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Rethinking our Counterterrorism Framework: How to Address Domestic Terrorism Twenty Years after 9/11

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Two decades into the U.S. war on terror, concerns over white supremacist and anti-government political violence have spurred calls for new legal authorities and responses to “domestic terrorism.” Many of these calls are predicated on the need for a new counterterrorism campaign patterned on tools and strategies adopted after 9/11. Yet such calls overlook serious flaws in the preventative counterterrorism framework undertaken for the past two decades. This Issue Brief cautions against the expansion of the domestic terrorism legal regime, especially the creation of new domestic terrorism criminal charges, from the vantage point of the 20-year war on terror.¹

I. Preventative Counterterrorism Since 9/11

In the weeks after September 11, 2001, the U.S. government adopted an aggressively preventative approach to terrorism both within and beyond the United States. Within the United States, law enforcement agencies redefined their mission to focus on preventing rather than prosecuting acts of terrorism.² Epitomizing this approach, Attorney General John Ashcroft reportedly cut off discussion about preserving evidence for trial in a high-level meeting following the attacks, insisting instead: “The chief mission of U.S. law enforcement...is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can’t bring them to trial, so be it.”³ Beyond U.S. borders, the U.S. government launched a global “war on terror” against al Qaeda and other groups deemed to be affiliated with it, invoking a new

¹ Parts of this Issue Brief draw on ideas and language from Professor Sinnar’s written submission for a hearing on countering domestic terrorism before the U.S. Senate Committee on Homeland Security and Governmental Affairs. *Countering Domestic Terrorism: Examining the Evolving Threat, Hearing Before the U.S. Senate Committee on Homeland Security and Governmental Affairs*, 114th Cong. (2019) (written statement of Shirin Sinnar, Professor of Law, and John A. Wilson Faculty Scholar, Stanford University).

² Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–28 (2005).

³ Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 27 (2005) (citing BOB WOODWARD, BUSH AT WAR 42 (2002)).

doctrine of preemption to justify using lethal force to prevent possible terrorist attacks, even if they were not imminent.⁴

From the beginning, this strategy of prevention used racial and religious profiling to define and address the threat of terrorism. In the weeks and months following the attacks, federal officials detained hundreds of Muslim immigrants and held them as terrorist suspects, despite the fact that the initial arrests often stemmed from vague tips about “suspicious” Middle Eastern men rather than any individualized factual basis for suspicion.⁵ In 2002, the Bush administration required thousands of immigrant men age twenty-five and older, almost all from Muslim-majority countries, to report to government offices to be registered, interrogated, and fingerprinted. Although these programs did not succeed in identifying terrorists, they led to significant deportations and fear in many immigrant Muslim communities, in addition to sending the public message that these communities at large presented a threat.⁶

Shortly after the 9/11 attacks, Vice President Dick Cheney stated openly that the United States would venture into the “dark side” to fight terrorism. U.S. security agencies embraced the idea that preempting terrorism required exceptional deviations from ordinary law.⁷ U.S. forces detained suspects incommunicado in secret CIA “black sites,” tortured dozens of detainees, sent others to foreign countries where they faced interrogation and torture, detained without charge hundreds of “enemy combatants” in Guantanamo Bay, and engaged in covert, warrantless electronic surveillance of U.S. citizens. The U.S. government subsequently retreated from some of these policies (like torture), sought authorization from Congress for others (NSA surveillance), and expanded still other programs (such as drone strikes targeting individuals abroad, including U.S. citizens).

Although a focus on preventing terrorism is intuitively appealing, U.S. preventative counterterrorism has several flaws. First, as noted above, U.S. efforts defined the threat in racial and religious terms that treated U.S. Muslim communities as dangerous and subjected large groups of people to surveillance and investigation. As Professor Amna Akbar has described, the Federal Bureau of Investigations (FBI), New York Police Department, and other agencies

4 LISA STAMPNITZKY, *DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM”* (2013) 173-75.

5 See generally OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (2003); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. REV. 379, 388 (2017).

6 For more on the failure of these terrorist identification programs, see, e.g., Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. REV. 379, 414-27 (2017) (addressing post-9/11 detentions); AM.-ARAB ANTI-DISCRIMINATION COMM., *NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS* 6, 23-24 (2009) (addressing the lack of terrorism arrests in the National Entry-Exit Registration System, which required certain non-immigrant entrants to the United States to register with at ports of entry or local immigration offices. The program solicited these registrations from thousands of men from Muslim-majority countries who were on temporary visas).

7 See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. OF PA. J. CONST. L. 1001, 1051 (2004).

mapped out the location, institutions, and activities of Muslim communities, deployed hundreds of informants to report on their activities, solicited intelligence through community engagement programs, conducted wide-scale “voluntary interviews,” and extensively monitored Internet activity—all with little oversight or accountability.⁸ Theories of radicalization popularized by law enforcement agencies “transformed the project of counterterrorism intelligence gathering into one squarely focused on gathering as much information as possible about Muslim life in the United States, with a particular emphasis on political and religious cultures of Muslim communities.”⁹

Second, prevention programs flagged people as potential threats based on vague standards and exceedingly low thresholds for suspicion. Operating in a “zero tolerance” political climate that excoriated agencies for failing to preempt all terrorist acts, security agencies created terrorist watchlisting systems that swept in thousands of people with little opportunity to contest their inclusion. The consolidated Terrorist Screening Database, the largest centralized watchlist, reportedly lists 1.2 million people including 4,600 U.S. citizens or lawful permanent residents.¹⁰ Depending on which subset of the centralized watchlist they are on, people on these lists can be barred from flying, detained at airports and land borders, denied visas to visit family in the United States, interrogated at police traffic stops, and scrutinized by private and public employers. Despite these serious consequences, the standard for inclusion is a “reasonable suspicion” standard that is not only vague—premising suspicion on an undefined “relationship” to terrorist activities—but also riddled with exceptions.¹¹

Third, law enforcement agencies relied heavily on investigatory methods that overestimate their capacity to predict true threats among large groups of people who are flagged as suspicious. As part of its focus on prevention, the FBI sends confidential informants and undercover agents to approach people who appear sympathetic to terrorism, often as a result of online speech, and furnish opportunities and inducements to act upon those sympathies. Those who take the bait are prosecuted on terrorism charges. These sting operations have frequently targeted individuals who are young, mentally ill, or financially insecure, and informants and agents have supplied financial rewards, fake religious guidance, and psychological pressure to overcome reluctant targets.¹² Federal judges have expressed concern about the FBI’s role in generating some of these cases. At the sentencing of one defendant, a federal judge observed, “I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept....Only the government could have made a terrorist out of [the defendant], whose

⁸ Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 854–68 (2013).

⁹ *Id.* at 845.

¹⁰ *Elhady v. Kable*, 391 F.Supp.3d 562, 568 (E.D.Va., 2019), *rev’d*, 993 F.3d 208 (4th Cir. 2021).

¹¹ Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1583 (2016).

¹² HUMAN RIGHTS WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS* 26 (2014).

buffoonery is positively Shakespearean in scope.”¹³ One terrorism researcher points out that terrorist attacks are “very low base rate events” that generate “an enormous number of false positives,” but that “special agents and juries cannot fully appreciate the ramifications of introducing older and authoritative FBI *agents provocateurs* that influence impressionable young men to do things such as detonating bombs that they would never have done on their own.”¹⁴

Despite these fundamental questions about preventative counterterrorism, courts and other institutions frequently insulate such programs from meaningful review. Throughout the post-9/11 period, courts have refused to hear many constitutional challenges on the basis that courts should defer to executive judgments in national security matters.¹⁵ In the lower federal courts, the extent of deference has varied. On the one hand, some lower courts have heard constitutional challenges to counterterrorism practices, including the terrorist watchlists, and ruled against the government in decisions that led to partial reforms of those programs.¹⁶ On the other hand, many courts refused to hear cases on jurisdictional or procedural grounds or applied an especially lax standard of review. While the U.S. Supreme Court ruled against the Bush administration in several early post-9/11 detention cases, it has increasingly deferred to the executive branch while asserting that courts lack either the authority or competence to adjudicate claims of rights violations. Thus, the Court has ruled that human rights groups lacked standing to challenge an NSA surveillance program, that immigrants detained after September 11, 2001, could not seek damages against high-level government officials, and that the Trump administration’s travel ban against citizens of several Muslim majority countries did not violate the First Amendment Establishment Clause despite evidence of the president’s animus towards Muslims.¹⁷ Despite these changes, U.S. security agencies continued to invoke an aggressive approach to prevention as the basis for a suite of controversial programs.

II. Addressing Domestic Terrorism

Following several horrific white supremacist mass shootings and the January 6, 2021 Capitol insurrection, political leaders and the public have increasingly focused on the threat of far-right violence. Indeed, for several years before the Capitol invasion, security agencies and independent researchers had observed that far-right political violence within the United States had surpassed the lethality of Islamic extremist violence.¹⁸ These fears have led to new policies

¹³ Graham Rayman, *Newburgh 4 Terror Case: Judge Sentences Three to 25 Years in Prison, U.S. Constitution Shivers*, VILLAGE VOICE (June 29, 2011).

¹⁴ Marc Sageman, *The Stagnation in Terrorism Research*, 26 *TERRORISM & POL. VIOLENCE* 565, 575 (2014).

¹⁵ Shirin Sinnar, *Procedural Experimentation & National Security in the Courts*, 106 *CAL. L. REV.* 991, 993 (2018)

¹⁶ Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, 40 *ADMIN. & REG. L. NEWS* 4, 4 (2015).

¹⁷ See generally, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013); *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017); *Trump v. Hawaii*, 138 S.Ct. 2382 (2018).

¹⁸ See, e.g., Peter Bergen et al, *Part IV: What is the Threat to the United States Today?*, NEW AMERICA (last visited Aug. 26, 2021) (reporting 114 deaths from far-right attacks, 107 from groups with “jihadist”

and proposals regarding what is generally framed as “domestic terrorism,”¹⁹ with the Biden administration releasing the country’s first National Strategy for Countering Domestic Terrorism in June 2021. Many security officials and political leaders call for a counterterrorism response modeled on the response to Muslim terrorist threats after 9/11. In fact, despite concerted opposition from many civil rights advocates, some law enforcement and security officials continue to call for a new counterterrorism statute that would expand criminal offenses and other legal authorities available against domestic terrorism.²⁰

Much of the policy discussion on responding to new terrorist threats fails to consider, let alone correct, the excesses of prevention that have characterized U.S. counterterrorism. Although addressing domestic terrorism requires leadership, prioritization, and resources from a range of government agencies, it does not require establishing new federal terrorism crimes, penalties, or surveillance authorities. Indeed, many existing counterterrorism practices should be revisited and subject to greater oversight, if not ended altogether.

A. Risks of a New Domestic Terrorism Statute

The creation of a new federal domestic terrorism crime is unnecessary for federal prosecution of domestic terrorism, and could lead to adverse consequences for individuals and communities. As it is, the terrorism chapter of the U.S. criminal code includes many federal crimes and defines an even wider variety of offenses—under approximately fifty listed statutes—as federal crimes of terrorism when committed with an intent to influence government conduct.²¹ Many of these statutes apply to terrorism irrespective of an international link. For instance, federal charges can apply to domestic terrorists who use, or seek to use, explosives or chemical or biological weapons.²² In 2019, three Kansas militia members were convicted of such charges for plotting to bomb a mosque and apartment complexes housing Somali immigrants and

motivations, 12 from “Black Separatist/Nationalist/Supremacist” ideology and 1 from “Far Left Wing” sources).

¹⁹ It should be noted that the term “domestic terrorism” is itself a misnomer. Although it is generally used to refer to white supremacist violence, anti-government “militia” plots, and other political violence associated with various left- and right-wing ideologies, these threats often are international in scope. While security officials and the Biden administration recognize the transnational dimensions of these threats, they retain the domestic terminology for rhetorical and political reasons. For more on the racialized nature of the categories “domestic” and “international” terrorism, and their implications, see Shirin Sinnar, *Questioning the “Domestic” and “International” in Biden’s Counterterrorism Strategy*, JUST SECURITY, (July 26, 2021).

²⁰ [Letter from Leadership Conference on Civil and Human Rights to Members of Cong.](#), (Jan. 19, 2021).

²¹ See 18 U.S.C. ch. 113B (“Terrorism”); *id.* § 2332b(g)(5) (defining the term “Federal Crime of Terrorism”).

²² *Id.* § 229 (prohibiting the knowing acquisition, production, use, or possession of chemical weapons); *id.* § 832 (prohibiting “Participation in nuclear and weapons of mass destruction threats to the United States”); *id.* § 844(i) (prohibiting destruction or damage to property used in interstate commerce “by means of fire or an explosive”); *id.* § 2332a (prohibiting the “Use of weapons of mass destruction”).

sentenced to 25-30 years in prison.²³ In addition, existing federal terrorism crimes cover violence or threats of violence against federal officials, federal government facilities, and mass transit or communication systems.²⁴ Moreover, an existing terrorism charge for acts of violence and property damage “transcending national boundaries” could apply to acts of white nationalist violence in the United States with international connections.²⁵

Federal *terrorism-specific* charges may not be available for all acts of terrorism, especially some acts of violence conducted with a gun or vehicle. Even for cases committed with a gun or vehicle, however, a wide range of other federal criminal charges often apply.²⁶ For example, federal civil rights charges are often available where white supremacists target racial or religious minorities or places of worship. In the past several years, federal prosecutors brought hate crimes and/or obstruction with the free exercise of religion charges against domestic terrorists such as Dylann Roof (the 2015 Charleston church shooter), James Alex Fields, Jr. (the 2017 Charlottesville assailant), Robert Bowers (the 2018 Pittsburg synagogue suspect), and John Timothy Earnest (the 2019 Poway synagogue suspect).

The creation of a new federal domestic terrorism charge is not only unnecessary, but would also create new risks. One problem stems from the broad definition of domestic terrorism that some legislative proposals seek to adopt in creating a new terrorism crime. Current federal law defines terrorism as unlawful activities that “involve violent acts or acts dangerous to human life” that “appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of

²³ Roxana Hegeman, *Militia Members Get Decades in Prison in Kansas Bomb Plot*, U.S. NEWS, (Jan. 25, 2019) (noting convictions for conspiracy to use a weapon of mass destruction and conspiracy against civil rights). For a discussion of the use or attempted use of weapons of mass destruction by domestic extremists, see Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1390–91 (2019).

²⁴ See, e.g., 18 U.S.C. § 351 (criminalizing the assassination, kidnapping, or assault of members of Congress, U.S. Supreme Court Justices, and Members of the Cabinet); *id.* § 1114 (concerning the “Protection of officers and employees of the United States”); *id.* § 930(c) (concerning a killing during an attack in a federal facility involving a firearm or dangerous weapon); *id.* § 1751 (criminalizing the assault, kidnapping, or assassination of president or presidential staff); *id.* § 844(f)(2)–(3) (concerning damage or destruction to federal properties causing or risking death or injury); *id.* § 1362 (prohibiting attacks on “Communication lines, stations or systems”); *id.* § 1992 (criminalizing attacks on railroads and mass transportation systems); *id.* § 2332f (concerning “Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities”).

²⁵ 18 U.S.C. § 2332b (criminalizing murder, serious assaults, and property damage risking serious injury within the United States, including threats, attempts, and conspiracies, where there is “conduct transcending national boundaries”). To be clear, the use of this statute should not be encouraged where international connections are marginal. See Sinnar, *Separate and Unequal*, *supra* note 23, at 1353, 1404.

²⁶ For a list of frequently charged, non-terrorism-specific federal laws in domestic terrorism prosecutions, see BRENNAN CTR. FOR JUSTICE, *WRONG PRIORITIES ON FIGHTING TERRORISM* 10–11 (2018).

a government by mass destruction, assassination, or kidnapping.”²⁷ Using this definition as the basis for a new terrorism charge could convert conventional crimes that create public fear, or efforts to influence a government official for entirely personal reasons, into terrorism. These concerns are not merely theoretical. Indeed, numerous states have already created terrorism charges modeled on the federal definition, and some have used such charges in cases far removed from standard conceptions of terrorism.

For instance, under a Michigan terrorism law that criminalized violent felonies “intended to intimidate or coerce a civilian population or influence or affect the conduct of government...through intimidation or coercion,” a court convicted a man whose anger at the government seemed more delusional than ideological.²⁸ The defendant, who shot randomly at vehicles over several days, testified that he believed the government had caused him to lose his job, that agents with clipboards were following him, and that “government-controlled advanced technologies...caused his wife to miscarry twice, killed one of his cats, made the other cat ill for a time, and gave his daughter extreme eczema.” Despite the lack of a broader ideological motive, an appellate court affirmed the man’s terrorism conviction on the grounds that he was aware that his actions made people afraid and that he intended to “send a message” to the government, whom he blamed “for everything that had gone wrong in his life.”²⁹

Some proposals for a federal domestic terrorism charge attempt to address the risk of overbroad use by requiring *ex ante* approval by the Attorney General or *ex post* oversight by institutions such as the Privacy and Civil Liberties Oversight Board. But these proposals put unwarranted faith in the ability of internal review mechanisms to guard against misuse. They neglect the potential for a future Attorney General to seek partisan advantage by approving terrorism charges in politicized circumstances and the long periods in which vacancies or threats to independence have compromised internal oversight mechanisms. While review mechanisms are important, they do not sufficiently mitigate the risks of creating a new, broadly defined terrorism charge.

B. Material Support Charges and Preventative Counterterrorism

Some proposals for a new domestic terrorism law aim to expand one or both of the government’s main laws prohibiting “material support or resources” for terrorism. The law defines “material support or resources” broadly to include financial contributions, expertise, training, or personnel (including oneself).³⁰ Post 9/11, the government aggressively used two federal material support charges against Muslim individuals: 18 U.S.C. § 2339B, which bans material support to designated foreign terrorist organizations (FTOs), and 18 U.S.C. § 2339A, which bans material support for particular terrorist crimes. But these charges are already

²⁷ 18 U.S.C. § 2331(5) (defining domestic terrorism).

²⁸ *People v. Casteel*, No. 321340, 2015 WL 5440195 at *5 (Mich. Ct. App. Sept. 15, 2015).

²⁹ *Id.*

³⁰ 18 U.S.C. § 2339A(b)(1).

broad, and used in combination with FBI sting operations, they lead to extensive prison sentences for individuals who may have never supported terrorist activities in the absence of the government's involvement.

Any new statute prohibiting individuals from providing so-called material support to purely domestic terrorist organizations could have major repercussions for civil liberties. As it is, 18 U.S.C. § 2339B prohibits "material support or resources" to listed organizations without regard to the nature of the support or its purpose: thus even speech coordinated with such groups for entirely peaceful purposes, such as training in international law or conflict resolution, might fall within its crosshairs.³¹ The expansive reach of the law, the difficulty of challenging designations, the use of the charge in FBI sting operations that risk entrapping individuals, and the stiff penalties associated with it all call for greater oversight, not expansion.³²

The FBI has recently used § 2339B charges against "domestic" terrorism in circumstances that illuminate some of the problems with the statute. In late 2020, federal officials charged two self-identified members of the "Boogaloo Boys," a loose group of anti-government individuals, with material support to terrorism for delivering weapons suppressors and other equipment to two men posing as members of the Palestinian group Hamas, which is designated as an FTO.³³ The Hamas "members" were actually a paid confidential informant and an undercover FBI agent, and the FBI affidavit in support of the charges provides no indication that the defendants had any connection to, interest in, or even knowledge of, Hamas prior to being contacted by the government informant.³⁴ In fact, once the charges became public, Hamas itself disclaimed any interest in such a plot or in activities tied to U.S. domestic issues.³⁵ While the affidavit suggests that the two men had actively discussed violence against the police and other institutions prior to being contacted by the informant, thereby justifying additional investigation, it is concerning that the actual crime for which they were charged was essentially a crime that the government instigated. The fact that the statute can be used to charge people for supporting a terrorist organization, who had no demonstrable interest in the organization prior to government

³¹ 18 U.S.C. § 2339B. *See* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding constitutionality of statute as applied to non-profit organizations' activities of training designated foreign terrorist organizations in international law and engaging in political advocacy on their behalf); *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (upholding material support conviction of Boston man charged in part with translating materials for a website alleged to be linked to al Qaeda, though on separate grounds).

³² For more analysis, see Sinnar, *Separate and Unequal*, *supra* note 23 at 1354-57, 1400, and accompanying citations.

³³ Press Release, U.S. Dep't. of Justice, [Second Member of "Boogaloo Bois" Pleads Guilty to Conspiracy to Provide Material Support to Hamas](#) (May 4, 2021).

³⁴ *Willberg Aff.* ¶ 10, fn. 5, U.S. v. Solomon, No. 0:20-CR-00193 (D. Minn. Sept. 9, 2020).

³⁵ Trevor Aaronson, *FBI's "Hamas" Sting Against Boogaloo Boys Was so Absurd that Even Hamas Spoke Out Against It*, INTERCEPT (Sept. 10, 2020); Christina Carrega, *Two Self-Proclaimed Members of 'Boogaloo Bois' Charged With Attempting to Support Hamas*, CNN (Sept. 6, 2020).

involvement, suggests how far the application of the statute has deviated from its intended purpose of cutting off actual support for specifically designated terrorist groups.

Calls from across the political spectrum to brand movements “terrorist organizations” underscore the risk of establishing a new process for designating domestic groups. In 2020, after nationwide protests following the killing of George Floyd, then-President Donald Trump called for Antifa, an affiliation embraced by disparate groups of anti-fascist protestors, to be labeled a terrorist organization. Members of Congress followed up that invocation of terrorism with direct calls to unleash a war on terror on U.S. streets—in a context where police forces were already deploying military equipment and tactics in responding to protestors. Rep. Matt Gaetz tweeted: “Now that we clearly see Antifa as terrorists, can we hunt them down like we do those in the Middle East?” while Sen. Tom Cotton suggested, “let’s see how tough these Antifa terrorists are when they’re facing off with the 101st Airborne Division.” On the other side of the political spectrum, the city of San Francisco passed a resolution labeling the National Rifle Association (NRA) a domestic terrorist group, though it clarified after an NRA lawsuit that the resolution would not affect city policy.³⁶ In a highly polarized political climate such as ours, new processes to designate domestic terrorist groups risk targeting a swath of organizations for disfavored speech, with serious legal, cultural, and political consequences.

The second material support statute, § 2339A, is not restricted to international terrorism in its current form. That statute proscribes material support where an individual knows or intends that it will be used to commit, or prepare to commit, enumerated federal terrorism offenses.³⁷ Most of the enumerated offenses listed can apply to either domestic or international terrorism.³⁸ Although the list of predicate offenses in the statute might not cover all domestic terrorist acts, there are good reasons not to expand the statute to include, for instance, a new domestic terrorism crime. For one thing, the existing charge already facilitates prosecutions of individuals several degrees removed from violent acts—a feature of the law that should be revisited. For instance, because prosecutors can charge conspiracies to provide material support, and the statute includes predicate offenses that are themselves conspiracy crimes, the existing law allows the charging of a person with a conspiracy to provide material support to a conspiracy. Moreover, the manner in which prosecutors have used § 2339A has already raised concern that the government is preemptively punishing individuals who may not have

³⁶ Mariel Padilla, *San Francisco Declares the N.R.A. a ‘Domestic Terrorist Organization,’* N.Y. TIMES, (Sept. 4, 2019); Danny Hakim, *In a Face-off With the N.R.A., San Francisco Blinks,* N.Y. TIMES, (Oct. 1, 2019).

³⁷ 18 U.S.C. § 2339A(a). The predicate statutes listed include a “catch-all” offense that includes violations defined as “federal crimes of terrorism.” *Id.* (listing 18 U.S.C. § 2332b(g)(5)(B)).

³⁸ See BRENNAN CTR. FOR JUSTICE, *WRONG PRIORITIES ON FIGHTING TERRORISM* 5 (2018) (counting 51 of these 57 crimes as applicable to domestic terrorism).

presented a threat.³⁹ If prosecutors use the statute—or a potential expanded statute—to charge people on the theory that they are providing support for their *own* potential future acts of terrorism, that is an especially broad theory that enables conviction for activities far in advance of any potential violent act.⁴⁰ In sum, the use of material support charges merits greater oversight, not less.

C. Breadth of Existing Federal Surveillance Authorities

Federal agencies have broad authority to investigate threats of terrorism, whether international or domestic. In recent decades, successive versions of the Attorney General’s Guidelines for Domestic FBI Operations have expanded the scope of information the FBI may obtain, reduced the degree of connection to criminal activity required, and weakened procedural protections.⁴¹ For instance, the FBI now has the explicit authority to conduct “assessments” of potential criminal activity with “no particular factual predication.”⁴² Assessments allow agents to search (potentially vast) commercial databases, track a person’s movements, and even task a confidential informant to report on the person’s activities.⁴³ While there must be an “authorized purpose” and “clearly defined objective” for such assessments, FBI agents need not demonstrate facts suggesting a basis for suspicion.⁴⁴

Nor are the standards for opening preliminary or full investigations especially demanding. Agents may open a preliminary investigation—permitting more intensive surveillance—on the basis of “information or an allegation” indicating that a federal crime “has or may have occurred, is or may be occurring, or will or may occur” and where the investigation may help elicit relevant information.⁴⁵ Full investigations, which permit additional investigative methods, require an “articulable factual basis” that “reasonably indicates” that a federal crime has or *may* occur.⁴⁶ In addition, Justice Department guidelines permit the FBI to conduct far-reaching enterprise investigations of groups suspected of supporting domestic terrorism.⁴⁷

³⁹ For one example, see *United States v. Hayat*, 710 F.3d 875, 904 (9th Cir. 2013) (Tashima, J., dissenting) (describing prosecution of defendant under § 2339A as “a stark demonstration of the unsettling and untoward consequences of the government’s use of anticipatory prosecution as a weapon in the ‘war on terrorism.’”). Hayat’s conviction for material support to terrorism was vacated in 2019 due to constitutionally inadequate assistance of counsel. *United States v. Hayat*, 2019 WL 3423538 (E.D. Cal. July 30, 2019).

⁴⁰ I thank Kai Wiggins for flagging this concern with respect to recent proposals and for a helpful discussion on this issue.

⁴¹ BRENNAN CTR. FOR JUSTICE, *DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS* 13–22 (2011).

⁴² DEP’T OF JUSTICE FED. BUREAU OF INVESTIGATION, *DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 5-1* (as released Mar. 2, 2016 and updated Sept. 28, 2016) [hereinafter DIOG].

⁴³ *Id.* at 5-34.

⁴⁴ *Id.*

⁴⁵ *Id.* at 6-3.

⁴⁶ *Id.* at 7-3, 7-7, 7-8.

⁴⁷ U.S. DEP’T OF JUSTICE, *THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS* 23 (2008).

Although FBI investigations generally require a connection to a prospective federal criminal violation, there is little indication that this requirement practically limits the FBI's domestic terrorism investigations. First, as discussed above, a wide range of federal criminal laws are already available for domestic terrorism. Second, even if a federal crime cannot ultimately be charged, investigations can be predicated on the possibility of a future violation—a significantly lower standard. Finally, the FBI has additional jurisdiction to investigate violations of state law in certain circumstances, such as felony killings of state or local law enforcement officers.⁴⁸

Moreover, the Attorney General Guidelines and the FBI's internal rules explicitly permit investigations implicating First Amendment rights. These guidelines prohibit investigations based *solely* on the exercise of such rights,⁴⁹ but they clarify that agents acting with an authorized purpose, such as assessing a potential criminal violation, may observe and collect First Amendment-protected speech and review its content.⁵⁰ For example, FBI agents may monitor a political group's advocacy of unspecified "action" against perceived enemies, even if the government cannot suppress the advocacy itself.⁵¹

Reviewing these guidelines, the Justice Department Inspector General concluded in 2010 that they "allow the FBI wide latitude to pursue" investigations "that may implicate First Amendment considerations."⁵² The Inspector General further stated that existing policies and guidelines "allow the FBI to open preliminary and full investigations through standards that are easily met."⁵³

Therefore, the idea that the FBI has limited power to investigate white supremacist violence is simply wrong. Existing restrictions are minimal. To the extent that First Amendment guidelines provide any constraint, they do so for good reason: to discourage freewheeling investigations of political speech or ideas in the absence of a genuine criminal threat.

D. Potential for Misdirected Terrorism Investigations of Dissenters and People of Color

An expansion of terrorism charges or associated surveillance powers is ill-advised in light of both the government's historical response to political threats and systemic racial inequalities in the criminal justice system. The FBI's sweeping programs to surveil and disrupt anti-war protestors and civil rights activists during the 1950s and 1960s, including Dr. Martin Luther King Jr., are well-known. According to historian David Cunningham, the FBI viewed "any

⁴⁸ DIOG, *supra* note 42, at 6-2; 28 U.S.C. § 540 (concerning the "Investigation of felonious killings of State or local law enforcement officers").

⁴⁹ DIOG, *supra* note 42, at 4-4.

⁵⁰ *Id.* at 4-7.

⁵¹ *Id.* at 4-7.

⁵² U.S. DEP'T OF JUSTICE INSPECTOR GEN., *A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS* 3 (2010).

⁵³ *Id.*

challenge by nonwhites...as threatening to a conventional vision of an ideal America.”⁵⁴ At the same time, the FBI conducted a more limited campaign against the Ku Klux Klan and other white supremacist groups because the agency opposed those groups’ violence but accepted their beliefs.⁵⁵ Historians have observed that liberal support for the FBI’s infiltration of “white hate” groups gave the agency a freer hand for its more intense targeting of black activists and anti-war groups.⁵⁶

There are at least two historical lessons to draw from such accounts: first, that law enforcement agencies’ approach to threats may vary based on the underlying ideologies and communities implicated; and second, that political support for addressing white supremacist violence can sometimes lead to diminished oversight of law enforcement powers—to the detriment of marginalized communities.

Law enforcement officials often dismiss such concerns as outdated. Yet in recent decades, as discussed above, the FBI and other law enforcement agencies have focused inordinate attention on communities of color, especially U.S. Muslim communities, and on political activists. In 2010, the Justice Department Inspector General issued an extensive report on allegations that the FBI had improperly investigated certain anti-war, animal rights, and environmental advocacy groups.⁵⁷ The Inspector General concluded that, while the FBI had not targeted the groups solely on the basis of First Amendment activities, it had sometimes opened investigations without a sufficient factual basis, extended investigations that should have ended (leading to individuals remaining on terrorist watchlists without justification), improperly classified lawful protest activities as terrorism, and collected and retained information related to non-violent civil disobedience.⁵⁸

Still more recently, the FBI’s publication of a threat assessment on a broadly defined category of “black identity extremists”⁵⁹ and its investigations of an indigenous-led oil pipeline protest movement⁶⁰ again raised concerns over how the agency conceptualizes terrorism. The oil and gas industry has pushed for new laws criminalizing pipeline disruption, including through terrorism charges. In at least 31 states, legislators introduced bills to curtail pipeline protests, some of which would expand definitions of terrorism, and 84 members of Congress wrote to the

⁵⁴ DAVID CUNNINGHAM, *THERE’S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* 113 (2004).

⁵⁵ *Id.* at 127–45.

⁵⁶ *Id.* at 111 (citing WILLIAM KELLER, *THE LIBERALS AND J. EDGAR HOOVER* (1989)).

⁵⁷ U.S. DEP’T OF JUSTICE INSPECTOR GEN., *A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS* 1–3 (2010).

⁵⁸ *Id.* at 173–91.

⁵⁹ See Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists’*, *FOREIGN POLICY*, (Oct. 6, 2017).

⁶⁰ Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, *GUARDIAN*, (Feb. 10, 2017).

Justice Department inquiring whether damaging pipelines qualifies as domestic terrorism.⁶¹ U.S. Attorneys have recently labeled individuals convicted of damaging pipelines as domestic terrorists.⁶²

While scrutinizing communities of color and individuals challenging economic interests, federal agencies often failed to take seriously threats from the far right. In 2009, news reports of a Department of Homeland Security intelligence analysis warning about “rightwing extremism” created such a furor among Republicans that the Obama Administration curtailed briefings, reports, and intelligence collection addressing domestic extremism.⁶³ For many years, law enforcement agencies failed to devote resources or attention to white supremacist threats.⁶⁴ Even as security agencies increasingly labeled such threats a priority, they continued to underestimate the potential for right-wing political violence, as in the weeks leading up to the invasion of the Capitol on January 6. While law enforcement agencies should direct attention to individuals credibly threatening actual violence across ideologies, the risk is that individuals from marginalized communities—or those opposing dominant economic or political interests—will receive the greatest scrutiny and most punitive treatment, and in circumstances that blur the line between terrorism and dissent.

III. Conclusion

Two decades after 9/11, the framework of preventative counterterrorism needs to be reined in, not further entrenched. For twenty years, security agencies have treated entire racial or religious communities as potentially dangerous, investigated or watchlisted people without a sufficient factual basis, and paid informants large sums of money to prod individuals into supporting violence—often with little judicial scrutiny in the name of national security deference. Expanding the legal regime for fighting domestic terrorism, without curtailing the excesses of current legal authorities and law enforcement practices, would be a step in exactly the wrong direction.

⁶¹ Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say*, WASH. POST, (Aug. 22, 2018); Letter from Rep. Ken Buck, et al, to Att’y Gen. Jeff Sessions, (Oct. 23, 2017).

⁶² Press Release, U.S. Dep’t of Justice, *Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline*, June 30, 2021.

⁶³ R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST (June 7, 2011).

⁶⁴ Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018).

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