

NOTES

RESPONDING TO DOMESTIC TERRORISM: A CRISIS OF LEGITIMACY

On January 6, 2021, thousands of rioters breached the U.S. Capitol.¹ With the express purpose of preventing the lawful Electoral College vote count, they broke through barriers, windows, and law enforcement lines,² threatening violence against various politicians.³ They assaulted over 140 police officers and caused an estimated \$2.73 million in property damage.⁴ Since then, the President,⁵ the Director of the Federal Bureau of Investigation (FBI),⁶ Democratic and Republican congresspersons,⁷ high-ranking Department of Justice (DOJ) officials,⁸ and numerous commentators have characterized the breach as domestic terrorism.⁹ Yet, as many have pointed out, none of the insurrectionists have been charged with domestic terrorism.¹⁰

This absence is not limited to the January 6 insurrection. Though the person responsible for the murder of eleven people at a Pittsburgh synagogue shouted “All Jews must die,”¹¹ his indictment included no

¹ Olivia Rubin et al., *7 Hours, 700 Arrests, 1 Year Later: The Jan. 6 Capitol Attack, By the Numbers*, ABC NEWS (Jan. 6, 2022), <https://abc7.com/jan-6-insurrection-us-capitol-riot/11428976> [<https://perma.cc/SE9Q-EHF3>].

² See *id.*

³ David A. Graham, *January 6 Never Ended*, THE ATLANTIC (Oct. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/paul-pelosi-attack-nancy-pelosi-husband-january-6/671918> [<https://perma.cc/64G9-NKKL>] (collecting quotes such as “Hang Mike Pence” and “We were looking for Nancy [Pelosi] to shoot her in the frickin’ brain”).

⁴ See Zachary Snowdon Smith, *Capitol Riot Costs Go Up: Government Estimates \$2.73 Million in Property Damage*, FORBES (Apr. 8, 2022, 5:07 PM), <https://www.forbes.com/sites/zacharysmith/2022/04/08/capitol-riot-costs-go-up-government-estimates-273-million-in-property-damage> [<https://perma.cc/U6JQ-W2R2>].

⁵ See Ken Thomas & Sabrina Siddiqui, *Biden Says Rioters Who Stormed Capitol Were Domestic Terrorists*, WALL ST. J. (Jan. 7, 2021, 8:40 PM), <https://www.wsj.com/articles/biden-says-mob-that-stormed-capitol-were-domestic-terrorists-11610046962> [<https://perma.cc/XPV6-BXPS>].

⁶ See Eric Tucker & Mary Clare Jalonick, *Watch: FBI Chief Chris Wray Calls Jan. 6 “Domestic Terrorism,” Defends Intel*, PBS (Mar. 2, 2021, 3:12 PM), <https://www.pbs.org/newshour/politics/watch-live-fbi-chief-chris-wray-to-face-questions-about-extremism-capitol-riot> [<https://perma.cc/523R-N3AJ>].

⁷ See Charlie Savage, *Was the Jan. 6 Attack on the Capitol an Act of “Terrorism”?*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/us/politics/jan-6-terrorism-explainer.html> [<https://perma.cc/2RLN-TLWG>].

⁸ See Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Remarks: Domestic Terrorism Policy Address (June 15, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-remarks-domestic-terrorism-policy-address> [<https://perma.cc/7UTL-VZVA>].

⁹ See, e.g., Brian Stelter, *How the News Media Covered Domestic Terrorism on Capitol Hill*, CNN (Jan. 7, 2021, 1:33 AM), <https://www.cnn.com/2021/01/07/media/domestic-terrorism-capitol-hill-reliable-sources-january-6/index.html> [<https://perma.cc/NMM4-6KJL>].

¹⁰ See, e.g., Savage, *supra* note 7.

¹¹ Daniel Byman, *When to Call a Terrorist a Terrorist*, FOREIGN POL’Y (Oct. 27, 2018, 11:35 PM), <https://foreignpolicy.com/2018/10/27/when-to-call-a-terrorist-a-terrorist> [<https://perma.cc/PLN2-YBL6>].

terrorism charge.¹² The same is true for the man who murdered nine Black churchgoers at Emanuel African Methodist Episcopal Church, seeking to increase racial tensions.¹³ So too for those responsible for the murder of Heather Heyer and for other violence committed at a white supremacist rally in Charlottesville, “despite then–Attorney General Jeff Sessions having initially described the . . . attack as meeting ‘the definition of domestic terrorism.’”¹⁴

This raises the question: why no terrorism charges? The answer is straightforward: there is no federal charge of domestic terrorism.¹⁵ “Domestic terrorism” itself evades easy definition. Terrorism is politically or ideologically motivated violence.¹⁶ But *domestic* terrorism is defined by its distinction from international terrorism. Its application focuses on whether the ideology or conduct at issue is international or domestic in nature. Though the USA PATRIOT Act¹⁷ defines domestic terrorism, it attaches no sanctions to such conduct.¹⁸ Some argue that the laws governing international terrorism sufficiently cover domestic terrorist conduct.¹⁹ Others argue that significant reform and expanded authority are necessary in order to respond adequately to this growing threat.²⁰

The current legal regime creates a quandary for law enforcement and prosecutors: either stretch the current regime to cover domestic terrorist conduct and risk pushback from judges, juries, and the public *or* do not pursue terrorism charges and lose credibility in the efforts to combat domestic terrorism. In a political climate marked by extreme polarization, decreasing trust in institutions, and increasing acceptance of political violence as legitimate, the former is a perilous choice while the latter prevents the government from credibly calling out and labeling domestic terrorism as such — something the public demands. The legitimacy concerns arising from this context are an underexplored piece

¹² Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [https://perma.cc/H3KG-AGBS].

¹³ Press Release, Loretta Lynch, Att’y Gen., U.S. Dep’t of Just., Attorney General Lynch Statement Following the Federal Grand Jury Indictment Against Dylann Storm Roof (July 22, 2015), <https://www.justice.gov/opa/pr/attorney-general-lynch-statement-following-federal-grand-jury-indictment-against-dylann-storm> [https://perma.cc/V2PX-24NS].

¹⁴ Trevor Aaronson, *Terrorism’s Double Standard*, THE INTERCEPT (Mar. 23, 2019, 8:34 AM), <https://theintercept.com/2019/03/23/domestic-terrorism-fbi-prosecutions> [https://perma.cc/XQN2-3TNQ].

¹⁵ See McCord, *supra* note 12.

¹⁶ See Samuel Scheffler, *Is Terrorism Morally Distinctive?*, 14 J. POL. PHIL. 1, 2 (2006).

¹⁷ Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

¹⁸ See *id.*; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

¹⁹ See *infra* section II.B, pp. 1921–22.

²⁰ See *infra* section II.A, pp. 1919–21.

of the current debate but are crucial to consider when thinking about the Executive's ability to respond adequately to domestic terrorism. Congressional authorization of existing tools to be used in the domestic terrorism context is therefore necessary to ensure the Executive maintains legitimacy in addressing this pressing threat.

This Note proceeds as follows: Part I describes the legal framework governing terrorism, the distinction between international and domestic terrorism, and current alternatives to the lack of a domestic terrorism statute. Part II explains why the current debate over whether and how to reform the statutory approach to domestic terrorism misses the core problem with the current system. Part III argues that this core problem is a matter of legitimacy. Part IV details why recent calls to use the sentencing enhancement to fill the statutory gap are misguided but highlights several legitimizing features of the sentencing enhancement. Part V analyzes the value of a congressional mandate and requirement that the factfinder pass on a legal-standard-of-intent element of terrorism like those inherent in the amended sentencing enhancement. This Part also briefly provides concrete examples of the reforms this Note advocates.

I. HISTORY OF TERRORISM LEGISLATION

There is no federal crime of domestic terrorism. Before 2001, domestic terrorism was understood only by reference to international terrorism.²¹ The distinction likely arose in response to a 1972 Supreme Court case distinguishing between the government's power to surveil in response to domestic versus international threats.²² This distinction by implication became common in counterterrorism legislation as (1) the initial focus of counterterrorism efforts was primarily on transnational threats,²³ (2) the historical context involved a string of governmental abuses and overreach in response to domestic threats from the 1960s through the 1970s,²⁴ and (3) the modern terrorism frame was designed in response to 9/11.²⁵

Yet the law is not completely silent on domestic terrorism. First, the USA PATRIOT Act includes a statutory definition of domestic terrorism, codified at 18 U.S.C. § 2331(5).²⁶ However, this statutory definition does not provide for civil or criminal sanctions; instead, it is

²¹ See Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 520 (2022).

²² See *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 308–09, 321–22, 324 (1972); see also Sinnar, *supra* note 21, at 520.

²³ See Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1361 (2019).

²⁴ See *id.* at 1362.

²⁵ See statutes cited *supra* note 18.

²⁶ USA PATRIOT Act § 802, 18 U.S.C. § 2331(5).

incorporated by reference in other statutory and regulatory provisions.²⁷ Second, the U.S. Sentencing Guidelines, as amended, provide for a terrorism enhancement to apply to cases of domestic terrorism. Before the modern terrorism enhancement, the guidelines provided for an upward departure for “[t]errorism” where “the defendant committed the offense in furtherance of a terroristic action.”²⁸ Then, 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.”²⁹ The Sentencing Commission did just that in creating the modern sentencing enhancement.

However, in its original form, the sentencing enhancement applied only to international terrorism.³⁰ In response to the Oklahoma City bombing, Congress again directed the Sentencing Commission to amend the guidelines.³¹ This new amendment provided for the enhancement in cases of “[f]ederal crimes of terrorism,” as defined by 18 U.S.C. § 2332b(g), rather than international terrorism.³² Section 2332b(g)(5) incorporates a list of crimes and defines them as “[f]ederal crime[s] of terrorism” if they are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” without making any distinction between international and domestic terrorism.³³ Then, in 2002, the Commission further amended the guidelines to provide for an upward departure in cases that do not fit the exact requirements of section 3A1.4 of the *U.S. Sentencing Guidelines Manual*.³⁴ This change provides for upward departure in cases excluded under the enhancement itself: (1) where the

²⁷ See, e.g., 6 U.S.C. §§ 124h-1(f)(3)(A), 1137a(d)(4)(A); see also 6 C.F.R. § 27.105 (incorporating the definition in regulations governing counterterrorism efforts at chemical facilities). The definition is also incorporated into the Federal Rules of Criminal Procedure that empower judges to issue nationwide search warrants, see FED. R. CRIM. P. 41(a)(2)(D), 41(b)(3); see also Spencer S. Hsu, *U.S. Cited “Domestic Terrorism” in Search Tied to Oath Keepers’ Lawyer*, WASH. POST (Sept. 7, 2022, 5:17 PM), <https://www.washingtonpost.com/dc-md-va/2022/09/07/domestic-terrorism-sorelle-oathkeepers/> [<https://perma.cc/RK3U-GCRL>], and that give government attorneys additional authority to share any grand jury matter, see FED. R. CRIM. P. 6(e)(3)(D).

²⁸ U.S. SENT’G GUIDELINES MANUAL § 5K2.15 (U.S. SENT’G COMM’N 1994).

²⁹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 (codified as amended in scattered sections of the U.S. Code).

³⁰ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 1995).

³¹ See Josh Gerstein, *Why DOJ Is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), <https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407> [<https://perma.cc/4EXL-7ALR>].

³² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 730, 110 Stat. 1214, 1303 (codified as amended at 28 U.S.C. § 994 note). Compare U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 1995), with U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 1997), and *id.* app. C, amend. 539.

³³ 18 U.S.C. § 2332b(g)(5).

³⁴ See U.S. SENT’G GUIDELINES MANUAL supp. to app. C, amend. 637 (U.S. SENT’G COMM’N 2002).

government can prove terroristic intent in the commission of a crime not included as a “federal crime of terrorism,” or (2) where the terrorist intent involves intimidation or coercion of a *civilian population* rather than the government.³⁵

The current iteration of the sentencing enhancement may apply to domestic terrorism in several ways.³⁶ The most straightforward way requires the government to prove, by a preponderance of the evidence,³⁷ (1) a conviction under one of the enumerated crimes of terrorism listed in § 2332b(g)(5)(B), and (2) terroristic intent — meaning the crime was “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”³⁸ However, the enhancement also applies when the underlying offense or relevant conduct “was [committed] to promote” a federal crime of terrorism.³⁹ The commentary to the guidelines provides that “harboring or concealing a terrorist” or “obstructing an investigation of a federal crime of terrorism” is sufficient to show that the enhancement applies.⁴⁰ Finally, as mentioned above, the enhancement also provides for an upward departure in a broader set of cases.⁴¹ Under this application of the enhancement, a judge has the discretion to upwardly depart, but any “departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.”⁴²

While no standalone federal crime of domestic terrorism exists, other alternative approaches are available. Acts of domestic terrorism often double as federal hate crimes.⁴³ For example, the defendant charged with the murder of Heather Heyer pleaded guilty to twenty-nine counts of violating provisions of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.⁴⁴ Similarly, the perpetrator of the 2015 shooting at Emanuel African Methodist Episcopal Church in Charleston,

³⁵ *Id.*

³⁶ Courts have consistently held that this enhancement does not require the offense to transcend national boundaries, *see, e.g.*, *United States v. Salim*, 549 F.3d 67, 77 (2d Cir. 2008), and the Eleventh Circuit has found the same for the upward departure provision, *see United States v. Jordi*, 418 F.3d 1212, 1216–17 (11th Cir. 2005).

³⁷ Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. ONLINE 212, 246 (2020).

³⁸ 18 U.S.C. § 2332b(g)(5); *see also* U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2021).

³⁹ U.S. SENT’G GUIDELINES MANUAL § 3A1.4(a) (U.S. SENT’G COMM’N 2021); *see also, e.g.*, *United States v. Hale*, 448 F.3d 971, 988 (7th Cir. 2006).

⁴⁰ U.S. SENT’G GUIDELINES MANUAL § 3A1.4, cmt. n.2 (U.S. SENT’G COMM’N 2021).

⁴¹ *See id.* § 3A1.4, cmt. n.4.

⁴² *Id.* This limitation is likely included to comply with the Supreme Court’s ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁴³ For a comprehensive comparison of the terrorism frame and the hate crime frame, *see generally* Sinner, *supra* note 21.

⁴⁴ 18 U.S.C. § 249; Press Release, U.S. Dep’t of Just., Ohio Man Pleads Guilty to 29 Federal Hate Crimes for August 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019), <https://www.justice.gov/opa/pr/ohio-man-pleads-guilty-29-federal-hate-crimes-august-2017-car-attack-rally-charlottesville> [<https://perma.cc/WP6L-RA8T>].

South Carolina, was charged under hate crime and firearms laws rather than terrorism laws.⁴⁵ Other cases are prosecuted under state laws criminalizing domestic terrorism⁴⁶ or under other state criminal statutes. Georgia, New York, and Vermont for instance, have laws expressly outlawing domestic terrorism,⁴⁷ while Michigan has a law broad enough to encompass cases of domestic terrorism that was recently used to prosecute the Oxford school shooter.⁴⁸

II. CONTEMPORARY DEBATE OVER REFORM

The lack of a comprehensive federal statutory approach to domestic terrorism has spurred a push for (and a responsive pushback against) reform.⁴⁹ This debate has been renewed in the aftermath of the Capitol breach on January 6, 2021.⁵⁰ Indeed, commentators and legislators alike have proposed language for such a statute.⁵¹ Modern reform debate is split into two camps: one that champions reform as the means to equip the Executive with the necessary tools to fight domestic terrorism (the “Wholesale Reform” camp) and another that suggests that prosecutors need no extra tools and instead lack political will to combat the issue (the “Status Quo” camp).

A. Wholesale Reform Camp

The Wholesale Reform camp, as this Note defines it, advocates for a standalone statute establishing a criminal charge of domestic terrorism. Generally, this camp argues that such reform would have

⁴⁵ See Gabe Gutierrez & Corky Siemaszko, *Jury Finds Dylann Roof Guilty of Charleston Church Massacre*, NBC NEWS (Dec. 15, 2016, 5:59 PM), <https://www.nbcnews.com/news/us-news/jury-finds-roof-guilty-charleston-church-massacre-n696406> [<https://perma.cc/LGV2-KDGE>].

⁴⁶ Indeed, as of 2019, thirty-four states and the District of Columbia have their own terrorism laws. See Margot Williams & Trevor Aaronson, *How Individual States Have Criminalized Terrorism*, THE INTERCEPT (Mar. 23, 2019, 8:30 AM), <https://theintercept.com/2019/03/23/state-domestic-terrorism-laws> [<https://perma.cc/DZB7-7Y2G>].

⁴⁷ See GA. CODE ANN. § 16-11-221 (2022); N.Y. PENAL LAW §§ 490.25, 490.27–.28 (McKinney 2022); VT. STAT. ANN. tit. 13, § 1703 (2021).

⁴⁸ See MICH. COMP. LAWS ANN. § 750.543b (West 2023); Lauren del Valle et al., *Teen Pleads Guilty to Terrorism and Murder Charges After Michigan School Shooting that Killed 4 Students*, CNN (Oct. 24, 2022, 6:10 PM), <https://www.cnn.com/2022/10/24/us/ethan-crumbley-plea-oxford-michigan-shooting-monday/index.html> [<https://perma.cc/J4VU-2P3Z>].

⁴⁹ See, e.g., McCord, *supra* note 12; Adam Goldman, *F.B.I., Pushing to Stop Domestic Terrorists, Grapples with Limits on Its Power*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/us/politics/fbi-domestic-terrorism.html> [<https://perma.cc/6Z4H-XHKD>].

⁵⁰ See, e.g., Chuck Rosenberg & Tom O’Connor, Opinion, *We Need a Domestic Terrorism Law. Call These Crimes What They Are, For Victims and America*, USA TODAY (Mar. 15, 2021, 8:59 AM), <https://www.usatoday.com/story/opinion/2021/03/15/domestic-international-terrorism-deserve-same-legal-treatment-column/4684258001> [<https://perma.cc/VT7S-MZS4>].

⁵¹ See, e.g., AMY C. COLLINS, PROGRAM ON EXTREMISM AT GEORGE WASHINGTON UNIV., *THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM* 23–26 (2020); Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019, 8:00 AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism> [<https://perma.cc/S9QH-EN8R>]; Laguardia, *supra* note 37, at 215.

expressive value;⁵² address the disparities that result from differential treatment of international and domestic terrorism that often fall on ideological, racial, and ethnic lines;⁵³ and guide, clarify, and restrain executive discretion.⁵⁴ For Wholesale Reformers, the core problem with the current regime is that it does not provide the government with the right tools to address domestic terrorism. In particular, they highlight the current tools' failure to deliver on the need for a clear expressive effect and the marked disparities between the tools available in the domestic terrorism context and in the international terrorism context.

The core motivating concern driving support for this position is grounded in the expressive value of the law — meaning “the function of law in ‘making statements’ as opposed to controlling behavior directly.”⁵⁵ Wholesale Reformers argue that expressive value is lost when an alleged domestic terrorist is criminally charged without being expressly labeled as a terrorist. Many advocates also note the differing approaches to international and domestic terrorism, arguing such disparities undermine the United States' moral authority both on the international stage⁵⁶ and domestically. Domestic criticism often highlights the disparate racial and ethnic impact of international counterterrorism efforts primarily targeting Muslim and Arab communities⁵⁷ versus the arguably less-than-robust domestic counterterrorism efforts involving white supremacists.⁵⁸

Another concern underlying support for a standalone charge is ambiguity as to what qualifies as domestic terrorism and how it should be charged.⁵⁹ Without a standalone charge, the federal government is left to use other tools to address this particular threat. While the Status Quo proponents argue that the tools the government currently has are

⁵² See Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), <https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism> [https://perma.cc/Y283-ZHDH].

⁵³ See Deepa Kumar, *Terrorcraft: Empire and the Making of the Racialised Terrorist Threat*, 62 RACE & CLASS 34, 43–48 (2020); Sinnar, *supra* note 21, at 556–57; Aaronson, *supra* note 14 (noting that the DOJ applied antiterrorism laws against only 34 of the 268 right-wing extremists prosecuted in federal court since 9/11 allegedly involved in domestic terrorism).

⁵⁴ See James Cullum, *No Domestic Terror Charge? Lack of Law Reflects “Considerable Ambiguity,” Says DOJ Official*, HOMELAND SEC. TODAY (Dec. 9, 2018), <https://www.hstoday.us/subject-matter-areas/counterterrorism/no-domestic-terror-charge-for-domestic-terrorism-lack-of-law-reflects-considerable-ambiguity-says-doj-official> [https://perma.cc/M3PJ-4RBU]; Goldman, *supra* note 49; Jason M. Blazakis, *The Intangible Benefits of a Domestic Terrorism Statute*, GEO. J. INT'L AFFS. (June 24, 2021), <https://gjia.georgetown.edu/2021/06/24/the-intangible-benefits-of-a-domestic-terrorism-statute> [https://perma.cc/YAA6-9PW7].

⁵⁵ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

⁵⁶ See McCord, *supra* note 12.

⁵⁷ See Kumar, *supra* note 53, at 43–48; Sinnar, *supra* note 21, at 556–57.

⁵⁸ See Sinnar, *supra* note 21, at 524.

⁵⁹ Cullum, *supra* note 54.

sufficient,⁶⁰ some reports indicate that “the F.B.I. often turns to local prosecutors to charge people they are concerned might be planning domestic attacks.”⁶¹ A domestic terrorism statute would provide greater certainty to investigators and prosecutors who otherwise must get “creative.”⁶² According to Wholesale Reformers, a criminal charge designed to address domestic terrorism would avoid these problems, provide express guidance as to the exercise of executive discretion, and address the threat directly rather than require prosecutors to use potentially overinclusive statutes not designed to address the threat of domestic terrorism.

B. *Status Quo Camp*

On the other side of the debate is the Status Quo camp. Proponents of this approach argue that the government should make better use of the tools that already exist. Those in this camp do not contest government failures to respond adequately to the threat of domestic terrorism but argue the government has all of the necessary tools, lacking only political will to utilize them.⁶³ Many of the tools that were designed for — and have been most often used in⁶⁴ — the international terrorism context are not strictly textually limited to international terrorism.⁶⁵ For instance, 18 U.S.C. § 2339A does not expressly textually limit the statute to international terrorism but rather broadly proscribes “[p]roviding material support to terrorists.”⁶⁶ While many of these tools were created in response to international terrorism⁶⁷ and have been used almost exclusively in that context, the government conceivably has enough room to stretch them to fit domestic terror.⁶⁸ This approach would require broad, somewhat novel, and sometimes creative readings of criminal statutes, but it would not significantly expand the government’s power.

The core motivating concern of this camp is the risk of abuse they find to be inherent in expanding the government’s power.⁶⁹ Status Quo

⁶⁰ See, e.g., Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government’s Power to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775 (2022).

⁶¹ See Goldman, *supra* note 49.

⁶² Blazakis, *supra* note 54.

⁶³ See, e.g., Michael German, *Why New Laws Aren’t Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously> [<https://perma.cc/5BPY-5C76>].

⁶⁴ See, e.g., Hanna & Halliday, *supra* note 60, at 821.

⁶⁵ See Sinnar, *supra* note 23, at 1361–63.

⁶⁶ Cf. 18 U.S.C. § 2339B (proscribing “[p]roviding material support or resources to designated foreign terrorist organizations,” textually limiting the statute to international terrorism).

⁶⁷ See Sinnar, *supra* note 23, at 1361–63.

⁶⁸ See Hanna & Halliday, *supra* note 60, at 821–22.

⁶⁹ See generally *id.* at 849–53; German, *supra* note 63; Letter from 157 Civil Rights Organizations to Congress (Jan. 19, 2021), http://civilrightsdocs.info/pdf/policy/letters/2020/No_Domestic_Terrorism_Charge_1_21_2021.pdf [<https://perma.cc/K3RD-M8J5>]; Sinnar, *supra* note 23. Cf. Melissa Powers, Comment, *Drifting Away from Terrorism: Downward Departure from the Terrorism Enhancement in Cases of Mental Illness*, 62 ST. LOUIS U. L.J. 939, 939–40 (2018).

advocates also maintain skepticism of the Wholesale Reform camp's position that additional tools would result in the government's effectively communicating a coherent and legitimate expressive "statement" about domestic terrorism. The Status Quo position emphasizes the fact that expanding the government's power would not guarantee that the government would engage in a "symbolically significant" deployment of those tools.⁷⁰ Moreover, the Status Quo camp highlights the challenges to, and perhaps impossibility of, meaningfully limiting politically motivated use of any such tools.⁷¹ This position leads many to be skeptical of claims that a new statute would have any real practical effect other than to increase the risk of abuse given that the conduct that would be criminalized under a domestic terrorism statute is already criminalized in other ways.⁷² Indeed, it is definitionally true that if sanctions were added to § 2331(5), it would not involve criminalization of any conduct not otherwise proscribed by criminal law.

III. THE LURKING PROBLEM OF LEGITIMACY

This Note takes the position that both the Wholesale Reform and Status Quo camps raise valid concerns, such as the need to resolve ambiguity in the current regime, the considerations surrounding the expressive value of criminal law in labeling terrorism as such, and the potential for abuse if the government's power were expanded. However, while each side identifies compelling considerations in the reform debate, each fails to grapple with limitations identified by their counterparts. Most concerningly, they misidentify the core problem underlying the current regime. While the Wholesale Reform camp identifies the problem as a lack of tools to address the problem and the Status Quo camp identifies the problem as a lack of political will, this Note argues that the core problem is the lurking problem of legitimacy. The reform debate as currently framed fails to grapple adequately with heightened legitimacy concerns within the United States' increasingly polarized and fragmented political environment.

Contrary to arguments of those in the Status Quo camp, the current political climate — the inherently political nature of questions of terrorism, extreme polarization, lack of trust in institutions — makes success under the current regime unlikely. The criminal justice system and the ability of the executive branch to wield authority in this area depends on the buy-in of a variety of actors — the public, juries, and judges. Currently, the executive branch may technically have tools to prosecute domestic terrorists. However, Congress did not expressly authorize

⁷⁰ Hanna & Halliday, *supra* note 60, at 851.

⁷¹ *See id.* at 847–49.

⁷² *See id.* at 835–49, 852–53.

these tools to be used against domestic terrorism.⁷³ This undermines the Executive's ability to assert credibly that domestic terror conduct is properly governed by the current statutory scheme and that the Executive has the authority to use this scheme to address domestic terrorism. It may sometimes be legally appropriate to stretch the criminal law to address new and novel threats — especially given the declining health of the legislative branch. Yet there are objective and subjective legitimacy concerns that make such an approach in the context of domestic terrorism normatively concerning and functionally challenging.

A. Concerning Legitimacy Inversion

Terrorism is definitionally political.⁷⁴ The difference between regular violence and *terrorism* is terroristic intent — motivation by a political aim or an ideology.⁷⁵ Moreover, apart from the objective definition, terrorism also involves a subjective component: was the violence and/or the underlying ideology legitimate? One recent study found that “politics constrain the American public’s understanding of terrorism,” as public perception of who is a terrorist is shaped by one’s own political persuasion.⁷⁶ Indeed, many of the American Revolutionaries committed conduct that could be understood as terrorism, but few Americans would characterize it as such because the modern view is that the conduct was legitimate.⁷⁷

As defining terrorism involves a question of legitimacy — specifically the legitimacy of violence — the governmental response to terrorism likewise involves a question of legitimacy. In order for the government to respond to terrorism effectively, it needs buy-in as to its authority. Because terrorism is political in nature, its invocation is subject to greater political scrutiny⁷⁸ and — especially in the domestic terrorism context — accusations of illegitimate targeting of political opponents.⁷⁹ Indeed, while there is certainly active debate over the legitimacy of the accusations, it is notable that Republicans in the House of Representatives have established what they are referring to as a “new

⁷³ Cf. Michal Buchhandler-Raphael, *What's Terrorism Got to Do with It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 819–21 (2012).

⁷⁴ Daniel L. Byman, *Who Is a Terrorist, Actually?*, BROOKINGS: ORDER FROM CHAOS (Sept. 22, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/09/22/who-is-a-terrorist-actually> [<https://perma.cc/M4B2-XTEG>].

⁷⁵ *Id.*

⁷⁶ See Murat Haner et al., *How Politics Constrain the Public's Understanding of Terrorism*, SOC. FORCES (forthcoming) (manuscript at 15) (on file with the Harvard Law School Library).

⁷⁷ See John J. Tierney, Jr., *Terror at Home: The American Revolution and Irregular Warfare*, 12 STAN. J. INT'L STUDS. 1, 2–3 (1977).

⁷⁸ See Laguardia, *supra* note 37, at 248.

⁷⁹ See e.g., Dean Obeidallah, Opinion, *The Revolting Celebration of January 6 at CPAC*, CNN (Aug. 7, 2022, 8:30 PM), <https://www.cnn.com/2022/08/07/opinions/cpac-jail-cell-booth-january-6-obeidallah/index.html> [<https://perma.cc/8YWP-7NN4>] (quoting Representative Marjorie Taylor Greene as “call[ing] the jailed January 6 attackers ‘political prisoners’”).

‘Church Committee’” to investigate allegations of political targeting in the Executive’s response to domestic terrorism.⁸⁰

Thus, in order to prosecute terrorism effectively, the violence must be viewed as illegitimate, and the government’s response must be viewed as legitimate. The current political environment involves an inversion of this necessary dynamic. The increase in political polarization⁸¹ and decreasing trust in institutions⁸² undermine governmental legitimacy, while there is a simultaneous increase in the perception of political violence as legitimate.⁸³ Democratic erosion undermines governmental legitimacy, which in turn undermines political authority.⁸⁴

It is against this backdrop that the current legislative scheme operates. Every move the government makes is under intense scrutiny from the “other side,” which stands ready to accuse those in power of illegitimacy and overreach. And sometimes those accusations bear out. But, given the trends of democratic erosion, the objective question of whether the government has overstepped is often immaterial to those making accusations of illegitimacy and overreach. And where there is actual government overreach, the political fallout will be outsized.

⁸⁰ Charlie Savage & Luke Broadwater, *House Republicans Preparing Broad Inquiry into F.B.I. and Security Agencies*, N.Y. TIMES (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/us/politics/house-republicans-fbi-investigation.html> [https://perma.cc/DBW6-YT77]. In 1975, the Church Committee conducted extensive hearings on the FBI and its counterintelligence program. Hanna & Halliday, *supra* note 60, at 842; S. REP. NO. 94-755, at 1–11 (1976). This investigation revealed that “the FBI illegally surveilled and employed covert operations against a wide array of left-wing organizations and actors, including Dr. Martin Luther King Jr., other leaders of the civil rights movement, the Black Panther Party, feminist activists, the American Indian Movement, anti-Vietnam War organizers, and environmental organizations,” Hanna & Halliday, *supra* note 60, at 842, with the aim of “counter[ing], combat[ing], disrupt[ing], and sometimes destroy[ing] those who” the FBI deemed threats to national security, S. REP. NO. 94-755, at 9.

⁸¹ See Drew DeSilver, *The Polarization in Today’s Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades> [https://perma.cc/24MM-KPXP].

⁸² Americans’ confidence in institutions is at the lowest point since Gallup polls started surveying on this question in 1979. Madeline Halpert, *Trust in U.S. Institutions Hits Record Low, Poll Finds*, FORBES (July 5, 2022, 2:57 PM), <https://www.forbes.com/sites/madelinehalpert/2022/07/05/trust-in-us-institutions-hits-record-low-poll-finds> [https://perma.cc/K7WH-QAAL].

⁸³ See Julie M. Norman, *Other People’s Terrorism: Ideology and the Perceived Legitimacy of Political Violence*, PERSPS. ON POL. (forthcoming) (manuscript at 1) (on file with the Harvard Law School Library).

⁸⁴ See Caroline Draughton, *Polarization and Its Threat to American Democracy*, DEMOCRATIC EROSION (Mar. 28, 2022), <https://www.democratic-erosion.com/2022/03/28/polarization-and-its-threat-to-american-democracy> [https://perma.cc/999B-5BRM] (“As the public’s faith in government institutions dwindles, democracies are more vulnerable to democratic backsliding. Polarized perceptions of the government result in undemocratic practices by both government supporters and opposition parties. Under the ‘Us versus Them’ rhetoric of polarization, government supporters are more likely to tolerate illiberal practices within government institutions, while opposition groups are encouraged to use undemocratic means to express opposition.”).

B. The Problem of Ambiguity

The legitimacy inversion discussed above breeds skepticism and mistrust, heightens risks, and amplifies the problems of ambiguity inherent to the current regime. Any ambiguity in whether the Executive is authorized to act in response to real and growing domestic terror threats will be weaponized — presenting *perceived* legitimacy problems. Ambiguity also heightens the risk of actual, rather than perceived, abuse — presenting *actual* legitimacy problems.

1. *Perceived Legitimacy Problems.* — Public perception of the executive branch’s approach to domestic terrorism is not just a public relations problem.⁸⁵ Prosecutors generally do not bring cases they cannot win. Public perception has implications for whether cases are “winnable” in several ways. First, criminal juries are guided in part by their perceptions of the legitimacy of the pertinent laws and legal authorities.⁸⁶ Even when cases are resolved through plea agreements before making it to a jury, which is the case in ninety-seven percent of federal convictions,⁸⁷ “prosecutors’ decisions — which cases to charge, what charges to bring, and what charges to dismiss — reflect the realities of how juries or judges decide tried cases, and what sentences judges will impose.”⁸⁸ A prosecutor’s assessment of her case, the risks of going to trial, and the value of a plea deal connect to her assessment of how other actors in the system will respond — “all of these phenomena are expressive.”⁸⁹ And these phenomena are tied, “at least in part, [to] a disagreement between the community and the criminal justice authority over how the criminal law should be written, how it should be enforced, or both.”⁹⁰ With this disconnect, prosecutors’, juries’, and judges’ expressive decisions “are [then] symptoms of the criminal justice system’s illegitimacy.”⁹¹ This illegitimacy hinders the Executive’s ability to pursue effectively its policy goals through the use of the criminal justice system.

While the current terrorism framework has occasionally been used to target domestic terror conduct, there is ample reason to think that authority to bring those charges is not clear. In a 2020 press release, the FBI suggested that a recent prosecution was “the first time a material

⁸⁵ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1848 (2005) (“[L]egal legitimacy depends fundamentally on sociological legitimacy.”); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2242 (2014).

⁸⁶ See Ouziel, *supra* note 85, at 2242.

⁸⁷ See Clark Neily, Opinion, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It’s Totally Legal.*, CATO INST. (Aug. 8, 2019), <https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal> [https://perma.cc/ZJP4-NXSK].

⁸⁸ Ouziel, *supra* note 85, at 2276.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

support charge . . . [was] used in a domestic terrorism case.”⁹² This was untrue.⁹³ In response, commentators argued that “[the] erroneous statement by the FBI may suggest that FBI field offices around the country are not aware that § 2339A charges can be and are brought against suspected domestic terrorists.”⁹⁴ If the subject-matter experts are unclear as to the scope of their authority, it is reasonable that laypeople may see such an approach as illegitimate. This, in turn, affects the prosecutorial calculus and calls into question whether cases are winnable.

2. *Actual Legitimacy Problems.* — In addition to legitimacy concerns inherent to the public perception of an approach that requires creative prosecutions, objective concerns also persist. First, consider the risk of abuse.⁹⁵ A recent study conducted by the Center for Strategic and International Studies found that despite ninety-three percent of protests across the United States being peaceful, there is a developing security dilemma in which “escalating violence in some metropolitan areas of the United States . . . pits such groups and loose networks as anti-fascists and anarchists against white supremacists, anti-government militias, and a host of others, such as the Three Percenters, Proud Boys, Patriot Prayer, and Oath Keepers.”⁹⁶ In this context, the government may not be able to differentiate adequately between peaceful, First Amendment-protected conduct and genuine threats of domestic terrorism. Moreover, those who are concerned about the civil liberties risks associated with aggrandizing the federal government’s power in this context argue that the risk of selective political targeting of groups is higher due to political polarization.⁹⁷ Recently, evidence has come to light of abuse and overreach targeting domestic groups, such as

⁹² See *Would-Be Mass Shooters Sentenced*, FBI (Jan. 31, 2020), <https://www.fbi.gov/news/stories/couple-sentenced-for-planning-mass-shooting-013120> [<https://perma.cc/B6RV-MUQN>].

⁹³ See Hanna & Halliday, *supra* note 60, at 822.

⁹⁴ *Id.*; see also Ryan J. Reilly et al., *Americans Are Surprised Domestic Terrorism Isn’t a Federal Crime. Most Think It Should Be.*, HUFFPOST (Apr. 12, 2018, 4:54 PM), https://www.huffingtonpost.com/entry/domestic-terrorism-federal-law-poll-dojfbi_us_5acd1c78e4b09212968c8907 [<https://perma.cc/DT8T-EF9F>].

⁹⁵ See Buchhandler-Raphael, *supra* note 73, at 812.

⁹⁶ CATRINA DOXSEE ET AL., CTR. FOR STRATEGIC & INT’L STUD., PUSHED TO EXTREMES: DOMESTIC TERRORISM AMID POLARIZATION AND PROTEST 3 (2022).

⁹⁷ See Letter from Ronald Newman, Nat’l Pol. Dir., ACLU & Manar Waheed, Senior Legis. & Advoc. Couns., to Jerrold Nadler, Chairman, House Judiciary Comm. & Doug Collins, Ranking Member, House Judiciary Comm. (Sept. 3, 2019), https://www.aclu.org/sites/default/files/field_document/2019-09-03_aclu_oppose_h.r._4192_confronting_the_threat_of_domestic_terrorism_act.pdf [<https://perma.cc/C4WB-93U9>]; see also Betsy Woodruff Swan, *Trump Says He’s Naming Antifa a “Terrorist Organization.” Can He Do That?*, POLITICO (May 31, 2020, 3:59 PM), <https://www.politico.com/news/2020/05/31/trump-antifa-terrorist-organization-legal-292785> [<https://perma.cc/78GR-V5CX>] (noting that former President Trump lacked the power to designate a domestic group as a terrorist organization).

progressive activists⁹⁸ and “Black Separatists,”⁹⁹ with no congressional oversight over FBI actions relating to domestic terrorism.¹⁰⁰ Even with the FBI’s history of targeting left-of-center groups, the risk of overreach and abuse of right-wing groups exists as well.¹⁰¹

The second objective legitimacy concern is one of separation of powers and political legitimacy. “[T]he criminal law should be exact. It should say what it means and mean what it says.”¹⁰² And the policy choices of what conduct should be criminalized and how it should be criminalized are choices that are properly decided by the legislative branch.¹⁰³ Yet Congress has seemingly abdicated its role in making these policy choices. Indeed, “[t]he consequence of this legislative failure has been to transfer effective criminal lawmaking power to politically unaccountable prosecutors and, on occasion, to judges willing to set some constitutional or statutory limits on prosecutorial discretion.”¹⁰⁴ This is especially concerning given that the DOJ maintains independence from the President¹⁰⁵ and “Congress cannot use many of the tools for monitoring and managing delegated criminal enforcement authority that it can draw on to constrain bureaucratic discretion in other areas.”¹⁰⁶ Moreover, specifically in the national security space, “Congress and the courts have notoriously failed to check executive power that often undermines individual rights.”¹⁰⁷ From this perspective, these kinds of significant and widely contentious policy questions, like whether federal law should criminalize domestic terrorism as such and how concerns about risks to civil liberties should be balanced against

⁹⁸ See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 1–2, 190 (2010), <https://www.oversight.gov/sites/default/files/oig-reports/s1009r.pdf> [<https://perma.cc/UF4U-UA4N>].

⁹⁹ See Michael German, *Manufacturing a “Black Separatist” Threat and Other Dubious Claims: Bias in Newly Released FBI Terrorism Training Materials*, ACLU (May 29, 2012), <https://www.aclu.org/news/national-security/manufacturing-black-separatist-threat-and-other> [<https://perma.cc/UR5P-VWCV>].

¹⁰⁰ See Hanna & Halliday, *supra* note 60, at 845.

¹⁰¹ Cf. Sinnar, *supra* note 21, at 554.

¹⁰² Richard Cohen, *How Creative Should Criminal Law Be?*, WASH. POST (Mar. 12, 1978), <https://www.washingtonpost.com/archive/local/1978/03/12/how-creative-should-criminal-law-be/2ac9d47b-77ae-4a7e-b182-4212586cd587> [<https://perma.cc/3HDG-73VZ>].

¹⁰³ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997, 1017 (2006); Buchhandler-Raphael, *supra* note 73, at 811–12; Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758 (1999).

¹⁰⁴ Richman, *supra* note 103, at 758.

¹⁰⁵ Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16 PM), <https://www.lawfareblog.com/independence-and-accountability-department-justice> [<https://perma.cc/J57M-BLNR>].

¹⁰⁶ Richman, *supra* note 103, at 767.

¹⁰⁷ Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 79 (2021) (footnote omitted).

any threat, should be decided by Congress rather than gap-filled in the context of relatively independent executive branch discretion.¹⁰⁸

IV. THE PROBLEM WITH THE TERRORISM SENTENCING ENHANCEMENT

In response to this political reality, many have pointed to a more robust use of the sentencing enhancement as a viable middle ground solution — at least with respect to the problem of prosecuting domestic terrorism.¹⁰⁹ Using the enhancement provides expressive value because it requires a judge to make a legal determination as to whether the defendant's conduct constituted terrorism.¹¹⁰ Indeed, this tool was highlighted in Assistant Attorney General Matt Olsen's testimony before the Senate Judiciary Committee¹¹¹ and noted in the FBI and the Department of Homeland Security's *Strategic Intelligence Assessment and Data on Domestic Terrorism*.¹¹²

While the sentencing enhancement is currently the primary tool federal prosecutors have to label a domestic terrorist as a domestic terrorist — and the only tool that involves a congressional mandate to do so — its use to address the lack of a clear statutory approach to domestic terrorism presents more problems than it solves. For several reasons stemming from the unique context of federal sentencing, the enhancement cannot bear the weight of being the primary tool the executive branch uses to respond to domestic terrorism. Yet the specific legitimizing features of the sentencing enhancement — (1) express congressional authorization for use in the domestic terrorism context, and (2) a requirement that the government prove terroristic intent — could and should appear in other parts of the terrorism statutory scheme.

¹⁰⁸ See Buchhandler-Raphael, *supra* note 73, at 836–37.

¹⁰⁹ See Hanna & Halliday, *supra* note 60, at 851, 853; Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, And Why It Matters*, 54 HARV. J. ON LEGIS. 259, 264 (2017); Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021, 11:17 AM), <https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism> [<https://perma.cc/S3LV-Z2YX>]; Michel Paradis, *Treat the Attack on the Capitol as Terrorism*, THE ATLANTIC (Apr. 23, 2021, 11:57 AM), <https://www.theatlantic.com/ideas/archive/2021/01/treat-attack-capitol-terrorism/617714> [<https://perma.cc/JYQ8-8C8L>].

¹¹⁰ Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 480 (2014) (noting the terrorism enhancement “also affords prosecutors and courts a vehicle of an expressive nature, to comment on their deep disapproval and condemnation of terrorism in a general sense”); see also Norris, *supra* note 109, at 293.

¹¹¹ Matthew G. Olsen, Assistant Att’y Gen., U.S. Dep’t of Just., Opening Remarks Before U.S. Senate Committee on the Judiciary (Jan. 11, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-opening-remarks-us-senate-committee> [<https://perma.cc/U7P3-3LDD>].

¹¹² FED. BUREAU OF INVESTIGATION & DEP’T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 22 (2022).

A. Problem with Discretion

Prosecutorial discretion is a necessary component of the American legal system.¹¹³ However, not all criminal statutory schemes provide prosecutors with the same amount of discretion. In the case of domestic terrorism and the use of the terrorism enhancement, prosecutors have significant discretion — to choose whether to charge a crime that would implicate the terrorism enhancement, whether to seek the enhancement, whether to seek the upward departure in cases where the standard enhancement is not applicable, and whether to advocate any other enhancements, departures, or variances. And while this discretion requires prosecutors to make a factual showing as to why an enhancement or departure applies, they need do so based only on a preponderance of the evidence — a far lesser burden of proof than is required for a conviction.¹¹⁴ Moreover, they do not need to make this showing to a jury and they can use evidence that would be otherwise inadmissible at trial.¹¹⁵ Therefore, in many domestic terrorism cases under the current regime, the only way a prosecutor can obtain a legal label of domestic terrorism involves a significant amount of discretion paired with notably reduced burdens of proof and persuasion.

These concerns as to the sentencing enhancement echo many of the issues the Status Quo camp identifies in considering additional reforms. First, the risk of abuse is especially present in the context of the politically charged crime of terrorism.¹¹⁶ And because the executive branch is politically accountable, there is a concern the Executive will be overly responsive to public demand for accountability in high-profile cases involving terrorism.¹¹⁷ Second, there is the ever-present risk of implicit (and explicit) bias and prejudice in the exercise of prosecutorial discretion¹¹⁸ — especially in the context of a broadly applicable, completely discretionary sentencing enhancement. Third, due to the politically charged nature of labeling domestic terrorists as such, even when not abused, political criticism is likely unavoidable.¹¹⁹ There will always be examples of cases involving “the other side” that could be characterized as proof that prosecutors are not requesting the enhancement equitably. Fourth, some have raised the concern that the broad applicability of the

¹¹³ See generally Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369 (2010).

¹¹⁴ See Laguardia, *supra* note 37, at 246.

¹¹⁵ See FED. R. EVID. 1101(b), (d).

¹¹⁶ See Gerstein, *supra* note 31 (quoting Michael German, a former FBI agent and a fellow at the Brennan Center for Justice at New York University, as saying that “[i]t’s very arbitrary in how and when the government wants to apply this enhancement”).

¹¹⁷ See Buchhandler-Raphael, *supra* note 73, at 845–48.

¹¹⁸ *Id.*

¹¹⁹ See Gerstein, *supra* note 31 (quoting Attorney General Merrick Garland as saying, “I am quite aware that there are people who are criticizing us for not prosecuting sufficiently and others who are complaining that we are prosecuting too harshly”).

terrorism enhancement stacks the deck against defendants in the context of plea bargaining.¹²⁰

B. *The Nature of Sentencing*

While prosecutors have a significant amount of discretion, they do not have the ultimate authority to apply the enhancement. Judicial discretion further restricts executive discretion, presenting several additional problems stemming from the uniqueness of sentencing. While judges are required to make findings as to the applicability of enhancements, the inquiry does not stop there. Sentencing judges also consider policy factors external to the case at hand — including how prosecutors in other cases exercised their discretion.

A judge could find the sentencing enhancement unequivocally applicable in applying the law to the facts. However, at this stage, the judge must engage in an inquiry into policy factors set forth in 18 U.S.C. § 3553(a), posing the risk that the judge will make decisions based on intuition or bias.¹²¹ In this context, intuition as to whether someone is a terrorist¹²² or deserves the “draconian”¹²³ punishment that results from the application of the terrorism enhancement¹²⁴ is especially concerning given that “the prototypical perpetrator is Muslim, Middle Eastern, or both.”¹²⁵ The flexibility of the sentencing factors has led to critiques from all sides that the enhancement is being used aggressively, inconsistently,¹²⁶ or not aggressively enough.¹²⁷

A recent case illustrates the challenge inherent in trying to use the sentencing enhancement for its expressive value. As of October 2022, the DOJ has charged over one thousand defendants in connection with

¹²⁰ See *id.* (quoting Karen Greenberg, Director of the Center on National Security at Fordham University School of Law, as saying that the sentencing enhancement is “just lying there as a cudgel if [prosecutors] want it, . . . [and it] can be used in so many different ways”).

¹²¹ See Laguardia, *supra* note 37, at 246.

¹²² Cf. Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380> [<https://perma.cc/MH75-PFRD>].

¹²³ Stephen Floyd, Note, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 GEO. L.J. ONLINE 142, 144 (2021) (quoting George D. Brown, *Notes on a Terrorism Trial — Preventive Prosecution, “Material Support” and the Role of the Judge After United States v. Mehanna*, 4 HARV. NAT’L SEC. J. 1, 48 (2012)).

¹²⁴ See Van Meter, *supra* note 122.

¹²⁵ Sinnar, *supra* note 21, at 532; see Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism*, 92 ST. JOHN’S L. REV. 393, 414 (2018); see also Michael Molstad, Note, *Our Inner Demons: Prosecuting Domestic Terrorism*, 61 B.C. L. REV. 339, 373 (2020).

¹²⁶ See generally Floyd, *supra* note 123.

¹²⁷ See Norris, *supra* note 109, at 280–81; Paradis, *supra* note 109.

the January 6 attack on the Capitol.¹²⁸ Yet, in only one case, against Guy Reffitt, has the DOJ sought the terrorism enhancement.¹²⁹ The sentencing judge rejected the attempt. Judge Friedrich refused to apply the enhancement not because she found it was *inapplicable*, but rather because, pursuant to § 3553(a), the enhancement had not been applied in other cases involving January 6 defendants and would therefore result in an “unwarranted sentencing disparity” with those cases.¹³⁰

On one hand, one could view the layering of judicial discretion on executive discretion as a necessary check. However, judges are not politically accountable by design, which raises a question as to whether they should be the ultimate arbiters of labeling terrorists when there has been a finding that they meet the relevant statutory requirements. Moreover, this case demonstrates the difficulty of actually achieving uniformity through sentencing. While Judge Friedrich used other January 6 defendants as the comparator for the purpose of evaluating the § 3553(a) factors, she need not have looked so narrowly. Instead, Judge Friedrich might have examined the cases of Ruby Montoya and Jessica Reznicek, climate activists who were charged with conspiring to damage the Dakota Access Pipeline and against whom judges applied the terrorism sentencing enhancement.¹³¹ Under this framing, she might have found that *not applying* the enhancement would create an unwarranted sentencing disparity between Reffitt — who was armed with a pistol while actively participating in an insurrection¹³² and “threatened to ‘physically attack, remove, and replace’ lawmakers”¹³³ — and Montoya and Reznicek, who burned equipment and damaged a pipeline.¹³⁴ Montoya and Reznicek are serving seventy-two months and ninety-six months under the enhancement, respectively, while Reffitt is serving eighty-seven months for his conduct without the enhancement.¹³⁵ It is

¹²⁸ See Madison Hall et al., *At Least 1,003 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All.*, INSIDER (Feb. 16, 2023, 11:53 AM), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [<https://perma.cc/LS88-YB3D>].

¹²⁹ See Lucien Bruggeman, *Who Should Be Labeled a Terrorist? Jan. 6 Sentencing Fuels the Debate*, ABC NEWS (Aug. 1, 2022, 9:28 PM), <https://abcnews.go.com/US/labeled-terrorist-jan-sentencing-fuels-debate/story?id=87769985> [<https://perma.cc/7VMZ-58CZ>].

¹³⁰ See Josh Gerstein, *Texas Militia Member Gets Most Serious Jan. 6 Sentence Yet: Just Over 7 Years*, POLITICO (Aug. 1, 2022, 5:14 PM), <https://www.politico.com/news/2022/08/01/jan-6-terrorism-sentencing-penalty-00048922> [<https://perma.cc/TZA4-J9BG>]. The judge also seemed compelled by the defense’s argument that the government was seeking the enhancement as a “trial tax.” See Bruggeman, *supra* note 129.

¹³¹ See Lucien Bruggeman, *Climate Activist Who Targeted Dakota Access Pipeline Sentenced to 6 Years After Terrorism Enhancement*, ABC NEWS (Sept. 26, 2022, 8:18 PM), <https://abcnews.go.com/US/climate-activist-targeted-dakota-access-pipeline-sentenced-years/story?id=90546657> [<https://perma.cc/A6MZ-6EJB>].

¹³² Gerstein, *supra* note 130.

¹³³ Bruggeman, *supra* note 129.

¹³⁴ Bruggeman, *supra* note 131.

¹³⁵ *Id.*; see also Gerstein, *supra* note 130.

at least arguable that the sentencing enhancement was just as, if not more, appropriately applicable to Reffitt's conduct as it was to either Montoya's or Reznicek's.

And beyond the question of uniformity, the inquiry into “unwarranted sentencing disparities” creates incentives for the government to be more aggressive in its use of the sentencing enhancement — because if it is not, then it might forfeit its ability to seek the enhancement in subsequent cases successfully.

C. A Blunt Tool for a Nuanced Problem

A final problem with a more aggressive use of the terrorism enhancement is that it is a particularly blunt tool. Mechanically, the enhancement increases a defendant's offense level to not less than thirty-two and increases the defendant's criminal history to Category VI — the highest criminal history category.¹³⁶ Critics have described the enhancement as “draconian”¹³⁷ and judges have refused to apply it because of its severity. For instance, Judge O'Toole refused to apply the enhancement over concerns about fairness, later stating that “the automatic assignment of the defendant to a Criminal History Category VI . . . is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this case, import a *fiction* into the calculus.”¹³⁸ Similarly, Judge Land found that the terrorism enhancement's requirement of automatic enhancement “ignores the individual ‘history and characteristics’ of the Defendant, and instead places too much weight on a questionable interpretation of what constitutes a federal crime of terrorism under the Guidelines.”¹³⁹ He too declined to apply the enhancement because it was “excessive.”¹⁴⁰

Not only do these examples again highlight judicial discretion,¹⁴¹ but they also demonstrate the bluntness of the tool. The fact that the sentencing enhancement “treat[s] a wide range of crimes alike” makes it an inappropriate choice to serve as the primary mechanism to address

¹³⁶ George D. Brown, *Punishing Terrorists: Congress, The Sentencing Commission, The Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517, 520 (2014); see also Pinky Wassenberg, *U.S. Circuit Courts & the Application of the Terrorism Enhancement Provision*, 42 S. ILL. U. L.J. 85, 87 (2017). For a comprehensive explanation of the mechanics of the sentencing regime and the terrorism enhancement, see Powers, *supra* note 69, at 941–51.

¹³⁷ See Floyd, *supra* note 123, at 144 (citing Brown, *supra* note 123, at 48).

¹³⁸ Powers, *supra* note 69, at 953 (quoting Joanna Baltes et al., *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, 8 J. NAT'L SEC. L. & POL'Y 347, 356 (2016) (emphasis added)).

¹³⁹ *United States v. Garey*, 383 F. Supp. 2d 1374, 1379 (M.D. Ga. 2005).

¹⁴⁰ *Id.* at 1380.

¹⁴¹ See Powers, *supra* note 69, at 953 (“[S]ome judges recognize the propensity for the automatic criminal history to create overly harsh sentences and take measures to avoid such a result . . .”).

domestic terror prosecutions as such.¹⁴² Indeed, the DOJ seems to have recognized this bluntness, as it has exercised restraint in its requests to use the enhancement in a variety of domestic terrorism contexts.¹⁴³

V. REFORM

Although the sentencing enhancement should not be the exclusive or primary tool wielded to respond to domestic terrorism as such, it should be a part of a broader set of tools authorized by Congress to be used to respond to the threat of domestic terrorism. Further, at least two aspects providing legitimacy to the sentencing enhancement should be applied more widely to the current statutory framework.

Congress should legislatively authorize a broader set of tools for the domestic terrorism context, subject them to a legal determination that any conduct charged constitutes terrorism, and make any minor adjustments to the statute as necessary to ensure it is adequately designed to address both international and domestic terrorism. While this would constitute a reform, it is distinct from the Wholesale Reform approach in that the goal is not to add tools for prosecutors, but rather to authorize tools that those taking the Status Quo approach argue already exist. This reform would also solve the expressive value and ambiguity concerns raised by the Wholesale Reform camp. Many tools that are currently available in the international terrorism context would form a more robust and democratically legitimate response to the current domestic threat that would neither upset the current balance between security and civil liberties nor leave the executive branch with overbroad discretion to designate defendants as terrorists.

While specific comprehensive legislative proposals are beyond the scope of this Note, a couple of concrete examples of reform are worth discussing. As previously mentioned, this Note advocates an approach, patterned off the 1996 sentencing enhancement reform, of amending the current legal regime to clearly apply to domestic terrorism and to require a factfinder to find terroristic intent. One example concerns the material-support statute — specifically, § 2239A. Many have proposed reforming the material-support statute, such as by eliminating the list of predicate offenses from § 2339A,¹⁴⁴ providing for designations of domestic terrorist organizations,¹⁴⁵ adding crimes to the list of federal crimes

¹⁴² Brown, *supra* note 123, at 48 (citing James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 54 (2010)).

¹⁴³ See Gerstein, *supra* note 31.

¹⁴⁴ See, e.g., Laguardia, *supra* note 37, at 234–35.

¹⁴⁵ See, e.g., Jimmy Gurulé, *Criminalizing Material Support to Domestic Terrorist Organizations: A National Security Imperative*, 47 J. LEGIS., no. 2, 2021, at 8, 25–28.

of terrorism,¹⁴⁶ or requiring the government to prove “specific intent to support an organization’s unlawful activities.”¹⁴⁷ This Note’s proposed reform does not chart uncharted territory in this regard. However, its motivation for reform differs from that of existing proposals, which affects the precise contours of what these broad categories of reforms might look like in practice.

In taking cues from the sentencing enhancement and focusing on the legitimacy concerns that have been identified, Congress should amend the material-support statute to apply clearly to domestic terrorism. It might do this by adding an express provision to § 2339A authorizing its use in cases where conduct occurs outside or within the territorial jurisdiction of the United States. In addition, hewing closer to its approach in response to the Oklahoma City bombing,¹⁴⁸ Congress might reexamine the list of predicate offenses in § 2339A and add any offense it identifies as being typical in the context of domestic terrorism that is not currently included. This is more in line with the sentencing enhancement’s approach whereby the Sentencing Commission expanded “international terrorism”¹⁴⁹ to “federal crime[s] of terrorism,” without expressly applying the enhancement to domestic terrorism.¹⁵⁰ If Congress, in response to January 6, expanded the list of predicate offenses to include crimes typical to the domestic terrorism context, that would clearly indicate that Congress had intended to authorize this statutory tool to be used to respond to domestic terrorism.

Additionally, the same avenue providing for a broader understanding of terroristic intent under the upward-departure provision of the sentencing enhancement could also be applied to the material-support statute. This is slightly complicated by the fact that the terroristic intent component of § 2339A is contained within the federal-crime-of-terrorism prong, which is cross-referenced in a variety of other contexts. Assuming Congress was unwilling to more broadly standardize the different intent standards and definitions of terrorism — international, domestic, transcending national boundaries, and so on — it might graft a broader intent prong within § 2339A itself. This might look like adding a provision specifying that where conduct does not fit the definition as set forth in § 2332b(g)(5), the material-support charge nonetheless applies if the government can prove the kind of intent set forth in § 2331(5)(b).¹⁵¹

¹⁴⁶ See, e.g., Laguardia, *supra* note 37, at 241–45; Jon Lewis & Seamus Hughes, Opinion, *Our Laws Have a Problem Calling Domestic Terrorism What It Is*, THE HILL (Feb. 6, 2020, 9:30 AM), <https://thehill.com/opinion/national-security/481166-our-laws-have-a-problem-calling-domestic-terrorism-what-it-is> [<https://perma.cc/Q6M4-SKLW>].

¹⁴⁷ Sinnar, *supra* note 23, at 1403.

¹⁴⁸ See *supra* notes 30–33 and accompanying text.

¹⁴⁹ U.S. SENT’G GUIDELINES MANUAL § 3A1.4(a) (U.S. SENT’G COMM’N 1995).

¹⁵⁰ *Id.*

¹⁵¹ See Laguardia, *supra* note 37, at 230–31.

Briefly, another example of reform would be to amend § 2332b — terrorism transcending national boundaries — to include domestic terrorism. Though there is little case law, this provision has been interpreted to require only a minimal international nexus. Indeed, the First Circuit assumed without deciding that conduct transcending national boundaries needed to be “substantial,” but that a mere exchange of information with someone overseas was sufficient to constitute conduct transcending national boundaries.¹⁵² This criminal charge could thus apply to domestic terrorists who were in contact with a sympathetic party in another country. Given the sparse case law, it is not clear whether this minimal nexus requirement would hold if this provision was used more robustly to target primarily domestic conduct. So this too might be a statute that could be amended to address domestic terrorism more clearly. Congress might also consider attaching a terroristic intent requirement to this charge to further legitimize its use and counterbalance any incidental expansion of authority.

The types of reform this Note proposes certainly will not change the minds of all those who view the current system as illegitimate. But a congressional mandate authorizing extant prosecutorial tools would insulate the DOJ from accusations of overreach while ensuring effective prosecution of domestic terrorism.

CONCLUSION

Domestic terrorism is not going away. Nor does it seem that the trends contributing to democratic erosion will recede. Yet the current approach is insufficient to respond to this threat. The current debate over reform does not adequately engage with the legitimacy challenges that are exacerbated in the context of the politically charged problem of domestic terrorism. While calls for increased use of the sentencing enhancement are misguided, the instinct to reach for that particular tool is understandable given several legitimizing features. These features need not be unique to the sentencing enhancement. Congress should (1) amend the current regime, not to expand executive power but instead to clarify and clearly authorize it in the domestic terrorism context, and (2) require a finding of terroristic intent. These reforms would strike a balance between the Wholesale Reform and Status Quo positions, address their core motivations, and account for the realities that shape the executive branch’s political authority to address domestic terrorism.

¹⁵² *United States v. Wright*, 937 F.3d 8, 32–33 (1st Cir. 2019).