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DOMESTIC TERRORISM

# How the Federal Government Investigates and Prosecutes Domestic Terrorism

By **Eric Halliday**, **Rachael Hanna** Tuesday, February 16, 2021, 11:17 AM

In the aftermath of the Jan. 6 riot at the U.S. Capitol, many politicians, including President Biden, and public commentators called for renewed efforts by the federal government to combat domestic terrorism. That reaction followed a pattern over recent years in which mass shootings and other violent attacks—like those in El Paso, Texas; Gilroy, California; and Pittsburgh, Pennsylvania—have spurred demands for an increased federal focus on domestic terrorism. Some lawmakers and experts have urged Congress to pass a domestic terrorism statute, while others have argued that the government already has sufficient power to pursue such cases but, rather, that it lacks the coordination and political impetus to properly do so.

In evaluating these arguments, it is important to understand exactly what powers the federal government can and cannot use when pursuing domestic terrorists. This is particularly relevant because domestic terrorism occupies a gray area in federal criminal law between international terrorism and nonterrorism criminal offenses. There is no specific crime of domestic terrorism. Rather, domestic terrorism could be any offense that meets the statutory definition laid out in 18 U.S.C. § 2331(5): acts within the U.S. that are dangerous to human life, violate the laws of the U.S. or a state, and "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or cercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping[.]" In contrast, international terrorism is defined as covering essentially the same conduct with the requirement that the specific acts must "transcend national boundaries in terms of the means by which they are accomplished."

In practice, the FBI operates under the distinction that international terrorism is any act of terror ordered by a foreign group or inspired by an ideology that originated overseas, while domestic terrorism is any act of terror inspired by political motivations rooted in the United States. That distinction is more than semantic—it has a real impact on how the federal government pursues suspected domestic terrorists, in terms of both what it is allowed to do during an investigation and which statutes it may use in a prosecution. What follows is a comprehensive overview of the authorities available to the federal government when fighting domestic terrorism, as well as brief descriptions of how the government has used them (and which available authorities the government has not yet applied in the domestic terrorism context). This overview is a building block for further debates about the necessity of a domestic terrorism statute and the policy choices facing the Biden administration.

## Powers Used by the Federal Government During Domestic Terrorism Investigations

### *Warrantless Investigations and Surveillance*

The FBI and other federal law enforcement agencies can rely on a diverse range of powers in domestic terrorism investigations.

The Attorney General's Guidelines for Domestic FBI Operations lay out three levels of investigations that the FBI can conduct, each of which escalates in both scope and intensity: assessments, predicated investigations and enterprise investigations. This chart provides a useful sketch of the differences between the three, including each tier's allowed investigative methods, duration, approval requirements and required factual basis to begin the inquiry. We highlight the most important elements below.

Agents may initiate assessments without any "particular factual predication"; instead, they may seek information "proactively or in response to investigative leads" pertaining to violations of federal law or threats to national security. Beyond conducting the usual baseline investigative steps like searching in law enforcement databases, agents may also use information purchased from commercial databases, use and recruit human sources (discussed in more detail below), and engage in any surveillance that does not require a court order.

The second tier, predicated investigations, is divided into two subunits: preliminary investigations, which may be initiated "on the basis of any allegation or information indicative of possible criminal activity or threats to national security," and full investigations, which require "an articulable factual basis." When conducting preliminary investigations, agents may also conduct property searches that do not require warrants (like searching a subject's garbage located on public property), conduct polygraph examinations and deploy undercover agents. Full investigations warrant the highest level of scrutiny and allow agents to use all the potential investigative tools at their disposal, including judicially approved wiretaps and search warrants.

Enterprise investigations are essentially full investigations targeting an entire organization suspected of domestic terrorism or some other pattern of illegal activity, such as international terrorism or racketeering. They also require an "articulable factual basis" indicating the group might engage in the relevant conduct. As discussed above, because domestic terrorism is not a standalone crime, the investigating agent(s) must be able to identify the underlying violation of federal criminal law in producing the factual basis to begin an enterprise investigation.

In addition to the usual procedures, heightened approval guidelines govern assessments or investigations that touch on "sensitive investigative matters"—such as those involving a target who is a public official or political candidate or who works at a media organization. These guidelines apply to all relevant cases, including those that focus on domestic terrorism. The special agent in charge of an FBI field office must approve any assessment or investigation that falls into this category, while officials at FBI headquarters must approve the more serious inquiries.

At the conclusion of any counterterrorism assessment or investigation, agents may implement a "disruption strategy," which the FBI Counterterrorism Policy Guide defines as "an affirmative action(s) … which neutralizes the threat posed by an FBI terrorism subject." A disruption strategy "may employ a range of tools [including] arrests, deportations, interviews, … source-directed operations [i.e., instructing confidential informants to provide disinformation] … media campaign[s] to publicize activities … [and] the seizure of financial assets."

Although many of these powers are not unique to counterterrorism investigations, FBI data obtained by the New York Times in 2011 shows that the FBI, at least at that time, pursued about an equal number of national security and general criminal inquiries: from March 2009 to March 2011, the bureau conducted 42,888 national security assessments and 39,437 general criminal assessments. Only 1,986 of the

national security assessments triggered further investigation. Because domestic terrorism can often be classified internally as a general criminal inquiry, it is unclear exactly where domestic terrorism inquiries fell within those figures, but they paint a larger picture of the FBI's use of these methods and its focus on counterterrorism. In 2019, the FBI revealed that it has arrested or disrupted more domestic terrorism suspects than international terrorism suspects "in recent years," indicating the growing threat of domestic terrorism and the corresponding shift in law enforcement resources.

Moreover, the bulk of the domestic terrorism cases investigated by the FBI in recent years are linked to "racially motivated violent extremism," and of those cases, white supremacy represents the greatest share. In 2010, the FBI updated its Civil Rights Program Policy Implementation Guide to require that hate crimes investigations also be opened as domestic terrorism investigations if the subject has any connection to a white supremacist group. The increase of white supremacy and other forms of racially motivated violence at the nexus of terrorism and hate crimes further prompted the FBI in 2019 to create the Domestic Terrorism-Hate Crimes Fusion Cell to address this growing threat by sharing information and resources across divisions.

### *Confidential Informants and Undercover Officers*

Of all the investigative tools laid out by the Attorney General's Guidelines and other relevant investigative manuals, the use of confidential informants and undercover agents is perhaps the most important in domestic terrorism investigations. Undercover agents are employed by the FBI and assume fabricated identities to infiltrate and prevent criminal activity, spanning one-off sting operations to longer assignments. Informants, by contrast, are not employed by the FBI but, rather, are recruited to provide information about criminal activity because of their familiarity with the targets, if not their prior involvement in the conduct itself. Informants perform a range of functions, providing information about criminal targets for weeks, months, or even years and sometimes even playing a role in sting operations. Informants and undercover agents have played key roles in many successful FBI investigations of domestic terrorists, including the foiled plot to kidnap Michigan Governor Gretchen Whitmer and the infiltration of the white supremacist group The Base.

Agents may recruit and use informants during assessments, whereas undercover agents may be deployed only during preliminary, full and enterprise investigations. Like most of these investigative methods, the use of informants and undercover agents requires only internal approval. Agents do not need supervisory approval to begin working with an informant, while the special agent in charge of an FBI field office must approve all undercover operations and "consult on a continuing basis" with the federal prosecutor on the case.

Separate policies govern the use of an informant or undercover agent in "sensitive circumstances," such as those discussed above, like investigations of religious or political organizations. Undercover agent involvement in such circumstances must be approved by "appropriate supervisory personnel" at FBI headquarters. Agents must seek supervisory approval to use an informant or undercover agent in an investigation of a "legitimate" organization, meaning that the investigation was "formed for a lawful purpose and its activities are primarily lawful," especially if they wish to have the informant or undercover agent influence the activities of such an organization. If the agents determine that the organization is not legitimate, meaning that it has a primary purpose of criminal activity or "engaging in the destruction of property as a means to bring public attention" to a political movement, no supervisory approval is required for deploying an informants to participate in, and potentially influence, the group.

The Justice Department's "left-of-boom" strategy—which emphasizes the need to thwart plots before their execution—has led to its extensive use of informants in counterterrorism investigations. Two studies have shown that about 50 percent of all federal terrorism cases brought in the first decade after 9/11 involved informants, while a little less than a third of those cases were predicated on "sting operations in which the informant played an active role in the underlying plot." Such strategies have prompted civil liberties groups, some legal academics and defense attorneys to accuse the federal government of entrapping many otherwise innocent defendants in counterterrorism stings. But federal courts have not shared that perspective and have dismissed few cases on the basis of entrapment or related legal arguments.

### *Delaying* Miranda *Warnings Under the* Quarles *Public Safety Exception*

The Supreme Court's 1966 ruling in *Miranda v. Arizona* requires arresting officers to tell suspects immediately that they have the rights to remain silent and have an attorney, that anything they say can be used against them in court, and that they will be provided with an attorney if they cannot afford one. If the officer does not provide the *Miranda* warnings before an interrogation, statements made by the defendant are presumptively inadmissible in court. The Supreme Court has carved out exceptions to *Miranda*, however, the most relevant of which is *New York v. Quarles*, a 1984 case that held that law enforcement officials may decline to immediately provide the *Miranda* warnings if they feel the need to first interrogate the suspect about a threat to public safety. In *Quarles*, the arresting officer had quickly questioned the suspect about a missing gun believed to be nearby, but the court did not cabin its exception to include questions about only missing weapons, nor did it include timing restrictions on how long an unwarned interrogation could last.

In the following decades, law enforcement agencies attempted—often successfully—to introduce statements under *Quarles* that fit the facts of the case itself, meaning that they were the product of quick interrogations about an immediate potential threat. That began to change, however, after the Justice Department sent a memorandum to the FBI in 2010 that encouraged agents to push the boundaries of *Quarles* in "exceptional cases" involving "suspected terrorists." In such cases, the Justice Department wrote that it interpreted *Quarles* to allow for "continued unwarned interrogation … to collect valuable and timely intelligence not related to any immediate threat."

The FBI has invoked that expansive interpretation of *Quarles* in several interrogations of suspected terrorists, both domestic and international, since 2010. For example, in 2014 FBI agents interrogated Terry Peace, who had been planning to attack local government facilities with explosive devices, for close to an hour about his plot and accomplices. A federal judge later admitted Peace's incriminating statements from that interrogation against him, citing *Quarles*. Peace's interrogation, as well as those of other domestic terrorists, demonstrates that the Justice Department uses the strategy outlined in the 2010 memo in such investigations, with increased tolerance by the federal judiciary when it attempts to introduce the resulting statements at trial.

## Powers Exclusive to Investigating International Terrorism

Though the federal government has many powers at its disposal in domestic terrorism investigations, it is prohibited from using four separate authorities that it invokes regularly in international terrorism cases and certain kinds of ordinary criminal cases.

First, it cannot conduct warrantless electronic surveillance and wiretapping of domestic terrorism suspects, despite being able to do so in international terrorism and foreign intelligence investigations. The Supreme Court drew that line in *United States v. U.S. District Court for the Eastern District of Michigan (Keith)*, a 1972 case that held that the Justice Department's warrantless wiretapping of suspects who had allegedly bombed a CIA office in Michigan violated the Fourth Amendment. Thus, in cases involving "domestic aspects of national security," the government must obtain a warrant. The Supreme Court declined, however, to extend its holding to investigations involving "the activities of foreign powers or their agents," which allowed Congress to pass the Foreign Intelligence Surveillance Act (FISA) in 1978.

Second, federal law enforcement agencies can work in tandem with the intelligence community on international terrorism cases. This means that the federal effort to pursue international terrorists brings the full weight of intelligence authorities, including the National Security Agency's bulk communications collection program under Section 702 of FISA, warrantless foreign surveillance under Executive Order 12333, to say nothing of the intelligence capabilities of the CIA, the Defense Intelligence Agency, the Treasury Department's Office of Intelligence and Analysis, and the individual branches of the military's intelligence agencies.

Third, the federal government cannot use national security letters (NSLs) in domestic terrorism investigations. NSLs allow federal law enforcement agencies to request information on suspected international terrorists from third parties, such as telecommunications providers and financial institutions, without a judicial warrant. The five statutes that empower the FBI and other federal agencies to issue NSLs limit that authority to investigations of foreign intelligence operations and international terrorism. The only exception is for the Secret Service, which can issue NSLs under the Right to Financial Privacy Act as part of its "protective functions"—that is, guarding the president and other senior officials. However, the federal government can use administrative subpoenas—which provide authorities similar to those of an NSL—in child pornography, health care fraud and controlled substances investigations but not for crimes of domestic terrorism.

Fourth, no specific mechanism exists to designate individuals or organizations as domestic terrorists. Chapter 8 U.S.C. § 1189 and Executive Order 13224 empower the State Department to designate and levy economic sanctions against foreign terrorist organizations, as well as individuals and corporate entities that support them, but no such power exists in the domestic context. Further, even if Congress were to enact a domestic terrorism statute, it would be unlikely to include a designation provision, as such a mechanism would face serious First Amendment challenges. In the relatively rare instances that extremists in the U.S. have connections abroad, the foreign groups may be designated as terrorist organizations. In April 2020, the State Department designated the Russian Imperial Movement (RIM)—a white supremacist group based in Russia with links to U.S. extremists—as a terrorist organization, marking the first terrorism designation against a hate group, but RIM's roots overseas set it apart from other, U.S.-based groups like The Base or Atomwaffen.

## Federal Charging Authorities

Because there is no specific crime of domestic terrorism, federal prosecutors may use an array of charges when pursuing domestic terrorists. Therefore, as Bobby Chesney has discussed, acts that meet the definition laid out in 18 U.S.C. § 2331(5) *must* be prosecuted under other federal and state laws, not the statute itself. To that end, certain acts of domestic terrorism are explicitly listed as federal crimes of terrorism at § 2332b(g)(5)(B). In addition to that list, numerous other federal criminal charges are commonly brought in connection with domestic terrorism cases.

Below, we catalog the most prominent of these charges and briefly describe how they have been or could be used to prosecute domestic terrorism.

### *Federal Crimes of Terrorism*

Section 2332b(g)(5)(B) defines 57 offenses as "federal crimes of terrorism." Of those, 51 can be brought in both international and domestic terrorism cases (the remaining six are applicable only to international terrorism). The following are those frequently brought in connection with domestic terrorism.

18 U.S.C. § 2332a

Section 2332a criminalizes the unlawful use of and the threat, attempt or conspiracy to use a weapon of mass destruction "against any person or property within the United States." Importantly, "weapon of mass destruction" means any "destructive device," as defined at 18 U.S.C. § 921(a)(4), which includes explosive or incendiary weapons. Thus, for purposes of § 2332a, a weapon of mass destruction could be a chemical weapon, but it could also be something much simpler, like a pressure cooker bomb or a Molotov cocktail. Perhaps most famously, Timothy McVeigh and Terry Lynn Nichols were charged with violating § 2332a for the Oklahoma City bombing. Other domestic terrorists, including a follower of McVeigh who plotted a similar attack and a KKK member who conspired to attack Muslim Americans with a radiation device, have also faced § 2332a charges.

18 U.S.C. § 844(f)

Section 844(f) criminalizes the arson or damage by explosion of U.S. property or property owned by an institution that receives federal funding. However, to be a federal crime of terrorism, a violation of § 844(f) must also cause substantial risk or actual personal injury or death. For example, McVeigh and Nichols faced § 844(f) terrorism charges, but the Justice Department has used the statute in far less serious cases as well.

18 U.S.C. § 844(i)

Section 844(i) criminalizes the malicious damage or destruction, by means of fire or explosive, of property used in interstate or foreign commerce. Domestic terrorists espousing ideologies from eco-terrorism to anti-government extremism to white supremacy have all been charged with violations of § 844(i) for acts of arson, bombing and otherwise planning attacks on a wide range of public and private facilities used in interstate commerce.

18 U.S.C. § 2339A

Section 2339A criminalizes providing material support to terrorists with the knowledge or intention that such support is to be used to facilitate a federal crime of terrorism listed at § 2332b(g)(5)(B). While its statutory companion, 18 U.S.C. § 2339B, applies only to material support of a designated foreign terrorist organization (FTO), § 2339A can and has been used in the domestic context. The scope of factual

scenarios in which § 2339A charges could be brought is potentially very broad, as "material support or resources" can include "any property, tangible or intangible, or service." Moreover, the Justice Department has taken the position that the intent element of § 2339A "requires only that the supplier of the material support have knowledge of its intended use." Despite its potential wide applicability and the frequent use of material support charges in international terrorism cases, § 2339A charges have been brought in only four domestic terrorism cases: a militia member who helped plot to blow up an FBI building, an environmental extremist for his role in acts of arson, a co-conspirator in the previously mentioned plot to kill Muslim Americans, and an anti-government extremist who plotted terrorist attacks against a bar and an interstate pipeline.

18 U.S.C. § 1361

Section 1361 criminalizes the willful depredation—attack—against any property of the United States. Notably, three defendants have been charged with attempting to violate § 1361 for their actions in forcibly storming the Capitol on Jan. 6. The FBI believes one defendant to be a leader within the Oath Keepers, a loose collection of anti-government militias, while the other two defendants are believed to be members of both the Ohio State Regular Militia and the Oath Keepers.

*Other Federal Charges Relevant to Domestic Terrorism*

A litany of charges commonly brought in domestic terrorism prosecutions are not federal crimes of terrorism (that is, they are not listed at § 2332b(g)(5)(B)), including interstate threats, firearms offenses, offenses against government employees and false statement or fraud offenses. Often, these nonterrorism charges are brought in connection with domestic terrorism cases because they can be proved more readily than terrorism charges that might be applicable. For example, the Justice Department's Criminal Resource Manual describes firearms violations as "generally simple and quick to prove."

Additionally, several recent high-profile racially, politically or religiously motivated crimes were classified and prosecuted as federal hate crimes even though the facts of the cases also met the federal statutory definition of domestic terrorism. The federal government has publicly called some of these crimes acts of domestic terrorism in addition to being hate crimes, such as the mass shootings at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, and at the Walmart in El Paso, Texas. In other cases, the government avoided the domestic terrorism label, such as the mass shooting at the Tree of Life Synagogue in Pittsburgh, Pennsylvania. Regardless of the federal government's messaging, hate crimes charges can and have been deployed to prosecute domestic terrorism.

**What Does It Take to Bring Charges in a Domestic Terrorism Case?**

The Justice Manual, which catalogs the Justice Department's internal policies and procedures, contains guidance for United States Attorneys' Offices (USAOs) on the required coordination between USAOs and Main Justice on domestic terrorism cases. There are two possible oversight requirements that a domestic terrorism investigation can trigger: notification to the Justice Department's National Security Division (NSD) and/or prior approval from the NSD for certain actions in court.

First, a USAO must notify the Counterterrorism Section (CTS) of the NSD "of the initiation and significant developments in domestic terrorism investigations." Notification enables "coordination and deconfliction of such matters, enhance opportunities to recognize overlap with international terrorism matters, and allow CTS to track developments in the FBI [Terrorism Enterprise Investigations] that CTS reviews." Generally, the NSD "approval is not required for the initiation, investigation, or prosecution of domestic terrorism matters," but there are significant exceptions to that rule.

Weapons of mass destruction (WMD) cases have a different set of notification and approval guidelines; for domestic terrorism cases that involve WMD charges, such as under §§ 2332a and 2332h, the WMD guidelines govern. Those guidelines provide that when a "USAO opens any WMD matter, the USAO shall promptly notify CTS," and subsequently "notify CTS of any significant development in the investigation and prosecution of the matter," such as the filing of a search warrant or criminal charges. In addition to notifying CTS, the USAO must simultaneously seek the approval of the assistant attorney general of the NSD for many of those same steps, including filing any criminal charges.

Certain other terrorism charges also require prior approval by the NSD assistant attorney general. In the international terrorism section of the Justice Manual, charges are split into two categories: Category 1 requires approval for significant court actions—search warrants, criminal complaints, indictments, and the dismissal of charges or a plea agreement—while Category 2 charges presumptively do not require prior approval. Category 1 charges include those outlined in §§ 2339A, 2339, 2339C and 2332f. Because Category 1 charges are rarely brought in domestic terrorism cases, the NSD will presumptively require prior approval for bringing these charges against domestic defendants. As with WMD charges, prior approval for terrorism charges requires a USAO to provide CTS with the "final draft of the proposed charge … before final [assistant attorney general] approval will be sought."

Finally, domestic terrorism cases can trigger the notification and prior approval requirements if the Criminal Division assistant attorney general deems them to be "matters of national significance," regardless of the particular charges that may be brought. For example, the charges brought against defendants who breached the Capitol on Jan. 6 are being coordinated through Main Justice.

Pursuant to these guidelines, domestic terrorism investigations predicated on charges that are not federal crimes of terrorism are far less likely to be reported up to the NSD from USAOs. The exception to that is domestic terrorism investigations predicated on federal hate crime charges.

**Terrorism Sentencing Enhancements**

As mentioned previously, the federal statutory definition of domestic terrorism at § 2331(5) does not have criminal penalties attached to it. And as several of the above cases note, there is a significant range of criminal behavior that meets that definition but is prosecuted via nonterrorism charges. However, whether criminal conduct satisfies § 2331(5) can have a major impact at the sentencing phase of a domestic terrorism prosecution.

The U.S. Sentencing Guidelines § 3A1.4 provides for sentencing enhancements for terrorism offenses. The enhancement can be applied to federal crimes of terrorism, as listed at § 2332b(g)(5)(B), but, importantly, it can also be applied to nonterrorism offenses where the offense was intended to influence government conduct by intimidation or coercion or was intended to promote a federal crime of terrorism with the

intention of intimidating or coercing a civilian population.

While the guidelines are not binding, federal judges are required to take them into account when sentencing defendants. The effect of § 3A1.4 is such that even less serious offenses that meet § 2331(5) can result in lengthy prison sentences. Federal courts have applied this enhancement to a range of domestic terrorists, both those who have been convicted of federal crimes of terrorism (for example, an anti-abortion extremist and an anti-government militia member convicted under § 844(i), a white supremacist who pleaded guilty to violating § 2332a, and eco-terrorists convicted under § 1361) and those who have been convicted of nonterrorism offenses (for example, an anti-government extremist convicted of fraud and obstructing the IRS and a white supremacist convicted of obstructing justice and soliciting a crime of violence).

Importantly, the Justice Department has discretion to seek a terrorism sentencing enhancement. For example, although the Charleston shooter's conduct met the § 2331(5) definition of terrorism, the Justice Department declined to seek a terrorism sentencing enhancement under § 3A1.4, even though it could have been applied.

Finally, while federal investigations into those involved in the Capitol riot on Jan. 6 have resulted thus far in few federal crimes of terrorism charges, § 3A1.4 could be applied to some cases involving nonfederal crimes of terrorism, should they result in convictions or guilty pleas. There is significant evidence already publicly available to support a claim that some of those involved in the Capitol riot intended to influence government conduct—preventing Congress from certifying the Electoral College vote—through intimidation or coercion.

**Topics: Domestic Terrorism**

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