over the last year and a half, the FBI

[1] *Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11: Hearing Before the S. Homeland Sec. and Gov't Affs. Comm.*, 117th Cong. (2021) (statement of Christopher Wray, Dir., FBI).

has pushed even more resources to our domestic terrorism investigations.[2]

Case studies from planned and carried out mass casualty attacks show that—although the attacks were committed alone—the attacker's pathway to targeted violence was often a journey not taken alone. The process by which someone goes from grievance, to ideation, to research and planning, to preparation, to breach, and then to attack is often spurred along by like-minded individuals.[3] While the eventual attacker exists within one country's borders, the often-small group of online collaborators is spread across the globe.

The concept of individuals from one country radicalizing citizens from another is not new for prosecutors and law enforcement working in the international terrorism arena. The distinctions emerging in domestic terrorism cases appear to be the two-way nature of radicalization as well as the blended ideology amongst individuals on the pathway to commit a targeted act of violence. In this article, we first describe how lone actor domestic terrorism attacks are a transnational problem. Next, because of the cross-border communication and inspiration often present in domestic terrorism attacks, we discuss the need for global partnerships and the challenges that are inherent in these partnerships. Finally, we discuss the importance of local solutions, including Threat Assessment and Threat Management (TATM) programs from the perspective of prosecutors.

II. Lone actors that really aren't alone

Case studies point toward the disturbing reality that mass shooters not only draw lethal inspiration from each other, but they also adopt each other's tactics and ideology. A recent horrific example can be seen in the May 14, 2022 attack in Buffalo, New York. The shooter in Buffalo, who murdered 10 people and injured 3 others, copied many of the tactics and much of the manifesto of the shooter in Christchurch, New Zealand.[4] The

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[2] *Id.*

[3] As discussed in another article in this edition, the pathway to targeted violence is a series of steps an attacker often (but not always) goes through, in sequential order, before committing an attack. Karie Gibson, *Pathway to Targeted Violence: Can Early Intervention Work?*, 71 DOJ J. Fed. L. & Prac., no. 2, 2023; *see* J. Reid Meloy, The Psychology of Stalking: Clinical and Forensic Perspectives 175, 189–90 (1998); *see generally* Frederick S. Calhoun & Stephen Weston, Contemporary Threat Management: A Practical Guide for Identifying, Assessing, and Managing Individuals of Violent Intent (2003).

[4] N.Y. State Off. of the Att'y Gen., Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022, at 1 (2022).

shooter in El Paso, Texas, who murdered 23 people and injured 24 others at a Walmart on August 3, 2019, also cited his support for the shooter in Christchurch, New Zealand.[5] The shooter in Christchurch, New Zealand was inspired by the shooter in Norway, who murdered 77 people in Oslo and Utøya in 2011 in furtherance of his white supremacist ideology.[6]

These attackers were ideologically motivated not only to kill minorities but also to spur along more violence throughout the world after their attack was complete. The FBI's own research on past attacks shows that domestic terrorists seeking to inspire and instigate more violence are present in the majority of cases. In a study of lone offender attacks, the FBI found that 96% of attackers produced content by video or in writing for others to view.[7] The common thread of these recent attacks appears to be a two-part motivation, that is, to kill as many people as possible and to motivate others (both inside and outside their own country) to commit further attacks.

The links between these recent attackers, who span across the globe but share their racial hatred as motivation, are visible in the evidence (including manifestos and videos) they leave behind. From an investigative standpoint, however, the international links are also important in understanding the radicalization process. The pathway to radicalization often occurs in an online forum whose participants are spread across the globe.[8]

Although not as publicized, recently thwarted would-be mass casualty attackers also show international links on their pathway to targeted violence. For example, Ethan Melzer, who was recently sentenced to 45 years' imprisonment in the Southern District of New York for a thwarted terrorist attack, participated in online chat forums as he furthered his neo-Nazi and satanic ideology for a future terrorist attack.[9] One of Melzer's co-conspirators was located in Canada.[10] In line with many other terrorists with a white supremacist ideology, Melzer also had the stated goal of spurring on more attacks across the globe in order to create a race

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5 *Id.* at 19.

6 *Id.* at 17.

7 FBI, Nat'l Ctr. for the Analysis of Violent Crime, Lone Offender: A Study of Lone Offender Terrorism in the United States (1972–2015), at 39 (2019).

8 New York State Office of the Attorney General, *supra* note 4, at 3.

9 Indictment at ¶ 2, United States v. Melzer, 1:20-cr-314 (S.D.N.Y. June 22, 2020), ECF No. 6.

10 United States Sentencing Submission at 8 n.1, United States v. Melzer, 1:20-cr-314 (S.D.N.Y Feb. 17, 2023), ECF No. 159.

war.[11] Melzer also cited support of the attacks of previous mass shooters, including the June 2016 Pulse Nightclub shooting and the October 2017 Las Vegas mass shooting.[12]

In December 2021, another planned neo-Nazi terrorist attack in Brazil, with an intended target of public schools, among other places, was thwarted.[13] Beginning earlier in 2021, law enforcement in the United States passed leads to Brazil after learning of "neo-Nazi groups using U.S.-based online platforms to call for violence against Jewish and black civilians."[14] Based on the information that U.S. law enforcement provided, authorities in Brazil executed 31 search warrants and 4 arrests.[15] Law enforcement in Brazil recovered "homemade explosives, weapons, Nazi paraphernalia, and detailed plans of future attacks."[16]

As prosecutors working on domestic terrorism cases, we are often privy to cases involving juveniles where, thankfully, individuals were stopped before committing a mass casualty attack—often through the incredible and persistent work of law enforcement and local prosecutors. Many of those cases, at least in the United States, are under seal in juvenile or family court. In these near-miss cases too, the pathway to radicalization often occurred in an online forum. That online forum is often multinational with respect to juveniles as well. Juveniles on the pathway to committing a domestic terrorism attack present a unique set of challenges. And juveniles committing, or on the pathway to committing, an act of domestic terrorism is a problem that is not unique to the United States.

In December 2020, for example, authorities in Singapore detained a 16-year-old who planned to attack two mosques on the anniversary of the Christchurch attack.[17] According to the investigation in Singapore, the 16-year-old was radicalized online, had already decided which two mosques he was going to attack based on his own research, and had drafted a detailed manifesto.[18] In Estonia, one of the leaders of a major

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11 *Id.* at 21.

12 *Id.* at 7.

13 *Brazil, ICE HSI Investigation Prevents a Neo-Nazi Group's Planned Mass Casualty Attack on New Year's Eve*, U.S. Immigr. & Customs Enf't (Dec. 17, 2021), https://www.ice.gov/news/releases/brazil-ice-hsi-investigation-prevents-neo-nazi-groups-planned-mass-casualty-attack.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Country Reports on Terrorism 2020: Singapore*, Bureau of Counterterrorism, U.S. Dep't of State, https://www.state.gov/reports/country-reports-on-terrorism-2020/singapore/ (last visited June 20, 2023).

18 Press Release, Singapore Ministry of Home Affs., Detention of Singaporean Youth Who Intended to Attack Muslims on the Anniversary of Christchurch Attacks in New

neo-Nazi network—a juvenile—plotted with others to carry out terrorist attacks in the United States, including in Las Vegas.[19] In the Melzer case too, the FBI believed that a juvenile was a co-conspirator in Canada whom Melzer was talking to online.[20]

Regarding both juveniles and adults, the research and case studies show that the six steps on the pathway to targeted violence do not take place overnight, and that the actors spent considerable time on the path to targeted violence before committing an attack.[21] As an FBI report states—

> Clinical and forensic data on adult and adolescent mass murder . . . will reveal that virtually all of these acts are premeditated, rather than impulsive, violence. Two obvious signs indicate this is so: the planning and preparation for days, weeks, or months, sometimes recorded by these offenders and often observed by others, and the utter lack of emotion witnessed by survivors while the perpetrators committed their crimes.[22]

Although the full pathway timeline can be months or years, case studies show that the timeline could be condensed greatly once the attacker moves from thought to action (that is, from grievance and ideation to planning and preparation).[23] Accordingly, while there can be time in the initial stages of radicalization, investigative steps that result in a disruption are needed quickly when an attacker begins preparation.

III. Global partnerships for a global problem

The transnational link between "lone actor" domestic terrorists requires partnerships and cooperation in the international community. Information sharing is perhaps one of the most important tools. Before addressing the benefits of these partnerships, it is important to understand some of the challenges and complications here in the United States. Some of these include the significant differences in or lack of domestic legal regimes applicable to transnational domestic violent extremism (DVE)

Zealand (Jan. 27, 2021).

19 Michael Kunzelman & Jari Tanner, *He Led a Neo-Nazi Group Linked to Bomb Plots. He Was 13*, Associated Press (Apr. 11, 2020), https://apnews.com/general-news-7067c03e1af0b157be7c15888cbe8c27.

20 United States Sentencing Submission, *supra* note 10, at 8 n.1.

21 *See* Molly Amman et al., FBI, Nat'l Ctr. for the Analysis of Violent Crime, Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks 4 (2016).

22 *Id.*

23 *Id.* at 25.

throughout the international community, the legal regime governing the designation of foreign terrorist organizations in the United States, and distinctions in online content moderation between the United States and many of its foreign partners. Despite the challenges, international partnerships are critical for information sharing and holding significant domestic terrorism actors accountable.

A. Differing domestic legal regimes regarding domestic terrorism

Although many countries, including the United States, have antiterrorism legislation that applies to DVE-related offenses in a domestic context, prosecutors may confront issues in applying the same statutes to target transnational DVE activity. In some countries, such as the United Kingdom, antiterrorism statutes are principally directed against individuals, making it more challenging to hold the broader groups to which attackers may belong accountable.[24] Proving culpability for a group or its leaders for a member's actions is also difficult in Canada and the United States. On the other hand, in other countries such as Germany, terrorism-related offenses may not be chargeable against attackers with no formal or material ties to a structured terrorist organization.[25] Likewise, in Belgium, "while the same anti-terrorism legislation applies to any terrorist threat, whatever its ideological motivation, prosecutors must prove an individual defendant's links to an organised group in order to secure a conviction."[26] Finally, a number of jurisdictions criminalize activity that may lack terroristic intent as an element but concern behavior like incitement or other speech-related criminal activity occurring primarily on the internet.[27] These statutes, however, vary widely in the nature of online activity proscribed by law, with some countries outlawing activities like the "glorification" of terrorism while others, like the United States,

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[24] *See, e.g.*, Terrorism Prevention and Investigation Measures Act, 2011, c. 23 (U.K.), https://www.legislation.gov.uk/ukpga/2011/23/contents/enacted.

[25] *See, e.g.*, United Nations Off. on Drugs and Crime, Manual on Prevention of and Responses to Terrorist Attacks on the Basis of Xenophobia, Racism and Other Forms of Intolerance, or in the Name of Religion or Belief 88 (2022).

[26] Int'l Inst. for Just. and the Rule of L., IIJ Criminal Justice Practitioner's Guide: Addressing Racially or Ethnically Motivated Violent Extremism 37 (2021).

[27] *See* Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, Council on Foreign Rels. (June 7, 2019), https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons.

criminalize only a narrow category of speech-related criminal activity.[28]

B. Limitations of group designations in the United States

As previously noted, the United States does not have a legal mechanism to designate purely domestic terrorist organizations. The same is not true for foreign terrorist organizations (FTOs). The U.S. Secretary of State is authorized to designate certain groups as "foreign terrorist organizations."[29] Before making such a determination, the Secretary must find that—

- the organization is a foreign organization;
- the organization engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism; and
- the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.[30]

Although the Secretary makes the final decision, an FTO designation usually involves extensive inter-agency collaboration.[31] Once a group has been designated as an FTO, the organization may seek judicial review of the Secretary's determination in the U.S. Court of Appeals for the District of Columbia Circuit.[32] A few groups currently designated as FTOs include Boko Haram, al-Qa'ida in the Arabian Peninsula (AQAP), and al-Shabaab.[33] The legal consequences of being designated an FTO are substantial. For example, domestic financial institutions generally are required to block an FTO's funds, members of FTOs who are aliens may be removed from the United States, and anyone in the United States who knowingly provides material support or resources to the group can be imprisoned for up to 20 years or for life if the death of any person results.[34]

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[28] Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, 43 A.B.A. Hum. Rts. Mag., No. 4, 2018, at 3.
[29] 8 U.S.C. § 1189.
[30] 8 U.S.C. § 1189(a)(1).
[31] Audrey Kurth Cronin, Cong. Rsch. Serv., The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations 2 (2003).
[32] 8 U.S.C. § 1189(c)(1).
[33] *Foreign Terrorist Organizations*, U.S. Dep't of State, https://www.state.gov/foreign-terrorist-organizations/ (last visited June 20, 2023).
[34] 18 U.S.C. § 2339B.

The United States lacks a statutory basis to designate domestic organizations in the same manner as foreign terrorist organizations. Other countries, however, do not have the same legal constraints when it comes to proscribing domestic terrorism groups. The United Kingdom, for example, proscribed the Sonnenkrieg Division (SKD) and Feuerkrieg Division (FKD) in February and July 2020, respectively.[35] An administrative banning order in Germany permits targeting domestic terrorism groups who openly oppose the German Constitution.[36] France, Finland, and Canada have also, in recent years, banned or proscribed certain domestic terrorism groups. Without the same prosecutorial toolset, there is a unique challenge in working with international partners facing the same problem, and often the same group, given the number of domestic terrorism groups operating in the United States.

Another challenge in targeting domestic terrorism groups is the sheer number and fluidity of the groups themselves. Unlike the Islamic State in Iraq and Syria (ISIS) and al-Qa'ida, many domestic terrorists motivated by white supremacist ideology are members of amorphous groups. These racist groups often pop up and form only to quickly change their name. They also do not typically have much of a command-and-control structure.[37] Rather, the groups might have a few members who are well-known in the online community. It is also not uncommon to see groups that have gained some notoriety in online circles to splinter into smaller groups.

C. Online content moderation and First Amendment considerations

The U.S. National Security Strategy recognizes that internet-based communications platforms can be used for terrorist purposes such as recruitment and mobilization to violence.[38] To combat this activity, the United States is investing millions of dollars in data-driven violence pre-

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35 *Proscribed Terrorist Organisations*, U.K. Home Off. (Nov. 26, 2021), https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations–2/proscribed-terrorist-groups-or-organisations-accessible-version#list-of-proscribed-international-terrorist-groups (last visited June 20, 2023).

36 *Number of Right-Wing Extremists in Germany on Rise, Security Report Suggests*, DW (July 9, 2020), https://www.dw.com/en/germany-right-wing-extremists/a-54105110.

37 *Racially and Ethnically Motivated Violent Extremism: The Transnational Threat: Hearing Before the Subcomm. on Intel. and Counterterrorism of the H. Comm. on Homeland Sec.*, 117th Cong. 19 (2021) (statement of John T. Godfrey, Acting Coordinator for Counterterrorism, U.S. Dep't of State).

38 Joseph R. Biden, The White House, National Security Strategy of the United States of America 30 (2022).

vention efforts.[39] In addition, the United States is working with civil society, the private sector, and like-minded governments to address terrorist and violent extremist content online, including through innovative research collaborations.[40]

At the international level, the United States works with the industry-led Global Internet Forum to Counter Terrorism, the United Nations-affiliated Tech Against Terrorism, and the Christchurch Call to counter the use of the internet and technology for terrorist purposes.[41] The United States also provides assistance to foreign partners to improve the digital investigation capabilities of our partners in law enforcement—including investigation capabilities on social media and the Dark Web—through multiple programs such as the Anti-Terrorism Assistance Program.[42] Given that one effective way to neutralize harmful speech is by producing a larger number of better alternatives and counter-speech programs—which the U.S. government supports—the United States helps international partners develop their own online and traditional media countering violent extremism messages and products for local audiences to challenge terrorist narratives and dissuade people from supporting terrorist organizations.

Although the United States is committed to robust collaboration with the international community to combat terrorist use of the internet, its approach is tempered by an ironclad resolve to protect freedom of speech and expression. In response to the unique challenges of the digital age, some have called for curbs on certain kinds of speech. The United States Constitution, however, provides some of the broadest protections for speech in the world. That said, within that framework, the United States remains committed to engaging affected communities and developing robust partnerships with social media companies and other internet service providers. The U.S. government regularly engages with technology companies to improve information sharing and promote voluntary collaboration to remove terrorist content, based on their own terms of service.[43]

Finally, the United States will not sit idly by when hateful expression transforms into incitement to violence or acts of violence. In the United

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39 *Id.* at 31.

40 *Id.*

41 *Examining Social Media Companies' Efforts to Counter On-Line Terror Content and Misinformation: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 9, 45 (2019) (statements of Monika Bickert, Head of Glob. Pol'y Mgmt., Facebook, and Nick Pickles, Glob. Senior Strategist for Pub. Pol'y, Twitter).

42 Bureau of Counterterrorism, U.S. Dep't of State, Anti-Terrorism Assistance (ATA) Program (Summary) (2016).

43 Godfrey, *supra* note 37, at 1.

States, robust laws and judicial infrastructure ensure that these offenses will be deterred and punished.

D. Benefits of global partnerships: information sharing

Recently, the White House released its first ever *National Strategy for Countering Domestic Terrorism*.[44] The National Strategy has four pillars: understanding and sharing domestic terrorism-related information; preventing recruitment and mobilization to violence; disrupting and deterring domestic terrorism activity; and confronting long-term contributors to this problem.[45] The first pillar is critical in domestic terrorism cases given the interconnectivity among subjects in different countries. Many of the cases discussed in this article demonstrate that information learned locally could impact another jurisdiction globally. The disrupted terrorist attack in Brazil is a great example of the power of timely information received from a foreign partner in domestic terrorism cases.

Both the content and the timeliness of the information received are important. Law enforcement agents should approach a domestic terrorism investigation expecting to find contacts with other actors in a foreign country. Many of the cases discussed in this article show that a would-be attacker who is thwarted in one country could very well have communications with a would-be attacker in another country. Removing barriers to this information being shared internationally, from law enforcement to law enforcement, helps ensure that prosecutorial steps taken to mitigate threats are not too late.

In addition to informal means of obtaining information, obtaining evidence and information pursuant to treaties, multilateral conventions, and executive agreements is occurring more frequently in domestic terrorism investigations. In the United States, the Office of International Affairs (OIA), housed within the Criminal Division of the Department of Justice (the Department), is the Central Authority for providing mutual legal assistance in criminal matters.[46] OIA functions both to assist foreign partners in obtaining evidence from the United States (which can be used in a prosecution in the foreign partner country) as well as obtaining evidence from the foreign partner country (which can be used in a prosecution in

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[44] *See generally* Nat'l Sec. Council, The White House, National Strategy for Countering Domestic Terrorism (2021).

[45] *Id.* at 7.

[46] *Office of International Affairs*, U.S. Dep't of Just., https://www.justice.gov/criminal-oia (last visited June 20, 2023).

the United States).[47] This process is critical for the Department and its foreign counterparts in building investigations that result in significant domestic terrorism prosecutions.

E. Identifying leaders and agitators, and supporting extraditions

Another benefit to international partnerships is the ability to identify significant leaders and agitators who are inspiring would-be domestic terrorism actors across the globe. While these actors may join different domestic terrorism groups that frequently rebrand, as noted above, they are prolific in creating and sharing content intended to radicalize others to mass casualty acts of violence. Often, these particular actors take a great deal of pride in having radicalized someone else. In our experience, these actors, who take on a type of leadership role, are often identified when multiple international partners detect the same person as playing a significant role in the radicalization process of people in their country.

It is important to focus long-term investigative and prosecutorial resources that result in charges against these domestic terrorism actors. Supporting extraditions for these types of domestic terrorism actors can also have a strong deterrent impact in discouraging actors from conspiring and prompting others in a foreign country to commit a mass casualty attack. Weeks after the terrorist attacks on September 11, 2001, the United Nations Security Council passed Resolution 1373, which reflects the importance of states prosecuting or extraditing terrorist actors.[48] In the United States, OIA assists and guides both federal and state prosecutors on extradition requests from a foreign country. For federal prosecutors in the United States, "[e]very formal request for international extradition based on Federal criminal charges must be reviewed and approved by OIA."[49] Similarly, OIA advises and supports federal prosecutors who are handling foreign extradition requests for fugitives found in the United States.[50]

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47 *Id.*

48 S.C. Res. 1373, at 2 (Sept. 28, 2001) ("all States shall: . . . Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice . . . ."); *see also* United Nations Off. on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism, at 75, U.N. Sales No. E.09.IV.2 (2009).

49 U.S. Dep't of Just., Justice Manual 9-15.210.

50 *Office of International Affairs*, *supra* note 46.

IV. Local solutions needed

Preventing acts of domestic terrorism typically requires quick and thoughtful law enforcement action. In domestic terrorism cases, time is almost always of the essence. Law enforcement and prosecutors are accustomed to intaking a case and then devoting nearly all their time and resources trying to mitigate that potential threat. One alarming trend we have seen over the past year is the increase in threats to religious groups, racial minorities, elected officials, law enforcement, and judges.[51] These cases often require immediate law enforcement and prosecutorial resources because the threats involve a desire to murder or otherwise harm individuals. Subpoenas, search warrants, interviews, and emergency disclosure orders are often utilized in these cases. While some actors are content with communicating a threat to murder others and seeing the harm it causes (that is, they may not have the intent to carry out their threat to murder), others appear intent on carrying out their threats.

This constant cycle of working around the clock to mitigate potential domestic terrorism actors will likely continue for the foreseeable future. It is necessary work. One mass shooting prevented at a school, place of worship, place of employment, or public event is worth all the effort. A million times over it is worth the effort, but it cannot be the only solution. Even if an attack is thwarted at the breach or preparation stage through heroic efforts of law enforcement, the subject has still been fully radicalized to violence. In cases involving juveniles in particular, detention is often a short-term solution to a long-term problem. Moreover, for every domestic terrorism actor that is stopped at the breach or preparation stage, more subjects are in the pipeline (that is, in the earlier stages of the pathway and progressing toward an attack). An example would be the Buffalo shooter in May 2020 and forward over the next two years.

The key question then becomes this: How does one off-ramp potential domestic terrorism actors who are early on in the pathway to targeted violence? That problem requires a local solution because it necessitates human intervention for a subject who is often living almost exclusively in an online reality. Prosecution is frequently not an option in the early stages on the pathway because often, a crime has not been committed (at least not in the United States). Law enforcement and prosecutors, though, are rightly concerned when they receive information that someone is, for example, espousing racist ideology and demonstrating an obsession and glorification of previous mass shooters. Left unchecked and undeterred

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[51] *See* FBI & U.S. Dep't of Homeland Sec., Strategic Intelligence Assessment and Data on Domestic Terrorism 29–40 (2021).

in their own violent and racist online reality—an echo chamber as it has been called—there is nothing to stop the subject from progressing on the pathway to an attack.[52]

In the United States, the FBI and the Department of Homeland Security have been investing in TATM principles to prevent mass casualty acts of violence. The FBI has supported TATM teams in 26 field offices throughout the United States. These multidisciplinary teams operate at the local level and are designed to incorporate participation from federal and state prosecutors, local law enforcement, mental health professionals, probation, parole, social services, and school districts (the latter most often with respect to juveniles). These TATM teams have experienced success in mitigating subjects who were on the path to targeted violence through a multidisciplinary approach that does not focus exclusively on prosecution.[53] Having this flexibility, and local resources available from non-law enforcement entities, is critical to mitigating threat actors who have not reached the latter stages on the path to targeted violence.

While the problem of stopping potential domestic terrorism actors requires a local solution at the human intervention level, there is still a great need for international partnerships here, too. A prevention program being utilized in Australia, the United Kingdom, or some other country might have success in the United States. The case studies demonstrate that domestic terrorism actors operate in an online sphere that is not limited to the borders of their own country. Given these international connections in domestic terrorism cases, it would be shortsighted not to draw from the experience of other countries who are facing the exact same problem. Lessons learned, including both missteps and success stories, from international partners are critical for continuing to develop programs that work.

V. Conclusion

The local threat of domestic terrorism has become increasingly transnational. As the Secretary General of the United Nations recently observed,

> The danger of these hate-driven movements is growing by the day. Let us call them what they are: white supremacy and neo-Nazi movements are more than domestic terror threats; they are becoming a transnational threat.

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52 *See, e.g.*, Ines von Behr et al., Radicalisation in the Digital Era, at xii (2013) ("[O]ur research supports the suggestion that the internet may act as an 'echo chamber' for extremist beliefs; in other words, the internet may provide a greater opportunity than offline interactions to confirm existing beliefs.").

53 Amman et al., *supra* note 21, at 70–81.

> . . . Today, these extremist movements represent the number one internal security threat in several countries. Individuals and groups are engaged in a feeding frenzy of hate—fundraising, recruiting and communicating online, both at home and overseas, travelling internationally to train together and network their hateful ideologies.[54]

President Biden echoed this sentiment in the *National Strategy for Countering Domestic Terrorism* and reinforced the necessity of global action to confront the threat:

> In today's interconnected world, very little remains wholly within a single country's borders, and domestic terrorism is no exception. . . . Aspects of the domestic terrorism threat we face in the United States, and in particular those related to racially or ethnically motivated violent extremism, have an international dimension. Identifying, confronting, and addressing that international dimension must be part of a comprehensive approach to tackling the domestic terrorism challenge.[55]

Given the dynamic and lethal danger that these phenomena pose, international partnerships are a crucial component of any solution. Working in concert, the global community can leverage its collective expertise both to harmonize its efforts at the international level to combat this pernicious threat as well as to craft local solutions to prevent and mitigate it.

About the Authors

Jake Warren is a 2006 graduate from North Carolina State University and 2009 graduate of Duke Law School. Jake served in the Marine Corps from 2009 to 2012 as a Judge Advocate. From 2012 to 2016, Jake worked at a global law firm in Manhattan focusing on securities litigation and enforcement. In July 2016, Jake was hired as an Assistant United States Attorney in the Southern District of New York (SDNY). As a federal prosecutor, Jake prosecuted a wide array of criminal cases, focusing mostly on violent and organized crime. In July 2022, Jake left SDNY and joined the Counterterrorism Section (CTS) of the National Security Division in the Department of Justice. Within CTS, Jake serves in the Domestic Terrorism Unit as an operations and case coordinator.

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[54] António Guterres, Sec'y-Gen., United Nations, Statement Delivered at the Forty-Sixth Regular Session of the Human Rights Council (Feb. 22, 2021).
[55] National Security Council, *supra* note 44, at 17.

Thomas E. Brzozowski currently serves as the Counsel for Domestic Terrorism in the National Security Division of the Department of Justice. Tom received his Bachelor of Arts in International Relations from the College of William & Mary in 1996, after which he was commissioned as a Second Lieutenant in the U.S. Army. Tom spent three years as an artillery officer at Fort Bragg, North Carolina, before he was selected to attend William & Mary Law School under the auspices of the U.S. Army Funded Legal Education Program. After law school, Tom spent six years in Europe serving as an officer in the U.S. Army JAG Corps. He then left active duty and clerked for Judge Stanley Birch, Jr., at the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Before taking up his present position, Tom was an Assistant General Counsel in the FBI's Office of General Counsel. Tom holds a Master of Laws degree in National Security Law from the Georgetown University Law Center and a master's degree in security studies from the U.S. Army War College. He also is an adjunct professor at the George Washington University Law School and continues to serve as a JAG officer in the U.S. Army Reserves.

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The "Terrorism" Sentencing Enhancement and Its Application to Domestic Terrorism

John D. Cella
Trial Attorney
Counterterrorism Section
National Security Division

Craig R. Heeren
Deputy Chief
National Security & Cybercrime Section
Assistant United States Attorney
Eastern District of New York

I. Introduction

More than 20 years ago, Congress adopted a definition of "domestic terrorism" in the federal criminal code to sit alongside the definition of "international terrorism."[1] As a matter of law, therefore, criminal conduct occurring primarily in the United States that involves acts dangerous to human life, and which appears to be intended to intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect the conduct of government by mass destruction, assassination, or kidnapping, is domestic terrorism.[2] Despite identifying and defining the conduct, Congress has not enacted any federal criminal offense specifically targeting domestic terrorism per se. As a result, while federal prosecutors can charge several offenses directly associated with international terrorism, such as providing material support to a designated foreign terrorist organization (FTO),[3] no analogous offenses are available for prosecuting individuals involved in purely domestic terror-

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 802(a), 115 Stat. 272, 376.
[2] *Id.* (codified at 18 U.S.C. § 2331(5)).
[3] 18 U.S.C. § 2339B.

ism. Instead, prosecutors are often limited to charging more traditional criminal offenses, such as those related to firearms,[4] arson and explosives,[5] or homicide,[6] some of which may not adequately reflect the magnitude or seriousness of the criminal conduct.[7]

But when it comes to sentencing domestic terrorists, prosecutors are not so limited. Individuals convicted of acts that constitute domestic terrorism can be held fully accountable for the serious harm they cause and the grave nature of their conduct. As the Second Circuit observed, it is "Congress's considered judgment that terrorism is different from other crimes" and "represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal."[8] When faced with conduct that constitutes domestic terrorism, particularly acts of mass violence and death like the 1995 Oklahoma City Federal Building bombing, the terrorism enhancement in the U.S. Sentencing Guidelines (U.S.S.G. or the Guidelines) allows for a court to sentence as a terrorist a defendant convicted of any felony offense where that defendant had a terroristic intent or motive. Specifically, U.S.S.G. § 3A1.4 provides for a significant enhancement that applies to defendants convicted of a broad range of offenses where the crimes that those defendants committed or promoted had the purpose of coercing or retaliating against a government or, in certain cases, intimidating a civilian population. Under section 3A1.4, defendants convicted of offenses in connection with domestic terrorism can—and based on the proper application of the Guidelines, should—face potential sentences as steep as those faced by international terrorists.

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[4] *E.g.*, 18 U.S.C. § 924(c) (use of firearms in furtherance of crimes of violence).

[5] *E.g.*, 18 U.S.C. § 844(i) (malicious damage or destruction by fire or explosive).

[6] *E.g.*, 18 U.S.C. § 51 (homicide offenses).

[7] Prosecutors have also charged civil rights offenses including those targeting hate crimes, in connection with attacks perpetrated by domestic violent extremists where there is evidence of a particular bias-motivation. *See, e.g.*, United States v. Roof, 10 F.4th 314, 333, 406 (4th Cir. 2021) (affirming convictions under 18 U.S.C. §§ 247 and 249 for Dylann Roof, who shot and killed nine members of a historic Black church in Charleston, South Carolina, in 2015), *cert. denied*, 143 S. Ct. 303, 303 (2022); Superseding Indictment at 1, United States v. Bowers, 2022 WL 1032735, No. 18-CR-292 (W.D. Pa. Oct. 31, 2018), ECF No. 45 (including hate crime charges against defendant who perpetrated 2018 mass shooting at the Tree of Life Synagogue in Pittsburgh, Pennsylvania).

[8] United States v. Saleh, 946 F.3d 97, 112–13 (2d Cir. 2019) (cleaned up). The Second Circuit's ruling was made in the context of a case surrounding a defendant's involvement in international terrorism—support for the Islamic State of Iraq and al-Sham (ISIS)—but the court's reasoning is not so restricted and applies equally to domestic terrorism.

The section 3A1.4 terrorism enhancement includes an *adjustment* provision that can ratchet up a defendant's potential sentence, pushing the Guidelines range to the far corner of the sentencing table, as well as a more flexible *departure* provision that allows for sentences equally as severe. It is mandatory for federal courts to apply the section 3A1.4 adjustment to the Guidelines calculation at sentencing when the facts of the case meet the requirements of the provision. Where the adjustment is not mandatory, section 3A1.4's Application Note 4 provides for an "encouraged" upward departure allowing for a correspondingly more significant sentence when the conduct at issue is of the same type, nature, and seriousness that it warrants consideration as "terrorism."[9]

While section 3A1.4 has been applied most often to offenses related to international terrorism, there is a substantial and growing body of precedent applying the enhancement to domestic terrorism.[10] As reflected in those cases, although the court must consider the intent behind the criminal offense to determine whether it is terrorism, the enhancement is strictly viewpoint neutral. Section 3A1.4 has been and should continue to be applied irrespective of defendants' political persuasions or the ideological valence of their beliefs. This is particularly important because individuals adopting extremist and radical ideologies at both ends of the political spectrum have perpetrated criminal acts of violence intended to coerce government policy or civilian populations.

Given the potentially blurry line between lawful political activism and politically motivated violence, it can sometimes be more difficult to discern or prove the requisite terroristic intent on the part of defendants whose offenses are associated with domestic terrorism. Yet where the evidence does demonstrate such an intent, the language of section 3A1.4 indicates that the enhancement should be considered and applied.[11]

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[9] U.S.S.G. § 3A1.4 cmt. n.4.

[10] Available data that the U.S. Sentencing Commission compiled for fiscal years 2002–2021 indicates that the section 3A1.4 adjustment has been applied in at least 638 cases, with 425 of those cases occurring during the last 10 years of that timespan. *See* U.S. Sent'g Comm'n, Guideline Application Frequencies: Chapter Three Adjustments (Guideline Calculation Based), Fiscal Years 2002–2021. The authors' review of records in the "American Terrorism Study" database, an open-source collection of federal terrorism-related court that the University of Arkansas Terrorism Research Center compiled with funding from the U.S. Department of Justice's Office of Justice Programs, as well as a survey of available section 3A1.4 cases, suggests that the majority of cases where the section 3A1.4 adjustment has been applied involved international terrorism. *See* Terrorism Rsch. Ctr., Univ. of Arkansas, *ATS Data & Analysis*, https://terrorismresearch.uark.edu/data/ (last visited July 5, 2023).

[11] U.S.S.G. § 3A1.4.

Where a particular set of facts warrants a sentence less than that recommended by application of the terrorism enhancement, the sentencing court retains the ability to vary downward pursuant to the factors listed in 18 U.S.C. § 3553(a) in that particular case.[12] But such a variance should be a step subsequent to the court's application of the section 3A1.4 enhancement in qualifying cases, not a substitute for it.

II. The history of section 3A1.4 and its coverage of domestic terrorism

Although it has evolved to apply more broadly today, section 3A1.4 was originally drafted as part of the effort to combat international terrorism in the aftermath of the 1993 World Trade Center bombing and years of terrorist attacks in the Middle East. Congress first directed the creation of terrorism-specific sentencing guidelines for "international terrorism" in the Violent Crime Control and Law Enforcement Act of 1994,[13] which resulted in the U.S. Sentencing Commission's adoption of the original version of section 3A1.4.[14] In keeping with Congress's directive at that time, section 3A1.4 applied exclusively to "international terrorism."[15]

Following the April 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, a devastating act of homegrown domestic terrorism, Congress broadened the scope of terrorism offenses to which the enhancement applied, deliberately removing any limitation based on whether a defendant's offense "transcended national boundaries" or otherwise could be characterized as "international."[16] Specifically, in the An-

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12 18 U.S.C. § 3553(a).

13 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 ("The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime."). The Violent Crime Control and Law Enforcement Act also created the offense of "providing material support or resources to terrorists," codified at 18 U.S.C. § 2339A.

14 Although there had previously been an upward departure policy statement in U.S.S.G. § 5K2.15 for "terrorism" that allowed for a departure in cases where "the defendant committed the offense in furtherance of a terroristic action," the Sentencing Commission added a specific enhancement provision in section 3A1.4 labeled "International Terrorism." *See* U.S.S.G. app. C, amend. 526 (1995).

15 *Id.*

16 *See* U.S.S.G. app. C., amend. 539 (1996) (including the removal of "International" in the title of section 3A1.4, as well as the reference to the definition of international terrorism in 18 U.S.C. § 2331).

titerrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress replaced the requisite predicate for the enhancement, removing the enhancement's previous requirement that a defendant's offense constitute "international terrorism" and adding a new requirement that an offense constitute a "federal crime of terrorism."[17] Congress simultaneously defined this new category of offenses under the "federal crime of terrorism" label such that there were no geographic limitations.[18]

AEDPA's legislative history makes clear that Congress intentionally expanded the definition of "terrorism" applicable at sentencing to cover domestic terrorism, even though it did not create a domestic terrorism offense akin to 18 U.S.C. § 2339B's prohibition on providing material support or resources to designated FTOs—a substantive criminal provision that was also enacted as part of AEDPA.[19] According to a House Judiciary Committee Report, AEDPA established "a new definition of terrorism that will apply to international and domestic terrorist offenses, alike."[20] The House Judiciary Committee also noted that it was "necessary to define this category of offenses because there are three specific areas in the criminal code that rely on a statutory definition of terrorism . . . [including the] sentencing enhancement."[21] The definition was intended "to keep a sentencing judge from assigning a terrorist label to crimes that are truly not terrorist, and to adequately punish the terrorist

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17 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1293 [hereinafter AEDPA].

18 United States v. Garey, 546 F.3d 1359, 1362 n.3 (11th Cir. 2008) ("[The 1996 directive] required the Commission to amend the Sentencing Guidelines so that the adjustment in § 3A1.4 (formerly relating to 'international terrorism') applied more broadly to 'federal crimes of terrorism.'"); United States v. Salim, 287 F. Supp. 2d 250, 349 (S.D.N.Y. 2003) ("Congress intended to broaden the application of a terrorism enhancement beyond only acts of 'international terrorism,' by applying the terrorism enhancement to . . . offenses for which conduct occurred 'outside of the United States in addition to the conduct occurring in the United States.'"); United States v. Arnaout, 282 F. Supp. 2d 838, 843 (N.D. Ill. 2003) ("The amendment responded to a congressional directive that the existing international terrorism guideline be defined more broadly to include only federal crimes of terrorism." (emphasis omitted)).

19 When Senator Orrin Hatch, one of the legislation's sponsors in the Senate, introduced the bill, he stated, "I hope . . . that we can, perhaps, bring some peace to the survivors of [the Oklahoma City bombing] in that we can enact this antiterrorism legislation in their memory. . . . The legislation that Representative Hyde and I have negotiated represents a landmark bipartisan effort to prevent and punish acts of domestic and international terrorism." 142 Cong. Rec. S3,352 (daily ed. Apr. 16, 1996) (statement of Sen. Orrin Hatch).

20 H.R. Rep. No. 104-383, at 39 (1995).

21 *Id.*

for his offense."[22]

Congress provided for this new definition in section 2332b(g)(5) and simultaneously directed the Sentencing Commission to amend section 3A1.4 so that the adjustment for terrorism "only applies to Federal crimes of terrorism," that is, offenses meeting the statutory definition.[23] Consistent with Congress's direction, the Sentencing Commission amended section 3A1.4 in 1996 to provide for the application of the adjustment whenever an offense was a felony that "involved, or was intended to promote, a federal crime of terrorism," specifically indicating its intention that the adjustment apply the definition of "federal crime of terrorism" in section 2332b(g)(5).[24] Today, the language of that statutory definition continues to govern section 3A1.4's scope.

As discussed further below, Application Note 4 to section 3A1.4 also permits a discretionary upward departure for a defendant who has a terroristic motive but whose offense did not "involve" and was not "intended to promote" a "federal crime of terrorism," as required for the adjustment.[25] The Sentencing Commission added Application Note 4 in 2002, six years after expanding the reach of the enhancement to domestic terrorism offenses, at the same time as the Commission adopted other changes to base level Guidelines for certain offenses enumerated under section 2332b(g)(5)(B), including section 2339B.[26] There was no specific discussion of the Application Note 4 upward departure provision during the Sentencing Commission's hearings at the time, but the commentary associated with the amendments to the Guidelines indicates that Application Note 4 "adds an encouraged, structured upward departure . . . for offenses that involve terrorism but do not otherwise qualify" for the adjustment.[27] The commentary also stated that Application Note 4 pro-

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[22] *Id.* at 39, 93. Note that the House Report's discussion appears to relate directly to the definition of "terrorism" that Congress provided in 18 U.S.C. § 2331, but the relevant language regarding a defendant's intent "to influence the policy of a government by intimidation or coercion" is almost identical to the relevant intent prong in 18 U.S.C. § 2332b(g)(5)(A). Section 2331 also defines "terrorism" with respect to a defendant's intent "to intimidate or coerce a civilian population," which is identical to language used in Application Note 4(B) of section 3A1.4, as discussed below. *See* 18 U.S.C. § 2331(1)(B)(i) and (5)(B)(i).

[23] AEDPA, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303; *see also* U.S.S.G., amend. 539 (1996).

[24] *See* U.S.S.G. § 3A1.4(a); *id.* cmt. n.1.

[25] *See* U.S.S.G. § 3A1.4.

[26] *See* U.S.S.G., app. C, amend. 637 (2002) (adopting Application Note 4 and U.S.S.G. § 2M5.3).

[27] *Id.*; *see also* U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts 2,461 (2002) (containing nearly identical language

vided for an upward departure, rather than an adjustment, "because of the expected infrequency" of such cases, and "to provide the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis."[28]

III. Application of the terrorism enhancement

Section 3A1.4 calls for a significant and mandatory adjustment[29] to a defendant's Guidelines range where the defendant's offense of conviction "involved, or was intended to promote, a federal crime of terrorism."[30] Section 2332b(g)(5), in turn, defines a "federal crime of terrorism" as a crime that (1) constitutes a violation of one or more of a long list of enumerated federal statutes, and (2) "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[31] Where the section 3A1.4 adjustment applies, the sentencing court must increase the defendant's offense level by 12 levels, to at least level 32, while also setting the defendant's criminal history as category VI, the top of the scale.[32] As a result, the minimum Guidelines range for a defendant who receives the section 3A1.4 adjustment, no matter the underlying base offense guideline, is 210–262 months' imprisonment.[33]

Where a defendant's conviction did not "involve" and was not "intended to promote" an offense enumerated under section 2332b(g)(5)(B), Application Note 4 of section 3A1.4 provides for a discretionary but "encouraged"[34] upward departure that "would be warranted," depending on the offense of conviction and the defendant's specific intent.[35] Application Note 4 allows for an upward departure equal to, but not in excess of, the Guidelines calculation that would have resulted if the section 3A1.4

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describing Application Note 4 before the relevant amendment's formal adoption).

28 U.S.S.G., app. C, amend. 637 (2002).

29 *See* U.S.S.G. § 1B1.1(a) and (a)(3) (stating the court "shall determine . . . the guideline range as set forth in the guidelines . . . by applying the provisions of this manual," including "the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three," which includes section 3A1.4).

30 U.S.S.G. § 3A1.4(a); *see* U.S.S.G. § 3A1.4 cmt. n.1 (incorporating the definition of section 2332b(g)(5)).

31 18 U.S.C. § 2332b(g)(5)(A) and (B).

32 U.S.S.G. § 3A1.4(a) and (b); *id.* cmt. n.3.

33 U.S.S.G. ch. 5, pt. A (Sentencing Table), at offense level 32 and criminal history category VI.

34 U.S.S.G., app. C, amend. 637 (2002).

35 U.S.S.G. § 3A1.4 cmt. n.4.

adjustment had been applied.[36] Thus, Application Note 4 affords more discretion to a sentencing court determining whether to apply the enhancement and upwardly depart, as well as more latitude when determining the magnitude of any resulting departure. But Application Note 4 still allows for sentences equally as punitive as section 3A1.4's adjustment provision.

A. Enumerated terrorism offenses under section 2332b(g)(5)(B)

For purposes of section 3A1.4, the first requirement of the definition of "federal crime of terrorism" is that the offense is a violation of a statutory provision specifically enumerated in section 2332b(g)(5)(B).[37] The long list of enumerated offenses ranges from core terrorism offenses, such as providing material support or resources to a designated FTO in violation of 18 U.S.C. § 2339B, to less frequently charged offenses, such as acts of violence against railroad carriers and mass transportation systems in violation of 18 U.S.C. § 1992, or the sabotage of nuclear facilities or fuel in violation of the Atomic Energy Act.[38] According to one analysis, 51 of the 57 enumerated offenses can apply to both international and domestic terrorism cases, while 6 require an international nexus as an element of the offense.[39]

Determining whether a defendant's offense of conviction is enumerated is often a prosecutor's starting point when considering the potential applicability of section 3A1.4. Yet conviction for an enumerated offense is not sufficient on its own to meet the definition of "federal crime of terrorism," because the two-part definition also requires proof of "calculation."[40] At the same time, conviction for an enumerated offense is not strictly required, for three reasons. First, a defendant may have been convicted of a different, unenumerated offense, but the defendant's "relevant

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36 *Id.*

37 United States v. Chandia, 514 F.3d 365, 375–76 (4th Cir. 2008) ("The key term, 'a federal crime of terrorism,' is defined to consist of two elements: (1) the commission of one of a list of specified felonies . . . and (2) a specific intent requirement, namely, that the underlying felony was 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.'").

38 18 U.S.C. § 2339B; 18 U.S.C. § 1992; 42 U.S.C. § 2121 or 2284 (Atomic Energy Act).

39 *See* Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, Lawfare (Feb. 16, 2021), https://www.lawfaremedia.org/article/how-federal-government-investigates-and-prosecutes-domestic-terrorism.

40 18 U.S.C. § 2332b(g)(5)(A).

conduct" might have "included" the commission of an enumerated offense and thus, "involved" a federal crime of terrorism.[41] Second, a defendant may have committed an offense that was not enumerated, but that was nevertheless "intended to promote" an enumerated offense not committed by the defendant. Third, a discretionary upward departure based on Application Note 4 may still be warranted even where no enumerated offense was involved or intended.

Although section 2332b(g)(5)(B) contains a long list of predicate offenses, it does not necessarily cover all crimes that may fit a lay person's understanding of terrorism. For example, certain crimes that are explicitly motivated by political ideology or intended to influence the government, such as treason[42] or seditious conspiracy,[43] are not enumerated offenses that would satisfy the definition of a "federal crime of terrorism." The list of offenses also excludes numerous other commonly prosecuted offenses that are often committed as part of an act of terrorism, such as the use or possession of a firearm in furtherance of a crime of violence. In such circumstances, proof that the defendant "intended to promote" one of the enumerated offenses, and that the enumerated offense was "calculated" to influence or retaliate against the government as discussed below, may be necessary to apply section 3A1.4 and reach an appropriately significant sentence.

B. Section 3A1.4's requirement that the defendant's offense "involved, or was intended to promote" an enumerated terrorism offense

As indicated above, section 3A1.4 provides for an adjustment to the Guidelines range where the defendant's offense of conviction "involved, or was intended to promote" one or more of the enumerated offenses in section 2332b(g)(5)(B).[44] The terms "involved" and "intended to promote"

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[41] *See* United States v. Awan, 607 F.3d 306, 313–14 (2d Cir. 2010) ("[A] defendant's offense 'involves' a federal crime of terrorism when his offense includes such a crime, *i.e.*, the defendant committed, attempted, or conspired to commit a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5), *or his relevant conduct includes such a crime*." (emphasis added)); United States v. Arcila Ramirez, 16 F.4th 844, 850 (11th Cir. 2021) (same); *see also* U.S.S.G. § 1B1.3 (defining "relevant conduct" for purposes of determining the Guidelines range).

[42] 18 U.S.C. § 2381.

[43] 18 U.S.C. § 2384.

[44] U.S.S.G. § 3A1.4(a). As described *infra*, the section 3A1.4 adjustment also requires that the defendant's offense of conviction "involved, or was intended to promote" an enumerated offense that was "calculated" to affect or retaliate against government conduct, under the terms of section 2332b(g)(5)(A).

have distinct meanings and capture different types of criminal conduct. Courts interpreting section 3A1.4 have held that to "involve" a "federal crime of terrorism," a defendant's conviction must "include" such a crime—that is, the defendant's offense must be the commission of, or the attempt or conspiracy to commit, an offense enumerated under section 2332b(g)(5)(B), or the defendant's "relevant conduct" must satisfy the elements of such an offense.[45]

But the terrorism enhancement is not limited to defendants actually convicted of (or whose relevant conduct "includes") an offense enumerated under section 2332b(g)(5)(B) because section 3A1.4 also applies to defendants whose offenses were "intended to promote" such an offense.[46] Every circuit that has specifically addressed the "intended to promote" prong of section 3A1.4 has held that the adjustment may be applied to defendants convicted of offenses that are not enumerated. The Fourth and Eleventh Circuits have interpreted "intended to promote" to require that the "promotion" of an enumerated offense be a "purpose" or "goal" of the defendant's unenumerated offense of conviction.[47] The Second Circuit has upheld the adjustment where the unenumerated offense of conviction was "intended to help bring about, encourage, or contribute to" an enumerated offense.[48] The Fifth and Seventh Circuits have held that an unenumerated offense that "helps or encourages" an enumerated offense is "intended to promote" it for purposes of section 3A1.4.[49] And the

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[45] *See, e.g.*, *Awan*, 607 F.3d at 313–14; United States v. Fidse, 862 F.3d 516, 522 (5th Cir. 2017); United States v. Graham, 275 F.3d 490, 516 (6th Cir. 2001) [hereinafter *Graham I*]; United States v. Mandhai, 375 F.3d 1243, 1247–48 (11th Cir. 2004); United States v. Arnaout, 431 F.3d 994, 1001 (7th Cir. 2005) ("[T]he word 'involved,' as used in § 3A1.4, signifies that where a defendant's offense or relevant conduct includes a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5)(B), then § 3A1.4 is triggered."). *But see* United States v. Parr, 545 F.3d 491, 504 (7th Cir. 2008) ("[W]e have held that an offense 'involves' a federal crime of terrorism only if the crime of conviction is itself a federal crime of terrorism.").

[46] U.S.S.G. § 3A1.4(a).

[47] United States v. Kobito, 994 F.3d 696, 702 (4th Cir. 2021) (affirming application of enhancement where sentencing court concluded that unlawful possession of an unregistered silencer in violation of 26 U.S.C. § 5861 was intended to promote a plan to conduct an attack in a federal building in violation of 18 U.S.C. § 1363); *Mandhai*, 375 F.3d at 1248 ("Under a plain reading, the phrase 'intended to promote' means that if a goal or purpose was to bring or help bring into being a crime listed in 18 U.S.C. § 2332b(g)(5)(B), the terrorism enhancement applies."); *see also* United States v. Hale, 448 F.3d 971, 988 (7th Cir. 2006) (defendant convicted of soliciting a crime of violence "promoted" violation of uncharged enumerated offense: 18 U.S.C. § 1114).

[48] *Awan*, 607 F.3d at 314.

[49] *Fidse*, 862 F.3d at 522–23 (quoting *Arnaout*, 431 F.3d at 1002).

Sixth Circuit has held that the "intended to promote" prong is satisfied in the context of a conspiracy to commit unenumerated offenses where a defendant's conduct made the commission of an enumerated offense "reasonably foreseeable to the defendant."[50] Courts have also held that the enumerated offense "promoted" by a defendant's conviction can be inchoate, such as an attempt or conspiracy.[51] A defendant may therefore qualify for the adjustment if his underlying offense of conviction had the "purpose" or "goal" of promoting, or was "intended to help bring about, encourage, or contribute to" an enumerated offense, including an attempt or conspiracy to commit such an offense.

In addition, section 3A1.4, Application Note 2 provides that an offense that "involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism . . . or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism."[52] In keeping with Application Note 2, courts have held that defendants convicted of obstruction offenses related to an investigation of an enumerated offense "intended to promote" the enumerated offense under investigation and therefore qualify for the section 3A1.4 adjustment.[53]

C. Section 3A1.4's "calculation" requirement

In addition to being enumerated, the enumerated offense must have been "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" in order to be a "federal crime of terrorism."[54] Courts have interpreted this "calculation" prong in section 2332b(g)(5)(A) to require that an offender

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50 *Graham I* at 517–19.

51 *See, e.g.*, United States v. Wright, 747 F.3d 399, 407 (6th Cir. 2014).

52 U.S.S.G. § 3A1.4 cmt. n.2.

53 *Fidse*, 862 F.3d at 526 (using defendant's conviction for conspiracy to make false statements for the section 3A1.4 adjustment since "at least one purpose of his false statements was to obstruct" the investigation into the provision of material support to a designated FTO); United States v. Benkahla, 530 F.3d 300, 312–13 (4th Cir. 2008) (upholding application of the section 3A1.4 adjustment where defendant was convicted of obstruction of justice and false statements in relation to the government's investigation into the provision of material support to terrorists and a designated FTO). Note that where a defendant is convicted of making a false statement under 18 U.S.C. § 1001 or obstructing an agency proceeding under 18 U.S.C. § 1505 where the investigation or proceeding involved international or domestic terrorism, the applicable offense guideline at U.S.S.G. § 2J1.2 allows for an offense level increase of 12, but that increase should not be applied if the court separately applies section 3A1.4. *See* U.S.S.G. § 2J1.2(b)(1)(C) and cmt. n.2(B).

54 18 U.S.C. § 2332b(g)(5)(A).

have the specific intent to influence, affect, or retaliate against the government by force or the threat of force.[55] The "influence" on government conduct intended can be indirect.[56] "[L]ong-term planning" is not required, and a defendant may have the requisite intent even where his plan was "developed in a span of seconds."[57] The "government" that a defendant's offense is "calculated" to affect or retaliate against need not be the U.S. federal government; foreign or U.S. state and local governments also qualify.[58]

Although the potential for or threat of force is arguably contemplated by the language's reference to "intimidation or coercion," the statutory definition of "federal crime of terrorism" in section 2332b(g)(5) omits certain definitional elements requiring "violent acts" or "acts dangerous to human life" that exist in the definitions of "international terrorism" and "domestic terrorism" elsewhere in the United States Code.[59] Consistent with this broader definition, courts have held that actual force is not required to demonstrate the requisite "calculation" under section 3A1.4, nor must a defendant's offense have created "a substantial risk of injury."[60] In addition, courts have upheld application of the enhancement in cases where the defendant's relevant conduct caused, or was intended to cause, damage to property but not people.[61]

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55 *See, e.g.*, United States v. Mohammed, 693 F.3d 192, 201 (D.C. Cir. 2012) (defendant's narcoterrorism offense had requisite "calculation" where evidence showed defendant "specifically intend[ed] to use the commission from the drug sales to purchase a car to facilitate attacks against U.S. and foreign forces in Afghanistan" (alteration in original)).

56 *See, e.g.*, Wright, 747 F.3d at 410 (finding "Occupy Cleveland" defendants' plot to bomb bridge demonstrated requisite calculation to affect government "by prompting [government agencies] to take heightened security measures").

57 United States v. Siddiqui, 699 F.3d 690, 709 (2d Cir. 2012).

58 *See* United States v. DeAmaris, 406 F. Supp. 2d 748, 750–51 (S.D. Tex. 2005) (finding that "government" as set forth in section 2332b(g)(5)(A) includes foreign governments); *see also* United States v. Harris, 434 F.3d 767, 773 (5th Cir. 2005) (applying enhancement to destruction of municipal building housing local police station).

59 *Compare* 18 U.S.C. § 2332b(g)(5) (defining "Federal crime of terrorism"), *with* 18 U.S.C. § 2331(1) and (5) (defining "international terrorism" and "domestic terrorism," respectively).

60 United States v. Thurston, No. CR-06-60069-01, 2007 WL 1500176, at *12 (D. Or. May 21, 2007), *aff'd sub nom.* United States v. Tubbs, 290 F. App'x 66, 69 (9th Cir. 2008) (not precedential); *see also* United States v. Wells, 163 F.3d 889, 899 (4th Cir. 1998) (rejecting argument by defendant convicted of mail fraud, bank fraud, interference with Internal Revenue Service (IRS) officials, and transportation of stolen property that "terrorism" label did not apply for purposes of sentencing "[s]ince he did not commit any violent acts").

61 United States v. Christianson, 586 F.3d 532, 538 (7th Cir. 2009) (applying section 3A1.4 adjustment to defendants who "destroyed over 500 trees that were part of several

As with any other sentencing factor, the government must prove by a preponderance of the evidence that the section 3A1.4 enhancement is applicable—including the requisite "calculation"—with reference to the defendant's conviction and "relevant conduct,"[62] except in the Ninth Circuit, which held that when a sentencing enhancement "has an extremely disproportionate effect on the sentence relative to the offense of conviction," the government must prove the enhancement by clear and convincing evidence.[63] The government can satisfy this burden with evidence ancillary to the defendant's conviction because a defendant's "relevant conduct" for purposes of sentencing is that which "occurred during, in preparation for, or to evade responsibility for" the offense of conviction, including even uncharged and acquitted conduct.[64] For this reason, evidence of a defendant's larger motivation and intent, even if not bearing directly on the offense of conviction, is highly relevant to the defendant's "calculation."[65]

Demonstrating that the commission of offenses enumerated under sec-

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experiments, ruining in a single night decades of others' work" and "vandaliz[ing] several vehicles" with graffiti threats); United States v. Mason, 410 F. App'x 881, 884 (6th Cir. 2010) (not precedential) (applying section 3A1.4 adjustment to defendant who set fire to university research facilities and commercial logging equipment); *see also* United States v. Paul, 290 F. App'x 64, 65 (9th Cir. 2008) (not precedential) (finding that 12-level upward departure was not an abuse of discretion even where district court declined to apply section 3A1.4 adjustment for defendant who "admitted that he sought to 'put Cavel West out of business' when he set the fire which destroyed it. Even if his intent was to protect animals, he sought to do so by inflicting terror on the people he believed were harming the animals.").

62 *See* United States v. Hasson, 26 F.4th 610, 625 (4th Cir.), *cert. denied*, 143 S. Ct. 310 (2022); United States v. Abu Khatallah, 314 F. Supp. 3d 179, 190 (D.D.C. 2018).

63 United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001), *cited by* United States v. Alhaggagi, 978 F.3d 693, 700–01 (9th Cir. 2020) (indicating parties' agreement that government had burden to prove section 3A1.4 by clear and convincing evidence where adjustment increased the low end of the Guidelines range from 51 to 324 months).

64 *Abu Khatallah*, 314 F. Supp. 3d at 187–88 (citing U.S.S.G. § 1B1.3).

65 Some have suggested that Congress should create a new domestic terrorism offense modeled on 18 U.S.C. § 2332b that would apply where a defendant had the intent to engage in "domestic terrorism," as defined in 18 U.S.C. § 2331(5). *See* Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, Lawfare (Feb. 27, 2019), https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism. While there may be other reasons for enacting such an offense, section 3A1.4 already allows for a defendant who committed the types of conduct covered in section 2332b with the intent described in section 2331(5) to be sentenced as severely as if there were a domestic terrorism offense enumerated in section 2332b(g)(5)(B), because such a defendant would satisfy the "calculation" prong under section 3A1.4, including its Application Note 4 upward departure provision.

tion 2332b(g)(5)(B), such as providing material support or resources to an FTO, are "calculated" to affect or retaliate against the government is often straightforward, but the sentencing court must make that "motivational" finding[66] and cannot simply assume that even an enumerated offense was so calculated.[67] A defendant's membership in or association with a terrorist organization is relevant to the defendant's "calculation," but merely ascribing the intent of a larger organization to a particular defendant without an individualized finding is insufficient for the enhancement's application. That said, a defendant need not be "personally motivated by a desire to influence or affect the conduct of government" in order to satisfy the "calculation" requirement.[68] The government simply must prove that the defendant's crime was "calculated to have such an effect."[69] Although "calculation may often serve motive," the enhancement's "calculation" requirement is satisfied whenever a defendant's offense was "planned—for whatever reason or motive—to achieve the stated object."[70] For instance, as the Second Circuit observed, a defendant who murders a head of state because of the defendant's personal motivation to "impress a more established terrorist with his abilities" has committed an offense "calculated" to affect or retaliate against government even if his "particular motivation" was distinct.[71] Moreover, a defendant's intent to influence government conduct or retaliate against the government need

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66 *See* 142 Cong. Rec. H3,337 (daily ed. Apr. 15, 1996). *But see infra* and United States v. Awan, 607 F.3d 306, 317 (2d Cir. 2010) (discussing the distinction between "motive" and "calculation").

67 *See Alhaggagi*, 978 F.3d at 704 (vacating section 3A1.4 adjustment where sentencing court "focused on ISIS's conduct" rather than the defendant's relevant conduct underlying material support conviction: "The district court did not find sufficient facts to indicate that Alhaggagi's opening of social media accounts [for ISIS] was intended to retaliate against government conduct. The district court did not find that Alhaggagi harbored retaliatory intent against any particular government, or that he posted retaliatory messages from the social media accounts he created, that he had a particular purpose in mind as to how the accounts would be used, or that he knew how ISIS sympathizers would use them. The district court's reasoning instead focused on ISIS's conduct, and that retaliation was a theme in the chatroom Alhaggagi visited."); United States v. Assi, 428 F. App'x 570, 573 (6th Cir. 2011) (not precedential) ("it is possible to be guilty of providing material support to a foreign terrorist organization but not qualify for the Terrorism Enhancement . . . if the material support was not intended to influence or affect a government's conduct by intimidation or coercion").

68 *Awan*, 607 F.3d at 317.

69 *Id.*

70 *Id.*; *see also* United States v. Jayyousi, 657 F.3d 1085, 1115 (11th Cir. 2011) (section 3A1.4 is focused on "what the activity was calculated to accomplish, not what the defendants' claimed motivation behind it was").

71 *Awan*, 607 F.3d at 317.

not be his "sole" or "primary" goal,[72] and the "calculation" requirement may be satisfied even if the defendant's relevant conduct "accomplish[ed] other goals simultaneously."[73]

In the context of a prosecution where the defendant "intended to promote" an offense enumerated under section 2332b(g)(5)(B)—for example, where the offense of conviction is not an enumerated offense but promoted one—courts have held that a defendant's offense "need not itself be 'calculated' as described in § 2332b(g)(5)(A)."[74] Indeed, by way of example, the Second Circuit indicated that it would be "absurd" to conclude that a defendant, "motivated solely by pecuniary gain," who sells weapons to a terrorist organization, could not be subject to the enhancement simply because the offense of conviction was not an enumerated offense calculated to influence or affect government conduct.[75] Where a defendant is convicted of a crime that intended to promote an enumerated offense, the question for the court is whether that enumerated offense meets the "calculation" prong of the statute.

A defendant's statements, including those made on social media or to co-conspirators or others engaged in similar conduct, are often the most powerful direct evidence of the defendant's intent, and such statements may be sufficient to prove the ends for which a defendant's offense is "calculated."[76] This is true even where a defendant made "inconsistent statements," held "false beliefs," or had "incoherent" political motivations, or where a defendant characterizes his own anti-government statements as

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72 United States v. Haipe, 769 F.3d 1189, 1193 (D.C. Cir. 2014) (defendant's "money-raising goals obviously do not preclude a finding of intent to influence government policy" even if raising money was defendant's "primary purpose").

73 United States v. Van Haften, 881 F.3d 543, 545 (7th Cir. 2018).

74 *Awan*, 607 F.3d at 314.

75 *Id.* at 315.

76 *See, e.g.*, *Jayyousi*, 657 F.3d at 1115 (finding calculation where defendants "spoke expressly about their desire to impose Sharia, toppling existing governments in the process"). While a defendant's hyperbolic statements or abstract beliefs, divorced from his offense, are not sufficient by themselves to demonstrate the "calculation" required for the enhancement, the court may consider evidence of a defendant's statements and beliefs that are relevant to his intent regarding his offense-related conduct. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489–90 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); Barclay v. Florida, 463 U.S. 939, 942–44 (1983) (allowing sentencing judge to consider defendant's membership in the "BLACK LIBERATION ARMY" and desire to provoke "race war" in relation to defendant's murder conviction); *see also* Dawson v. Delaware, 503 U.S. 159, 167 (1992) ("The Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.").

"mere venting."[77] Moreover, a series of a defendant's separate statements may fit "within a context of plans" that would "implicate government interests" even if each of those statements alone would be insufficient to support the enhancement.[78]

Since a defendant "often will not admit his full knowledge or intentions, the district court may find the requisite calculation or intent existed based on circumstantial evidence and reasonable inferences drawn from the facts."[79] Significantly, evidence that a defendant targeted a government building may be sufficient on its own for the court to infer the intent necessary for applying section 3A1.4,[80] because attacking "a physical manifestation of the U.S. government . . . suggests a desire to retaliate against or influence that government."[81]

IV. Section 3A1.4 Application Note 4's upward departure provision

Even where the section 3A1.4 adjustment does not directly apply to the criminal offense at issue, section 3A1.4, Application Note 4 advises that a court should still consider an upward departure in two scenarios.

A. Application Note 4(A)—offense conduct equivalent to a federal crime of terrorism

Application Note 4(A) applies where a defendant's offense of conviction did not "involve" or "intend[] to promote" an enumerated offense but the defendant had the same "calculation" as otherwise required under the definition of "federal crime of terrorism": "to influence or affect the conduct of government by intimidation or coercion, or to retaliate

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77 *Van Haften*, 881 F.3d at 544–45.

78 *See* United States v. Wright, 747 F.3d 399, 408–10 (6th Cir. 2014) (finding "Occupy Cleveland" defendants' separate statements regarding their intentions to engage law enforcement in combat during protests, using explosives to damage government buildings and bridges, and the potential for the government to implement greater security measures in response to their offenses satisfied the "calculation" requirement even if defendants' stated goal was "antagonizing the 'one percent.'").

79 United States v. Arcila Ramirez, 16 F.4th 844, 854 (11th Cir. 2021).

80 *See, e.g.*, United States v. Abu Khatallah, 314 F. Supp. 3d 179, 198–99 (D.D.C. 2018) (citing United States v. Dye, 538 F. App'x 654, 666 (6th Cir. 2013) (not precedential)).

81 *Id.* at 199 (citing *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 153 (2d Cir. 2008); United States v. McDavid, 396 F. App'x 365, 372 (9th Cir. 2010) (not precedential) (federal environmental facility and federal dam); United States v. Tubbs, 290 F. App'x 66, 68 (9th Cir. 2008) (not precedential) (U.S. Forest Service Ranger Station)).

against government conduct."[82] Accordingly, any defendant convicted of a felony that was so calculated is eligible for the Application Note 4(A) departure. There is no requirement that the defendant be convicted of or have "intended to promote" a specific enumerated offense, only that the defendant's offense was so calculated to affect or retaliate against government.

The dividing line between an offense that "intended to promote" an enumerated offense (and would require the mandatory application of the section 3A1.4 adjustment) versus one that was only "calculated" to affect or retaliate against government (and would be covered only by the advisory Application Note 4(A)) is not always clear. For example, consider a convicted felon who unlawfully acquired a firearm in violation of 18 U.S.C. § 922(g) and did so as part of a scheme to violently attack a Drug Enforcement Administration (DEA) agent because of the DEA's enforcement of drug-related crimes.[83] A prosecutor might argue that section 3A1.4 directly applies because, even though section 922(g) is not an enumerated offense, the conduct "intended to promote" an enumerated offense—killing or attempted killing of officers and employees of the United States, in violation of 18 U.S.C. § 1114—and was calculated to influence the government's policy on narcotics through the attack on the DEA agent.[84] Or a prosecutor might instead determine that while there is sufficient proof of "calculation," there is insufficient evidence to prove that the defendant intended to promote the specific section 1114 offense. The prosecutor, therefore, may advocate for the advisory upward departure under Application Note 4(A) rather than the adjustment. As the foregoing demonstrates, the analysis is fact-specific and requires carefully assessing the defendant's intentions beyond those ordinarily considered to prove the underlying offense of conviction.

1. Application Note 4(B)—terrorism that targets civilians

The second scenario for an upward departure is described in Application Note 4(B). Application Note 4(B) recommends an upward departure where a defendant's offense of conviction "involved" or "was intended to promote" an offense enumerated under section 2332b(g)(5)(B), but the "terrorist motive was to intimidate or coerce a civilian population"

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[82] U.S.S.G. § 3A1.4 cmt. n.4(A); *see also* United States v. Doggart, No. 20-6128, 2021 WL 5111912, at *2 (6th Cir. Nov. 3, 2021) (not precedential).
[83] 18 U.S.C. § 922(g).
[84] 18 U.S.C. § 1114.

rather than to influence or retaliate against the government.[85] The "terrorist motive" language in Application Note 4(B) does not rely on section 2332b(g)(5)'s definition of "federal crime of terrorism," instead drawing on, but not completely adopting, the definitions of both "international terrorism" and "domestic terrorism" that exist in 18 U.S.C. § 2331(1) and (5).[86]

While Application Note 4(A) encompasses a wide range of offenses where the defendant's intent was calculated to affect or retaliate against government, Application Note 4(B) only captures the defendants whose conviction was for, or intended to promote, an enumerated offense if the motivation was to intimidate or coerce a civilian population. This situation potentially leaves defendants who commit violent but unenumerated offenses—with the purpose of intimidating a civilian population—outside of the enhancement's reach.[87]

B. Mandatory consideration of section 3A1.4 and the potential for variance

Although the sentencing court has considerable discretion when imposing a sentence, considering relevant sentencing enhancements under the Guidelines, including section 3A1.4, is mandatory. Therefore, like any other potential enhancement, the prosecution and the court should consider section 3A1.4 in all such cases where the facts indicate it should be applied.

The court and the parties normally consider the application of sentencing enhancements, including section 3A1.4, at both the plea and sentencing stages.[88] At the plea stage, the prosecution calculates any applicable statutory maximum and mandatory minimum sentences, as Rule 11 of the Federal Rules of Criminal Procedure requires, and often provides the defendant with an estimate of the defendant's Guidelines calculation.[89] While the prosecution has no duty to provide the defendant with the specific Guidelines provisions that may apply, courts have indicated that the preferred practice is for the prosecution to "inform defendants . . . as to the likely range of sentences that their pleas will authorize under the

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[85] U.S.S.G. § 3A1.4 cmt. n.4(B).

[86] *See* 18 U.S.C. § 2331(1)(B)(i) and (5)(B)(i).

[87] Such defendants may be eligible for the U.S.S.G. § 3A1.1 "Hate Crime Motivation or Vulnerable Victim" enhancement depending on the circumstances of the case, but the section 3A1.1 enhancement only provides for a maximum offense level increase of seven levels. *See* U.S.S.G. § 3A1.1(a) and (b).

[88] There may be other stages at which this determination is relevant, such as calculating a defendant's likely sentencing exposure for purposes of a bail argument.

[89] Fed. R. Crim. P. 11.

Guidelines."[90]

At the sentencing stage, the court's consideration of applicable enhancements is mandatory even though the Guidelines are not binding. In fact, the sentencing court must begin by accurately calculating the applicable Guidelines range as part of determining the appropriate sentence for a defendant.[91] The court is not entitled simply to omit a Guidelines enhancement that applies in a defendant's case based on a disagreement with the Guidelines or the effect it may have on the defendant's sentencing range. In fact, under 18 U.S.C. § 3553, the court "shall" consider "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission,"[92] as well as "any pertinent policy statement issued by the Sentencing Commission."[93] This consideration necessarily includes the enhancements in Chapter Three of the Guidelines, such as section 3A1.4, as well as the policy statements reflected in the Application Notes for those enhancements.[94]

Of course, a district court retains significant discretion in sentencing a defendant. That discretion, however, does not apply to the calculation of the Guidelines range, but rather to the subsequent decision as to whether "to deviate from the Guidelines once properly ascertained."[95] As

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90 *See* United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991).

91 *See* Gall v. United States, 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." (cleaned up)); United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) ("A district court commits procedural error where it fails to calculate the Guidelines range" or "makes a mistake in its Guidelines calculation.").

92 18 U.S.C. § 3553(a)(4)(A)(i).

93 18 U.S.C. § 3553(a)(5)(A).

94 *See* U.S.S.G. § 1B1.7 (indicating that where the commentary "suggest[s] circumstances which, in the view of the Commission, may warrant departure from the guidelines," the "commentary is to be treated as the legal equivalent of a policy statement").

95 *See* United States v. Thomas, 628 F.3d 64, 71 (2d Cir. 2010); *accord, e.g.*, United States v. Dorvee, 616 F.3d 174, 180 (2d Cir. 2010) ("Once the proper Guidelines sentence has been ascertained, a sentencing court should consider the § 3553(a) factors to determine whether a non-Guidelines sentence is warranted."). The Second Circuit, however, has observed that there may be cases in which a sentencing court "makes a decision to impose a non-guidelines sentence, regardless of which of the two [Guidelines] ranges applies." United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005). In such cases, although the government must inform the court of the applicable Guidelines range, if the defendant contests relevant facts that would affect the Guidelines calculation, the court need not resolve such factual disputes if it determines that a

a result, with limited exceptions, the government does not have discretion regarding application of the enhancements under the Guidelines; an enhancement either applies under the law, or it does not.[96] After the sentencing court considers and incorporates the relevant enhancements into its calculation, it must look to the factors listed in sections 3553(a)(1) and (2) to determine what the ultimate sentence should be in light of "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as the seriousness of the offense, need for deterrence, protection of the public, and rehabilitation of the defendant.[97]

Virtually all enhancements, including section 3A1.4 and the Application Note 4 upward departure provision, are based on policy judgments relating to a defendant's relevant conduct that are also captured in the factors under section 3553(a)(1) and (2) that could support a variance from the Guidelines. For example, a departure pursuant to U.S.S.G. § 4A1.3 (inadequate criminal history category) could instead be couched as an upward variance grounded in the history and characteristics of the defendant. Similarly, the relevant conduct that supports an upward departure under Application Note 4 might support an upward variance based on the need for the sentence to reflect the seriousness of the offense.[98] For this reason, even where a court declines to apply the enhancement under section 3A1.4, the evidence supporting such an enhancement should play a meaningful role in the court's ultimate sentencing determination.[99]

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non-Guidelines sentence is warranted under 18 U.S.C. § 3553(a).

96 The government has discretion, in certain limited circumstances, in determining whether, as a factual matter, a defendant has sufficiently accepted responsibility for his conduct (U.S.S.G. § 3E1.1(b)), whether a defendant "has truthfully provided to the Government" information about an offense that might qualify him for a "safety valve" reduction (U.S.S.G. § 5C1.2(a)(5)), and whether a defendant has provided substantial assistance to the government (U.S.S.G. § 5K1.1).

97 18 U.S.C. 3553(a)(1) and (2).

98 *See, e.g.*, Government's Sentencing Memorandum at 5–6, United States v. Bartlett, No. 22-cr-423 (N.D.N.Y. Mar. 22, 2023), ECF No. 34. *Bartlett* involved the self-described "Chinese Zodiac Killer," a defendant who pleaded guilty to violating 18 U.S.C. § 876(c) by mailing over 54 threatening letters to news outlets, businesses, houses of worship, and politicians in New York and surrounding states. In his letters, the defendant claimed that he was a serial killer and that he intended to kill other unnamed individuals. At sentencing, the government pointed to evidence suggesting that the defendant "may have been motivated to influence government officials to identify him by name as a result of his threatening communications" and might therefore warrant an upward departure under Application Note 4, but argued instead that this "potential threat of domestic terrorism" weighed in favor of a "high-end Guideline sentence." The court sentenced Bartlett to 16 months' imprisonment, the high end of the Guidelines range.

99 A sentence based on an upward departure, rather than a variance, may have a more significant role in the Bureau of Prisons' (BOP) inmate risk determination. For

Of course, as in certain cases described herein, a court may apply the section 3A1.4 enhancement but then vary downward if the court determines that section 3A1.4 results in a Guidelines range, or a suggested upward departure, that is inappropriate based on other sentencing factors that must be considered under section 3553(a). But that is a step in a court's sentencing determination that it should reach only after considering and applying the enhancement, where warranted.

V. Domestic terrorism and section 3A1.4

Courts have applied section 3A1.4 in many cases related to domestic terrorism and to defendants acting to further a wide range of animating ideologies.

A. Guideline adjustments in domestic terrorism cases

The section 3A1.4 adjustment has been applied in numerous cases related to racially and ethnically motivated violent extremists, militia extremists, and other anti-government or anti-authority extremists, often where courts have found that defendants conspired to commit or "intended to promote" enumerated terrorism offenses,[100] including in relation to convictions for offenses not typically characterized as terrorism or that have much broader application, such as interference with Internal Revenue Service (IRS) officials[101] and firearms offenses.[102] Courts have also applied the adjustment to environmental extremists, anarchist extremists, and other defendants animated by causes or ideologies more often associated with the political left.

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example, a judgment and statement of reasons that cites Application Note 4 as the reason for an upward departure may provide a label of the defendant's conduct that is more meaningful than a variance, particularly where the sentencing court does not elaborate on the reason for the variance in the statement of reasons itself. Nonetheless, it is incumbent upon the prosecutor to provide information bearing on the defendant's connections to terrorist activity in the Presentence Report, which the BOP also reviews before or upon a defendant's arrival at an institution. *See* U.S. Dep't of Just., Justice Manual 9-27.720.

100 *See, e.g.*, *Graham I* at 518–19 (militia defendant's conviction for conspiracy to illegally possess machine guns and attack law enforcement "promoted" enumerated offenses); United States v. Hale, 448 F.3d 971, 988 (7th Cir. 2006).

101 *E.g.*, United States v. Cleaver, 163 F. App'x 622, 630–31 (10th Cir. 2005) (not precedential).

102 *E.g.*, United States v. Graham, 327 F.3d 460, 462–63 (6th Cir. 2003); *Graham I* at 516–18 (convictions for conspiracy to commit offenses against the United States, and weapons possession and drug-related offenses).

1. Racially and ethnically motivated violent extremism (REMVE)

Several cases demonstrate the straightforward application of the enhancement to domestic terrorism associated with REMVE activity,[103] either because it "involved" or "intended to promote" a federal crime of terrorism. In *United States v. Allen*, three members of "the Crusaders," a "militia group whose members support and espouse sovereign citizen, anti-government, anti-Muslim, and anti-immigrant extremist beliefs," were convicted of conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a, in connection with their plan to blow up a Kansas apartment complex that included a mosque and was home to many Muslims of Somali descent.[104] Section 2332a is an enumerated "federal crime of terrorism" under section 2332b(g)(5)(B), but the defendants argued that their sole motivation for the bombing was to target Muslims, not the government as required under the "calculation" prong of section 2332b(g)(5)(A). To rebut this argument, the government relied on recordings of Crusaders meetings where the defendants "discussed—and then explicitly documented in a manifesto—that they planned to use the bombing to retaliate against the government, to warn the government to change its policies, and to 'wake up' others to commit more violent attacks if the government did not change its immigration policies and stop Muslims from entering the country."[105] The government also pointed to recordings where the defendants debated other potential targets associated with the local, state, and federal government before settling on the

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[103] Although attacks associated with REMVE often have been characterized as "domestic," the U.S. intelligence community has indicated that actors "who promote the superiority of the white race are the [domestic violent extremist] actors with the most persistent and concerning transnational connections because individuals with similar ideological beliefs exist outside of the United States and these RMVEs frequently communicate with and seek to influence each other." Off. of the Dir. of Nat'l Intel., Domestic Violent Extremism Poses Heightened Threat in 2021, at 2 (2021); *see also* Press Release, U.S. Dep't of Just., Former U.S. Army Soldier Sentenced to 45 Years in Prison for Attempting for Murder Fellow Service Members in Deadly Ambush (Mar. 3, 2023) (describing sentencing of a defendant who adhered to the "Order of the Nine Angles"—a "white supremacist, neo-Nazi" ideology—and sought to orchestrate a jihadist-led attack against a U.S. military installation with a purported member of al Qaeda); Government Sentencing Memorandum at 62, United States v. Melzer, No. 20-cr-314 (S.D.N.Y. Feb. 17, 2023), ECF No. 159 (indicating that parties agreed on the application of the 3A1.4 adjustment in Melzer's case).

[104] Complaint, United States v. Allen, No. 16-cr-10141 (D. Kan. Oct. 14, 2016), ECF No. 1; Government's Sentencing Memorandum, United States v. Allen, No. 16-cr-10141 (D. Kan. Oct. 29, 2018), ECF No. 449.

[105] Government's Sentencing Memorandum, *supra* note 104, at 16.

apartment complex.[106] The sentencing court applied the section 3A1.4 adjustment when calculating the Guidelines range for all three defendants, but found that the resulting range of life imprisonment "frustrate[d]" the court's ability "in making differentiations between the defendants in this case."[107] The court then varied downward based on the factors in section 3553(a) to sentence one of the defendants to 30 years' imprisonment and the other two defendants to 26 and 25 years' imprisonment, respectively.

More recently, in *United States v. Cook*, white supremacist defendants who created propaganda referring to their group as "The Front" were sentenced in the Southern District of Ohio in connection with their guilty pleas to conspiring to provide material support to terrorists (each other) knowing and intending that they would use that support in an attempt to destroy energy facilities, in violation of 18 U.S.C. § 1366(a).[108] The trio took steps to build and acquire assault rifles, which they planned to use by firing on electrical substations and penetrating transformers. They believed the resulting blackouts would sow unrest and provide an opportunity for white supremacist leaders to seize control from the government.[109] Pursuant to their plea agreements, all three defendants accepted the application of the section 3A1.4 adjustment, and the two who have been sentenced thus far received sentences of 92 and 60 months' imprisonment (after the court's downward variance from the applicable Guidelines ranges).[110] Although the application of section 3A1.4 was not contested in *Cook*, the sentences in that case reflect how "accelerationism"—a concept adhered to by many REMVE groups that calls for the collapse of contemporary society so that a new form of social order and government can take its place—may be sufficient for a court to find that a defendant's destructive plans or acts had the requisite "calculation" to affect or influence government.[111]

Two other recent cases involving REMVE defendants are particularly instructive regarding the reach of the "intended to promote" language in section 3A1.4(a). In *United States v. Hasson*, the Fourth Circuit up-

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106 *Id.* at 21–22.

107 Transcript of Sentencing Hearing at 68:15–17, United States v. Allen, No. 16-cr-10141 (D. Kan. Jan. 25, 2019), ECF No. 505.

108 Sentencing Judgments, United States v. Cook, No. 22-cr-19 (S.D. Ohio Apr. 21, 2023), ECF Nos. 144, 146, and 148; Government's Sentencing Memorandum for Christopher Cook, United States v. Cook, No. 22-cr-19 (S.D. Ohio Oct. 28, 2022), ECF No. 83.

109 Government's Sentencing Memorandum for Christopher Cook, *supra* note 108, at 1–6.

110 *Id.*

111 *Id.*

held the application of the section 3A1.4 adjustment to a self-proclaimed "white nationalist" and U.S. Coast Guardsman convicted of unlawful firearms possession where evidence of the defendant's relevant conduct included (1) personal writings and communications with other white nationalists concerning his plans to engage in violence to provoke a government response, (2) internet searches for information concerning the residences and other locations where he could find specific members of Congress and Supreme Court Justices he had targeted, and (3) stockpiled weapons consistent with the plans described in his writings.[112] In particular, the defendant's writings included a draft email "manifesto" in which he wrote, "Have to take serious look at appropriate individual targets, to bring greatest impact. Professors, DR's, Politian's [sic], Judges, leftists in general" and where he suggested his intent was to "provoke gov/police to over react [sic] which should help to escalate violence. [Black Lives Matter] protests or other left crap would be ideal to incite to violence."[113] While the Fourth Circuit found that the defendant's "rhetoric and weaponry viewed separately" would not support applying the adjustment, their "combination" demonstrated that the defendant was "formulating a plan" to commit an enumerated offense: the attempted killing or kidnapping of members of Congress and Supreme Court Justices, in violation of 18 U.S.C. § 351.[114] The district court sentenced Hasson to 160 months' imprisonment, varying downward from the Guidelines range after applying the section 3A1.4 adjustment, and the Fourth Circuit affirmed.[115]

Another case in the District of Maryland, *United States v. Lemley*, involved members of a white supremacist organization convicted of unenumerated offenses. The court arrived at a similar conclusion as in *Hasson* by applying the section 3A1.4 adjustment based on an extensive record of the defendants' statements connecting their ideological aims to plans they discussed concerning future enumerated offenses.[116] There, defendants Brian Mark Lemley, Jr., and Patrik Jordan Mathews pleaded guilty to several offenses—none of which were enumerated in section 2332b(g)(5)(B)—including transporting illegal aliens (Mathews was a Canadian citizen who illegally entered the United States), disposing of a firearm and ammunition to an illegal alien, transporting a firearm

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112 United States v. Hasson, 26 F.4th 610, 612–15 (4th Cir. 2022). Hasson was also convicted of possession of a controlled substance, but his firearms offenses were the basis for applying the section 3A1.4 adjustment.

113 *Id.* at 613.

114 *Id.* at 621.

115 *Id.* at 616.

116 United States v. Lemley, Jr., No. 20-cr-33 (D. Md. Jan. 7, 2020).

and ammunition in interstate commerce with intent to commit a felony, harboring illegal aliens, aiding and abetting an alien in possession of a firearm, and obstruction of justice.[117] Both Lemley and Mathews were members of "The Base," a white supremacist organization that has espoused the creation of a white "ethno-state" and promoted violent acts against racial minorities and the U.S. government.[118]

Relying on a voluminous record of Lemley's and Mathews's statements obtained pursuant to a Title III wiretap, the government argued that both defendants' convictions were "intended to promote" the murder of federal employees, in violation of 18 U.S.C. § 1114; intentionally damaging communication lines, stations, and systems controlled, operated, or used by the United States, in violation of 18 U.S.C. § 1362; damaging an energy facility, in violation of 18 U.S.C. § 1366(a); damaging rail facilities, in violation of 18 U.S.C. § 1992; and arson, in violation of 18 U.S.C. § 844(i).[119] Specifically, the government argued that Lemley and Mathews intended to carry out those enumerated offenses in the aftermath of a January 2020 pro-firearm rally in Richmond, Virginia, as part of their plan to bring about the downfall of the U.S. government.[120] A month before the rally, the defendants discussed their desire to "create [ ] some instability while the Virginia situation is happening," and more specifically, to "derail some rail lines," "shut down the highways," "shut down the rest of the roads," and "kick off the economic collapse of the US."[121] They also discussed breaking Dylann Roof, the convicted white supremacist mass shooter, out of prison and murdering federal corrections officers in the process.[122] The government arrested Lemley and Mathews shortly before the January 2020 Richmond rally, leading to their federal convictions on charges related to the firearms seized when they were arrested as well as other offenses.

At sentencing, the court rejected Lemley's argument that the section 3A1.4 adjustment only applied to defendants convicted of offenses enumerated under section 2332b(g)(5)(B), consistent with the other courts

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117 Plea Agreement as to Patrik Jordan Mathews, United States v. Lemley, No. 20-cr-33 (D. Md. June 11, 2021), ECF No. 156; Plea Agreement as to Brian Mark Lemley, Jr., United States v. Lemley, No. 20-cr-33 (D. Md. June 11, 2021), ECF No. 159.

118 The Base also had overlapping membership with other white supremacist groups, including the Atomwaffen Division, and Lemley had sought to join the "Northwest Front," a white supremacist separatist group.

119 Government's Sentencing Memorandum at 21–22, United States v. Lemley, No. 20-cr-33 (D. Md. Sept. 30, 2021), ECF No. 169.

120 *Id.* at 22.

121 *Id.* at 23.

122 *Id.* at 27.

that have addressed the same issue. The court also rejected Lemley's contention that his and Mathews's statements introduced by the government were "no more than braggadocio" and "detached from reality or any particular concrete plan of action," instead finding that the section 3A1.4 adjustment was warranted.[123] After applying the adjustment, however, the court varied downward significantly from the resulting Guidelines range, sentencing Lemley and Mathews both to 9 years' imprisonment rather than the 25 years' imprisonment that the government sought based on the application of section 3A1.4.[124]

In *Hasson* and *Lemley*, the defendants' conduct was intended to bring about ends directly associated with their white supremacist goals, including the death of U.S. political figures and the overthrow of the federal government. But the Seventh Circuit has also affirmed the application of section 3A1.4 where a white supremacist's offense of conviction was arguably secondary to his ultimate ideological objectives. In *United States v. Hale*, the defendant served as the "Pontifex Maximus" of the "World Church of the Creator," a white supremacist organization whose followers had a history of engaging in acts of violence targeting minority groups.[125] The World Church of the Creator was sued for trademark infringement by a non-aligned religious organization operating under a similar name and in that suit, a district court judge entered an order barring Hale's "World Church" from using that name in its literature or otherwise.[126] Hale refused to comply and then directed one of his followers to target the judge who entered the adverse order, leading to Hale's arrest and convictions for soliciting a crime of violence and obstructing justice. The court found that because Hale's relevant conduct "intended to promote" the murder of a federal officer, the section 3A1.4 adjustment applied and sentenced him to 40 years' imprisonment.[127]

Viewed together, *Lemley*, *Hasson*, and *Hale* indicate that determining whether evidence is sufficient to support a finding that the defendant's unenumerated offense of conviction was "intended to promote" a

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123 *See* Response to Government's Sentencing Memorandum at 20–21, United States v. Lemley, 20-cr-33 (D. Md. Oct. 12, 2021), ECF 184.

124 *See* Press Release, U.S. Dep't of Just., Two Members of the Violent Extremist Group "The Base" Each Sentenced to Nine Years in Federal Prison for Firearms and Alien-Related Charges (Oct. 28, 2021); *see also* James Verini, *The Paradox of Prosecuting Domestic Terrorism*, N.Y. Times (Feb. 8, 2023), https://www.nytimes.com/interactive/2023/02/08/magazine/domestic-terrorism-prosecution.html.

125 United States v. Hale, 448 F.3d 971, 975 (7th Cir. 2006).

126 *Id.* at 978.

127 *Id.* at 988.

"federal crime of terrorism" will be fact-specific and contingent on the defendant's statements and other evidence of intent. *Lemley* and *Hasson* also demonstrate that even after applying the section 3A1.4 enhancement, courts may vary downward to arrive at a sentence well below the adjusted Guidelines range.

2. Anti-government, anti-authority extremism and opposition to the IRS

Courts have also applied section 3A1.4 in cases of sovereign citizens or "constitutional law groups" opposing the authority of the federal government and the IRS in particular. In *United States v. Cleaver* and *United States v. Dowell*, the Tenth Circuit affirmed the application of the section 3A1.4 adjustment to co-defendants convicted of destroying a government building, in violation of 18 U.S.C. § 844(f), and forcible interference with IRS employees and administration, in violation of 26 U.S.C. § 7212(a).[128] Those defendants were convicted in connection with their role in setting off a bomb that led to a significant fire at the IRS offices in Colorado Springs, Colorado. While perpetrating the arson, two of the defendants also spray-painted "AAR" on the walls of the office, in reference to "Army of the American Republic," which the government described as the "military arm" of the defendants' anti-government group.[129] *Cleaver* and *Dowell* affirmed the application of the section 3A1.4 adjustment and held that the jury's finding of guilt regarding the defendants' charge of interfering with the IRS (an unenumerated offense) satisfied the required showing that defendants' separate but related conviction under section 844(f) (an enumerated offense) was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[130]

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[128] United States v. Cleaver, 163 F. App'x 622, 624 (10th Cir. 2005) (not precedential); United States v. Dowell, 430 F.3d 1100 (10th Cir. 2005).

[129] Appellee's Consolidated Answer Brief at 11, United States v. Dowell, 430 F.3d 1100 (10th Cir. 2005) (Nos. 03-1341, 03-1510).

[130] *Cleaver*, 163 F. App'x at 630–31; *Dowell*, 430 F.3d at 1110–12; *see also* United States v. Wells, 163 F.3d 889, 899 (4th Cir. 1998) (although defendant committed the offenses of interfering with IRS officials, bank fraud, and related offenses in early 1996 before AEDPA's direction to include domestic terrorism within the scope of section 3A1.4, the court affirmed an upward departure under U.S.S.G. § 5K2.0 based on defendant's "domestic terrorism activities" that included bringing a vehicle to Montana in conjunction with a "Montana Freemen" plot to abduct internal revenue officers who would later be hanged).

3. Environmental extremism and animal rights extremism

Environmental extremists and animal rights extremists, sometimes referred to as "ecoterrorists," have also received the section 3A1.4 adjustment in connection with their destruction of public and private property. In *United States v. Tubbs*, the Ninth Circuit affirmed application of the section 3A1.4 adjustment to a member of the Earth Liberation Front (ELF) and Animal Liberation Front (ALF) who conspired with others at so-called "Book Club" meetings to plan a series of arsons between 1995 and 2001.[131] The defendants' arsons resulted in the destruction of a high electric energy tower and numerous other public and private properties, including meat packing plants, lumber companies, and Bureau of Land Management wild horse corrals.[132] Although many of the targets were government buildings, including ranger stations, the "communiqués" sent by the conspirators focused on the actions of private industry, declaring in one such message that "[a]s long as companies continue to operate and profit off of Mother Earth and Her sentient animal beings, the [ALF] will continue to target these operations and their insurance companies until they are all out of business."[133] Another communiqué threatened "an escalation in tactics against capitalism and industry."[134] The district court found that defendants' convictions for conspiracy under 18 U.S.C. § 371 could have "intended to promote" offenses enumerated under section 2332b(g)(5)(B), namely sections 844(i) (arson) and 1366 (destruction of an energy facility).[135] Although the district court had observed that the government must make a showing that "defendants targeted government conduct rather than the conduct of private individuals or corporations" to apply section 3A1.4,[136] at least one of the conspirators admitted in his plea agreement that "[t]he primary purposes of the conspiracy were to influence and affect *the conduct of government*, commerce, private business

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131 United States v. Tubbs, 290 F. App'x 66 (9th Cir. 2008) (not precedential).

132 *Id.* at 68; United States v. Thurston, No. CR-06-60069-01, 2007 WL 1500176, at *12 (D. Or. May 21, 2007), *aff'd sub nom. Tubbs*, 290 F. App'x at 69.

133 *Thurston,* 2007 WL 1500176, at *3.

134 *Id.*

135 *Id.* at *12–13. The district court also considered arson of government property, in violation of 18 U.S.C. § 844(f), and destruction of government property, in violation of 18 U.S.C. § 1361, but found that those offenses could not serve as the basis for the terrorism enhancement because they were not specifically enumerated in section 2332b(g)(5)(B) during the charged time of defendants' conspiracy.

136 *Id.* at *15.

and others in the civilian population."[137]

Two other circuits have affirmed the application of section 3A1.4 to defendants associated with ELF, pointing out that—

> ELF and its members are not to be confused with the typical environmental protestor denouncing and peacefully demonstrating against such things as nuclear power, strip coal mining, cutting old-growth timber, offshore drilling, damming wild rivers, and so on. Rather, ELF members are of a different sort, and to group them with the well-meaning complainers of controversial projects is both inaccurate and purposely misleading.[138]

Notably, the Seventh Circuit made a point to highlight how terrorism-related determinations should be viewpoint neutral, stating, "[b]ecause the defendants do not look the part of our current conception of a terrorist does not separate them from that company. Indeed, it doesn't matter why the defendants oppose capitalism and the United States government—if they use violence and intimidation to further their views, they are terrorists."[139]

4. Anarchist extremism

The Sixth Circuit has applied section 3A1.4 to defendants protesting economic inequality, specifically anarchist extremist groups associated with the "Occupy" movement.[140] In *United States v. Wright*, the court evaluated the enhancement with respect to defendants who conspired to explode a bridge that was part of the Ohio state highway system, after considering numerous other targets including federal buildings and commercial cargo vessels transiting the Cuyahoga River.[141] The "Occupy Cleveland" defendants argued that they did not have the requisite calculation for section 3A1.4 because they "sought to influence corporate

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137 *Tubbs*, 290 F. App'x at 68 (emphasis added).

138 United States v. Christianson, 586 F.3d 532, 537–38 (7th Cir. 2009); *accord* United States v. Mason, 410 F. App'x 881, 883–84 (6th Cir. 2010) (not precedential) (Affirming section 3A1.4 for ELF defendant, the court noted that ELF "encourages actions that violate federal and state criminal laws and often accomplishes its goals through politically motivated violence designed to intimidate or coerce the general civilian population, private business, and government. Arson is one of the most frequently employed forms of ELF action."); *see also* United States v. McDavid, 396 F. App'x 365, 372 (9th Cir. 2010) (not precedential).

139 *Christianson*, 586 F.3d at 539.

140 *See, e.g.*, United States v. Wright, 747 F.3d 399, 404 (6th Cir. 2014); United States v. Stafford, 782 F.3d 788, 792 (6th Cir. 2015).

141 *Wright*, 747 F.3d at 405–06.

behavior or disrupt the lives of the 'one percent' but did not target the government specifically."[142] The Sixth Circuit rejected that argument, relying in part on evidence that in addition to preparing to bomb the bridge that was their ultimate target, the defendants discussed "basically beat[ing] the [expletive] outta the cops" as part of a "black block" during the North Atlantic Treaty Organization (NATO) and Group of Eight (G8)[143] summits held in Chicago, and that defendants considered the Federal Reserve and the Northeast Ohio Regional Fusion Center in Cleveland, government buildings, as potential targets before settling on the bridge.[144] The court also pointed to two of the defendants' comments that they expected to be sent to Guantanamo Bay if their plot were discovered, suggesting that they viewed their own actions as terrorism.[145]

More recently, in *United States v. Mattis*, the section 3A1.4 adjustment has been applied to criminal conduct arising out of civil unrest following the 2020 murder of George Floyd by a Minnesota police officer.[146] During protests in Brooklyn on May 30, 2020, Colinford Mattis and Urooj Rahman constructed homemade Molotov cocktails and then drove to a police stationhouse in Fort Greene, Brooklyn. After first offering a Molotov cocktail to an individual on the street and encouraging that individual to throw it, Rahman lit the Molotov cocktail and threw it through the broken window of a parked and unoccupied police vehicle, starting a fire. Another fully assembled Molotov cocktail and precursor materials were recovered from Mattis's minivan. Mattis and Rahman pleaded guilty to conspiracy to commit arson and to make and possess an unregistered destructive device, in violation of section 371.[147] The government argued that the terrorism enhancement applied to Mattis and Rahman's conduct because the defendants conspired to commit arson and to possess and create unregistered incendiary devices, offenses enumerated under section 2332b(g)(5)(B); so their convictions "involved" those enumerated offenses.[148] The government also argued that the defendants' conduct was

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142 *Id.* at 408.

143 The G8 was an unofficial group of the world's largest developed countries and Russia that met periodically to address international economic issues.

144 *Wright*, 747 F.3d at 409–10 (alteration in original).

145 *Id.* at 410.

146 No. 20-cr-203 (E.D.N.Y. June 11, 2020).

147 On October 20, 2021, the guilty plea superseded a previous guilty plea to making, receiving, and possessing unregistered explosive devices, in violation of 26 U.S.C. § 5861. *See* Government's Sentencing Memorandum at 3, United States v. Mattis, No. 20-cr-203 (E.D.N.Y. Sept. 22, 2022), ECF No. 94.

148 Specifically, conspiracy, attempt, and use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a; and attempted arson of property used in and affecting

calculated both to "influence or affect the conduct of government"—by seeking to cause the New York City Police Department (NYPD) to retreat from the streets and to influence the New York City government to order the NYPD to do so—and to "retaliate against" the NYPD and city government because of the police's performance of its duties during the protests.[149] The defendants stipulated in their plea agreements that the enhancement applied to their conduct, but the sentencing court ultimately concluded that it was unnecessary to make a finding concerning the application of section 3A1.4 because the court intended to order a sentence below the Guidelines range even if the enhancement were applicable. Rahman was ultimately sentenced to 15 months' imprisonment, while Mattis was sentenced to 12 months and 1 day of imprisonment.

The complex disposition of the *Mattis* case, as well as the fact that several other cases arising out of the George Floyd protests resulted in low sentences and no application of the terrorism enhancement,[150] caused at least one court to raise concerns about politicization of the disposition of domestic terrorism cases.[151] Although the government in *Mattis* remained consistent in its position that the terrorism enhancement applied to the defendant's conduct, and other cases may have warranted below-Guidelines sentences based on unique facts and circumstances, failing to apply the terrorism enhancement, where appropriate, or a court's decision to sentence below the Guidelines can create a troubling perception if those decisions appear to be colored by the ideology of the defendant at issue. The possibility of this perception also underscores why the viewpoint-neutral nature of the terrorism enhancement is particularly important when applied in domestic terrorism cases.

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interstate commerce, in violation of 18 U.S.C. § 844(i).

149 Government's Sentencing Memorandum, *supra* note 147, at 6.

150 *See, e.g.*, Sentencing Transcript, United States v. Carberry, No. 20-cr-544 (S.D.N.Y. Feb. 18, 2022), ECF No. 91 (sentencing defendant to six months' imprisonment for assisting with throwing a burning bottle of accelerant at an NYPD van); Sentencing Transcript, United States v. David-Pitts, No. 20-cr-143 (W.D. Wash. May 24, 2021), ECF No. 43 (sentencing defendant to 20 months' imprisonment for attempting to burn down Seattle police precinct).

151 *See* Sentencing Transcript at 43:20-23, United States v. Seefried, No. 21-cr-287 (D.D.C. Feb. 9, 2023), ECF No. 143 (at sentencing hearing involving January 6 rioter, the court noted its concern that the prosecution of these cases led the court to conclude that the Department of Justice was not living up to "the Attorney General's promise that there will not be one rule for Democrats and another for Republicans, one rule for friends and another for foes").

B. Upward departures in domestic terrorism cases

Although there are relatively few cases discussing the upward departure provision under Application Note 4, it has been applied to defendants guilty of offenses related to domestic terrorism.

1. The application of Application Note 4(A)

One of the only decisions that discusses the application of Application Note 4(A) is an unreported decision from the Sixth Circuit in 2021, *United States v. Doggart*, which involved a defendant convicted of solicitation to destroy religious property, in violation of 18 U.S.C. § 247, a civil rights offense not enumerated under section 2332b(g)(5)(B).[152] Doggart's conviction was based on his conduct targeting a Muslim community in New York called "Islamberg," which he believed was plotting a terrorist attack in New York City. Doggart made specific plans to burn down buildings in Islamberg and recruited others to assist.[153] Although one reading of Doggart's conduct is that it was directed toward the Muslim civilian population in Islamberg rather than the government, the record indicated that the defendant had spoken "about setting in motion an armed insurrection against the government of the United States that would force the government of the United States either to respond to" Doggart's planned attacks, "or to give in and capitulate."[154] Based on this evidence, the government argued that his conduct was "calculated to influence or affect government conduct by intimidation or coercion."[155] Without the Application Note 4(A) departure, Doggart's Guidelines range was 51–63 months (equivalent to offense level 24 at criminal history category I), but it jumped to 324–405 months (equivalent to offense level 41 at criminal

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[152] 2021 WL 5111912, at *1 (6th Cir. 2021). In what may be the only other decision specifically discussing the application of Application Note 4(A), *United States v. Biheiri*, the Eastern District of Virginia declined to depart upward for a defendant convicted of immigration fraud offenses. 299 F. Supp. 2d 590, 607–08 (E.D. Va. 2004). The court found that the government established by a preponderance of the evidence at sentencing that although not charged, the defendant also violated the International Emergency Economic Powers Act (IEEPA) by dealing in property and providing services to the chairman of the Political Bureau of Hamas. But the court held that even assuming those IEEPA violations were "relevant conduct" for purposes of sentencing, they were not "calculated to influence or affect the conduct of government by intimidation or coercion" as Application Note 4(A) required. The government did not produce evidence to satisfy the "intimidation and coercion of government element" of Application Note 4(A), in the court's view. *Id.* at 608.

[153] *Doggart*, 2021 WL 5111912, at *1.

[154] Government's Supplemental Sentencing Memorandum at 6, United States v. Doggart, No. 15-cr-39 (E.D. Tenn. Sept. 16, 2020), ECF No. 343.

[155] *Doggart*, 2021 WL 5111912, at *1.

history category I) with the district court's upward departure.[156] The district court sentenced Doggart to the statutory maximum for his offense, 10 years' imprisonment, relying on the departure.[157]

At the Sixth Circuit, Doggart argued that the Application Note 4 departure provision conflicted with AEDPA, by which Congress directed the Sentencing Commission to amend section 3A1.4 so that it applied "only" to "[f]ederal crimes of terrorism."[158] Consistent with other circuits that have addressed the issue, the Sixth Circuit rejected that argument, holding that the relevant language in AEDPA was directed at the section 3A1.4 *adjustment* and that the Application Note 4 departure provision adopted by the Sentencing Commission—six years after AEDPA's passage—was not inconsistent. In the court's view, Application Note 4 simply "alerts the district court that it may depart upward and treat an offender as severely as if the adjustment applied," at the sentencing court's discretion.[159] The Sixth Circuit also held that Application Note 4 only purported to "identify grounds for a discretionary departure" and did not impermissibly "interpret the guideline" of the section 3A1.4 adjustment itself.[160] For that reason, it held that Application Note 4 does not run afoul of *Stinson v. United States* or its progeny.[161]

The Ninth Circuit is also reviewing the sentences of two co-defendants for whom the district court upwardly departed pursuant to Application Note 4(A).[162] Those defendants, Jason Patrick and Darryl William Thorn, were convicted of conspiracy to impede federal officers, in violation of 18 U.S.C. § 372, based on their participation in the three-week-long armed occupation of the Malheur National Wildlife Refuge in southeast Oregon in January 2016.[163] Twenty-four other individuals were also charged

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156 The court's application of the Application Note 4 upward departure in *Doggart* demonstrates how the court is not limited to an offense level increase of 12 steps as contemplated in section 3A1.4(a). But the court may depart higher because section 3A1.4(b) also calls for an increase of the defendant's criminal history category to level VI.

157 *Doggart*, 2021 WL 5111912, at *1.

158 *Id.* at *2.

159 *Id.* at *3.

160 *Id.*

161 *Id.* The Supreme Court held in *Stinson* that the commentary may not interpret the Guidelines in a way that "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." United States v. Stinson, 508 U.S. 36, 38, (1993).

162 United States v. Ehmer, Nos. 17-30242, 17-30246, 18-30025, 18-30042, 19-30077 (9th Cir. Apr. 30, 2019).

163 Consolidated Answering Brief of Government-Appellee at 15–16, United States v. Ehmer, Nos. 17-30246, 17-30242, 18-30025, 18-30042, 19-30077

in relation to the Malheur occupation,[164] including Ammon and Ryan Bundy, the sons of Cliven Bundy, who gained notoriety during his 2014 standoff with the Bureau of Land Management in Nevada. Along with other Bundy followers who refused to recognize the government's authority over certain parcels of federal land, Patrick and Thorn joined a convoy of militiamen who entered the Malheur refuge and cleared buildings at gunpoint, then formed a perimeter to block the entrance of workers from the Fish and Wildlife Service and other federal agencies. The aims of the occupiers, as reflected in part by Patrick's Facebook posts and statements to the press, were to "adversely possess" the land at the Malheur refuge and to compel the release of two like-minded ranchers convicted of arson on federal land. Although certain defendants involved in the occupation claimed their actions were peaceful, Patrick and Thorn carried firearms as they patrolled the refuge, including in a fire watchtower where they and other occupiers stood guard.[165] Thorn also claimed membership in the "Washington III%" militia.[166]

Other defendants involved in the Malheur refuge occupation who pleaded guilty pursuant to plea agreements agreed that Application Note 4(A) provided the basis to depart upwardly between two and ten offense levels.[167] But Patrick and Thorn, who were convicted at trial, contested the application of Application Note 4(A). The district court found that Patrick's and Thorn's conspiracy convictions warranted upward departures under Application Note 4(A)—just as it did for those defendants who had pleaded guilty[168]—and departed upward four levels pursuant to Application Note 4(A) in Patrick's case (where the government had requested six levels)[169] and two levels in Thorn's case (where the government had requested five levels).[170] With the departure, Patrick and

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(9th Cir. Apr. 10, 2020), ECF No. 113. Thorn was also convicted of possessing a firearm in a federal facility, in violation of 18 U.S.C. § 930(b), but that offense grouped with his conspiracy conviction for sentencing purposes.

164 *Id.* at 15; Government's Sentencing Memorandum at 10, United States v. Patrick, No. 16-cr-51 (D. Or. Feb. 9, 2018), ECF No. 2466.

165 Consolidated Answering Brief of Government-Appellee, *supra* note 163, at 60, 63.

166 Government's Sentencing Memorandum at 3, United States v. Thorn, No. 16-cr-51 (D. Or. Nov. 14, 2017), ECF No. 2323.

167 Government's Sentencing Memorandum, *supra* note 164, at 10; Sentencing Transcript at 43–45, United States v. Patrick, No. 16-cr-51 (D. Or. Feb. 15, 2018), ECF No. 2160.

168 *See* Sentencing Transcript, *supra* note 167, at 44–45 (indicating Application Note 4(A) upward departure levels for certain of Patrick's co-defendants).

169 *Id.* at 41:12-13.

170 Sentencing Transcript at 12:6-9, United States v. Thorn, No. 16-cr-51 (D. Or. Nov. 21, 2017), ECF No. 2517.

Thorn received sentences of 21 months' imprisonment and 18 months' imprisonment, respectively.

At the Ninth Circuit, Patrick and Thorn argued that Application Note 4 is legally invalid because it conflicts with language in the section 3A1.4 guideline—the *Stinson* argument that the Sixth Circuit rejected in *Doggart*.[171] Patrick and Thorn also argued that the Application Note 4(A) departure "double count[ed]" the conduct for which they had been punished under the base level offense applicable to their section 372 convictions, and that in any event, it was clear error for the district court to find the specific intent required for "calculation" under section 3A1.4, given the evidence of their relevant conduct.[172] While the Ninth Circuit panel heard oral arguments on June 1, 2020, neither the parties nor the judges specifically addressed Patrick's and Thorn's arguments regarding Application Note 4(A) at the hearing. The court ordered supplemental briefing of other issues, which the parties submitted on June 25, 2020, and as of the date this article is published, the Ninth Circuit panel has not yet ruled.

More recently, the government has sought the Application Note 4(A) upward departure for several defendants sentenced in connection with the breach of the U.S. Capitol on January 6, 2021. In the first of those cases, *United States v. Reffitt*, the government argued that a member of the Texas III% militia who charged up the exterior Capitol steps with a holstered firearm, urging others to follow him, demonstrated the requisite calculation for Application Note 4.[173] The government pointed to evidence of the defendant's planning and accumulation of weapons and body armor for weeks ahead of January 6, as well as his statements about "drag[ging] lawmakers out of the Capitol by their heels with their heads hitting every step" and his plan to "carry a weapon and take over the Congress."[174] District of Columbia District Court Judge Dabney Friedrich, a former commissioner at the Sentencing Commission, declined to depart upward in Reffitt's case, owing to "a real effort on the Court's part to ensure that there's not unwarranted sentencing disparity between various defendants" in other January 6-related cases.[175] In three other January 6 cases where the defendants engaged in acts of violence, including at the lower

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171 Joint Opening Brief of Appellants at 132–34, United States v. Ehmer, Nos. 17-30246, 17-30242, 18-30025, 18-30042, 19-30077 (9th Cir. Apr. 30, 2019), ECF No. 21.
172 *Id.* at 136–37.
173 Government's Sentencing Memorandum at 6, United States v. Reffitt, No. 21-cr-32 (D.D.C. July 15, 2022), ECF No. 158.
174 *Id.* at 38–41. Reffitt did not actually enter the Capitol building.
175 Transcript of Sentencing Hearing at 87:7-9, United States v. Reffitt, No. 21-cr-32 (D.D.C. Aug. 1, 2022), ECF No. 175.

west terrace "tunnel" that the government described as the "epicenter" of the violence at the Capitol,[176] sentencing judges have also declined to apply the Application Note 4(A) departure.[177] In another January 6 case, however, the court applied a one offense level upward departure under Application Note 4(A) to a Florida singer convicted of seven felonies related to her "violent rampage through the United States Capitol Building."[178] In that case, the government introduced evidence that the defendant had contributed to an online "manifesto" that proposed amending the Constitution, installing Donald Trump as President through 2024, removing all politicians and officials associated with the Democratic Party from government, and establishing a "People's Department of Government Control and Intervention."[179] She also broadcast live videos on Facebook while at the Capitol indicating that she was "ready to take it."[180] In one other January 6 case, a defendant pleaded guilty to offenses including assaulting law enforcement officers using a dangerous weapon, in violation of 18 U.S.C. § 111(a) and (b), and accepted a two-level upward departure under Application Note 4(A) as part of his plea agreement.[181]

Finally, a court found that Application Note 4(A) applied to Stewart Rhodes and seven other "Oath Keepers" who were convicted of seditious conspiracy and other offenses related to the storming of the Capitol on January 6.[182] Rhodes, the founder and leader of the Oath Keepers, and his co-defendants were charged with seditious conspiracy along with other offenses such as conspiracy to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(k), and conspiracy to prevent federal officers from

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176 Transcript of Sentencing Hearing at 49:24-25, United States v. Judd, No. 21-cr-40 (D.D.C. Feb. 27, 2023) (sentencing transcript not yet publicly available).

177 *See, e.g.*, *id.* at 42:6-12 (declining to depart upwards because "I think that the enhancement there [under Application Note 4(A)] suggests a level of planning and premeditation that is not shown here"); Transcript of Sentencing Hearing, United States v. Wright, No. 21-cr-341 (D.D.C. Mar. 6, 2023) (sentencing transcript not yet available); Transcript of Sentencing Hearing at 55:20-56:20, United States v. Gardner, No. 21-cr-622 (D.D.C. Mar. 16, 2023), ECF No. 63 (declining to apply Application Note 4, but stating twice that "I struggled with this").

178 Transcript of Sentencing Hearing, United States v. Southard-Rumsey, No. 21-cr-387 (D.D.C. July 14, 2023) (sentencing transcript not yet available) (Southard-Rumsey was convicted of obstruction of an official proceeding under 18 U.S.C. § 1512(c)(2), as well as three counts for assault under 18 U.S.C. § 111(a) and three counts of civil disorder under 18 U.S.C. § 231(a)(3)); Government's Sentencing Memorandum at 1, 4, United States v. Southard-Rumsey, No. 21-cr-387 (D.D.C. July 3, 2023).

179 Government's Sentencing Memorandum at 6–7, *supra* note 178.

180 *Id.* at 8.

181 Plea Agreement at 4–5, United States v. Milstreed, No. 22-cr-198 (D.D.C. Apr. 14, 2023), ECF No. 30.

182 *See* United States v. Rhodes, No. 22-cr-15 (D.D.C. Jan. 12, 2022).

discharging their duties, in violation of 18 U.S.C. § 372. Evidence adduced at trial demonstrated that Rhodes and his co-defendants prepared for weeks following the presidential election to prevent the peaceful transfer of power, including by overtaking Congress during the certification of the electoral vote. Leading up to January 6, the Oath Keepers defendants stockpiled weapons at a hotel across the Potomac River in Virginia and coordinated to establish a "Quick Reaction Force" with the intent of ferrying those weapons to the Capitol.[183] Then during the riot, some of these defendants advanced up the Capitol steps in "stack" formations and physically engaged with law enforcement. Based on the extensive trial record of this conduct and Rhodes's numerous related statements, the court included a six-level upward departure under Application Note 4(A) when calculating Rhodes's guidelines range, but then sentenced Rhodes below the resulting range to a term of 18 years' imprisonment. The court also applied Application Note 4(A) upward departures of between one and three levels to seven of Rhodes's co-defendants—including to two co-defendants who had not been convicted of seditious conspiracy—while sentencing them to between three and twelve years' imprisonment, well below the calculated guidelines ranges following the departure application.

2. The application of Application Note 4(B)

There are several decisions specifically discussing Application Note 4(B), all of which involve defendants with different motivating ideologies, but whose conduct can be described as domestic terrorism.

In *United States v. Jordi*, the Eleventh Circuit reversed a sentencing court and found that a defendant who attempted to firebomb abortion clinics in violation of section 844(i), an offense enumerated under section 2332b(g)(5)(B), intended "to intimidate or coerce a civilian population," namely abortion providers.[184] During a recorded meeting with a confidential source, Jordi stated, "I do not have the means to kill abortion doctors, but I do have the means to bomb clinics. Maybe that way I can dissuade other doctors from performing abortions."[185] The government also pointed to evidence that he had purchased gas cans, starter fluid, and other supplies in preparation.[186] On remand, the district court departed upward pursuant to Application Note 4(B) and sentenced Jordi

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183 Government's Omnibus Sentencing Memorandum and Motion for Upward Departure, United States v. Rhodes, No. 22-cr-15 (D.D.C. May 5, 2023), ECF No. 565.
184 United States v. Jordi, 418 F.3d 1212, 1215–17 (11th Cir. 2005).
185 *Id.* at 1214.
186 *Id.*

to 10 years' imprisonment, doubling the sentence he was originally given without the departure.[187]

In two other cases, courts applied the Application Note 4(B) departure to REMVE defendants who made plans to target particular civilian groups. In *United States v. Harpham*, the court departed upward by three offense levels when sentencing a defendant convicted of attempting to use a weapon of mass destruction, as well as associated hate crimes. The court found that evidence of the defendant's "racist views set forth in his internet messages and blogs" indicated that when he planted an explosive device with rat poison-coated shrapnel along the route of a Martin Luther King, Jr. Day parade in Spokane, Washington, he did so with the intent to "intimidate the civilian population who chose to participate."[188] Similarly, in *United States v. Holzer*, the court indicated that an Application Note 4(B) departure would apply to a neo-Nazi defendant convicted of arson for planning to blow up a synagogue with pipe bombs and dynamite, although the court based the ultimate sentence of 235 months' imprisonment on a significant upward variance rather than a departure.[189]

Furthermore, in *United States v. Cottrell*, the Ninth Circuit affirmed an Application Note 4(B) upward departure for an environmental extremist defendant associated with ELF.[190] Cottrell was convicted of conspiracy to commit arson and multiple counts of arson in connection with a vandalism spree that included spray painting, firebombing eight SUVs, and incinerating a large commercial building.[191] Cottrell sent emails to a newspaper claiming responsibility for the attacks and connecting them to ELF's objectives: "We support destruction of property as a means of bringing attention to important issues, and to directly hurt the profits of those who gain wealth at the expense of all others living on this planet."[192] With the Application Note 4(B) departure, Cottrell was sentenced to 100

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187 Sentencing Minutes, United States v. Jordi, No. 03-cr-60259 (S.D.F.L. Nov. 1, 2005), ECF No. 77.

188 *See* Sentencing Memorandum at 4, United States v. Harpham, No. 11-cr-42 (E.D. Wash. Dec. 27, 2011), ECF No. 237.

189 Order Denying Motion for Resentencing Pursuant to 28 U.S.C. § 2255 at 2–5, United States v. Holzer, 19-cr-488 (D. Colo. Mar. 22, 2023), ECF No. 101.

190 United States v. Cottrell, 312 F. App'x 979, 981 (9th Cir. 2009), *amended and superseded by* 333 F. App'x 213 (9th. Cir. 2009) (en banc) (not precedential).

191 Government's Answering Brief at 12–13, United States v. Cottrell, No. 05-50307 (9th Cir. May 4, 2006), ECF. No. 20. The Ninth Circuit later vacated Cottrell's arson convictions, and he was resentenced to the same 100 months' sentence based on his conspiracy conviction alone. *See* Judgment and Commitment Order, United States v. Cottrell, 04-cr-279 (C.D. Cal. Nov. 19, 2009), ECF No. 219.

192 Government's Answering Brief, *supra* note 191, at 13.

months' imprisonment.[193]

VI. Conclusion

The terrorism sentencing enhancement may not always be top of mind for prosecutors charging defendants whose criminal conduct did not transcend national boundaries or whose ideological aims appear purely domestic. But the history of section 3A1.4's enactment and application confirms that prosecutors and courts should consider it wherever a defendant's relevant conduct reflects an intent to influence or affect the government or civilian populations through intimidation or coercion. Given its drastic effect on a defendant's sentencing exposure, section 3A1.4 has been criticized as "draconian"[194] and "controversial,"[195] but it has also been extolled as representative of an "important component of national counterterrorism policy."[196] Appropriately applied, section 3A1.4 has served and will continue to serve as a significant prosecutorial tool reflecting the policy judgment of Congress and the Sentencing Commission concerning the punishment of terrorism, including domestic terrorism.

About the Authors

John D. Cella serves as a Trial Attorney in the Counterterrorism Section (CTS) of the National Security Division. Before joining CTS, he worked as a Senior Associate in the Washington, D.C., office of a national law firm, where he practiced in the areas of white-collar criminal defense, government enforcement, and complex commercial litigation. He also served as an active duty judge advocate in the U.S. Navy Judge Advocate General's Corps.

Craig R. Heeren serves as an Assistant United States Attorney in the Eastern District of New York, where he is Deputy Chief of the National Security & Cybercrime Section for the Criminal Division. Among other roles, he previously served as the office's Counterintelligence and Export Control Coordinator and a Computer Hacking and Intellectual Property (CHIP) coordinator. Before his career as a prosecutor, he worked as a Senior Associate in the New York office of a national law firm, where he practiced in the areas of white-collar criminal defense and complex

193 *Id.* at 3.

194 James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 Minn. J.L. & Inequality 51, 54 (2010).

195 George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 Cornell J.L. & Pub. Pol'y 517, 521, 545 (2014).

196 *Id.* at 550.

commercial litigation. He also clerked for the late Hon. Harold Baer, Jr., District Judge for the Southern District of New York.

Managing the Extreme: Domestic Violent Extremism in Federal Custody

Dr. Miranda Faust
Administrator
Bureau of Prisons Intelligence and Counterterrorism Branch

Nick Masellis
Correctional Program Officer
Bureau of Prisons Intelligence and Counterterrorism Branch

I. Introduction[1]

With the advent of the Ku Klux Klan from the post-Antebellum and Reconstruction period, to the deadliest domestic terrorist attack on U.S. soil at the Alfred P. Murrah Federal Building in Oklahoma City, to the influx in frequency of mass shootings and threats to critical infrastructure around the country, domestic violent extremism (DVE) has been, and continues to be, a pervasive challenge in the United States.[2] The current ideological span of DVE threats also ranges broadly, such as anti-authority and anti-government, racially motivated violent extremism (RMVE), and other lone actors with overlapping or nuanced motivations. The statistics unfortunately corroborate the scope over the past several years as well. According to the Government Accountability Office, "[f]rom fiscal years 2013 through 2021, the FBI's number of open domestic terrorism-related cases grew by 357 percent from 1,981 to 9,049."[3] The rhetorical observation of the contemporary DVE landscape is therefore not only vast but

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[1] The views expressed in this article are those of the authors and do not necessarily reflect those of the Department of Justice, Federal Bureau of Prisons, or any other government entity.

[2] *See generally* U.S. Secret Serv., Nat'l Threat Assessment Ctr., U.S. Dep't of Homeland Sec., Mass Attacks in Public Spaces: 2016-2020 (2023). This report analyzed 173 attacks impacting various locations and spaces, including workplaces, schools, houses of worship, military bases, public transportation sites, open spaces, and other public locations that citizens visited on a regular basis.

[3] U.S. Gov't Accountability Off., Domestic Terrorism: Further Actions Needed to Strengthen FBI and DHS Collaboration to Counter Threats, at ii (2023).

also has grown significantly.[4]

In June 2021, the White House published the *National Strategy for Countering Domestic Terrorism,* noting the continued, significant threat to the homeland.[5] The strategy, which specified the focus to prevent domestic terrorism (DT) and reduce the factors that fuel its scourge, demands a multifaceted response across the federal government and beyond. Such a mandate involves a holistic, whole-of-government approach, including correctional systems.

The DVE threat is neither new nor unique from the correctional perspective. Through time, the Federal Bureau of Prisons (BOP) has housed convicted defendants who are associated with various groups and ideologies. The increase and reach of these entities through technology and social media platforms, however, has expanded the DVE ideological scope beyond national borders to exponential proportions. This trend only expounds upon the elevated threat assessments from U.S. intelligence and law enforcement entities to include those in the correctional environment. As such, managing and monitoring DVE offenders is vital, with programs targeting reintegration post-incarceration equally as significant, particularly because most of these individuals will return to communities within the United States.

The scope of this article will center on the federal level of corrections, specific to inmates that fall under the purview of the BOP; management of these inmate populations, including the myriad programs offered for post-incarceration reentry; and the brief purview of post-incarceration visibility.

II. Background

A. BOP: an overview

The BOP was established in 1930 under the Hoover Administration.[6] Since that time, it has adapted to the era's prevailing societal approach to incarceration. In essence, the BOP has been responsible for incarcerating those who violated the laws of the day, while offering a reflection of the unstable, fragile portions of the society from which they came. The common thread across the span of time associates well with Stimmel's

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[4] Multiple examples can be seen in the past decade, including the 2016 anti-authority violent extremist attack on law enforcement in Dallas, Texas; the 2017 lone gunman with political animus wounding four people at a congressional baseball game; and the January 6, 2021 assault on the U.S. Capitol.

[5] Nat'l Sec. Council, The White House, National Strategy for Countering Domestic Terrorism 8 (2021).

[6] Fed. Bureau of Prisons, About the Federal Bureau of Prisons 1 (2015).

assertions that "prisons and the larger social order are connected by the umbilical cord of social sentiment."[7] The historical precedent since the BOP was established provides a semblance of such societal sentiments.

For instance, at the onset of the BOP's existence, the country faced vast economic hardship out of depression and economic collapse. In the proceeding decades, war and conflict—World War II, the Korean War, and the Vietnam War—brought returned service members with the skills of violence and the experience of applying its trade. In the 1960s, civil disobedience related to anti-war protests, racial inequality, and anti-government sentiments led to disturbances in over 200 cities.[8] Moving through the 1970s and 1980s, corrections populations grew to historic proportions in the advent of newly established drug laws; by the middle of 1990, the BOP population was at 170% of rated capacity.[9]

In the 1990s, from the counterterrorism (CT) perspective, militia and nascent accelerationist ideologies became publicly recognized through such events as Ruby Ridge and Oklahoma City. The next two decades were dominated by the Global War on Terrorism (GWOT) and enduring threats by various Foreign Terrorist Organizations (FTOs). A new cohort of combat-hardened veterans was another derivative of the GWOT, as well as increased DVE threats recently culminating in assault on the U.S. Capitol on January 6, 2021. These latter developments have ushered much of the contemporary era of terrorist-related incarceration, which continues to evolve.

Today, the BOP is responsible for the care and custody of approximately 159,058 individuals across 121 institutions and varied security levels ranging from administrative maximum facilities to minimum security camps.[10]

Reflecting on the original 1930 mandate, covering the totality of the

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[7] *See* E.N. Stimmel, *The Evolution of Penology and the Federal Bureau of Prisons*, *in* Penology: The Evolution of Corrections in America 21 (George G. Killinger et al. eds., 1979).

[8] Norman Carlson, *The Federal Prison System: Forty-Five Years of Change*, Fed. Prob. J. Corr. Phil. & Prac., June 1975, at 37, 37. Carlson outlined the context for the changes to the federal prison system up to that period.

[9] John Roberts & Kristen Mosbaek, *60 Years of a Proud Tradition: An Historical Perspective of the Federal Bureau of Prisons*, 1 Fed. Prisons J. 61, 62 (1990). Roberts and Mosbaek further explained, "This growth occurred largely as a result of new enforcement emphases at the Federal level, the enactment of new drug laws, the continuing impact of Federal sentencing guidelines, and changes in the Nation's demographics." *Id.*

[10] *Statistics: Population Statistics*, Fed. Bureau of Prisons, as of June 29, 2023. https://www.bop.gov/about/statistics/population_statistics.jsp (last visited July 5, 2023).

federal inmate population, the United States Code established that the BOP shall "have charge of the management and regulation of all Federal penal and correctional institutions" and be responsible for the safekeeping, care, protection, instruction, and discipline "of all persons charged with or convicted of offenses against the United States."[11] Little has changed since the latter founding principles, except perhaps the contemporary notion of reentry: the path an inmate takes from and during their incarceration to the point they complete their sentence and transition back into society.

Reentry is one of the primary goals of the BOP, and there are unique challenges both in the structural avenues and security posture for the DVE population to effectively afford reentry opportunity without a level of risk acceptance. Nevertheless, there are multiple, structured, and unstructured program opportunities within the BOP that offer rehabilitative tools, skills, and techniques to effectively reintegrate offenders into society.

A core component of the BOP's ability to identify inmates with a nexus to extremist-related violence (for example, those with an IT and DT nexus) is derived through the inmate designation process. One of the factors for designation involves determining the security level of an inmate based upon a classification system that considers offense conduct and offender history. It should be noted that individuals convicted of terrorism-related offenses who are incarcerated in the BOP fall under the purview of the Intelligence and Counterterrorism Branch (ICTB).

B. BOP ICTB: an overview

Though incarcerated terrorists, international and domestic, comprise a small proportion of offenders in prisons, the management of this population has vast implications. Individuals and groups commonly associated with FTOs, and groups or individuals that espouse and act upon DVE who are incarcerated within the BOP, require significant attention to ensure they do not pose further risk to the safety and security of staff and inmates within the agency, as well as the community writ large. It is imperative that such individuals are unable to further disseminate and influence other inmates to engage in violence on behalf of an extremist ideology. Organizationally, the BOP had to adapt to fill the needs associated with managing this growing inmate population.

In 2006, the BOP's Counter Terrorism Unit (CTU) was established to manage and monitor inmates with a nexus to terrorism.[12] In 2008, the

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[11] 18 U.S.C. § 4042(a).

[12] *Historical Information: Timeline,* Fed. Bureau of Prisons, https://www.bop.

BOP's ICTB was established because the agency recognized the unique status of these offenders, and to provide the field institutions with oversight of policy and training.[13] In 2019, in addition to the CT mission, the ICTB reorganized to expand oversight and centralize all intelligence and investigative operations for the BOP, including gang management, drug and contraband introductions, and other Security Threat Group (STG) oversight.[14]

The goal of the ICTB has since been to improve the BOP's ability to collect, develop, and share intelligence in a more organized and efficient manner, operationalized through its three primary units: the CTU, the National Gang Unit (NGU), and the most recently established Investigations and Intelligence Unit (IIU). These entities are core to managing the STG populations, including terrorist offenders.

C. BOP processes to managing terrorist offenders

The BOP's approach to managing terrorist offenders, including those who categorically fall into the DVE variety, can be described through three tiers: identify and validate; manage and monitor; and observe and report.[15] These are taught as baseline concepts for all correctional staff to understand and apply (as applicable to their position) across the BOP. Though the framework may appear simplistic, these mechanisms apply to managing inmates across varied security levels and specific extremist-related categories.

1. Identify and validate

The BOP and ICTB implement a full suite of techniques and procedures to glean knowledge of individuals coming into the BOP system. These efforts culminate in the identification of individuals who have an affiliation with or nexus to extremist activity and the assignment of an internal tracking code specific to each inmate. Through this identification process, appropriate managing and monitoring of the inmate can be applied at the respective BOP facility housing the inmate. Properly managing the inmate begins with the ability to accurately identify an offender who may have an affiliation with an extremist ideology based on their offense conduct, behavior while incarcerated, or activity within the community.

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gov/about/history/timeline.jsp (last visited June 26, 2023).

13 *Id.*

14 *Id.*

15 Due to the nature of the mechanisms used in these efforts, these tiers will be covered in a generic fashion.

As such, it is important to understand the criminal charges that are typically associated with DVE. Domestic violent extremism concerns individuals or groups based and operating primarily within the United States or its territories without direction or inspiration from a foreign terrorist group or other foreign power and who seek to further political or social goals, wholly or in part, through unlawful acts of force or violence dangerous to human life. There is no federal statute, however, that criminalizes domestic terrorism per se, nor is there a federal law that allows for designating domestic groups or organizations in the same manner as the U.S. government designates FTOs, such as the Islamic State of Iraq and Syria (ISIS).[16]

Instead, DT associated with what would be considered DVE criminal conduct is often charged with offenses that can also be utilized outside of terrorism matters, such as weapons possession, conspiracy-related charges, or seemingly unrelated charges such as cigarette smuggling or bank robbery. In other cases, state charges may be applied, as some states have their own DT charges, and the offender may be serving their sentence with the BOP under an inter-government agreement.

One crucial way for the BOP to identify such inmates is through information found in the presentence report (PSR).[17] This information is shared with the United States Probation Office (USPO) at the time of the finding of guilt or shortly thereafter. These reports, which the BOP reviews before or upon the arrival of inmates at BOP institutions, help to ensure the BOP is appropriately monitoring social communications of high-risk inmates so that the Federal Bureau of Investigation can conduct appropriate follow-up activities, if necessary. Prosecutors are trained to provide probation services with all information about a defendant's connections to terrorist activity or terrorist groups, including information that links the defendant to violent extremist ideology, including racially or ethnically motivated violent extremism, anti-government or anti-authority violent extremism, or other DVE ideology.

With the latter background in mind, there are certain examples that help illustrate how DVE criminal activity has been charged and exemplify the process the ICTB undertakes to identify and validate individuals

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[16] Though there are no federal DT statutes, certain states (for example, Georgia) have state-level DT statutes. *See* GA. Code Ann. § 16-11-220 (2020). During recent and ongoing incidents surrounding the planned construction of a roughly 1,000-acre police and fire training center, also known as "Cop City," multiple individuals have been charged under state DT charges after violent clashes with law enforcement. It should also be noted that as plots are being disrupted earlier, state and local prisons may begin to see an increase in individuals with a nexus to terrorism.

[17] Fed. R. Crim. P. 32(d)(2).

associated with DVE:

- January 6, 2021 U.S. Capitol Siege: The actions of the individuals who descended upon the U.S. Capitol on January 6, 2021, are notorious and profound, with certain participants having a nexus to DVE. As of July 2023, approximately 968 individuals had been identified through legal processes (that is, charged federally) in relation to the criminal activity at the U.S. Capitol on January 6, 2021.[18] Though some of the longer sentences coincide with assaulting a federal officer and seditious conspiracy, as noted above, there were other more common charges associated that were not necessarily indicative of what would be overtly considered DVE or DT-related charges.[19] The more common of these were knowingly entering or remaining in any restricted building or grounds without lawful authority (18 U.S.C. § 1752); violent entry and disorderly conduct and parading, demonstrating, or picketing in a capitol building (40 U.S.C. § 5104); and destruction of government property (18 U.S.C. § 1361).[20]
- Oath Keepers[21]: On November 29, 2022, two members of the Oath Keepers were found guilty of seditious conspiracy (18 U.S.C § 2384) related to the breach of the U.S. Capitol on January 6, 2021.[22] On January 23, 2023, in a separate trial, four additional members of the Oath Keepers were also found guilty of this charge.[23] According to

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[18] The George Washington University Program on Extremism has also been maintaining an open-source tracking tool entitled "Capitol Siege Cases." Disposition status includes the following: acquitted by trial, pleaded guilty, pending, case dismissed, and convicted by trial. *See Capitol Hill Siege Cases,* Geo. Wash. Univ., https://extremism.gwu.edu/capitol-hill-siege-cases (last visited July 5, 2023).

[19] 18 U.S.C. § 111 (assaulting, resisting, or impeding certain officers or employees); 18 U.S.C. § 2384 (seditious conspiracy).

[20] 18 U.S.C. § 1752 (restricted building or grounds); 40 U.S.C. § 5104 (unlawful activities); 18 U.S.C. § 1361 (government property or contracts).

[21] Ari Weil, *Strategies of Narrative Coherence: How Militias Justify Embracing State Power*, Persps. on Terrorism, Dec. 2022, at 19, 22. The Oath Keepers were founded in 2009 in Lexington, Massachusetts, the site of the first battle of the Revolutionary War. The organization sought to recruit military and law enforcement (active and retired) to keep their oath to the U.S. Constitution. As Weil noted, the Oath Keepers' founding document, the "Declaration of Orders We Will Not Obey," lists 10 orders that an authoritarian government could give, and that all Oath Keepers should refuse to abide by, including the imposition of martial law, firearm confiscation, blockading cities, and the use of foreign troops on American soil.

[22] 18 U.S.C. § 2384.

[23] *See* Press Release, U.S. Dep't of Just., Leader of Oath Keepers and Oath Keepers Member Found Guilty of Seditious Conspiracy and Other Charges Related to the U.S.

the evidence at trial, in the months leading up to January 6, 2021, the defendants and their co-conspirators plotted to oppose the lawful transfer of presidential power, including by amassing an armed "quick reaction force" on the outskirts of the District of Columbia.[24] In addition to the sedition charges, the defendants were found guilty of conspiracy to obstruct an official proceeding, obstruction of an official proceeding, and conspiracy to prevent members of Congress from discharging their official duties.[25]

- Governor Whitmer Kidnapping Plot: In early 2020, multiple individuals, fomented by militia and anti-government- and anti-authority-related aspirations, were involved in a conspiracy to kidnap the governor of Michigan and utilize weapons of mass destruction against persons or property. The initial and ongoing coordination and discussion pertaining to the plot were through social media, where individuals discussed overthrowing certain government and law enforcement components.[26] The federal charges associated with these actions were conspiracy to kidnap the governor of Michigan (18 U.S.C. § 1201), conspiracy to use weapons of mass destruction against persons or property (18 U.S.C. § 2332a), and knowingly possessing an unregistered destructive device (26 U.S.C. § 5861).[27]
- RMVE Plots on Critical Infrastructure: In January 2018, an individual was sentenced to five years in federal prison for possessing an unregistered destructive device and for unlawful storage of explosive material. For background, the individual was an active and founding member of a neo-Nazi group known as the "Atomwaffen Division" which translates in German to "atomic weapons."[28] More

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Capitol Breach (Nov. 29, 2022); *see also* Press Release, U.S. Dep't of Just., Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach (Jan. 23, 2023).

[24] *See* Press Release, U.S. Dep't of Just., Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach (Jan. 23, 2023).

[25] *Id.*

[26] *See* Criminal Complaint at ¶ 6, United States v. Franks, No. 1:20-MJ-416 (W.D. Mich. Oct. 6, 2020).

[27] 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 2332(a) (criminal penalties); 26 U.S.C. § 5861 (prohibited acts); *see also* Press Release, U.S. Dep't of Just., First of Two Convicted at Trial in Michigan Governor Kidnapping Plot Sentenced to 16 Years in Prison (Dec. 27, 2022); Press Release, U.S. Dep't of Just., Final Defendant in Michigan Governor Kidnapping Plot Sentenced to Over 19 Years in Prison (Dec. 28, 2022).

[28] *See* Press Release, U.S. Dep't of Just., Neo-Nazi Leader Sentenced to Five Years in Federal Prison for Explosives Charges (Jan. 9, 2018); Jonah Bromwich, *What Is Atomwaffen? A Neo-Nazi Group, Linked to Multiple Murders*, N.Y. Times (Feb. 12,

recently, authorities allege that the same subject, along with a fellow co-conspirator, planned to shoot five electrical substations in the state of Maryland.[29] The individuals were charged with conspiracy to damage an energy facility.[30]

Once an offender is identified with an offense charge, such as those outlined above, and an ideological nexus is affirmed, the focus then moves to ensuring the BOP provides a safe and secure setting during confinement. The setting that is often tailored to the unique needs of such individuals.

2. Manage and monitor

Oversight and information sharing are essential functions for ICTB for all groups of inmates who pose additional risk to safety and security. Such risks may be based upon their respective criminal conduct or extremist activity, including those relating to DVE. Appropriate designation based upon security needs to a BOP facility is, therefore, an integral part of the strategy in managing this type of offender. Once an offender is identified with a DVE nexus, several factors are considered for institution designations, including security level, mental health, and medical needs, as well as whether a need for heightened security or monitoring is applicable.

Most DVE-related inmates are housed at prison facilities of high, medium, or low security. Certain offenders may require placement at the BOP's administrative maximum facility or Communications Management Unit (CMU) when egregious offense conduct or prevention of further extremist-related violence within the custodial setting is deemed necessary; these placements are pursued through a carefully vetted review process.

Similar in concept, but vastly different by origin and oversight, are the Special Administrative Measures (SAMs), which the Attorney General of the United States must approve.[31] Under these provisions, inmate communications specific to their respective offense conduct are strictly monitored. The monitoring is often in coordination with other interagency partners with jurisdiction, while the daily management of these inmates is under the purview of the BOP.

Notwithstanding the multiple layers and levels of federal incarceration, the BOP seeks to manage an inmate at the lowest security level possi-

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2018).

29 Press Release, U.S. Dep't of Just., Maryland Woman and Florida Man Charged Federally for Conspiring to Destroy Energy Facilities (Feb. 6, 2023).

30 *Id.*

31 28 C.F.R. § 501.1 (BOP emergencies); 28 C.F.R. § 501.3 (prevention of acts of violence and terrorism).

ble and will only consider an increase in restrictions or security needs with documented evidence to justify a change. Nonetheless, the next portion of the management strategy is critical to ensure that individuals are appropriately managed within the system.

3. Observe and report

As with the case of any individual in federal custody, staff are expected to carefully observe and report concerning inmate behavior. This need is heightened for those offenders with STG validations, including those reflecting a nexus to DVE. Each BOP facility invokes certain caveats for procedures and protocols, but the impetus for documenting and reporting observations is universally standardized through annual trainings when it comes to possible radicalization or extremist behaviors.

Additionally, each institution has specialized investigative staff that are responsible for information sharing between the local facility and the ICTB. They report observations of day-to-day behavior that may indicate concerning trends or attempts to engage in DVE-related attack planning or plotting.

Conversely, the ICTB provides notifications on a myriad of safety, intelligence, or other overlapping domestic and international events that may pose implications for a specific institution or the inmate population at large. This two-way information-sharing cycle seeks to ensure inmate behaviors and actions that may indicate continued criminal activity or attempts at radicalization are identified, thwarted, and reported to relevant outside law enforcement for appropriate action.

To add value to the ICTB mission, staff must remain vigilant and recognize trends within these populations for observing and reporting. Some areas offering contemporary examples are—

- Knowing leadership within a group, or onset of establishing a leadership position. Examples from among inmate gang populations demonstrate the importance of how charismatic individuals can assert themselves and influence other inmates;
- Identifying recruitment techniques, whether they be through internal or external influence or coercion;
- Identifying and documenting symbolism, insignia, and tattoos that have known, or unknown, affiliation with an extremist movement or ideology; and
- Communications containing details, insinuation, or otherwise encrypted correspondence that may have security implications for the institution or the broader public.

Lastly, the BOP has built and fostered external partnerships, including with the National Joint Terrorism Task Force (NJTTF) and certain Joint Terrorism Task Force (JTTF) posts, and collaboration with other Department of Justice task forces and Department of Homeland Security (DHS) fusion centers. These partnerships reinforce the BOP's information-sharing efforts and ensure potential crimes are investigated and, when necessary, the individual is charged and convicted accordingly.

III. BOP scope of incarcerating DVE inmates

Overall, before the influx of certain FTO-related offenders, such as ISIS, incarcerated individuals were older, more educated, and serving very lengthy sentences. Most IT inmates were either deported upon release or under long-duration sentences up to life imprisonment. Though the ICTB's focus over the past few years has been on FTOs like ISIS, the response and management strategy has remained flexible and expanding, whether due to a resurgence of Al Qaeda and foreign fighters, or the increase in DVE.

The current cohort of DT inmates includes a range of ideological associations such as animal rights extremism, environmental extremism, abortion extremism, and other RMVE and DVE types. Despite the range and prevalence of DVEs in federal custody, categories of increased concern within the DVE realm are those that appear to be increasingly blending with other ideological dogmas.

Some within the law enforcement community have referred to the latter as the "ideological salad bowl," representing an amalgamation of perspectives and ideas that may or may not be connected or combined but share a type of Machiavellian common cause. Other researchers have used the term "Composite Violent Extremism," or "CoVE," to further delve into the increased blending of extremist ideological beliefs phenomena.[32]

Though the variance and nuance take on many shades, those which overlay from one degree to another with RMVE, anti-authority and anti-

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[32] *See generally* Daveed Gartenstein-Ross et al., *Composite Violent Extremism: Conceptualizing Attackers Who Increasingly Challenge Traditional Categories of Terrorism*, Studies in Conflict & Terrorism (2023) (not yet published in a volume). As described in the article's abstract, "Despite a proliferation of labels like 'salad bar extremism,' consensus on the nature of the problem is lacking and current understandings risk conflating what are in fact distinct types of extremism. Building on current literature and a detailed dataset, this article presents a new conceptual framework for understanding this phenomenon, consisting of an overarching concept of composite violent extremism (CoVE) and underlying typologies of ambiguous, mixed, fused, and convergent violent extremism. The article then proposes explanations for the apparent increase in these radicalization patterns."

government extremism, criminal gang affiliations, and FTOs are of particular concern both inside and outside the correctional environment. These can be group-oriented, as seen with RMVE types, as well as from the more obscure but increasingly concerning involuntary celibate-related violence.

Another area of concern is the potential increase of foreign fighter returnees, whether those who participated on behalf of FTOs overseas, such as in Syria under ISIS-ISIL, or others joining the fighting in Ukraine to exacerbate certain RMVE tendencies. In both cases, these individuals seek camaraderie through operational application of their ideological beliefs. Such combat-hardened and experienced individuals could represent a challenge to the correctional environment, both in terms of general security and the gravitas associated with these experiences to other inmates in shared, captivated vicinity.

Notwithstanding the latter DVE potential, all these DVE types bring positions and beliefs into the correctional environment where the outlined continuum of identify and validate; manage and monitor; and observe and report are so vital. Moreover, the potential and concern for hybrid ideology merging with more criminal gang-related or other illicit networks is cause for concern in federal correctional institutions and the general community as well.

Irrespective of all DVE ideologies, movements, and groups, a core principle of the BOP is not to change beliefs or abridge any element of an inmate's fundamental constitutional and civil rights. Instead, the agency's obligation is to counter extremist and terroristic pursuits, whether manifested through attempts to spread ideological beliefs or through outright attempts to engage in operational activities. To this end, the BOP's endeavor is to provide tools for the inmate to disengage from the behavior.

A. The BOP's approach to disengagement from extremism

Critics often suggest the BOP implement a deradicalization or disengagement program specific to extremist offenders and speculate that a lack of such program reflects a lack of effort to motivate change or to offer opportunities for personal growth within the prison system. While the layperson's logic likely stems from a desire to ensure that no further lives are lost or harm is inflicted upon communities because of DVE, there are several factors complicating the implementation and effectiveness of a singular approach to programming.

Recognizing these factors is crucial to ensuring the BOP, as well as any service provider involved with this population (for example, probation services, community treatment providers, etc.), can adeptly consider new lines of effort in this realm. Moreover, there is an impetus to ensure

such implementation is not driven by political or policy motivations, but rather grounded in the evidence-based, fundamental principles of behavioral change. These are represented by a robust suite of program opportunities offered to the entire BOP inmate population, including those with a DVE nexus. With the advent of the First Step Act in 2018, a law designed to improve criminal justice outcomes and reduce the size of the federal prison population, the BOP standardized program service delivery and focused on building capacity in existing programs to serve all individuals across BOP facilities.[33]

1. Rehabilitation posture: programs

Reentry programs are the pillar of the BOP. Current statistics show rates of recidivism to be approximately 20% lower than many state departments of corrections.[34] The BOP's approach to reentry is applied to all inmates, beginning on the first day of incarceration and independent of their offense conduct. All inmates have opportunities to participate in programs that address identified needs. Program engagement attempts to promote prosocial behavior, improve overall well-being, and increase the probability of successfully reentering society or serving their sentence in a manner that reduces the risk of harm to self, staff, and other inmates.

Education and recreation services

Central to reentry success, especially in the interconnected information age, is traditional and vocational education. As a baseline, all BOP institutions offer literacy classes, English as a Second Language, parenting classes, wellness education, adult continuing education, library services, and instruction in leisure-time activities. The BOP outlines its education and recreation services as follows:

> In most cases, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the literacy program for a minimum of 240 hours

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33 *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

34 *About Our Agency*, Fed. Bureau of Prisons, https://www.bop.gov/about/agency/ (last visited June 26, 2023). "In 2016, the U.S. Sentencing Commission found that only 34% of the inmates released from the Bureau of Prisons in 2005 were rearrested or had their supervision revoked over a three-year period and returned to federal custody. As well, the BOP's 2019 Second Chance Act report provides crude recidivism rates for inmates released from BOP custody during FY 2014-2016 and compares inmates who participated in various programs to inmates who did not participate. The BOP's overall recidivism rate (as defined by a rearrest or return to any jurisdiction's custody) is around 43% which is lower than most studies of state prisoners using comparable definitions and methodologies." *Id.* (emphases omitted).

> or until they obtain the GED. Non-English-speaking inmates must take English as a Second Language.
>
> Vocational and occupational training programs are based on the needs of the inmates, general labor market conditions, and institution labor force needs. An important component is on-the-job training, which inmates receive through institution job assignments and work in Federal Prison Industries. The Bureau also facilitates post-secondary education in vocational and occupationally oriented areas. Some traditional college courses are available, but inmates are responsible for funding this coursework.
>
> Parenting classes help inmates develop appropriate skills during incarceration. Recreation and wellness activities encourage healthy lifestyles and habits. Institution libraries carry a variety of fiction and nonfiction books, magazines, newspapers, and reference materials. Inmates also have access to legal materials to conduct legal research and prepare legal documents.[35]

Chaplaincy services

Chaplaincy services are core to the BOP's mission and the spiritual well-being of the inmate population interested in their respective spiritual and religious journey. The BOP outlines religious opportunities as follows:

> The Chaplaincy Services Branch ensures the Constitutional religious rights of inmates. Chaplains facilitate religious worship and sacred scriptural studies across faith lines in addition to providing pastoral care, spiritual guidance, and counseling. Religious programming is led by agency chaplains, contracted spiritual leaders, and trained community volunteers. In support to BOP policy, inmates may participate in religious observances and holy days; wear religious items; and have access to religious materials.
>
> The Life Connections Program (LCP) and Threshold Programs offer inmates the opportunity to improve critical life areas within the context of their personal faith or value system. LCP is a multi-faith residential reentry program that is available at five sites across the country at low, medium, and high security levels. It is an intensive, multi-phase program

[35] *Custody & Care: Education Programs*, Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/education.jsp (last visited July 12, 2023).

> which instills values and character through a curriculum of personal, social and moral development. The LCP program utilizes various faith communities nationwide who serve as support group facilitators or mentors at program sites and release destinations to enhance community reintegration. Reentry preparation for inmates not eligible for the residential LCP is also offered through the Threshold program that also seeks to strengthen inmate community reentry. Threshold is a nonresidential condensed version of LCP that is active in institutions throughout the agency.[36]

Psychology services

Perhaps one of the more fundamental aspects of rehabilitation and preparation for reentering society is through mental health and substance abuse treatment. These services are vital for the entirety of the inmate population, and fundamental for those with DVE aspirations and behaviors. The BOP outlines mental health and substance abuse treatment as follows:

> The Bureau provides a full range of mental health treatment through staff psychologists and psychiatrists. The Bureau also provides forensic services to the courts, including a range of evaluative mental health studies outlined in Federal statutes.
>
> Psychologists are available for formal counseling and treatment on an individual or group basis. In addition, staff in an inmate's housing unit are available for informal counseling. Services available through the institution are enhanced by contract services from the community.[37]

Substance abuse treatment

Often, substance abuse issues coincide with other criminal behaviors, which include those affiliated with DVE ideations. Thus, a core component to any programming and reentry initiative would entail substance abuse treatment as applicable to an individual inmate. The BOP outlines its substance abuse treatment program as follows:

> The Bureau's drug abuse treatment strategy has grown and changed as advances have occurred in substance treatment

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[36] *Custody & Care: Religious Programs*, Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/religious_programs.jsp (last visited June 26, 2023).
[37] *Custody & Care: Mental Health,* Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/mental_health.jsp (last visited June 26, 2023).

programs. Staff members have maintained their expertise in treatment programming by monitoring and incorporating improvements in the treatment and correctional programs literature, research, and effective evidence-based practices.

Drug treatment studies for in-prison populations find that when programs are well-designed, carefully implemented, and utilize effective practices they:

- reduce relapse
- reduce criminality
- reduce recidivism
- reduce inmate misconduct
- increase the level of the offender's stake in societal norms
- increase levels of education and employment upon return to the community
- improve health and mental health symptoms and conditions
- improve relationships

Collectively, these outcomes represent enormous safety and economic benefits to the public.[38]

Residential reentry opportunities

In circumstances where an inmate is assessed for residential reentry placement, which can include inmates with DVE-related STG assignments, opportunities for structured reintegration are available through residential reentry centers (RRCs). The BOP outlines RRCs as follows:

> The BOP contracts with residential reentry centers (RRCs), also known as halfway houses, to provide assistance to inmates who are nearing release. RRCs provide a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, and other programs and services. RRCs help inmates gradually rebuild their ties to the community and facilitate supervising ex-offenders' activities during this readjustment phase.[39]

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[38] *Custody & Care: Substance Abuse Treatment,* Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited June 26, 2023).

[39] *About Our Facilities: Completing the Transition,* Fed. Bureau of Prisons, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp (last visited June 26, 2023).

B. Factors that impact progress in prison

1. Individual offender element

Sometimes, the most obvious piece of a puzzle is the one that is hardest to recognize. In that, the most fundamental piece to program engagement and reentry is the offender themselves. There are myriad challenges for any offender in their pathway to change, and these are highlighted for those who are ideologically driven. The individuals in custody may present at different stages on the change continuum, including those with no apparent self-initiative to disengage, those who show willingness to disengage but have many push-pull factors challenging them, and those who pose vulnerabilities to extremist concepts but have not necessarily passed the threshold of being radicalized. At any given point for an individual who is in a category of contemplating or pursuing change, life events (such as social or familial push-pull factors) may drive them back into a place where change related to DVE ideology is precluded by the immediate crisis. For those offenders who exhibit a willingness to change, the BOP's reentry resources are readily available and can be applied for maximum optimization.

Personal reflection of one's own attempts at change will readily identify how difficult it is for an individual to commit to a mindset and behavior change. For an individual who is incarcerated for a DVE-related offense, consider the stigma associated with such criminal activity. In some cases, the offender may need to reconsider their religious and social networks, which likely provided a level of support they were seeking to counter the factors that lead to their radicalization. Lastly, consider the loss the offender has likely endured due to their conviction and subsequent incarceration. All these factors will weigh heavily on one's ability to successfully commit to and sustain a positive change away from extremism.

Length of sentence is also an influencing individual element, though not one in the direct control of an individual. Where an inmate may be incarcerated for a shorter sentence, the programs that are more intense and require longer participation, such as one year, may not be available to the inmate. Sentence length should be considered as a significant factor that contributes to the offender's ability to successfully work toward self-driven change and program completion.

2. Access to other inmates: prisoner governance

Irrespective of the system, security level, or even legal construct (non-U.S. facilities), a convening variable in every correctional environment

is the concept of prison governance.[40] Among the ecosystem of human populations, whether through the study of clans or gangs, human beings tend to consolidate into governing constructs to thrive, control, and survive. Prison administrations must be cognizant of these dynamics, monitor them, and act if and when these challenge the safety and security of staff and inmates. Moreover, the culture of the prison administration often impacts the prisoner governance dynamic. In the BOP, official staff represent the primary source of governance.[41] Still, perception and ideological thrust can combine to generate a notional prison governance where other, vulnerable inmates may succumb to the ideologically rigid DVEs uninterested in disengaging in the behaviors that drive their criminal conduct.

The better managed the system, case management team, and program opportunities, the better chance the prisoner governance concept minimalizes in scope and impact within the inmate population, and the focus on program participation and reentry transition takes precedence.

3. Other liabilities and external variables

The discussion related to implementing specialized disengagement or deradicalization programs is not complete without a willingness to understand the associated risks. A model of segregated programs tailored specifically to extremist offenders allows for the co-location of these individuals in one housing unit or institution. In these instances, the balance between programming and monitoring becomes critical to ensuring that grouping certain offenders together does not cause further radicalization or opportunities to plot attacks.[42]

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[40] *See* David Skarbek, The Puzzle of Prison Order: Why Life Behind Bars Varies Around the World 9 (2020). Skarbek explains four types of government regimes in prisons "based on who produces the governance: official governance, co-governance, self-governance and minimal governance." *Id.*

[41] *Id.* at 5. Skarbek expands upon these dynamics in a comparative analysis of various prison environments across time and geography. Sharbek also notes the commonality among prisoners who "suffer the pains of imprisonment, which often include deprivation of liberty, goods and services, heterosexual relationships, autonomy, and security." *Id.* The concept of prison governance rests on a variety of variables among groups who share experience, with a primacy of safety. For instance, Skarbek notes stark differences between Civil War prisoner-of-war camps, like Andersonville, and that of contemporary Norwegian prison culture that typically exhibits a pattern of respect among the inmate population.

[42] It is worth noting the research that Tinka M. Veldhuis conducted on the dynamic and choice between dispersal- and concentration-related strategies for incarcerating terrorist offenders based upon the Dutch experience. *See generally* Tinka M. Veldhuis, Prisoner Radicalization and Terrorism Detention Policy: Institutionalized Fear or Evidence-Based Policy Making? (2016).

Conversely, segregating offenders completely does not afford them exposure to alternative forms of thinking and understanding of their viewpoint. As with all forms of treatment in a custodial setting, there must be a balance between modeling and rewarding prosocial behavior and understanding the ability to manipulate for additional gain. The question then becomes, what risks are the prison system, the law enforcement stakeholders, and the community willing to take to allow an extremist offender an opportunity to disengage? The question itself, however, presents a litany of layers with which to contend. As mentioned previously, the BOP's partnership with USPO presents a foundational element to this outstanding query.

Indeed, the BOP's partnership with the USPO is integral to community reception and investment. Specifically, this collaboration begins before release with the sharing of offense conduct and incarcerated behavior data. Additionally, USPO detailed to the ICTB provides timely information sharing, which lends to a seamless transition from incarceration to supervised release. These cumulative efforts offer a precursor during supervised release for a successful community transition. Communities, however, must also be willing to invest and afford relevant opportunities for individuals returning to society.

Notwithstanding the data-driven and results-based methodologies applied to the programming that the federal correctional system offers, credence should be heeded in terms of DVE population, and in general terms as well. One of the early reformers of prisons opined on the matter around the mid-nineteenth century, stating:

> We promise, through all reformed prisons systems, too much, even under the most favorable modes of administering them. It is not easy to correct a trivial, inconvenient habit for a short time indulged; shall a whole life of wrong and mistake be amended by a few years of imprisonment? Nourish and train rightly the young plants; then, as they grow to maturity, they will not exhibit deformity, and yield unwholesome fruits.[43]

The nourishment referenced is certainly sown through the programs afforded to DVE inmates through the course of their incarceration, ranging from short-term to long-term sentences.

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[43] Dorothea Dix, Remarks on Prisons and Prison Discipline in the United States 65 (2d ed. 1845).

IV. Concluding remarks

In 1899, while covering the Second Boer War as a journalist, Winston Churchill was captured and taken prisoner of war by Boer commander Louis Botha.[44] Churchill would eventually escape captivity, and years later serve as Home Secretary in charge of all British prisons.[45]

During a House of Commons speech in 1910, Churchill observed—

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal, . . . tireless efforts towards the discovery of curative and re-generative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which, in the treatment of crime and the criminal, mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue within it.[46]

The dissection of this statement in the U.S. experience over time offers potential for other historical investigation.[47] Nevertheless, what partly gives reverence to the living virtue that Churchill alluded to are the physical age, designated security level, general topography, oversight regimes, and other convening mission sets. The latter particularly play into a re-

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[44] Boer commander Louis Botha would later become South Africa's first prime minister. *See* Mark S. Hamm, The Spectacular Few: Prisoner Radicalization and the Evolving Terrorist Threat 1 (2013).

[45] *Id.* at 1–3. Hamm described Churchill's position as one of condemning punishment in favor of rehabilitation; advocating for an early form of "just deserts" sentencing; and whose actions meeting with discharged convicts represented "one of the earliest forms of after-care." Hamm also noted that British penologists generally agreed that "Churchill's reforms were grounded in his personal experience as a prisoner." *Id.* at 3.

[46] *See* Michael Tonry, *Punishments, Politics, and Prisons in Western Countries*, 51 Crime & Just. 7, 8 (2022).

[47] The evolution of the U.S. prison system in general has advanced in significant ways since the advent of the Pennsylvania and Auburn systems. The latter was built upon the foundational Quaker ideology and principles, otherwise known as the Quaker Plan in the late 1700s. Even during this more nascent and rudimentary period, the U.S. prison system was still a system that the Europeans sought to emulate. Regardless, the increased development of societal systems, administration of justice, well-defined and adhered notions of human and civil rights, and oversight apparatus to retain accountability have helped to frame the conditions of confinement recognized today in the U.S. federal system—particularly with confining DVE and other extremist groups—as a gold standard for many other countries around the world. Stimmel, *supra* note 7, at 17–38.

spective prison's disposition, as well as the systemic infrastructure presiding over those jurisdictions.

With particularly the latter in mind when it comes to managing DVE offenders in federal custody, the standardized feature of the U.S. federal prison system reflects well in regard to the ICTB's inmate management concept of identify and validate, manage and monitor, and observe and report. The effectiveness and efficiency of this standardized, systematic approach can be translatable through training and oversight. This is in line with the BOP core value of Correctional Excellence and continues to lend to the BOP being the premier correctional system in the world.[48]

About the Authors

Dr. Miranda Faust is the Administrator of the BOP ICTB. Miranda received her master's degree and Doctor of Psychology in Forensic Psychology at the California School of Professional Psychology in Fresno, CA. She began her career in Forensic Psychology in the California Department of Corrections and Rehabilitation and began her Bureau of Prisons career in 2001 and worked at three different facilities where she had oversight for mental health, substance abuse, and pro-social skills programs.

In 2008, Miranda transferred to the BOP's headquarters in Washington, DC, as a Special Agent in the Office of Internal Affairs. She was promoted to Supervisory Special Agent in 2014. In 2016, she moved to her current position of Assistant Administrator for the Counter Terrorism Branch. In this capacity, she has oversight for the agency's Counter Terrorism Unit and staff assigned to the National Joint Terrorism Task Force and the Joint Terrorism Task Force-New York. She also is responsible for national policy, programming, training, and new initiatives related to managing all extremist inmates for the Bureau of Prisons. In 2020, Miranda was selected as the Administrator for the Intelligence and Counter Terrorism Branch. Due to an agency wide re-organization initiative, she assumed oversight of all intelligence and investigative operations for the agency, including gang management, drug and contraband introductions, and other Security Threat Groups, in addition to the terrorism mission.

Nick Masellis is an ICTB Correctional Program Officer. Nick returned to the BOP from the Department of Defense Office of Inspector General (DoD-OIG) in November 2021, after three years of service with the DoD-OIG, St. Louis Resident Agency. Nick had previously served in the BOP at Central Office Headquarters, as well as Federal Correctional In-

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[48] *About Our Agency: Pillars: Core Values,* Fed. Bureau of Prisons, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited on June 26, 2023).

stitution, Dublin, CA. Nick is a U.S. Army veteran, where he served in support of Operation Iraqi Freedom (2003–04) with the 101st Airborne Division (Air Assault). Nick holds a Master of Science in Defense Analysis (Information Operations) from the United States Naval Postgraduate School, Monterey, CA, and a Bachelor of Arts in Political Science (*magna cum laude*) from the University of California, Irvine.

Data Matters: Reporting Requirements for Domestic Violent Extremism

Katarina Porter
Lead Program Analyst
Counterterrorism Section
National Security Division

Stephen Brundage
Senior Counsel
Counterterrorism Section
National Security Division

I. Introduction

If money talks, then data teaches. Data is the ubiquitous currency of information that pulses through every facet of society. Data is invested, traded, and if cared for properly, cashed in with fruitful return. To be accessible, data must go through a currency exchange of reporting requirements, which translate the data into meaningful metrics for stakeholders. With clear reporting requirements and due diligence, data has the power to track progress, highlight issues, and illustrate impact in ways not previously possible.[1]

Over the last two years, the Department of Justice (the Department) has significantly updated its Domestic Violent Extremism (DVE) data management strategy. Until recently, the Department did not have a thorough policy that included clearly defined tracking and reporting requirements. DVE data existed before 2021, but minimal reporting requirements severely limited the Department's ability to track the data in a meaningful way.

This quickly changed on March 8, 2021, when the Department published a directive from then-Acting Deputy Attorney General (DAG) John Carlin entitled *Guidance Regarding Investigations and Cases Related to*

[1] *See Identify Reporting Requirements,* Glob. Evaluation Initiative, https://www.betterevaluation.org/frameworks-guides/rainbow-framework/report-support-use-findings/identify-reporting-requirements (last visited June 19, 2023).

Domestic Violent Extremism (March 8 Memo).[2] As detailed more fully below, the March 8 Memo outlines what DVE data should be reported to the National Security Division (NSD) and how the NSD should track such data. Most recently, in November 2022, Justice Manual 9-2.137 was updated to codify and expand upon the policy changes outlined in the March 8 Memo, and to give the NSD approval authorities in certain DVE cases.[3] These updated policies and reporting requirements have given the NSD greater visibility into DVE cases across the country. Deputy Attorney General Lisa Monaco highlighted these "data-driven" changes during her keynote address at the ADL-McCain Institute's Domestic Violent Extremism Policy Summit on June 13, 2022, stating:

> We have also changed the way our prosecutors and investigators report and track investigations with a domestic terrorism nexus in order to provide a more accurate picture of the threat across the entire country. As we did in the wake of 9/11, and to ensure we have a national picture of the threat and our investigations, we are taking a data-driven approach to tack[l]ing this problem and emphasizing a coordinated and consistent approach to disrupting these threats. These efforts advance one of the strategy's central goals of improving information sharing across and outside of the federal government.[4]

The ability to effectively track and report on DVE cases will enhance the Department's ability to inform decisions, ensure consistency, and promote collaboration and transparency—all of which are imperative to the Department's coordinated response to DVE.

II. DVE reporting requirements

On June 15, 2021, the Biden Administration released the first *National Strategy for Countering Domestic Terrorism*.[5] This strategy set the foundation for the current DVE reporting landscape and the critical data strategy that would enable its success. During his remarks introduc-

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[2] Memorandum from the Acting Deputy Att'y Gen. to All Fed. Prosecutors, Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism (Mar. 8, 2021) [hereinafter March 8 Memo].

[3] U.S. Dep't of Just., Justice Manual 9-2.137: Notification, Consultation, and Approval Requirements in Matters Involving Domestic Violent Extremism, Including Domestic Terrorism [hereinafter Justice Manual 9-2.137].

[4] Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., Keynote Address at ADL-McCain Institute Domestic Violent Extremism Policy Summit (June 13, 2022).

[5] Nat'l Sec. Council, The White House, National Strategy for Countering Domestic Terrorism (June 2021) [hereinafter National Strategy].

ing the strategy to the Department, Attorney General Merrick Garland explained that the publication of the strategy was the "culmination of an effort undertaken at the President's direction by federal agencies all across the government—from the Justice Department to the Departments of Homeland Security, Defense, State, Health and Human Services, and others."[6] Attorney General Garland also outlined the ways in which the Department had already begun implementing components of the strategy. He described the March 8 Memo as one such measure—ensuring "that we carefully track investigations and cases with a domestic terrorism nexus."[7] In addition to publishing the March 8 Memo, the Department later updated the Justice Manual to further support the strategy.

A. March 8 Memo: *Guidance Regarding Investigations and Cases Related to Domestic Violent Extremism*

The March 8 Memo notes the necessity of reporting requirements stating, "[b]uilding on the notification required under an existing Justice Manual provision, JM 9-2.137, experience has shown that clarifying and enhancing the current process can bring operational benefits."[8] According to the Memo, the benefit of these enhancements is to ensure appropriate coordination and consistency for tracking investigations and prosecutions involving conduct related to DVE.[9] The Memo notes that DVE raises important legal and policy considerations, and that the Department must be "consistent, considered, well-coordinated, and informed by the relevant facts and circumstances" when formulating its response to such questions.[10] To do that, the Memo "seeks to enhance our ability to collect information about existing and new cases and investigations for internal review . . . ."[11] As Deputy Attorney General Monaco would later describe, the March 8 Memo was a culminating step in the Department's "data-driven" approach to addressing the issue of DVE.[12]

A key component of the March 8 Memo is the definition of DVE. The Memo explains that DVE should be "interpretated broadly and include all violent criminal acts in furtherance of ideological goals stemming from

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[6] Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Domestic Terrorism Policy Address (June 15, 2021).
[7] *Id.*
[8] March 8 Memo, *supra* note 2, at 1.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Monaco, *supra* note 4.

domestic influences, such as racial bias and anti-government sentiment."[13]

1. Responsibilities of trial attorneys in DVE-connected investigations and cases

After defining DVE, the Memo lays out a three-step process for attorneys handling DVE matters. The process is detailed below and can be simplified into the following three stages: identification, notification, and coordination.

Identification

During the identification stage, the Assistant United States Attorney (AUSA) or Trial Attorney handling the investigation or case will review the matter to determine if it (a) involves suspected DVE or (b) bears a material nexus to DVE.[14] If the assigned attorney determines that the matter meets at least one of those two prongs, it is designated as "DVE-related." The Memo explains that DVE-related matters include the following:

a. Any investigation or case involving conduct that meets the definition of "domestic terrorism," as set forth in 18 U.S.C. § 2331(5);

b. Any investigation designated as a domestic terrorism investigation by the FBI (to include any investigation assigned a "266" case classification by the FBI); and

c. Any investigation or case where a subject or target is believed to have engaged in or attempted to have engaged in domestic violent extremism in the past, if that conduct is reasonably expected to be referenced in connection with the current investigation or case (*e.g.*, in pleadings, hearings, reports prepared by U.S. probation or pretrial services officers, sentencings, or press releases).[15]

Notification

After the assigned attorney determines that the investigation or case involves DVE, the next step is to make proper notification. The Memo states, "[a]fter determining that an investigation or case is DVE-related, the assigned Trial Attorney or Assistant United States Attorney (or the office's National Security/Anti-Terrorism Advisory Council (ATAC) Coordinator) shall, as soon as practicable, notify the Counterterrorism Sec-

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[13] March 8 Memo, *supra* note 2, at 1.
[14] *Id.*
[15] *Id.* at 1–2.

tion (CTS) in the National Security Division (NSD)."[16] The Memo goes on to explain that "[n]otification to CTS may be provided to the CTS Chief, the CTS Counsel for Domestic Terrorism, or the relevant CTS Regional ATAC Coordinator. Thereafter, the prosecuting office must ensure that CTS receives prompt notification of significant new developments in the case, to include: new charges, pleas, dismissals, trial dates, and sentencings. CTS will consult with the prosecuting office if more detailed notifications are requested."[17]

Coordination

Following notification, the Memo requires that the assigned AUSA coordinate with CTS on particular DVE matters. Per the Memo, coordination with CTS is required for—

a. Any public statements that reference domestic violent extremism;

b. Prior review and approval by CTS, of any charging document or other court filing that contains descriptions of the particular nexus of a subject/defendant, or of the conduct under investigation, to domestic violent extremism or groups engaged in domestic violent extremism; and

c. In cases requiring the approval or authorization from another component of the Department (for example, those described in JM 6-2.000, 8-3.000, or 9-2.400), the review and approval from CTS is not necessary. In these instances, the approving or authorizing component shall consult with CTS regarding filings and other public descriptions of the material nexus of a subject/defendant, or of the conduct under investigation, to domestic violent extremism or groups engaged in domestic violent extremism.[18]

2. Responsibilities of CTS in DVE-connected investigations and cases

The March 8 Memo gives CTS two major responsibilities as they relate to DVE matters. The first is tracking all DVE-related investigations or cases for the Department, and the second is notifying the relevant offices or Department components of investigations or cases that should be designated as DVE-related. These responsibilities allow CTS to be "consistent, considered, well-coordinated, and informed" in their response

16 *Id.* at 2.
17 *Id.*
18 *Id.*

to DVE-related investigations and cases.[19]

The Memo centralizes the tracking of DVE-related cases and investigations in CTS, thus giving CTS the ability to recognize related investigations despite geographical disparity. DVE-related investigations and cases may also span different Department components or even different offices within one United States Attorney's Office (USAO). By keeping a pulse on all DVE-related investigations and cases, CTS can identify relationships that may have previously gone unnoticed and will be able to notify all relevant offices and components for proper coordination. Acting DAG John Carlin explained this in his remarks on domestic terrorism (DT) on February 26, 2021, stating, "[w]e know that information developed in one investigation may be the key to saving lives because of another district's investigation thousands of miles away."[20]

As the central repository for DVE-related investigations and cases, the Memo uniquely positions CTS as a hub of information from both the Federal Bureau of Investigation (FBI) and the USAOs. This design situates CTS as a liaison to facilitate the sharing of DVE-related information from the FBI's Domestic Terrorism Operations Section (DTOS) and the relevant USAOs.

Because CTS is reviewing DVE-related investigations and cases from across the country, it can take a broader perspective on what constitutes a DVE-related matter. If CTS receives an investigation from the FBI where the assigned prosecutor has not yet notified CTS of the investigation, but where CTS believes there is a DVE-related nexus, the March 8 Memo permits CTS to proactively reach out to that office and designate the matter as DVE-related moving forward. Because CTS has a broader view of the national DVE landscape and has access to information about other cases and subjects, it may designate a case as DVE-related where the USAO may otherwise not have. This process ensures greater consistency on a national level.

3. Justice Manual provisions and updates in DVE-connected investigations and cases

The March 8 Memo references the Justice Manual and explains that any investigation or case that is designated as DVE-related will remain subject to any applicable Justice Manual provisions and requirements, including any such requirements or approvals required from the NSD, the Civil Rights Division, the Tax Division, or the Criminal Division. The

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[19] *Id.* at 1.

[20] John Carlin, Acting Deputy Att'y Gen., U.S. Dep't of Just., Remarks on Domestic Terrorism (Feb. 26, 2021).

March 8 Memo also mentions subsequent updates to the Justice Manual to reflect the new requirements.[21]

B. Updates to Justice Manual 9-2.137: Notification, Consultation, and Approval Requirements in Matters Involving Domestic Violent Extremism, Including Domestic Terrorism[22]

In November 2022, the Justice Manual was updated to codify and clarify the notification and coordination requirements as set forth in the March 8 Memo. The additions to the Justice Manual supersede and expand upon the March 2021 guidance.[23]

In addition to solidifying reporting requirements, Justice Manual 9-2.137 codifies the definition of "DVE-related matter":

> To ensure appropriate coordination and consistency for such investigations and cases, the phrase "DVE-related matters" is defined to include all matters related to violent criminal acts in furtherance of ideological goals stemming from domestic influences, such as racial bias, anti-authority, and anti-government sentiment. If an investigation or criminal case (a) involves suspected DVE, including domestic terrorism, or (b) bears a material nexus to DVE, USAOs shall designate it as DVE-related.[24]

Justice Manual 9-2.137 expands upon the March 8 Memo by creating a two-tiered structure for further defining DVE-related matters as either Category 1 or Category 2.[25] This categorization is delegated to the Assistant Attorney General (AAG) for National Security or his or her designee. According to the update, as soon as practicable after the NSD receives notification or becomes aware of a DVE-related matter, the AAG will further designate the matter as a Category 1 DVE-related matter or a Category 2 DVE-related matter. CTS will then notify the appropriate USAO of the designation as soon as practicable. The category assigned to a DVE-related matter will determine what prior approvals are required for the USAO to request from the NSD.[26]

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21 March 8 Memo, *supra* note 2, at 3.
22 Justice Manual 9-2.137, *supra* note 3.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*

1. Category 1 DVE-related matters

Per Justice Manual 9-2.137, a Category 1 DVE-related matter is one that—

a. Involves a violation or potential violation of a statute listed in JM Section 9-2.136(B)(1) and is not an international terrorism matter;

b. Involves conduct that resulted in death to any individual or serious bodily injury to multiple individuals; or

c. Otherwise implicates, as determined by the Assistant Attorney General in consultation with the relevant United States Attorney(s) and/or other Assistant Attorneys General, significant national interests, such as the coordination of investigations across multiple jurisdictions, the uniform application of the law, or other substantial policy considerations.[27]

2. Category 2 DVE-related matters

Per Justice Manual 9-2.137, a Category 2 DVE-related matter is defined as "any other DVE-related matter not designated under Category 1. USAOs are in the best position to handle matters that do not involve the national interests in Category 1, except in the two narrow instances described in Section E."[28]

3. Prior approvals required in Category 1 DVE-related matters

Subsection D of Justice Manual 9-2.137 outlines the actions occurring in Category 1 DVE-related matters that will require prior express approval from the AAG or his or her designee. This approval is required unless the AAG instructs the USAO that he or she does not wish to exercise approval authority regarding a particular action or group of actions related to a particular matter, or if a matter involves violations or suspected violations of criminal civil rights statutes.

In matters involving criminal civil rights statutes, the USAO or the Civil Rights Division must still receive approval from the AAG for the NSD for any decision related to applying U.S. Sentencing Guideline (U.S.S.G.) § 3A1.4. The Civil Rights Division will also need to consult with CTS on filings and public descriptions regarding the relationship between a subject or defendant, or the conduct under investigation, to

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[27] *Id.*
[28] *Id.*

DVE or groups engaged in DVE. Where the AAG for the NSD requires prior approval, USAOs should direct the request for approval to CTS.[29]

Significant filings

Prior express approval is required for the following actions in Category 1 DVE-related matters:

a. Filing an application for a search warrant or a Title III wiretap.

b. Filing an application for a material witness warrant.

c. Filing a criminal complaint or information or seeking the return of an indictment.

d. Filing a superseding complaint or information, or seeking the return of a superseding indictment.

e. Offering or accepting a plea agreement.

f. Dismissing a charge for which the Assistant Attorney General's approval was initially required.

g. Filing a sentencing memorandum.

h. Any court filing that contains descriptions of a nexus of the subject/defendant, or of the conduct under investigation, to DVE and/or groups engaged in DVE, unless the court filing includes a description that has already been approved by the Assistant Attorney General (or his or her designee) in a document previously filed in that matter.

i. Other specific court filings as requested by the Assistant Attorney General.[30]

Indictments, informations, and complaints

When seeking approval of an indictment, information, or complaint, the USAO should submit a prosecution memorandum and a copy of the proposed filing to CTS; however, CTS may waive this requirement in specific cases. The USAO must provide the final draft of the proposed charge to CTS before final approval from the AAG for the NSD will be requested.

The Justice Manual encourages USAOs to consult with CTS throughout the investigation and before a final indictment and prosecution memorandum are sent for review. The Justice Manual also recommends that the AUSA submit these documents for review with sufficient time before

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29 *Id.*
30 *Id.*

the grand jury is scheduled and that the AUSA specifies both the proposed date for the investigatory action and the proposed date by which the USAO needs a response. If CTS is "unable to respond within the time frame suggested by the USAO, CTS must immediately notify the USAO to determine an acceptable time frame agreed to by both parties."[31]

Application of U.S.S.G. § 3A1.4

Per Justice Manual 9-2.137, in all Category 1 DVE-related matters, the USAO must receive the NSD's approval for arguing that the sentencing enhancement pursuant to U.S.S.G. § 3A1.4 applies, or for seeking an upward departure pursuant to Application Note 4 of that provision.[32] If the USAO has decided that the enhancement does not apply or decides not to seek an upward departure, the USAO must notify CTS at least 14 days before filing the sentencing memorandum. In these instances, the AAG for the NSD will consult with the United States Attorney and may direct the USAO to argue that the enhancement applies or to seek an upward departure if the AAG believes that in doing so, justice will be provided for the federal interests involved. The Justice Manual explains that "[o]ther determinations and strategic decisions regarding sentencing should generally remain in the discretion of the USAO."[33]

Staffing

Because national interests are involved in Category 1 DVE-related matters, the AAG for the NSD and the United States Attorney should consider the participation of attorneys from the USAO and CTS as co-counsel throughout the life cycle of a DVE investigation and case.[34]

4. Prior approvals required in Category 2 DVE-related matters

Subsection E of Justice Manual 9-2.137 explains that the USAOs must notify CTS of significant events in Category 2 DVE-related matters to include "the filing of criminal charges via complaint or indictment, plea resolutions, the initiation and results of any trials, sentencing disposition, and final appeals."[35] In addition to these continuing notifications, the USAOs are required to consult with, and receive prior approval from, the AAG for the NSD or his or her designee in the following two areas

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31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*

because of their national impact. According to the Justice Manual, "[b]oth areas implicate national interests where the Department and USAOs must speak with one voice to ensure consistency and fairness in handling DVE matters."[36]

Descriptions of DVE and groups engaged in DVE

Before filing, USAOs must send CTS any charging document or other court filing containing "descriptions of a nexus of the subject/defendant, or of the conduct under investigation, to DVE and/or groups engaged in DVE."[37] This requirement is waived in instances where CTS has previously approved identical language in another document filed in the same investigation or case. During their review, CTS will seek to ensure accuracy and consistency in filings across the country.[38]

Application of U.S.S.G. § 3A1.4

Like Category 1 DVE-related matters, USAOs are required to receive express approval from the AAG for the NSD or his or her designee before arguing that the sentencing enhancement pursuant to U.S.S.G. § 3A1.4 applies, or before seeking an upward departure pursuant to Application Note 4 of that provision. In Category 2 DVE-related matters, however, USAOs do not need to notify or receive approval from CTS when they decline to argue that an enhancement applies or to seek an upward departure.[39]

5. Exceptions for DVE-related matters involving criminal civil rights statutes

Section F of Justice Manual 9-2.137 makes clear that this update in no way changes or reduces the authorities of the Civil Rights Division as outlined in Justice Manual 8-3.000.[40] The update explains "[t]he fact that a criminal civil rights case is or may be DVE-related shall not alter or diminish the Civil Rights Division's role in any such case."[41] Because of this, and as discussed above, the approval requirements of Category 1 DVE-related matters do not apply in those matters that involve violations or suspected violations of criminal civil rights statutes.

In matters involving criminal civil rights statutes, the USAO or the

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36 *Id.*
37 *Id.* (emphasis omitted).
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*

Civil Rights Division will still receive approval from the AAG for the NSD for any decision related to the application of U.S.S.G. § 3A1.4. The Civil Rights Division will also need to consult with CTS on filings or public descriptions regarding the relationship between a subject or defendant, or the conduct under investigation, to DVE or groups engaged in DVE. To maximize coordination, if CTS becomes aware of a DVE-related matter involving a violation or suspected violation of a criminal civil rights statute, CTS must notify the Civil Rights Division and vice versa. Section F of Justice Manual 9-2.137 goes on to explain that, in instances where both divisions are involved, they should collaborate to best utilize each division's area of expertise.[42]

6. Organized crime and racketeering provisions

Like section F, section G of Justice Manual 9-2.137 clarifies that this update in no way minimizes the authorities of the Criminal Division in cases involving the enforcement of the Racketeer Influenced and Corrupt Organizations (RICO) and the Violent Crimes in Aid of Racketeering (VICAR) statutes, as outlined in Justice Manual 9-110.000. Again, the update explains that in situations where a RICO or VICAR case may be a DVE-related matter, the Criminal Division and the NSD should work together to employ both divisions' expertise. The update also explains that the AAG for the NSD must consult with the AAG for the Criminal Division before designating a RICO or VICAR case as a Category 1 DVE-related matter.[43]

7. Exigent circumstances

Understanding that prior notifications and approvals take time, section H of Justice Manual 9-2.137 explains how the USAOs should handle exigent circumstances. In situations where the USAO needs to take immediate action in a DVE-related matter and is not able to comply with the prior approval requirements, the USAO should notify CTS of the actions taken and circumstances surrounding the exigency as soon as possible. The USAO will also need to provide any relevant court filings to CTS. If the AAG for the NSD decides that additional review is necessary, he or she will coordinate with the USAO on the best way forward. The DAG will resolve any conflicts.[44]

The November 2022 updates to the Justice Manual codify and reinforce the guidance provided in the March 8 Memo, clarifying the reporting

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42 *Id.*
43 *Id.*
44 *Id.*

obligations of the USAOs, authorizing the NSD to use approval authority in nationally significant DVE-related cases, and promoting the coordination of the NSD with other divisions within the Department. These documents set out the strategic framework for the Department's data-driven approach to DVE by enhancing the Department's ability to inform decisions, ensure consistency, and promote collaboration and transparency.

III. Informing decisions

The *National Strategy* describes domestic terrorism as a "serious and evolving threat."[45] It goes on to explain that "domestic terrorism threats in the United States have ebbed and flowed, reflected different motivating ideologies, and demanded varying governmental responses."[46] The dynamic nature of the domestic terrorism landscape makes data vital to formulating strategy and informing key decisions.

A. Resource allocation

According to the *National Strategy*, the President's Fiscal Year 2022 Budget called for over $100 million in additional resources for the Department, the FBI, and the Department of Homeland Security (DHS) to address DVE.[47] The strategy explained that "[f]ederal law enforcement is working to identify interim measures that will allow the necessary flexibility in movement of human resources to ensure that the domestic terrorism threat is addressed" and that "the Department of Justice plans to augment its provision of training and other resources to U.S. Attorney's Offices across the country to match the heightened priority already being assigned by the Department to domestic terrorism investigations and prosecutions."[48] The best way for the Department to effectively allocate training and resources is through understanding the DVE story as told through data. For example, the Department's Fiscal Year 2022 Budget requested that $40 million in funds be allocated to the USAOs—the budget specifically requested enough funding for 100 positions.[49] The justification provided in the budget request explained that—

> The January 6, 2021 assault on the Capitol has resulted in

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45 National Strategy, *supra* note 5, at 8.

46 *Id.*

47 *See* Press Release, Nat'l Sec. Council, The White House, FACT SHEET: National Strategy for Countering Domestic Terrorism (June 15, 2021).

48 National Strategy, *supra* note 5, at 23.

49 U.S. Dep't of Just., FY 2022 Budget Request: Addressing Domestic Terrorism 3, https://www.justice.gov/jmd/page/file/1398831/download (last visited Mar. 18, 2023).

> hundreds of cases charging defendants from around the Nation with a broad range of offenses from basic violations such as unlawful entry to more complex charges such as conspiracy. Funding is needed to provide the USAOs with additional prosecutors and support personnel to respond to the increase in Domestic Terrorism-related Federal prosecutions, litigation, and other court proceedings arising from cases associated with mass shootings, terrorism, threats, and potential violence or related violence, such as those Domestic Terrorism cases stemming from the breach of the United States Capitol.[50]

With the allocation of additional resources to address DVE, data analysis will be crucial for allocating those resources most effectively. Data, often in the form of performance metrics or key performance indicators, can be used to assess where best to direct additional resources to include employees, training, and technology. According to the Department's FY 2019 Annual Performance Report (APR), "[t]he Department views data reliability and validity as critically important in the planning and assessment of its performance."[51] Through the collection of data, the Department can review and analyze trends across the country to better determine where specific resources are best suited. Acting DAG Carlin explained, "[b]y collecting this data, we will be in a stronger position to take an empirical, evidenced-based approach to domestic terrorism across our work."[52]

B. Operational strategies

Not only does data drive the allocation of resources, but more broadly, data lays the groundwork for setting department-wide priorities. The Government Performance and Results Modernization Act of 2010 guides the Department in setting strategic priorities. In 2019, the Department conducted its first Strategic Objective Review (SOR) to develop "action items to improve program outcomes and better position DOJ to achieve the Department's long-term goals and objectives."[53]

> The Department's strategic and annual planning processes stem from our mission and core values. The Department em-

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50 *Id.*

51 U.S. Dep't of Just., FY 2019 Annual Performance Report/FY 2021 Annual Performance Plan 11, https://www.justice.gov/d9/pages/attachments/2020/02/14/fy_2019_annual_performance_report_fy_2021_annual_performance_plan.pdf (last visited Mar. 18, 2023) [hereinafter FY 2019 APR].

52 Carlin, *supra* note 20.

53 FY 2019 APR,*supra* note 51, at 3.

> braces the concepts of performance based management. At the heart of these concepts is the understanding that improved performance is realized through greater focus on mission, agreement on goals and objectives, and timely reporting of results. In the Department, strategic planning is the first step in an iterative planning and implementation cycle. This cycle, which is the center of the Department's efforts to implement performance based management, involves setting long-term goals and objectives, translating these goals and objectives into budgets and program plans, implementing programs, monitoring performance, and evaluating results.[54]

One of the four strategic goals of the Department is to "Enhance National Security and Counter the Threat of Terrorism."[55] This goal is broken down into eight performance measures that are reported quarterly by the FBI, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the NSD, the Criminal Division, and the USAOs. These metrics go on to inform operating plans and to assist the Department's components in setting future performance targets and baselines.[56] According to the 2019 APR, "[t]he Department is committed to the Administration's performance management strategy to use performance information to lead, learn, and improve outcomes."[57] As part of the strategy, agencies were asked to identify a handful of Priority Goals. The APR states—

> A Priority Goal is a measurable commitment to a specific result that the agency will deliver for the American people. The Goals represent high priorities for both the Administration and the agency, have high relevance to the public, reflect the achievement of key agency missions, and will produce significant results over a 12 to 24 month period.[58]

Every four years, the Attorney General must select these Priority Goals as part of the Department's Strategic Plan. These decisions are largely informed through data analysis showing what issues are the most crucial for the Department to address. To accurately assess priorities, it is imperative to inform Departmental leadership utilizing data analytics.

The FBI also sets priorities in terms of threats and threat mitigation utilizing a specific process called the Threat Review and Prioritization

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54 *Id.*
55 *Id.* at 4.
56 *Id.* at 14–15.
57 *Id.* at 19.
58 *Id.*

(TRP) process "as a standardized method for reviewing and prioritizing threats within operational programs to inform threat strategies, mitigation plans, and resource allocation."[59] Operational divisions at FBI Headquarters use the TRP process to outline and prioritize an array of threats at the national level. They develop National Threat Priorities (NTPs) and create national threat strategies. These strategies trickle down to the field offices, where they prioritize the threat issues based on the threat landscape unique to their area of responsibility (AOR). The FBI involves key strategic partners in the TRP process as it "seeks to build consensus, and includes applicable USAO(s) and stakeholders, such as NSD/CTS, to determine prioritization (banding) and to develop threat strategies for mitigation of threat issues."[60]

In 2019, the DHS began a similar threat prioritization process across its mission areas called Intelligence Threat Banding. The DHS and the FBI "obtain raw intelligence from lawful collection methods consistent with their respective authorities and then synthesize this data into a form intelligence personnel can use."[61] After "a rigorous legal, privacy, civil rights and civil liberties review process," assessments and analytic intelligence products can then be used by "operational counterparts who then make decisions informed by that information."[62]

The threat prioritization processes that the FBI and the DHS utilize not only show a collaborative whole-of-government approach to the DVE issue—they also highlight that data informs the analysis of trends that shape national strategy. The Department's Office of Justice Programs' (OJP) Fiscal Year 2023 proposed budget reaffirms data's role in forming strategy through its request for the advancement of innovation and the use of science, research, and statistics. The budget requests over $80 million in this field stating that "[s]cience should be central to policymaking."[63] One research topic of focus within the budget is domestic radicalization, with a request for $10 million in funds.[64]

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[59] FBI & U.S. Dep't of Homeland Sec., Strategic Intelligence Assessment and Data on Domestic Terrorism 11 (2022).
[60] *Id.*
[61] *Id.* at 12.
[62] *Id.*
[63] Off. of Just. Programs, U.S. Dep't of Just., FY 2023 Budget Request: Overview 8, https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fy23budgetovervie-w.pdf (last visited Mar. 29, 2023).
[64] *Id.* at 11.

IV. Ensuring consistency

One of the major frameworks of the March 8 Memo and the Justice Manual update is the notion that consistency in the Department's response to DVE is crucial. Acting DAG Carlin stated, "[i]nformation-sharing allows all of us to anticipate legal and practical questions before they emerge and maximizes our ability to collectively respond to present and emerging domestic threats, no matter where they arise."[65] The reporting requirements as set forth in the March 8 Memo and codified in the Justice Manual ensure that the NSD, and in particular CTS, have eyes on the DVE landscape as a whole. Receiving DVE-related data from DTOS, the USAOs, and other Department components places CTS as an information trading hub. This unique posture allows CTS to connect dots, analyze trends, and find commonalities that may have previously gone undetected. This position also allows the Department to have a centralized body from which cohesive messaging is produced at the national level.

A. DVE-related descriptions

Per the Justice Manual, the NSD must be consulted and provide prior approval, in both Category 1 and 2 DVE-related matters, on any descriptions of DVE and groups engaged in DVE. Sections D and E of Justice Manual 9-2.137 stipulate that prior express approval is required from the NSD for—

> Any court filing that contains descriptions of a nexus of the subject/defendant, or of the conduct under investigation, to DVE and/or groups engaged in DVE, unless the court filing includes a description that has already been approved by the Assistant Attorney General (or his or her designee) in a document previously filed in that matter.[66]

The use of national-level pattern language in DVE-related descriptions not only unifies the Department and its messaging, but practically speaking it ensures, for example, that AUSAs in the Eastern District of Arkansas are describing DVE subject matter and groups in their filings the same way that AUSAs in the Eastern District of California are describing them in theirs. Because the NSD and CTS can see DVE subject matter and groups at the national level, they are best suited to formulate and vet language that is appropriate for prosecutors to use across the

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[65] Carlin, *supra* note 20.

[66] Justice Manual 9-2.137, *supra* note 3.

country. CTS is also able to garner subject-matter expertise from various law enforcement partners to ensure all descriptions are factual and current. For example, two cases in the Eastern District of Michigan and the District of Maryland each described a particular white supremacist group in charging documents and plea agreements in 2020 and 2021. Although the cases were geographically separated, a CTS attorney was assigned to each of the cases and was able to ensure the descriptions of the group used in Michigan and in Maryland were consistent. This consistency strengthens the Department's credibility and supports a unified approach to articulating DVE-related subject matter and groups.

This consultation and approval requirement streamlines Departmental communications and allows the NSD to track what DVE-related matters around the country have issued court filings containing DVE-related descriptions. The ability to track when and how descriptions are used in court filings provides meaningful insight into trends within the DVE space.

B. Application of U.S.S.G. § 3A1.4

Sections D and E of Justice Manual 9-2.137 also explain that USAOs must notify and obtain approval from the NSD before arguing that the sentencing enhancement pursuant to U.S.S.G. § 3A1.4 applies, or before arguing an upward departure pursuant to Application Note 4 of that provision. Approvals for DVE-related descriptions and approvals for application of the sentencing enhancement are necessary because "[b]oth areas implicate national interests where the Department and USAOs must speak with one voice to ensure consistency and fairness in handling DVE matters."[67]

Consistent application of the sentencing enhancement at the national level is crucial in establishing a standard legal precedent from one district to the next. Using the same example as above—it is important that AUSAs in the Eastern District of Arkansas and those in the Eastern District of California are applying U.S.S.G. § 3A1.4 similarly. While applying the enhancement requires the NSD's approval for both Category 1 and Category 2 DVE-related matters, it is important to note that Category 1 matters also require that the USAO consult with the NSD before filing a sentencing memorandum if they have decided not to apply the enhancement. In Category 2 matters, however, the determination not to apply the enhancement is at the discretion of the USAO.[68]

Although this difference may seem trivial, it is actually quite telling of

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67 *Id.*
68 *Id.*

the Department's stance on applying U.S.S.G. § 3A1.4. A policy requiring review of 100% of the DVE-related matters in which the enhancement will be applied, but only a handful of those where it will not be applied, suggests that the Department is very aware that U.S.S.G. § 3A1.4 is a powerful tool—one that requires coordinated discretion in its application.

While the Department wants to review U.S.S.G. § 3A1.4's application in all DVE-related matters, it is also particularly interested in consulting with USAOs in Category 1 cases where the district has determined that the enhancement should not be applied. Because Category 1 DVE-related matters implicate significant national interests, the decision not to argue the enhancement may be just as impactful as the decision to argue for it.

This consultation requirement also ensures a consistent approach to the DVE-related cases where the application is being used. Since the NSD has a national-level view of the DVE landscape, it is logical that the Justice Manual allows the AAG for the NSD, in consultation with the appropriate AAG, to direct the USAO to argue that the enhancement applies in Category 1 DVE-related cases, even if the district had previously decided against its application.[69] This oversight ensures that the Department is speaking with a unified voice and further bolsters the enhancement's impact.

C. Charging best practices

Reporting DVE-related cases to CTS is a way to build a centralized repository of the range of criminal statutes that have been used effectively to prosecute individuals for conduct involving DVE. Centralizing this information within CTS is crucial in Category 1 DVE-related matters where charges must receive prior approval from the NSD. Because CTS has a nationwide view of DVE-related matters and because of its expertise with statutes listed in Justice Manual 9-2.136(B)(1), CTS can act as a resource for consultation on what charges are best suited for specific prosecutions. CTS, per the Justice Manual, is also instructed to deconflict with the Civil Rights Division and the Criminal Division when DVE-related matters involve civil rights, RICO, or VICAR statutes.[70] Tracking charging data allows CTS to assess what statutes may be most effective in bringing justice in DVE-related cases.

Although not frequently used in the DVE context, 18 U.S.C. § 2339A, which criminalizes providing material support or resources knowing or intending that they be used in preparation for or carrying out certain terrorism-related offenses, is a statute that may be appropriate in certain

69 *See id.*
70 *Id.*

DVE-related cases.[71] CTS has expertise in applying 18 U.S.C. § 2339A and a thorough understanding of the fact patterns necessary to meet the statute's required elements.

As an example, in February 2022, three defendants in Ohio pleaded guilty to 18 U.S.C. § 2339A for conspiring to provide material support and resources in the form of training, weapons, explosives, and personnel, intending for the material support to be used in preparation for and in carrying out the destruction of an energy facility. In this case, the defendants conspired to attack power grids in the United States in furtherance of racially or ethnically motivated violent extremism.[72] In April 2023, two of the defendants were sentenced to 92 and 60 months in prison, respectively.[73] Sentencing remains pending for the third defendant.

V. Promoting collaboration and transparency

A recurring theme in the strategy against DVE is the need for collaboration. Many have recalled that collaboration was a cornerstone of the national response to the 9/11 terror attacks. The 9/11 Commission Report states—

> The biggest impediment to all-source analysis—to a greater likelihood of connecting the dots—is the human or systemic resistance to sharing information. The U.S. government has access to a vast amount of information. . . . But the U.S. government has a weak system for processing and using what it has."[74]

The March 8 Memo and the updates to the Justice Manual echo the call for collaboration and articulate the steps for cohesively tracking and sharing DVE data. In his February 2021 remarks on DVE, Acting DAG Carlin explained that—

> [W]e must make it known that the Department of Justice is prioritizing the detection, the disruption, and deterrence of the threat of domestic terrorism and violent extremism in all its forms. Now, this is something, as with challenges in the

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71 18 U.S.C. § 2339A.

72 Press Release, U.S. Dep't of Just., 3 Men Plead Guilty to Domestic Terrorism Crime Related to Plans to Attack Power Grids (Feb. 23, 2022).

73 *Id.*

74 Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 416–17 (2004) [hereinafter The 9/11 Commission Report].

> past, that we can't do alone, but we have to do with partners, particularly our partners in state and local law enforcement. Together, we will tirelessly pursue justice for all[] victims of violent extremism.
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> . . . .
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> . . . [W]e will confront this challenge, as we have for years since September 11, using an intelligence-led, threat-driven approach grounded in data and intelligence assessments of career experts.[75]

Data sharing across the federal government and with state and local law enforcement partners is required to take a broad view of the DVE landscape. In essence, collaboration is what makes everything else at the national level possible. Without information sharing, there would be no data to inform nation-wide decisions, and there would be no need for national consistency.

The 2012 National Strategy for Information Sharing and Safeguarding (NSISS) laid a framework for steps the U.S. government should take to further enhance national security. In its 2012 Information and Safeguarding Report, the FBI explained that "[t]hrough enhanced understanding of their diverse needs, the FBI is able not only to improve the collection, exchange, and protection of information, but also to leverage partner capabilities to mitigate and defeat threats to the United States, its citizens, and infrastructure."[76]

AAG for National Security Matthew Olsen has said that the "Department of Justice uses all of its authorities—including those exercised by the FBI, the U.S. Attorney's Offices, the National Security Division, the Civil Rights Division, the Tax Division, the Criminal Division, and other components—to take a whole-of-Department approach to combatting domestic terrorism."[77] Information sharing between the NSD, the FBI, and the USAOs is a recurring theme in both the March 8 Memo and the Justice Manual. The FBI's Joint Terrorism Task Forces (JTTFs) and the USAOs' ATACs have longstanding partnerships with state, local, tribal, and territorial (SLTT) law enforcement agencies. ATACs and JTTFs work together to promote training and information sharing with

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75 Carlin, *supra* note 20.

76 FBI, Information Sharing and Safeguarding Report 8 (2012).

77 *The Domestic Terrorism Threat One Year After January 6: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2022) (statement of Matthew G. Olsen, Assistant Att'y Gen., U.S. Dep't of Just.).

both SLTT and private sector partners on DVE-related matters.[78] This training and information sharing with SLTT partners is crucial because local law enforcement agencies may be the first to encounter DVE-related threats within their communities. Ensuring that local partners have the training, contacts, and resources necessary to disrupt DVE-related threats is crucial in preventing terrorist attacks before they happen. Federal and local partnerships allow officials to assess these threats together to evaluate what federal or state charges are available for disruption.[79] There are situations when state and local partners can utilize state charges to prosecute DVE-related subjects more effectively.[80]

The value of SLTT collaboration is further illustrated in OJP's Fiscal 2023 Budget, where State and Local Law Enforcement Assistance (SLLEA) accounts for 74% of the overall budget with a request for $2.518 billion in funds.[81] One specific area where these funds may be used is to address "a surge in hate crimes, reaching a 12-year high in 2021."[82] The request explains that the Department can "promote change and accountability by supporting state, local, and tribal efforts to prevent hate crimes, improve data collection and reporting of hate-related criminal offenses and incidents."[83] The budget requests $5 million for the Khalid Jabara and Heather Heyer NO HATE Act Program, which among other things, helps local law enforcement agencies to improve "their ability to report hate crimes and incidents by implementing and enhancing their reporting of incident-based crime in the National Incident-Based Reporting System (NIBRS)."[84] Enhanced data tracking at the state and local level helps to ensure that reporting is available at a national level so that trends can be analyzed and resources applied where they are needed the most—further strengthening the partnership between local and federal law enforcement.

Each USAO also has a prosecutor who serves as a National Security/ATAC Coordinator. These coordinators have specialized training in terrorism matters and are an incredible resource in DVE investigations. Because a range of criminal statutes are used to prosecute individuals whose conduct involves domestic violent extremism, information on DVE-related matters may originate outside of a USAO's designated National

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78 *Id.* at 2–3.
79 *Id.* at 3–4.
80 *Id.* at 7.
81 Office of Justice Programs, *supra* note 63, at 9.
82 *Id.* at 6.
83 *Id.*
84 *Id.* at 7.

Security Section or Unit. In these instances, the federal prosecutors assigned to these cases may rely on the National Security/ATAC Coordinator for subject-matter expertise and for initial coordination with the NSD.[85] National Security/ATAC Coordinators within the USAO may work with assigned prosecutors to make DVE notifications to CTS. If CTS must notify a USAO of a DVE-related matter, that may also be done through the National Security/ATAC Coordinator. Within CTS, there are six regional coordinators who have a close partnership with the National Security/ATAC Coordinators from the districts within their respective regions. Having designated coordinators both in the USAOs and within CTS ensures that the hurdles often posed by bureaucratic barriers are made navigable. This unique partnership opens lines of communication and encourages bilateral information sharing.

In June 2022, the NSD launched the DT Unit within CTS to support the *National Strategy* and to further coordinate DVE prosecutions. The DT Unit also facilitates partnership, information sharing, and training with other Department components to address the DVE threat. Department components have identified DT liaisons who act as the main points of contact for notifying CTS of any DVE-related investigations or cases within their respective offices.

Again, due to the scope of the DVE threat, other components within the Department may partner with CTS on DVE-related prosecutions. The DT Unit works with other components to deconflict roles and responsibilities in instances where DVE-related prosecutions involve statutes whose approval authority is managed by a different division. In fact, the update to the Justice Manual thoroughly discusses notification and deconfliction across Departmental components.[86] The creation of the DT Unit within CTS has provided other Department components a centralized place to report DVE-related data and a resource from which to receive expertise and guidance.

To maximize transparency and collaboration, the DT Unit is also engaged in outreach and training. Data has allowed the DT Unit to respond to inquiries and provide benchmarks that deliver meaningful insight into the Department's progress in its response to DVE. As DVE-related data collection and processes continue to enhance and develop, the DT Unit's ability to continue these meaningful conversations will be further strengthened.

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[85] *Id.* at 4.

[86] Justice Manual 9-2.137, *supra* note 3.

VI. Conclusion

The NSD remains steadfast in carrying out the Department's highest priority: to protect and defend the United States against the full range of national security threats, including DVE. Critical to this dynamic mission is a coordinated data strategy that is well articulated across the Department and its stakeholders. The Department's DVE data collection and tracking strategy will continue to evolve and mature with the goals of informing decisions, ensuring consistency, and promoting collaboration and transparency in the fight against DVE.

About the Authors

Katarina Porter is a Lead Program Analyst in CTS and has been with the NSD since 2010.

Stephen Brundage is a Senior Counsel in CTS and has been with the NSD since 2008.

Note from the Editor-in-Chief

This issue brings together articles on a sobering twenty-first century issue: domestic terrorism. I spent over 15 years as a Criminal Chief in U.S. Attorneys' Offices where, because of my position, I held top-secret clearances and got to see firsthand the work of the Department of Justice employees who fight the battle against terrorism on U.S. soil. And, without violating any secrecy laws, I can tell you that our country is in good hands with these dedicated prosecutors, agents, and analysts.

Our articles cover a broad range of timely topics related to the prevention of domestic terrorism, and the investigation and prosecution of those who desire to destroy our way of life through terrorist activity. I want to commend all our authors for taking the time to enlighten and educate us, and I especially want to thank Kelly Shackelford, the National Security Division's Director of Training and Workforce Development, for acting as point of contact. Kelly recruited our authors and reviewed their articles to ensure consistency with DOJ policy and guidance.

In addition, thanks to Jan van der Kuijp, managing editor; Kari Risher, associate editor and now a doctoral student at the University of South Carolina; our law clerks for their exemplary work in creating this issue; and Jim Scheide, the USC IT guru who provides invaluable technical assistance for our publications. And thanks to you readers, who inspire us to excellence in our work.

Stay well.

Chris Fisanick
Columbia, South Carolina
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