

## NOTES

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# SWATTING POLITICAL DISCOURSE: A DOMESTIC TERRORISM THREAT

*Matthew James Enzweiler\**

### INTRODUCTION

In late August 2014, the social media world was overtaken by the shocking story of a fifteen-year-old online gamer, Paul Horner, who was reportedly sentenced to twenty-five years to life in prison for his role in what has been perceived as a mere online prank.<sup>1</sup> According to the story, circulating on popular media outlets including Facebook and Twitter, “[w]hat many teenagers . . . are considering a harmless prank . . . landed one online gamer in more trouble than he could have ever imagined.”<sup>2</sup> The article continued by identifying that supposed “harmless prank” as an act known as “swatting” and reported that Horner’s role in the swatting constituted domestic terrorism, resulting in a sentence of twenty-five years to life.<sup>3</sup> While the story ultimately proved to be a hoax, it nonetheless shed light on swatting as a dangerous intimidation tactic that is growing increasingly common across American communities and prompted a number of prosecutions and convictions nationwide.<sup>4</sup>

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\* J.D. Candidate, Notre Dame Law School, 2016; B.S. in Science-Business and B.S. in Political Science, University of Notre Dame, 2013. This Note is dedicated to my parents, and my siblings Tara, Tommy, and Luke for all of their support and encouragement over the years. I would also like to thank Professor Jimmy Gurulé for his guidance in developing this Note as well as the *Notre Dame Law Review* staff for their help in the editing process.

1 Simi John, *15-Year-Old Gamer Convicted in ‘Swatting’ Hoax: Satirical Article Creates Stir on Social Media*, INT’L BUS. TIMES (Sept. 1, 2014, 1:33 PM), <http://www.ibtimes.co.uk/15-year-old-gamer-convicted-swatting-hoax-satirical-article-creates-stir-social-media-1463463>.

2 *Id.*

3 *Id.*

4 See, e.g., Press Release, Dep’t of Justice, Individual Pleads Guilty in Swatting Conspiracy Case (Jan. 29, 2009) [hereinafter DOJ Weigman Conviction], *available at* [http://www.justice.gov/usao/txn/PressRel09/weigman\\_swat\\_ple\\_pr.html](http://www.justice.gov/usao/txn/PressRel09/weigman_swat_ple_pr.html) (discussing sentencing of Matthew Weigman for his involvement in a swatting conspiracy); Press Release, Dep’t of Justice, Last Defendant Sentenced in Swatting Conspiracy (Nov. 16, 2009) [hereinafter DOJ Nalley Conviction], *available at* <http://www.justice.gov/usao/txn/PressRel09/nal->

The act of swatting involves individuals making fraudulent 911 calls and reporting threats or ongoing violent situations in order to draw a response from law enforcement, usually a SWAT team.<sup>5</sup> Through the use of deceptive means such as Caller ID spoofing technology, individuals placing the call make it appear as though the threats or emergency reports are coming from the victim's phone.<sup>6</sup> The authorities respond with weapons drawn, expecting a high-risk incident, thereby creating a dangerous situation for the unsuspecting swatting victim and police alike.<sup>7</sup> From the time swatting was first brought to the attention of the FBI in 2008,<sup>8</sup> the phone hacking phenomenon has grown increasingly popular, particularly in the realm of online gaming and in use against Hollywood celebrities.<sup>9</sup> In these areas, swatting functions primarily as a prank, albeit a very dangerous prank. Swatting presents a high degree of danger not only for the victims staring down the barrel of SWAT team guns,<sup>10</sup> but also presents peripheral danger to the community and the law enforcement officers themselves as they rapidly respond

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ley\_swat\_sen\_pr.html (discussing sentencing of Carlton Nalley for his involvement in a swatting conspiracy).

5 *The Crime of 'Swatting': Fake 9-1-1 Calls Have Real Consequences*, FBI (Sept. 3, 2013), <http://www.fbi.gov/news/stories/2013/september/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences>.

6 *Id.*; see also Eric Brumfield, *Chapter 284: Deterring and Paying for Prank 911 Calls that Generate a SWAT Team Response*, 45 McGEORGE L. REV. 571, 572 (2014) (referencing the process of swatting and its use of "caller ID spoofing technology"); Adam Panagia, Director, AT&T Network Fraud Investigations, Panel Discussion at Robocalls All the Rage: An FTC Summit (Oct. 18, 2012) (discussing the goals of swatting and the use of telecommunications technology in carrying out a swatting attack).

7 See *Don't Make the Call: The New Phenomenon of 'Swatting'*, FBI (Feb. 4, 2008), <http://www.fbi.gov/news/stories/2008/february/swatting020408> ("Needless to say, these calls are dangerous to first responders and to the victims."); see also Adam Nagourney & Ian Lovett, *'Swatting' Hoax Tests the Police and Stars Alike*, N.Y. TIMES (Apr. 11, 2013), <http://www.nytimes.com/2013/04/11/us/hollywood-swatting-hoax-strains-both-police-and-stars.html?pagewanted=all> (discussing the danger presented to both victims and first responders swatting incidents); *The Crime of 'Swatting'*, *supra* note 5 (stating that the FBI takes swatting crimes very seriously because "[i]t's only a matter of time before somebody gets seriously injured" (internal quotation marks omitted)).

8 *The Crime of 'Swatting'*, *supra* note 5.

9 See Brumfield, *supra* note 6, at 571 ("[T]here have been more than 400 'swatting' calls' [sic] nationwide . . . mainly associated with celebrity homes."); Nagourney & Lovett, *supra* note 7 (listing a number of celebrities who have been recent swatting victims and expressing the explosion in popularity of swatting attacks in Hollywood); see also Angela Ellis & Joanne Fuchs, *Hackers Prank Call Authorities, Provoke SWAT Team Response*, ABC NEWS (Aug. 16, 2011), <http://abcnews.go.com/US/swatting-hackers-prank-calls-authorities-provoke-swat-team/story?id=14312879> (describing a swatting incident involving a teenaged gamer and discussing the growth of swatting incidents amongst gamers in the United States and Canada).

10 See, e.g., Ellis & Fuchs, *supra* note 9 (describing a SWAT team response to a swatting call and expressing the victim's fear and endangerment as the SWAT team "[had] their guns pointed at [him]" (internal quotation marks omitted)); John Keilman, *'Swatting' No Prank to Video Game Celebrities*, CHI. TRIB. (Sept. 12, 2014, 5:15 PM), <http://www.chicagotribune.com/suburbs/bolingbrook-plainfield/ct-swatting-video-games-met-20140912-story>

to the false reports.<sup>11</sup> Additionally, the mass response by authorities to false reports is further damaging as it is highly expensive and threatens the effectiveness of our law enforcement agencies.<sup>12</sup> Clearly all instances of swatting present a real threat to safety in American communities, however, as the practice has grown increasingly prevalent, there have been instances of its use for far more alarming and disconcerting purposes meriting a closer examination of the legal recourse necessary to combat swatting.

As stated previously, swatting is most prevalent in the online gaming community where individuals regularly interact anonymously and personal information is easily accessible to Internet hackers seeking to intimidate fellow gamers. However, as early as July 2011, several conservative political commentators were victims of swatting incidents resulting in responses from authorities at their homes.<sup>13</sup> The use of swatting as a form of political intimidation against the ideals of another by placing them in potentially dangerous situations is of grave concern and must be addressed. Such politically motivated swatting activities bring to the fore a sinister application of this phenomenon, in which it is aimed at silencing particular viewpoints in political discourse. Such actions threaten not only the safety of the parties involved, but at a deeper level pose a threat to the viability and integrity of the American political system, which is heavily reliant upon free expression. While certainly the classification of a teenaged gamer, such as Paul Horner mentioned at the outset, as a domestic terrorist for his actions in a swatting scandal is a fiction, recognition of this political threat raises the question of whether or not swatting in the political context is deserving of treatment as domestic terrorism and the heightened sentencing that comes with that designation.

This Note will attempt to address the question of whether or not incidents of swatting aimed at contrary political ideals meet the characterization of domestic terrorism in the post-9/11 era. In particular, there will be consideration of the extent to which treatment of political swatting as domestic terrorism is consistent with the maintenance of the delicate balance between public safety concerns and protection of the constitutional values of free

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.html#page=1 (“[T]he threat [to civilians] is real, straining the nerves of gamers and law enforcement professionals alike.”).

11 See, e.g., *The Crime of ‘Swatting’*, *supra* note 5 (referencing an incident in which a police officer was injured in a car accident as a result of his rushing to the scene of a reported emergency that turned out to be a swatting incident).

12 *Id.*; see also Nagourney & Lovett, *supra* note 7.

13 Christopher Collins, *Erik Erickson of RedState Targeted in Latest ‘SWATting’ Attack*, EXAMINER.COM (May 28, 2012, 8:10 AM), <http://www.examiner.com/article/erick-erickson-of-redstate-targeted-latest-swatting-attack>; CNN Contributor Erickson and Family Targeted in Latest ‘Swatting’ Attack, BREITBART (May 27, 2012), <http://www.breitbart.com/Big-Government/2012/05/27/cnn-contributor-targeted-in-swatting-attack>; Arlette Saenz, *Senator Asks DOJ to Investigate SWAT-ting Attacks on Conservative Bloggers*, ABC NEWS (June 6, 2012, 6:37 PM), <http://abcnews.go.com/blogs/politics/2012/06/senator-asks-doj-to-investigate-swatting-attacks-on-conservative-bloggers/>; John Sexton, *LA Weekly Interviews Patterico about His Swatting*, BREITBART (Nov. 9, 2012), <http://www.breitbart.com/Big-Government/2012/11/09/LA-Weekly-Interviews-Patterico-About-His-SWATting>.

speech and free expression. This Note will proceed in four parts. Part I will examine the growth of telecommunication manipulation practices from products of curiosity to an alarming means of intimidation in modern day swatting and the dangers swatting presents to American communities. Part II will offer a history of the development of domestic terrorism in American jurisprudence and discuss the current state of domestic terrorism in the post-9/11 era. Part III provides context for the application of the domestic terrorism classification by offering examples of domestic terrorism in U.S. history, particularly the rise of “special-interest” domestic terrorism. Finally, Part IV analyzes political swatting in light of domestic terrorism requirements grown out of the PATRIOT Act<sup>14</sup> and in comparison with prior examples of crimes classed as domestic terrorism. Part IV concludes with the argument that, in light of the definitional requirements of domestic terrorism in the United States and strong public policy interests, swatting should in fact be classified as an act of domestic terrorism when used to intimidate political adversaries or coerce advocates of a particular viewpoint to withdraw from participation in political discourse.

## I. SWATTING: A DANGEROUS TAKE ON AN OLD CRIME

### A. *Predecessor to Swatting*

While swatting is a relatively young phenomenon, crimes involving the manipulation of technology integrated in telecommunication channels dates back several decades. An early predecessor to modern day telephone and computer hacking was a practice that came to be known as phone “phreaking.” Phreaking was a term used to describe practices in which individuals would “study, experiment with, [and] explore telecommunication systems, such as equipment and systems connected to public telephone networks.”<sup>15</sup> In the 1950s and 1960s, phone phreaking arose out of curiosity on the part of intelligent youth including, but not limited to, students from some of the nation’s top universities.<sup>16</sup> In those early days, the exploration and manipulation of telecommunication channels was not prompted by money, but rather a mere fascination with the virtual world in which phreakers could interact and explore the bounds of new communication technology.<sup>17</sup> Phreaking reached its peak in the early 1970s when John Draper discovered

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14 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

15 Brent Dean, *Phreaking and Spoofing—A Short History*, COMPUTER CRIME & TECH. L. ENFORCEMENT (Quinlan), July 2011, art. 4; see also *Don’t Make the Call*, *supra* note 7 (describing “phone phreakers” and their practices “hacking into phone companies’ computers and making free long-distance calls”).

16 Chris Baraniuk, *Whatever Happened to the Phone Phreaks?*, THE ATLANTIC (Feb. 20, 2013), <http://www.theatlantic.com/technology/archive/2013/02/whatever-happened-to-the-phone-phreaks/273332/>.

17 *Id.* (“These were not people who were out to make free phone calls, you know, for the sake of making free phone calls. They were just like, ‘Wow, what happens if. What

that the emission of precise tones, at precise times, enabled users to make free calls through pay phones.<sup>18</sup> On the heels of Draper's discovery, phreaking exploded in popularity and the practice began to take on economic significance as parties used those exploitation tactics for a variety of purposes ranging from Caller ID manipulation to free teleconferencing.<sup>19</sup> As technology changed and telephone networks became increasingly computerized, the underlying concepts established by early phreakers heavily influenced the development of more complex and sophisticated manipulation practices such as computer hacking.<sup>20</sup> Today the legacy of phreaking lives on as manipulation and exploitation of telecommunication technology continues. However, what was initially motivated by curiosity and fascination now often serves as a vehicle for economic gains,<sup>21</sup> and has seen application in far more sinister spin offs such as swatting.

### B. *The Mechanics of Swatting and SWAT Deployment*

Having developed along with modern technology and drawing upon the methodology and discoveries generated by phreakers, a modern day "more serious twist on [that] old crime" has manifested itself in the practice of swatting.<sup>22</sup> Advances in modern technology have made masking the origin of calls easier than ever, which in turn has substantially contributed to the increased pervasiveness of swatting instances as the body of individuals capable of carrying out the acts has broadened.<sup>23</sup> Swatting refers to the practice of making a hoax call to 911 prompting the deployment of a SWAT team

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happens if I dial this number? What happens if I play this tone? They were simply curious.").

18 Dean, *supra* note 15 (describing Draper's discovery that a whistle as a prize in a "Cap'n Crunch" box emitted the precise tone that would allow free calls to be made through pay phones); see Peter T. Leeson & Christopher J. Coyne, *The Economics of Computer Hacking*, 1 J.L. ECON. & POL'Y 511, 513 (2005).

19 See Dean, *supra* note 15 (discussing businesses' use of phreaking methods for purposes of enabling call centers "to display one main telephone number on all outgoing calls, even though those calls were not really originating from those numbers"); see also Leeson & Coyne, *supra* note 18, at 513 (explaining Draper's discovery created an opportunity for exploitation of AT&T's switching system to make free long distance calls); Baraniuk, *supra* note 16 ("[H]ackers would phreak their way into teleconferencing systems in order to have all-night group discussions—always at the expense of someone else (a client of the teleconferencing company).").

20 Dean, *supra* note 15 (discussing the computerization of telephone networks and the link between early phreaking methods and computer hacking); see also Leeson & Coyne, *supra* note 18, at 513–15 (tracing the earliest origins of computer hacking to phreaking practices).

21 Leeson & Coyne, *supra* note 18, at 524–25 ("A third class of hackers is driven by the profit potential of hacking activity.").

22 *Don't Make the Call*, *supra* note 7.

23 Dean, *supra* note 15 (discussing new smart phone apps and internet services that mask the origins of calls, thereby making anonymous phone calling readily available to the public at large).

response.<sup>24</sup> To prompt the response of a SWAT unit, swatters describe a highly dangerous situation unfolding, often involving claims of weapons, violence, and a continuing threat to the safety of the community.<sup>25</sup> Through the use of Caller ID spoofing,<sup>26</sup> swatters are able to make the fraudulent phone call appear as though it is coming from the residence or business of their intended victim, thereby directing the SWAT response to that location.<sup>27</sup>

To appreciate the gravity of the danger resultant from such acts of swatting requires an understanding of SWAT teams and the functions they serve. SWAT units first came into existence in the late 1960s with the recognition that the ordinary police officer was not adequately trained or equipped to handle “incidents in which the slightest slip could cost many lives.”<sup>28</sup> Therefore, SWAT teams exist to provide a police force capable of adequately meeting the unique challenges of high-risk situations.<sup>29</sup> Today, the majority of police departments have either their own SWAT team or access to units capable of providing such high-stakes response services.<sup>30</sup> These teams are specially trained and equipped to face the most severe threats encountered by law enforcement and their deployment often entails the expectation of heavy violence, making such instances highly dangerous and tense.<sup>31</sup>

### C. *Modern Day Instances of Swatting and the Dangers Presented*

The phone-hacking phenomenon known as swatting was first brought to the attention to the FBI in 2008<sup>32</sup> and has since experienced considerable growth across the country, even rising to the level of “near-epidemic proportions” in some areas.<sup>33</sup> The practice of swatting has most prominently taken root in online gaming communities where anonymous interaction is com-

24 *The Crime of ‘Swatting’*, *supra* note 5.

25 *Don’t Make the Call*, *supra* note 7 (describing the reports relayed by swatters to prompt mass response by authorities, such as “tales of hostages about to be executed or bombs about to go off”).

26 Panagia, *supra* note 6 (explaining Caller ID spoofing as “[t]he practice of sending false or misleading information, so as to deceive the receiving party and/or hide the caller’s true identity and/or call origination”); *see also* Dean, *supra* note 15 (“Caller ID ‘spoofing’ . . . is essentially the practice of disguising or obscuring the origin of a transmission, in [a “swatting”] case, the source of a telephone call.”).

27 *The Crime of ‘Swatting’*, *supra* note 5.

28 Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 677–78 (2001).

29 *Id.* at 677.

30 *Id.* at 680.

31 *See id.* at 680–84.

32 *The Crime of ‘Swatting’*, *supra* note 5.

33 Brumfield, *supra* note 6, at 575 (quoting California State Senator Lieu who stated that swatting “has grown to near-epidemic proportions in California—particularly throughout Los Angeles County” (internal quotation marks omitted)); *see also id.* at 571 (recognizing that “there have been more than 400 ‘swatting’ calls nationwide; these calls have been mainly associated with celebrity homes”).

mon and personal information is easily accessible to savvy hackers operating in those forums.<sup>34</sup> However, recent trends have moved towards an increased targeting of celebrities as victims of swatting incidents, with victims ranging from comedian Russell Brand to popular artists such as Rihanna and Justin Timberlake.<sup>35</sup> For authorities, the swatting phenomenon is alarming as it jeopardizes the safety of the victims, the responders, and the community at large.<sup>36</sup> Plainly stated, the risk of injury or death is beyond question in these instances. Kevin Kolbye, the assistant special-agent-in-charge of the FBI's Dallas Division underscored the severity of the risk associated with a SWAT team raid stating, "[t]hey are in a heightened state, the safety's off and their finger is close to the trigger."<sup>37</sup> Whether it is an officer injured in responding to the scene or in confronting an unsuspecting victim, a civilian harmed as authorities speed through neighborhoods, or a victim injured in a violent SWAT team entry, Kolbye says "[i]ts only a matter of time before somebody gets seriously injured as a result of one of these [swatting] incidents."<sup>38</sup>

In addition to the risk of injury, swatting responses by authorities pose other risks worth considering. First, there is a heavy financial burden associated with the deployment of a SWAT team. Mass police responses can cost thousands of dollars, with expenses reaching as much as \$10,000 for a full-blown SWAT team deployment.<sup>39</sup> Further, swatting imposes a less tangible, but equally concerning cost, in that it interferes with the effectiveness of law enforcement authorities.<sup>40</sup> A cause for concern in the law enforcement community is that resources applied to a false swatting report may deprive an adequate response to a simultaneous criminal incident requiring immediate police action.<sup>41</sup> Equally devastating would be a situation where suspicion of a

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34 See Ellis & Fuchs, *supra* note 9 (describing an incident involving a fifteen-year-old gamer who was targeted by swatters, leading to a SWAT team storming his Florida home); Keilman, *supra* note 10 (stating that "swatting" is "increasingly striking participants in the world of video gaming").

35 Brumfield, *supra* note 6, at 571 ("What do Russell Brand, Justin Timberlake, Rihanna, and Selena Gomez have in common? . . . They have all been victims of 'swatting.'"); see also Nagourney & Lovett, *supra* note 7 (highlighting the rising problem that "swatting" presents in Hollywood, and mentioning specific cases of "swatting" involving Justin Bieber, Tom Cruise, and Miley Cyrus).

36 *The Crime of 'Swatting'*, *supra* note 5 (highlighting general threats to victims, responders, and society as a result of swatting).

37 Ellis & Fuchs, *supra* note 9 (quoting Kevin Kolbye, the assistant special agent in charge of the FBI's Dallas office) (internal quotation marks omitted).

38 *The Crime of 'Swatting'*, *supra* note 5 (internal quotation marks omitted).

39 *Id.*; see also Nagourney & Lovett, *supra* note 7 ("[R]esponses can cost thousands of dollars and . . . a full-blown SWAT team can cost \$10,000.").

40 Nagourney & Lovett, *supra* note 7 (explaining the difficulties created by fraudulent emergency reports including a difficulty in determining which calls are valid and deserving of a full-blown response).

41 See, e.g., *id.*

reported threat being a swatting event results in an insufficient response to a real, life-threatening criminal incident.<sup>42</sup>

The seriousness of these fears and concerns is manifested in the recent convictions of high-profile swatters to substantial prison sentences<sup>43</sup> and in the efforts in some states to enact legislation to specifically combat the mounting swatting threat.<sup>44</sup> In November 2009, Carlton Nalley was sentenced by the U.S. District Court for the Northern District of Texas to 108 months in federal prison following a guilty plea for offenses relating to his involvement in a swatting conspiracy.<sup>45</sup> Nalley's offenses included "one count of conspiracy to retaliate against a witness, victim, or informant and one count of conspiracy to commit access device fraud and unauthorized access of a protected computer."<sup>46</sup> That conviction came on the heels of the earlier sentencing of Matthew Weigman, in June 2009, in the Northern District of Texas to 135 months in federal prison following his conviction on the same charges as Nalley.<sup>47</sup> Clearly, the past convictions of swatters are indicative of the recognition by law enforcement officials that swatting poses a real public safety concern and merits substantial deterrence through stiff punishment.

#### D. *Swatting as a Weapon in Political Debate*

While previous paragraphs illustrate that swatting is a serious offense and one not taken lightly by law enforcement, the recent use of swatting as a means of intimidation in the realm of political discourse is a cause for consideration as to whether increased punishment, in excess of the sentencing standards provided under criminal law provisions, may be justified to vigorously eliminate the practice from use as a weapon to silence political opposition. Classification of political swatting as an act of domestic terrorism would permit the application of harsher sentencing guidelines and in so doing would offer stronger deterrence of future acts of swatting.<sup>48</sup> In July 2011, Patrick

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42 *Id.* ("If officers are thinking it could be a swatting, maybe they let their guard down approaching the home. What happens if one of these days, it's a real incident? The safety of everyone could be jeopardized because of this boy crying wolf." (internal quotation marks omitted)).

43 *See, e.g.*, DOJ Nalley Conviction, *supra* note 4; *see also* DOJ Weigman Conviction, *supra* note 4.

44 Brumfield, *supra* note 6, at 574–80 (analyzing how chapter 284 changes punishment for a "swatting" call and how such punishment changes deter the mounting issue); *see also* Nagourney & Lovett, *supra* note 7 (discussing recent state senate committee meetings in California advocating legislation to make it easier to convict individuals filing false reports).

45 DOJ Nalley Conviction, *supra* note 4.

46 *Id.*

47 DOJ Weigman Conviction, *supra* note 4.

48 *See* Jonathan Masters, *Militant Extremists in the United States*, COUNCIL ON FOREIGN RELATIONS (Feb. 7, 2011), <http://www.cfr.org/terrorist-organizations-and-networks/militant-extremists-united-states/p9236> (asserting the fact that a domestic terrorism determination "invokes much harsher sentencing guidelines").



Frey, a deputy district attorney in Los Angeles and conservative blogger writing under the name “Patterico,” was a victim of a swatting after police received a 911 call from Frey’s home in which a man claimed to have killed his wife.<sup>49</sup> Frey, who was initially handcuffed and his home searched, expressed his fear saying, “[i]t’s a phone call that could have gotten me killed.”<sup>50</sup> A similar incident happened to CNN contributor, and editor-in-chief of RedState.com, Erik Erickson in May 2012 when sheriff’s deputies arrived at Erickson’s Georgia home following receipt of a call from his phone number claiming that an accidental shooting had occurred at the family dinner table.<sup>51</sup>

Both incidents raise serious concerns over the use of swatting as a vehicle for political intimidation and the potential employment of swatting as a means of silencing expression of political opposition. Senator Saxby Chambliss of Georgia voiced his concerns in a letter to Attorney General Eric Holder, seeking an investigation into the swatting incidents targeting “members of the community of online political commentators.”<sup>52</sup> Recognizing the alarming use of swatting to target political speech, Chambliss expressed his concerns stating:

The perpetrators appear to be targeting individuals who are vigorously exercising their First Amendment rights to political speech [and] . . . efforts to intimidate those who choose to enter the political forum and express their opinions are in conflict with the founding principles of our nation.

Regardless of any potential political differences that may exist, threats and intimidation have no place in our national political discourse.<sup>53</sup>

It is clear that the legacy of phreaking, which grew out of harmless curiosity to explore a new technology, has progressed into a frightening and dangerous means of political attack in swatting. While “inquisitiveness is a fundamental and valuable part of humanity—especially for a humanity which day by day absorbs more and more complex machinery,”<sup>54</sup> the use of the discoveries of such inquisitiveness to both intimidate political adversaries and silence a contrary viewpoint raises a real legal concern requiring not only attention, but also adequate recourse. Such recourse may be found in the heightened sentencing that would come with classifying political swatting as domestic terrorism under the 18 U.S.C. § 2331(5) definition.

49 Saenz, *supra* note 13.

50 *Id.*; *see also* Sexton, *supra* note 13 (recounting Frey’s fears of having law enforcement shoot him if they mistook his cell phone for a gun).

51 Collins, *supra* note 13; Saenz, *supra* note 13.

52 Letter from Saxby Chambliss, U.S. Senator, to Eric Holder, Attorney Gen., Dep’t of Justice (June 5, 2012) [hereinafter Chambliss Letter], *available at* <https://votesmart.org/public-statement/704214/letter-to-attorney-general-eric-holder#.VOfkSy6FiFs>.

53 *Id.*

54 Baraniuk, *supra* note 16.

## II. RISE OF DOMESTIC TERRORISM

### A. *Terrorism Generally*

In the post-9/11 era, the term terrorism is all too common in the American vocabulary, and while there is general consensus that “terrorism” carries a pejorative connotation,<sup>55</sup> there remains no precise or widely accepted definition that entirely encapsulates the concept of terrorism.<sup>56</sup> Inconsistency in the definition exists from the international level<sup>57</sup> all the way down to differences in how terrorism is characterized between state and local entities.<sup>58</sup> The lack of a concrete definition for terrorism has prompted some criticism from those claiming that “terrorism” is little more than a “fad” word applied indiscriminately across a broad range of violent or threatening acts.<sup>59</sup>

However, regardless of any inability to comprehensively define terrorism, there are several consistent themes that serve as fundamental, conceptual aspects of terrorism.<sup>60</sup> The most elemental characteristic distinguishing acts of terrorism from plainly criminal acts is the fact that terrorist acts are rooted in the furtherance of special interests, namely political or social objectives.<sup>61</sup> This is an important distinction as it removes from the terrorism classification those illicit actions taken solely for economic gain. “[T]he purpose of [a] criminal act does not go beyond the act itself or the acquisition of money and other valuables”; conversely, however, a terrorist act is “in pursuit

55 KEVIN JACK RILEY & BRUCE HOFFMAN, *DOMESTIC TERRORISM: A NATIONAL ASSESSMENT OF STATE AND LOCAL PREPAREDNESS* 2 (1995).

56 *Id.*; see also Dane E. Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 OR. L. REV. 249, 256 (2007) (“The concept of terrorism has persisted throughout history, but resists capture in a universal definition despite the efforts of sociologists, theologians, philosophers, psychologists, and law-makers.” (footnote omitted)).

57 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (indicating that nations are “divisively split” in their definitions of terrorism); Johnson, *supra* note 56, at 256 (“Here and abroad, debate over the elements of terrorism continues.”); Frederick V. Perry, *Multinationals at Risk: Terrorism and the Rule of Law*, 7 FLA. INT’L U. L. REV. 43, 73–75 (2011) (comparing terrorism definitions from various nations and illustrating disparities between each).

58 RILEY & HOFFMAN, *supra* note 55, at 16 (indicating that survey results revealed the fact that state and local enforcement officials apply a looser and less precise definition of what they consider terrorism as compared with the FBI’s explicit definition).

59 *Id.* at 2 (pointing to terrorism expert Brian Jenkins’s lamentation that terrorism is merely a “fad” term).

60 *Id.* at 2–5.

61 28 C.F.R. § 0.85(l) (2014) (offering a terrorism definition in which terrorism is “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, *in furtherance of political or social objectives*” (emphasis added)); see also COUNTERTERRORISM DIVISION, FBI, *TERRORISM 2002–2005*, at v (2005) [hereinafter *TERRORISM 2002–2005*] (mentioning an essential element of terrorism definitions as being aims of further political or social objectives); *id.* at 2–3; Perry, *supra* note 57, at 76 (highlighting the intent element in the FBI terrorism definition).

of some long-range political goal.”<sup>62</sup> Acts of terrorism are indistinguishable from plain crime without an examination of motive.<sup>63</sup> Motive is paramount in determining whether or not a violent or threatening action constitutes terrorism. For example, on July 4, 2002, Hesham Mohamed Hadayet opened fire at the El Al ticket counter at Los Angeles International Airport.<sup>64</sup> It was only after nine months of investigation, in which the FBI determined that Hadayet had specifically targeted the Israeli airline and had killed two Israeli civilians in hopes of influencing U.S. government policy in favor of Palestinians, that the act was classified as terrorism.<sup>65</sup> In the absence of the political motive this would have been nothing more than a criminal, albeit tragic, matter.

While a political or social motivation is a fundamental aspect of terrorist acts, there exist other important and universal characteristics of terrorist activities. Terrorist acts seek “to create an atmosphere of fear and alarm” which serves as a powerful coercive force compelling the target audience to take actions or viewpoints they would not otherwise take, or to avoid specific actions or viewpoints contrary to the beliefs of the terrorist actor.<sup>66</sup> In order to bolster the coercive effect of their actions, terrorist actors generally conduct their actions in such a way as to maximize publicity.<sup>67</sup> In generating high degrees of publicity through intentionally provocative actions, terrorists create lasting psychological repercussions broad enough to intimidate and coerce not only the direct victims of their threats, but also a greater target audience.<sup>68</sup> By creating deep social anxiety, terrorists elicit enduring fear in the target population capable of generating long-term coercion and compliance with the values or viewpoints the terrorist acts were intended to advance.<sup>69</sup> On top of the highly public and psychologically powerful charac-

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62 RILEY & HOFFMAN, *supra* note 55, at 3 (emphasis omitted).

63 See TERRORISM 2002–2005, *supra* note 61, at 32 (stating “[t]errorism is not always self-evident” and referencing the fact that in the Hadayet shooting case, it was not until nine months after the shooting that it was determined to have been a terrorist act, thereby suggesting the necessity of motive in a domestic terrorism classification).

64 See FBI, *Justice: El Al Attack Was Terrorism*, CNN (Apr. 12, 2003, 12:25 PM), <http://www.cnn.com/2003/US/West/04/12/airport.shooting/>.

65 *Id.*; see also TERRORISM 2002–2005, *supra* note 61, at 32; John C. Richter, *Counterterrorism: A Federal Prosecutor’s View*, 33 OKLA. CITY U. L. REV. 297, 326 n.100 (2008).

66 RILEY & HOFFMAN, *supra* note 55, at 3.

67 See *id.*; see also Margaret Thatcher, Prime Minister of the U.K., Speech to the American Bar Association (July 15, 1985) (transcript available at <http://www.margaretthatcher.org/document/106096>) (explaining the importance of “starv[ing] [terrorism] of the oxygen of publicity” in order to effectively combat its prevalence).

68 See RILEY & HOFFMAN, *supra* note 55, at 3; see also TERRORISM 2002–2005, *supra* note 61, at 33 (explaining that the classification of acts as terrorism generally depends, to some extent, on an examination of the publicity associated with the attacks and whether they were intended to increase notoriety and impact a wide audience).

69 See Arik Burakovsky, *Understanding the Determinants of Terrorist Attack Publicity* (Apr. 1, 2013) (unpublished manuscript, University of California, San Diego), *available at* [https://polisci.ucsd.edu/\\_files/undergrad/Thesis%202013%20Understanding%20the%20Determinants%20of%20Terrorist%20Attack%20Publicity.pdf](https://polisci.ucsd.edu/_files/undergrad/Thesis%202013%20Understanding%20the%20Determinants%20of%20Terrorist%20Attack%20Publicity.pdf).

ter of terrorist acts, an additional factor routinely considered by the FBI in terrorism classifications is whether or not there was a conspiratorial dimension.<sup>70</sup> Generally, where such conspiratorial nature was not found, the terrorism characterization has been found to be less applicable.<sup>71</sup> However, the requirement of a conspiratorial dimension is not expressly included in the FBI's terrorism definition,<sup>72</sup> thereby leaving the question of whether or not it is an essential element in terrorism determinations open to debate and permitting that it be discounted for purposes of this Note. Ultimately, the combination of the aforementioned universal factors, consistent across all acts of terrorism, forwards the ends of provocation of governmental overreaction, discouragement of dissent, or intimidation and coercion.<sup>73</sup>

Aware of both the need for clarity in the definition of terrorism and the presence of underlying factors consistent across all acts of terrorism, the FBI attempted to codify those themes into a singular, coherent definition, which was developed as a reflection of legislation as well as consultations with senior-level government advisory bodies.<sup>74</sup> According to the Code of Federal Regulations, “[t]errorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, a civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>75</sup>

### B. *The Domestic Terrorism Threat in the United States*

Domestic terrorism is a substantial threat in the United States and should not be discounted as minimal.<sup>76</sup> Despite the fact that in the post-9/11 era the overwhelming majority of public focus remains on international

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70 See RILEY & HOFFMAN, *supra* note 55, at 4 (examining the importance of a conspiratorial dimension by providing the example of the murder of Dr. Gunn, a Florida physician who performed abortions). Despite the fact that the murder was carried out for purposes of furthering a social objective, that being bringing an end to abortions, the FBI refused to characterize the act as terrorism due to the lack of a greater conspiracy. *Id.*

71 *Id.*

72 See *supra* note 61 and accompanying text (providing the FBI's definition of terrorism, which lacks a conspiratorial element).

73 RILEY & HOFFMAN, *supra* note 55, at 3 (“The fear created by terrorists, for example, may be intended to cause people to exaggerate the strength of the terrorists and the importance of their cause, to provoke governmental overreaction, to discourage dissent, or simply to intimidate and thereby enforce compliance with their demands.”).

74 See *id.* (indicating input for the terrorism definition from “senior-level advisory and consulting bodies such as the Vice President’s Task Force on Terrorism”).

75 28 C.F.R. § 0.85(1) (2014).

76 See *Domestic Terrorism in the Post-9/11 Era*, FBI (Sept. 7, 2009), [http://www.fbi.gov/news/stories/2009/september/domterror\\_090709](http://www.fbi.gov/news/stories/2009/september/domterror_090709) (describing the current state of domestic terrorism as “alive and well”); see also JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, *THE DOMESTIC TERRORIST THREAT 1* (2013) (emphasizing that domestic terrorism has posed a significant threat over the past thirty years and continues to threaten the United States today); RILEY & HOFFMAN, *supra* note 55, at 13–17 (discussing various contemporary domestic terrorism threats in the United States).

terrorism threats from prominent terrorist organizations,<sup>77</sup> domestic terrorism remains a great concern for our country and should be taken at least as seriously as international threats.<sup>78</sup> From its inception in 1908, the FBI has been tasked with the responsibility of investigating and combating domestic terrorist threats,<sup>79</sup> a role it retains today.<sup>80</sup> Immediately upon its inception, the FBI inherited domestic terrorism threats largely concerning “subversive domestic political threats, including anarchism and communism.”<sup>81</sup> Today, the FBI continues to face those same historic threats along with new, ever-changing breeds of terrorism concerns. However, what has remained consistent is the fact that, despite a rise in a broad array of threats on the international level, domestic terrorism remains a threat requiring vigilant attention.<sup>82</sup> In fact, from 2002 to 2005, “[23] of the 24 recorded terrorist incidents in the United States were perpetrated by domestic terrorists,”<sup>83</sup> which offers plain evidence that domestic terrorism continues to account for the vast majority of terrorist threats faced by this country.

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77 See Dale L. Watson, Exec. Assistant Dir., FBI Counterterrorism & Counterintelligence Div., Testimony Before the Senate Select Committee on Intelligence (Feb. 6, 2002) [hereinafter Watson Testimony], available at <http://www.fbi.gov/news/testimony/the-terrorist-threat-confronting-the-united-states> (discussing the serious threat that “international terrorists continue to pose to nations around the world, particularly the United States”); see also James J. Ward, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471, 499–500 (2008) (recognizing that the government has an “international focus” and views the primary terror threat as being international); *Domestic Terrorism*, *supra* note 76 (“[G]lobally-fueled terrorism continues to occupy much of [American authorities’] time and attention these days.”).

78 See Watson Testimony, *supra* note 77 (presenting statistics showing that between 1980 and 2000 domestic terrorists accounted for 247 of the 335 incidents or suspected incidents of terrorism in the United States); see also BJELOPERA, *supra* note 76, at 1 (“The FBI reported in 1999 that ‘[d]uring the past 30 years, the vast majority—but not all—of the deadly terrorist attacks occurring in the United States have been perpetrated by domestic terrorists.’” (alteration in original)); WILLIAM DYSON, INST. FOR INTERGOVERNMENTAL RESEARCH, *THE EMERGENCE OF SPECIAL-INTEREST/SINGLE-ISSUE TERRORISM* 6 (2001) (indicating that law enforcement should recognize that domestic terrorism is a real threat, and suggesting the threat still remains as law enforcement has not yet adequately developed an effective program to address the threat); Ward, *supra* note 77, at 474 (asserting that domestic terrorism acts should not be taken lightly, as they “indeed can ‘happen here’—and [they have]”).

79 See TERRORISM 2002–2005, *supra* note 61, at 34.

80 See 28 C.F.R. § 0.85(l) (granting the FBI “Lead Agency responsibility in investigating all crimes . . . which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States”); RILEY & HOFFMAN, *supra* note 55, at 16 (“[T]he FBI has been designated as the lead federal agency with authority to investigate acts of terrorism in the United States.”); see also BJELOPERA, *supra* note 76, at 3 (noting that the FBI has principal responsibility for investigating terrorism at the “federal level”).

81 TERRORISM 2002–2005, *supra* note 61, at 34.

82 See Watson Testimony, *supra* note 77 (recognizing the persistent terrorist threat posed by traditional sources including right-wing hate groups and left-wing extremists); see also RILEY & HOFFMAN, *supra* note 55, at 13–17 (discussing the historic and continuing domestic terrorism threat posed by several notable ideologies).

83 TERRORISM 2002–2005, *supra* note 61, at 1.

Although the threat posed by domestic terrorism is nothing new, the post-9/11 era has witnessed a shift in the nature of the domestic terrorism threat. Historically, the greatest domestic threats came from formal terrorist organizations with readily identifiable political and social objectives.<sup>84</sup> However, the modern era has brought with it an “insidious concern that touches all forms of domestic extremism,” that being the lone offender who acts independent of any organizational affiliation.<sup>85</sup> In addition to the rise of the lone offender, actors in domestic terrorism have turned their focus to unconventional weapons and nontraditional terror tactics such as nonviolent threats and intimidation.<sup>86</sup> Compounding the problems presented by a rise in lone offenders and unconventional terrorism tactics is the fact that the global technological landscape has undergone drastic changes in recent history. While the presence of extremist ideals has remained largely consistent throughout history, the rise of the Internet and unprecedented connectedness through social media outlets have played a significant role in the development of new brands of terrorism, and have opened alternate avenues for terrorist activity.<sup>87</sup> Due to this changing nature of terrorism and an awareness of its domestic pervasiveness, government authorities recognized law enforcement officials’ need for greater authority and flexibility to meet the

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84 See Watson Testimony, *supra* note 77 (tracing the development of historic sources of domestic terrorism); see also BJELOPERA, *supra* note 76, at 10–49 (same); TERRORISM 2002–2005, *supra* note 61, at 34–35 (same).

85 *Domestic Terrorism*, *supra* note 76; see also Joshua K. Marquis & Danielle M. Weiss, *Eco-Terror: Special Interest Terrorism*, PROSECUTOR, Jan.–Feb. 2005, at 30 (explaining that lone-offender actors raise particular concern in that they can easily “blend into their community, camouflaging themselves as mainstream concerned citizens”).

86 Michael A. Clancy, Deputy Assistant Dir., FBI Counterterrorism Div., Statement Before the Senate Judiciary Committee (Sept. 19, 2012) [hereinafter Clancy Statement], available at <http://www.fbi.gov/news/testimony/the-domestic-terrorism-threat> (highlighting some nontraditional forms of domestic terrorism tactics including “white-collar crime, threats, and other violations of federal law”); see BJELOPERA, *supra* note 76, at 1 (acknowledging that “a large number of those labeled as domestic terrorists do not necessarily use traditional terrorist tactics such as bombings or airplane hijackings”); Susan W. Brenner & Marc D. Goodman, *In Defense of Cyberterrorism: An Argument for Anticipating Cyber-Attacks*, 2002 U. ILL. J.L. TECH. & POL’Y 1, 51 (2002) (acknowledging development in terror tactics by domestic terrorists, as they have already moved into using computer technology to carry out acts of terror and intimidation).

87 See BJELOPERA, *supra* note 76, at 2 (describing modern domestic terrorists as “[i]nternet savvy and [willing to] use the medium as a resource for their operations”); GOV’T PRINTING OFFICE, THE INTERNATIONAL TERRORISM THREAT IS CHANGING 5–6 (2000), available at <http://www.gpo.gov/fdsys/granule/GPO-COUNTERINGTERRORISM/GPO-COUNTERINGTERRORISM-1-3.pdf> (describing the increase in use of information technologies by terrorists and the potentially crippling impact such attacks may have on the United States); Paul N. Stockton & Michele Golabek-Goldman, *Prosecuting Cyberterrorists: Applying Traditional Jurisdictional Frameworks to a Modern Threat*, 25 STAN. L. & POL’Y REV. 211, 212–13 (2014) (expressing concern over the threat posed by the use of cyberattacks by terrorists).

constantly shifting challenges posed by domestic terrorism.<sup>88</sup> The horrific terrorist attacks of September 11, 2001 offered the catalyst for such necessary legislative change to come in the form of the PATRIOT Act.<sup>89</sup>

### C. Section 802 and Its Definition of Domestic Terrorism

Following the devastation of the 9/11 terrorist attacks, Congress turned its attention to drafting legislation that granted law enforcement the authority necessary to meet the threat of terrorism in the modern era.<sup>90</sup> Fueled by a surge in patriotic sentiments and a realization of the extreme threat terrorism posed, Congress enacted the PATRIOT Act by “overwhelming, bipartisan margins.”<sup>91</sup> The purpose of the PATRIOT Act was to provide law enforcement agencies with the requisite legal tools and authority to detect and prevent terrorism in any form.<sup>92</sup> In drafting the PATRIOT Act, “Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.”<sup>93</sup> In addition to retrofitting such existent legal principles, many of them were also expanded so as to increase their applicability. Included in the Act was section 802, which expanded the definition of terrorism to expressly classify “domestic terrorism” as separate from a broader conception of terrorism, including international terrorist activities.<sup>94</sup>

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88 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-52, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code) (noting that the purpose of the legislation was specifically drafted to address the needs of law enforcement officials in combating mounting terrorist threats by creating various tools with which officials are able to more effectively investigate, address, and prevent terrorist activity in the United States); Drew Fennell, *The USA PATRIOT Act: Can We Be Both Safe and Free?*, DEL. LAW., Summer 2003, at 10 (describing the PATRIOT Act legislation as “sweeping and comprehensive” in its changes in authority granted to law enforcement).

89 USA PATRIOT Act, 115 Stat. 272.

90 DEP’T OF JUSTICE, THE USA PATRIOT ACT: PRESERVING LIFE AND LIBERTY 1 [hereinafter PRESERVING LIFE AND LIBERTY].

91 *Id.* (“The USA PATRIOT Act was passed nearly unanimously by the Senate 98–1, and 357–66 in the House, with the support of members from across the political spectrum.”).

92 *Id.*

93 *Id.* (characterizing the changes in law created by the PATRIOT Act as “modest [and] incremental”); see Fennell, *supra* note 88, at 10 (“Section 802 does not create a new crime of domestic terrorism. Instead, it expands the type of conduct that the government may investigate as ‘terrorism.’”).

94 18 U.S.C. § 2331(5) (2012) (codifying section 802 of the PATRIOT Act); see also *How the USA PATRIOT Act Redefines “Domestic Terrorism”*, ACLU (Dec. 6, 2002), <https://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism> [hereinafter ACLU PATRIOT Act Discussion] (noting that “Section 802 . . . expanded the definition of terrorism . . .”).

A distinct definition of domestic terrorism was necessary to meet the unique challenge of domestic threats, which is constantly evolving.<sup>95</sup> The PATRIOT Act recognized the potential for domestic actions, typically addressed as merely criminal, to carry deeper implications and require stricter punishment when such actions are paired with political or social motivations.<sup>96</sup> With respect to domestic terrorism, the primary concern was offering a structured definition capable of addressing uses of force or the threat of force, motivated by political or social radicalization.<sup>97</sup> The FBI sought stronger authority to conduct terrorist investigations when the expression of otherwise constitutionally protected ideals was taken too far, resulting in intimidation, coercion, and the threat of violence.<sup>98</sup> In order to accomplish that goal, the PATRIOT Act clarified the concept of domestic terrorism and offered a formal, yet broad, definition for the phenomenon the FBI had long referred to as “Americans attacking Americans based on U.S.-based extremist ideologies.”<sup>99</sup>

As mentioned above, section 802 of the PATRIOT Act created a specific definition of domestic terrorism. This section of the PATRIOT Act did not create a new crime called “domestic terrorism,” but rather expanded the type of criminal behavior that may be deserving of such a characterization and therefore subject to investigation as domestic terrorist acts.<sup>100</sup> Section 802 expressly codifies the fundamental requirement of a political or social motive in domestic terrorist acts as it does not restrict the classes or types of criminal actions that may be branded as domestic terrorism.<sup>101</sup> Rather, the sole

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95 Fennell, *supra* note 88, at 10 (explaining that provisions of the PATRIOT Act were intended to account for changes in the threat landscape, changes that would not have otherwise been addressed by outdated and irrelevant statutory provisions existing prior to the PATRIOT Act).

96 See ACLU PATRIOT Act Discussion, *supra* note 94 (emphasizing that section 802 does not create a new crime of domestic terrorism, but rather provides a framework in which to identify those otherwise criminal acts that rise to the level of terrorism due to their ideological backing and coercive intentions).

97 See BJELOPERA, *supra* note 76, at 5–10.

98 Watson Testimony, *supra* note 77 (describing the role of the FBI in domestic terrorism investigations by stating that domestic terrorists “engage in activity that is protected by constitutional guarantees of free speech and assembly” and noting that “[l]aw enforcement becomes involved when the volatile talk of these groups transgresses into unlawful action.”).

99 *Domestic Terrorism*, *supra* note 76.

100 ACLU PATRIOT Act Discussion, *supra* note 94 (“Section 802 does not create a new crime of domestic terrorism. However, it does expand the type of conduct that the government can investigate when it is investigating ‘terrorism.’”); see also Fennell, *supra* note 88, at 10 (noting that the Act expanded the concept of terrorism to “include” domestic terrorism).

101 ACLU PATRIOT Act Discussion, *supra* note 94 (indicating that section 802 does not create a new crime for domestic terrorism); see also *United States v. Gillespie*, 452 F.3d 1183 (10th Cir. 2006) (indicating through sentencing in the case that activity that would otherwise be considered merely criminal may be terrorist activity when paired with a particular political or social motivation).



requirement is that there is a “violation of the criminal laws of the United States”<sup>102</sup> paired with a political or social motivation.

The domestic terrorism definition established in Section 802, and found at 18 U.S.C. § 2331(5) is as follows:

- (5) the term “domestic terrorism” means activities that —
  - A. involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
  - B. appear to be intended —
    - (i) to intimidate or coerce a civilian population
    - (ii) to influence the policy of a government by intimidation or coercion; or
    - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  - C. occur primarily within the territorial jurisdiction of the United States.<sup>103</sup>

Certainly, the above definition creates a concrete standard against which potential acts of domestic terrorism may be compared in order to determine whether those acts qualify as such. However, the definition retains the requisite flexibility to address the continually shifting threat posed by domestic terrorism. A notable aspect of this expansive definition is the lack of a requirement of actual violence, injury, or death in terrorist actions.<sup>104</sup> Instead, the sole requirement that the activity “involve acts dangerous to human life”<sup>105</sup> gives the domestic terrorism definition a degree of malleability, ensuring its applicability to the vast array of developing trends in terrorist threats such as nonviolent terrorist actions.<sup>106</sup> Further, the definition offers discretion in determining the social or political objective providing the underlying motivation for the attack by requiring only that the actions “appear to be intended” to coerce or intimidate.<sup>107</sup> While the requirement that there be the *appearance* of an intention to coerce or intimidate clearly underscores the definition’s recognition of motive in the classification of terrorist actions, the requirement appears to diminish, if not eliminate, a mens rea requirement. This omission grants authorities a great deal of discretion

102 18 U.S.C. § 2331(5)(A) (2012).

103 *Id.* § 2331(5).

104 See NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* 44–45 (2002) (suggesting that under the expanded definition of domestic terrorism in section 802, even nonviolent confrontational protests could be construed as constituting acts of domestic terrorism).

105 18 U.S.C. § 2331(5)(A).

106 BJELOPERA, *supra* note 76, at 42 (“While some domestic terrorism suspects engage in violent plotting, others commit much different crimes that do not physically harm people. . . . ‘[P]aper terrorism’ is a term used to describe some of the *non-violent* criminal activity committed by sovereign citizens involving the filing of fraudulent documents in the hopes of harassing enemies or bilking state or federal tax authorities.”); see also Clancy Statement, *supra* note 86 (providing a list of potential domestic terrorism threats, which illustrates the range of actions from violent to nonviolent).

107 18 U.S.C. § 2331(5)(B).

in determining whether or not there was a sufficient terrorist motive. Finally, the definition lacks any requirement of organizational affiliation for classification as a domestic terrorist act,<sup>108</sup> which is an increasingly important omission as the nature of terrorism, both domestically and internationally, has shifted towards cases of “lone-offender” action.<sup>109</sup>

Undoubtedly, section 802 is significant as a major development in the struggle against the threat posed by domestic terrorism as it not only offers clarity on the question of what constitutes domestic terrorism but also maintains adequate flexibility to meet unforeseen threats and challenges that may arise in the realm of domestic terrorism. However, as will be discussed in subsequent sections of this Note, section 802’s broad flexibility presents a challenge in application as it must be ensured that the domestic terrorism classification is not overextended. Domestic terrorist threats are grounded in ideologies that are constitutionally protected; as such, the domestic terrorism definition should only be applied in cases where actions based on those ideologies are magnified to the point of exceeding constitutional protection.<sup>110</sup> Therefore, the challenge for the FBI in dealing with possible domestic terrorism threats is to protect the public safety from those threats while “act[ing] within the confines of the rule of law and the safeguards guaranteed by the Constitution.”<sup>111</sup>

### III. DOMESTIC TERROR THREATS IN U.S. HISTORY

Prior to an analysis as to whether or not swatting in the political arena is consistent with conceptions of domestic terror under U.S. law, it is beneficial to examine past examples of confirmed domestic terrorism in the United States to serve as points of comparison in the following analysis of political swatting as domestic terrorism. Additionally, an examination of the history of domestic terrorism in the United States reveals the broadening scope of those ideologies that serve as sufficient bases for domestic terrorism classifica-

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108 *Id.* § 2331(5); U.S. DEP’T OF JUSTICE, DOMESTIC TERRORISM (2014), available at <http://www.justice.gov/usao/priority-areas/national-security/domestic-terrorism> (expressing a willingness to classify “lone wolf” actors as domestic terrorists regardless of organizational affiliation).

109 See Beau D. Barnes, *Confronting the One-Man Wolfpack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism*, 92 B.U. L. REV. 1613, 1615 (2012) (acknowledging the increasing emergence of lone-offender terrorism); see also NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, UNDERSTANDING LONE-ACTOR TERRORISM 2 (2013) (referencing a quote by President Obama explaining the pervasive threat posed by lone-offender terrorists without organizational affiliation).

110 Watson Testimony, *supra* note 77 (explaining that law enforcement will only enter the picture when the extreme ideologies espoused by individuals or groups of individuals progress into unlawful action); see also BJELOPERA, *supra* note 76, at 2 (explaining that domestic terrorists are “distinct” from persons who merely theorize or hold ideologies that may serve as foundations for domestic terrorism activities); Marquis & Weiss, *supra* note 85, at 35 (stating that there is a line, that once crossed, requires action by the justice system as the act has then moved into the realm of potential terrorism).

111 Clancy Statement, *supra* note 86.

tions and in so doing supports the argument in favor of characterizing political swatting as an act of domestic terrorism.

As stated previously, the phenomenon of “Americans attacking Americans based on U.S.-based extremist ideologies” remains a present reality.<sup>112</sup> “Today’s domestic terror[ism] threats run the gamut,”<sup>113</sup> but a comprehensive view of domestic terrorism threats beginning in the early 1900s reveals that those threats have generally fallen into three subgroups, with each having distinct eras of prominence.<sup>114</sup> Those three subgroups are right-wing extremism, left-wing extremism, and special interest extremism.<sup>115</sup> The following sections will provide a brief history of the ideologies of these groups and their presence in American history. Special interest terrorism will be given special attention because “eco-terrorism” and antiabortion terrorism are illustrative of the fact that a domestic terrorism classification exists even where the objective is the furtherance of a particular viewpoint rather than a complete overhaul of the current government structure.<sup>116</sup> Many sources of historic domestic terrorism threats were geared towards a complete destruction of the political system then in place, and the development of domestic terrorism without that focus is an important development. Increasingly, domestic terrorism is rooted in ideologies related to a particular viewpoint or stance on a singular political issue rather than discontent with the American political system as a whole.<sup>117</sup> It is these forms of special interest terrorism to which political swatting is most analogous and a comparison most helpful.

#### A. *Right-wing and Left-wing Terrorism: Pre-special-interest Dominance*

From its inception in the early 1900s, the primary domestic issues facing the FBI came from left-wing and right-wing extremism.<sup>118</sup> An early source of those threats was the notorious Ku Klux Klan (perhaps better known as the KKK), which perpetrated acts of hate and intimidation fueled by ideals of racial supremacy, antigovernment sentiments, and antiregulatory beliefs all

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112 *Domestic Terrorism*, *supra* note 76.

113 *Id.*

114 See Watson Testimony, *supra* note 77 (discussing domestic terrorist threats across history and their prominence in respective eras); see also Masters, *supra* note 48 (tracing the history of various subgroups of domestic terrorism including right-wing groups, left-wing groups, and lone-offender actors).

115 See Watson Testimony, *supra* note 77; see also BJELOPERA, *supra* note 76, at 10–33; RILEY & HOFFMAN, *supra* note 55, at 13–17; TERRORISM 2002–2005, *supra* note 61, at 34; Masters, *supra* note 48.

116 Dyson, *supra* note 78, at 1 (noting that “[m]ore often than not, special-interest/single-issue extremists do not seek the overthrow of a government or even a major alteration in the manner in which it operates or in the manner in which people live” and that instead, the goal is to “coerc[e] a government and/or population to modify its behavior with respect to a specific area of concern”).

117 See Matthew E. Dunham, *Eliminating the Domestic Terrorist Threat in the United States: A Case Study on the Eradication of the Red Brigades*, 107 DICK. L. REV. 151, 167 (2002) (discussing the FBI’s increased awareness of the growth in special interest terrorist activity).

118 TERRORISM 2002–2005, *supra* note 61, at 34.

of which they held to be individual freedoms to which they were entitled.<sup>119</sup> However, as the political and social threats posed by the KKK grew, the FBI went after the Klan as terrorists and secured prosecutions of several Klan members in the 1960s, contributing to a general decline of the organization.<sup>120</sup>

From the 1960s through the mid-1980s, the most prominent terrorist threat came from those ascribing to left-wing extremist ideals.<sup>121</sup> These groups espoused “revolutionary socialist” ideals and “view[ed] themselves as protectors of the people against the ‘dehumanizing effects’ of capitalism and imperialism.”<sup>122</sup> They did not believe that such ideals could be established through traditional political avenues, but rather advocated for a revolutionary cure.<sup>123</sup> Left-wing extremist groups were populated by “a wellspring of disaffected, radical youth with ideological roots in the civil rights, women’s liberation, and antiwar movements provided these groups with much of their militant fervor.”<sup>124</sup> In addition to the steady influx of youth into their ranks, the left-wing ideologists were also sustained due to their ability to draw from a broad constituency, as they tended to be less radically tied and less violent when compared with other ideological movements in history.<sup>125</sup> However, despite a less violent approach in furtherance of their left-wing ideals, many groups espousing those ideals were classified as domestic terrorists.<sup>126</sup> In some states, examples of such left-wing groups included the Black Panther Party, Students for a Democratic Society, and The Weather Underground.<sup>127</sup> However, despite their growing prominence across the late 1960s and 1970s, many left-wing groups dramatically declined in the mid-1980s as “the fall of

119 See *id.* (“In the period between World War I and World War II, the domestic threat primarily came from right-wing groups, like the Ku Klux Klan, which often adhered to principles of racial supremacy or embraced antigovernment and antiregulatory beliefs in favor of individual freedoms.”).

120 *Id.*

121 Watson Testimony, *supra* note 77; see KARL A. SEGER, LEFT-WING EXTREMISM: THE CURRENT THREAT 3 (2001) (“[L]eftist extremism in the United States was at its peak during the 1960s and 1970s . . . [and was] responsible for three fourths of the officially designated acts of domestic terrorism in the United States during the 1980s.”); Masters, *supra* note 48.

122 Watson Testimony, *supra* note 77.

123 *Id.*

124 Masters, *supra* note 48; see also SEGER, *supra* note 121, at 4 (providing a chart indicating that only eighteen percent of left-wing extremists indicted were over forty as of 2001, thereby confirming the statement that leftist movements tended to be comprised of youth).

125 See RILEY & HOFFMAN, *supra* note 55, at 14 (drawing distinctions between left-wing groups, right-wing groups, and issue-oriented groups, and highlighting the less violent nature of the left-wing causes).

126 See *id.* (noting that left-wing groups can still be terrorists even though they are “generally less lethal” and rarely engage in action with potential to cause “widespread, indiscriminate casualties”).

127 See Mark James, *The Perfect Storm: Are We Headed for a Resurgence of Right-Wing Domestic Terrorism?*, 2008 J. INST. JUST. & INT’L STUD. 9, 10 (2008) (discussing left-wing extremist groups that arose in the 1960s); see also Barnes, *supra* note 109, at 1629.

communism in Eastern Europe deprived the movement of its ideological foundation and patronage.”<sup>128</sup>

The void created by the substantial downturn in the number of left-wing ideologists was soon filled as right-wing militant groups burst onto the scene in the late 1980s and grew throughout the 1990s.<sup>129</sup> These right-wing groups expressed ideologies similar to those of the Ku Klux Klan prior to the 1960s, namely antigovernment sentiment, racism-based hatred, and fundamentalist Christianity.<sup>130</sup> Prominent groups of right-wing extremists in that era included the National Alliance, the World Church of the Creator (WCOTC), and the Aryan Nations.<sup>131</sup> Over the course of the 1990s, some right-wing groups even grew so vast as to have substantial national memberships.<sup>132</sup> That growth, however, was short-lived as right-wing extremism experienced a decline toward the late 1990s, and remains only a lingering threat today.<sup>133</sup> These residual right-wing groups are substantially more violent than their left-wing predecessors thereby making them a serious source of concern.<sup>134</sup>

### B. *Narrowed Ideologies: The Modern Domestic Threat of Special Interest Terrorism*

While remnants of prominent left-wing and right-wing terrorist ideologies remain, and both continue to present terrorist threats,<sup>135</sup> the major domestic threat emerging in, and dominating, the modern era is that of “special-interest terrorism.”<sup>136</sup> Special interest terrorism entails violent or threatening actions taken in furtherance of a particular viewpoint or stance on a specific political or social issue.<sup>137</sup> Special interest ideologies are not necessarily antigovernment, but are narrowed to oppose or promote a specific

128 Watson Testimony, *supra* note 77; see also ALEJANDRO J. BEUTEL, BREACH OF LAW, BREACH OF SECURITY § 2, para. 4 (2007) (“[Left-wing groups’] downfall had more to do with the collapse of the Soviet Union and the gains made by the civil right movement than the FBI’s efforts.”).

129 Masters, *supra* note 48.

130 RILEY & HOFFMAN, *supra* note 55, at 14 (“Although related to the Ku Klux Klan and older American Nazi groups, the new organizations . . . not only champion the old dogmas . . . [but] they are also violently opposed to any form of government above the county level.”); see Watson Testimony, *supra* note 77 (explaining that right-wing groups continue to espouse antigovernment and racial supremacy ideals); see also Masters, *supra* note 48 (detailing right-wing ideologies similar to those held by the Ku Klux Klan of the past, including fundamentalist Christianity).

131 Watson Testimony, *supra* note 77.

132 See James, *supra* note 127, at 12 (stating that national-level, right-wing, extremist groups appeared in Missouri as early as the 1980s).

133 Watson Testimony, *supra* note 77 (“Right-wing groups continue to represent a serious terrorist threat.”); see also SEGER, *supra* note 121, at 4.

134 RILEY & HOFFMAN, *supra* note 55, at 14 (“[Right-wing extremist groups] are extremely violent, have no reservations about killing, spawn successor generations, and are often oriented toward specific political issues.”).

135 See SEGER, *supra* note 121, at 4.

136 See Dunham, *supra* note 117, at 167; Dyson, *supra* note 78, at 1.

137 Watson Testimony, *supra* note 77; see also BJELOPERA, *supra* note 76, 10–34 (discussing the ideologies of various special interest terrorists).

viewpoint or practice.<sup>138</sup> “[S]pecial interest terrorism differs from traditional right-wing and left-wing terrorism in that extremist special interest groups seek to resolve specific issues, rather than effect widespread political change.”<sup>139</sup> Those engaged in special interest terrorism advocate constitutionally protected ideals; however, they often distance themselves from individuals promoting similar ideals through proper channels, opting instead to forward their political or social beliefs through radical measures such as violence, coercion, and intimidation.<sup>140</sup> Such perpetrators carry out their intimidation by “attack[ing] targets that embody [the] distinct political issues” they wish to either promote or oppose.<sup>141</sup>

A particularly alarming development arising out of the growth of special interest terrorism is the lone offender.<sup>142</sup> The Department of Homeland Security has found that, since 1995, the number of terrorist attacks perpetrated by individuals without organizational affiliation has grown five-fold.<sup>143</sup> This rise in lone-offender attacks is at least partially attributable to the dawn of special interest terrorism.<sup>144</sup> As acts of terrorism, including violence and intimidation, have increasingly been employed in furtherance of stances on specific political issues, the role of formalized organizations as the primary terrorist actors has diminished.<sup>145</sup> This shift was likely a major driving force in influencing Congress to enact the expansive definition of domestic terror-

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138 See, e.g., Clancy Statement, *supra* note 86 (highlighting a potential threat from environmental extremists “if they perceive that legislative efforts to protect and preserve the environment are ineffective or unsuccessful,” illustrating their concern only with a particular political course of action).

139 Watson Testimony, *supra* note 77.

140 See BJELOPERA, *supra* note 76, at 2 (highlighting the fact that domestic terrorists “often rope themselves off from ideological (above-ground) elements that openly and often legally espouse similar beliefs”); Dyson, *supra* note 78, at 1 (“[R]ather than attempting to ‘educate’ the public about the topic, the clandestine terrorist’s emphasis is more towards coercing and forcing the people to take a desired action.”); Tricia Engelhardt, *Foiling the Man in the Ski Mask Holding a Bunny Rabbit: Putting a Stop to Radical Animal Activism with Animal and Ecological Terrorism Bills*, 28 WHITTIER L. REV. 1041, 1042–43 (2007) (tracing the progression of animal rights activist groups from mere radicals to terrorists as their behavior turned violent).

141 Masters, *supra* note 48.

142 *Domestic Terrorism*, *supra* note 76; see NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *supra* note 109, at 2 (quoting President Obama as saying, “One of the dangers we now face are self-radicalized individuals who are already here in the U.S. and, in some cases, might not be part of any network”) (citation omitted).

143 Masters, *supra* note 48.

144 See Dyson, *supra* note 78, at 8 (arguing that evolutions in terrorism have diminished the need for group affiliation in order to carry out effective terrorist activities).

145 See Watson Testimony, *supra* note 77 (identifying a major source of concern for the law enforcement community as being “an apparent shift in [terrorist operations] from traditional sources of terrorism—state sponsors and formalized terrorist organizations”); see also NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *supra* note 109, at 2 (discussing the weakening of Al-Qaeda and the concurrent rise in lone-offender style terrorist attacks).

ism discussed in Part II, which reaches actions carried out by individuals without organizational affiliation.<sup>146</sup>

As stated previously, two highly notable special interest ideologies that have motivated substantial acts of terrorism include eco-terrorism and antiabortion activism.<sup>147</sup> Eco-terrorism is a term describing criminal acts done in the name of protection of the environment.<sup>148</sup> The actions of eco-terrorists seek to coerce enactment of specific policies or actions related to environmental protection through acts of violence and intimidation.<sup>149</sup> Eco-terrorism rose to prominence in the 1990s, gaining substantial notoriety in the wake of several high-profile acts of terrorism carried out in the name of the cause.<sup>150</sup> As environmental extremism grew and acts of eco-terrorism continued, the FBI declared eco-terrorists as the top domestic terrorism threat in 2004.<sup>151</sup> Eco-terrorists' crimes have attempted to coerce agreement with their beliefs largely through civilian intimidation including "intimidation of scientists and employees" engaged in work eco-extremists view as contrary to their political and social stances on how the environment should be managed and preserved.<sup>152</sup> These actions undertaken by eco-terrorists "have caused millions of dollars in property damage, and . . . have involved the intimidation and harassment of victims" including civilians and government entities alike.<sup>153</sup>

Similar to eco-terrorism, antiabortion terrorism came into major existence in the early 1990s when the antiabortion movement experienced the

146 See *supra* Section II.C; see also Barnes, *supra* note 109, at 1615 (explaining that law enforcement tools historically used to meet international terrorist threats are ineffective in meeting the challenge of domestic lone-offender terrorism and therefore new legislation was required).

147 Dyson, *supra* note 78, at 2; Engelhardt, *supra* note 140, at 1041.

148 Marquis & Weiss, *supra* note 85, at 30 (defining eco-terrorism as "the use or threatened use of violence against innocent victims or property for environmental-political reasons often aimed at an audience beyond the target").

149 BJELOPERA, *supra* note 76, at 11 (discussing actions taken by eco-terrorists in pursuit of their beliefs on environmental policy); Engelhardt, *supra* note 140, at 1050 (detailing tactics used by the Earth Liberation Front (ELF) and Animal Liberation Front (ALF) for purposes of advancing their political beliefs).

150 See, e.g., Natalie Pawelski, *Group Claiming Credit for Vail Fires Says the Aim Was to Help Lynx*, CNN (Oct. 22, 1998, 7:14 PM), <http://edition.cnn.com/TECH/science/9810/22/vail.fire.02/> (recounting ELF's setting fire to seven buildings at the Vail Ski Resort as a means of advocating for protection of the lynx); see also BJELOPERA, *supra* note 76, at 11–12 (discussing the history and development of eco-terrorism).

151 Masters, *supra* note 48; see also Engelhardt, *supra* note 140, at 1041 (identifying the classification of eco-terrorism as the primary threat in 2005 as well).

152 BJELOPERA, *supra* note 76, at 11–13 (discussing philosophies of environmental extremist groups and the tactics they employ in furtherance of those philosophies).

153 *Id.* at 11; see Clancy Statement, *supra* note 86 (expressing concern over potential destruction of property by environmental extremists if government policies are perceived as contrary to their beliefs on environmental preservation); see also Dunham, *supra* note 117, at 167–69 (detailing various instances of arson and bombings carried out by ELF and ALF against private and governmental entities); Engelhardt, *supra* note 140, at 1045–46 (claiming that the ELF alone has accounted for \$43 million in damage from 1996–2002).

first cases of killings in the name of the cause.<sup>154</sup> However, despite the fact that antiabortion extremists undertook tactics of extreme violence and destruction to bring about an end to abortion,<sup>155</sup> the actions were not initially recognized as terrorist acts.<sup>156</sup> In fact, while discussing domestic terrorism in 1984, William Webster, then-Director of the FBI, cited antiabortion violence as an example of an action not constituting domestic terrorism when he stated that bombing “a bank or a post office is terrorism . . . [b]ombing an abortion clinic is not an act of terrorism.”<sup>157</sup> It was not until a major anthrax-related incident following shortly after the 9/11 attacks that the FBI acknowledged antiabortion sentiments as a political ideology capable of supporting domestic terrorism classifications for antiabortion actions.<sup>158</sup> That “major anthrax-related incident” occurred in September and October 2001 when Clayton Lee Waagner mailed over 500 letters to abortion clinics nationwide in which he informed the workers “that they were now exposed to anthrax and would die.”<sup>159</sup> The letters proved to be a hoax and none of the recipients were in fact exposed to anthrax, but on the heels of 9/11 and recently confirmed anthrax attacks, the letters generated a great deal of fear and anxiety.<sup>160</sup> Therefore, relying on the recent expansion of domestic terrorism in the PATRIOT Act and heightened fears following 9/11, Attorney General John Ashcroft acknowledged antiabortion attacks as domestic terrorism,<sup>161</sup> confirming the fact that the understanding of domestic terrorism was substantially broadened in the post-9/11 era.

### C. *Striking a Balance Between Protection of the Public and Preservation of Rights*

With the proliferation of special interest terrorism, the nature of domestic terror threats has changed considerably. In the post-9/11 era, law enforcement agencies tasked with combating terrorism have expressly recog-

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154 See Carol Mason, *Who's Afraid of Virginia Dare? Confronting Anti-abortion Terrorism After 9/11*, 6 U. PA. J. CONST. L. 796, 796 (2004) (“[S]o-called pro-lifers began, paradoxically enough, to kill for life in the early 1990s.”).

155 See MIREILLE JACOBSON & HEATHER ROYER, AFTERSHOCKS: THE IMPACT OF CLINIC VIOLENCE ON ABORTION SERVICES 2 (2009), available at <http://www.ccpr.ucla.edu/events/ccpr-seminars-previous-years/Royer-Aftershocks%20The%20Impact%20of%20Clinic%20Violence%20on%20Abortion%20Services.pdf> (“Between 1973 and 2003, there were over 300 clinic attacks in the U.S.”); Masters, *supra* note 48 (“Anti-abortion extremists are responsible for seven murders, forty-one bombings, and 173 acts of arson in the [United States] and Canada . . .”).

156 Mason, *supra* note 154, at 796–97 (describing the rise of antiabortion violence in the 1990s, and the federal government’s failure to classify the actions as terrorist acts prior to the 9/11 attacks).

157 *Id.* at 813–14 (internal quotation marks omitted).

158 *Id.* at 797; see COUNTERTERRORISM DIVISION, FBI, TERRORISM 2000–2001, at 24 (2001) [hereinafter TERRORISM 2000–2001].

159 Mason, *supra* note 154, at 804, 805; see also TERRORISM 2000–2001, *supra* note 158, at 24.

160 Mason, *supra* note 154, at 804.

161 *Id.* at 804–05; see CAROL MASON, KILLING FOR LIFE 50–51 (2002).



nized that terrorism threats are not limited solely to actions in furtherance of those ideologies traditionally branded as extremist or fundamentalist such as right-wing or left-wing extremism.<sup>162</sup> Rather, the changing threat landscape has created an environment in which domestic terrorism potentially exists wherever violence, intimidation, or coercion is undertaken with intentions of furthering or suppressing *any* political or social viewpoint.<sup>163</sup>

Politically or socially motivated instances of violence and intimidation are extremely detrimental to society and represent serious security threats.<sup>164</sup> Therefore, such actions and tactics merit increased punishment measures to guarantee adequate justice and sufficient deterrence.<sup>165</sup> Characterizing those incidents as acts of domestic terrorism permits stiffer sentencing guidelines and grants the justice system the necessary authority to effectively meet those threats.<sup>166</sup> However, that extension of authority brings with it a great degree of responsibility. Authorities must fiercely guard the balance between the need to keep the American public safe and the need to protect the constitutional rights of free expression and free assembly.<sup>167</sup> “Hate and anger are not crimes; neither are hard-line and poisonous ideologies. It’s only when actions by groups or individuals cross the line into threats, the actual use of force or violence, or other law-breaking activities that [law enforcement authorities] can investigate.”<sup>168</sup> Government authorities must be cautious in their terrorism characterizations so as to avoid stifling legal activism and nonviolent protest, both of which are important aspects of the American experience.<sup>169</sup> “In the end . . . the [government] will be judged not only by [its] ability to keep Americans safe from terrorism, but [sic] also by whether

162 See Watson Testimony, *supra* note 77 (“The third category of domestic terrorism, special interest terrorism differs from traditional right-wing and left-wing terrorism in that extremist special interest groups seek to resolve specific issues, rather than effect widespread political change.”).

163 This is evident in the fact that, in the general understanding of terrorism, the requirement of a political or social agenda is not qualified to require a *particular* political or social ideology.

164 See, e.g., BJELOPERA, *supra* note 76, at 12–13 (discussing special interest eco-terrorism and the damages it has created on society); see also JACOBSON & ROYER, *supra* note 155 (examining the impacts of antiabortion violence including in excess of \$35 million in damage to clinics and access limitation to women).

165 Marquis & Weiss, *supra* note 85, at 35 (expressing the fact that prosecutors must send a clear message to eco-terrorists when they cross the line between constitutionally protected expression and terrorist coercion).

166 United States v. Arnaut, 431 F.3d 994, 1002 (7th Cir. 2005) (explaining that the domestic terrorism sentencing enhancement permits application of stiffer sentencing guidelines for the crime underlying the domestic terrorism claim); United States v. Graham, 275 F.3d 490, 516–18 (6th Cir. 2001) (describing the domestic terrorism classification as an “enhancement” in the sentencing scheme).

167 Clancy Statement, *supra* note 86.

168 *Domestic Terrorism*, *supra* note 76.

169 Johnson, *supra* note 56, at 256–57.

[it] safeguard[s] the civil rights and civil liberties for which [it is] fighting.”<sup>170</sup>

#### IV. POLITICAL SWATTING AS DOMESTIC TERRORISM

In light of the discussion of the development of domestic terrorism classifications in the United States and an examination of trends in domestic threats in recent history, the question to be answered is whether incidents of swatting for purposes of intimidating persons, notably professional political analysts and commentators expressing political views contrary to those held by the swatter, constitute domestic terrorism under the post-9/11 conception? This is an important and difficult question as it straddles the line between the countervailing interests of applying domestic terrorism classifications broadly, as intended by the PATRIOT Act, and ensuring no interference with the constitutional right to protest contrary viewpoints.

A determination of whether or not an instance of swatting is deserving of a domestic terrorism designation requires an analysis drawing upon two key sources. First, determining whether swatting may rise to the level of domestic terrorism requires an examination of how swatting fits within the definitional requirements laid out in section 802 of the PATRIOT Act as well as fundamental characteristics of terrorism in general.<sup>171</sup> Next, even if a criminal action is consistent with section 802, the policy implications must be considered to determine whether or not it is prudent to apply a domestic terrorism classification, and the stricter sentencing guidelines that come with it, as a means of recourse for swatting.

##### A. *Domestic Terrorism: A Six-part Test*

The process of determining whether or not a criminal action taken against a civilian target population constitutes domestic terrorism distills to a six-part test. The test examines whether the action at issue possesses the fundamental characteristics consistent across all actions considered terrorism and meets the specific definitional requirements of domestic terrorism in section 802. The result is a six-part, elemental analysis providing a framework within which it can be determined whether or not a given criminal action is properly classified as domestic terrorism and deserving of treatment in line with that characterization.

For an action against a civilian population to constitute domestic terrorism, the six-part test requires that the action: (1) seek to advance a political or social agenda, (2) “involve acts dangerous to human life,”<sup>172</sup> (3) be in violation of the criminal laws of the United States or of any state,<sup>173</sup> (4)

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170 Clancy Statement, *supra* note 86.

171 18 U.S.C. § 2331(5) (2012) (codifying the domestic terrorism definition found in section 802 of the PATRIOT Act).

172 *Id.* § 2331(5)(A).

173 *Id.*

“appear to be intended”<sup>174</sup> to intimidate or coerce,<sup>175</sup> (5) a civilian population,<sup>176</sup> and (6) the actions occurred in the territorial United States.<sup>177</sup>

### B. *Is Political Swatting Domestic Terrorism?*

Therefore, in order to make a determination as to whether or not political swatting, as exemplified in the previously mentioned accounts of Erik Erickson and Patrick Frey,<sup>178</sup> would properly be characterized as domestic terrorism, the practice of political swatting must be analyzed under the six-part test articulated above. The test, as stated, requires that each element be satisfied with no single element being dispositive of domestic terrorism. In cases where the requirement in one of the elements is not met, the test will fail and a classification as domestic terrorism would be undeserved.

#### 1. Political and Social Agenda

The first, and arguably most fundamental, element of the six-part domestic terrorism analysis concerns whether or not the allegedly terrorist action was perpetuated in furtherance of a social or political ideal. This requirement is derived from an elemental understanding of terrorism as a whole, including both international and domestic threats.<sup>179</sup> Although the general notion of terrorism is understood and the term carries a practically universal pejorative connotation, there remains a high degree of variance across levels of government in determinations as to which actions or tactics constitute terrorism.<sup>180</sup> However, there are select aspects consistent across all incidents of terrorism that serve as fundamental elements in any terrorist act or tactic.<sup>181</sup> The most notable and universal element is the requirement that the act promotes or suppresses a political or social ideal.<sup>182</sup>

174 *Id.* § 2331(5)(B).

175 *Id.* § 2331(5)(B)(i).

176 *Id.*

177 *Id.* § 2331(5)(C).

178 *Supra* notes 49–51 and accompanying text.

179 See RILEY & HOFFMAN, *supra* note 55, at 2–3 (stating that “[i]t is this political element that distinguishes economically motivated crimes from politically motivated (i.e., terrorist) violence,” thereby indicating that terrorist violence requires an underlying political agenda); see also BJELOPERA, *supra* note 76, at 3 (discussing the fact that acts of domestic terrorism are those motivated by an underlying political and social agenda).

180 *Domestic Terrorism*, *supra* note 76 (“Today’s domestic terror threats run the gamut . . . .”); see also RILEY & HOFFMAN, *supra* note 55 (highlighting the fact that terrorism, while unsettled in definition, is generally taken as a pejorative term).

181 TERRORISM 2002–2005, *supra* note 61, at iv–v (acknowledging that there is no single, widely accepted definition of terrorism, but that there is agreement on the general concept of terrorism which centers on fundamental elements of those actions deemed terrorist).

182 See Keiran Hardy & George Williams, *What is “Terrorism”? Assessing Domestic Legal Definitions*, 16 UCLA J. INT’L L. & FOREIGN AFF. 77, 92–95 (2011) (offering two definitions of terrorism, both of which make reference to there being a foundational social or political view behind terrorist actions); see also RILEY & HOFFMAN, *supra* note 55, at 2–3.

In the post-9/11 era, the understanding of what constitutes a political or social ideology capable of validating a terrorism designation has been drastically loosened. No longer is there an assumption that all terrorist acts are rooted in an ideology shared collectively with a greater organization. In fact, organizational affiliation is not a requisite, nor a highly dispositive, factor in terrorism classifications.<sup>183</sup> Examples of this shift in understanding are manifest in antiabortion terrorism and eco-terrorism. In both instances, the political ideology underlying the terrorist actions, and sustaining their characterization as terrorist acts, is highly specific and often only individually held. In fact, the political agenda requirement no longer refers solely to terrorist ideologies of old, which sought abolition and overhaul of the political system in its entirety.<sup>184</sup> Instead, modern examples of domestic terrorism highlight the reality that what constitutes a political ideology for purposes of terrorism classifications can be specific viewpoints on singular political issues free from greater ideological affiliation.<sup>185</sup>

In the cases of political swatting, the presence of a political objective is obvious. It is this underlying political motive that differentiates such cases of swatting in the realm of political discourse from those aimed at celebrities or online gamers. Here, the political underpinnings of the swatting acts perpetrated against Frey and Erickson were prompted by their political expression of their conservative viewpoints.<sup>186</sup> The ideal backing the swatting actions were not merely to victimize Erickson and Frey specifically, but to intimidate holders of conservative viewpoints, and in so doing advance the contrary beliefs held by the swatters. While all cases of swatting are undoubtedly criminal actions, the additional layer of a political motivation elevates acts of political swatting beyond the foundational hurdle that acts of domestic terrorism must clear, that being the requirement of an underlying political or social ideology. However, as stated before, the mere presence of intent to further a political agenda is alone insufficient to validate a domestic terrorism designation, and further analysis is required.

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183 See 18 U.S.C. § 2331(5) (2012) (statute codifying the domestic terrorism definition established at section 802 of the PATRIOT Act and lacking any requirement of organizational affiliation for an act to constitute domestic terrorism).

184 See Watson Testimony, *supra* note 77 (discussing right-wing and left-wing domestic terrorism and the shared goal of abolition of the current political system to be restructured in line with their ideals); see also TERRORISM 2002–2005, *supra* note 61, at 54 (representing the historic dominance of right-wing and left-wing terrorism in stating: “During the first 75 years of its history the FBI encountered a predominantly domestic terrorist threat . . . primarily from right-wing extremists, [which] then shifted to left-wing, socialist-oriented groups”).

185 See Dyson, *supra* note 78, at 1.

186 See, e.g., Collins, *supra* note 13 (explaining that the Frey swatting came on the heels of his reporting against Anthony Weiner and his recent sex scandal, implying that the swatting attack was in response to his discussion of Weiner).

## 2. Acts Dangerous to Human Life

In order for an otherwise criminal action to constitute domestic terrorism under the general definition established in section 802 of the PATRIOT Act, and codified at 18 U.S.C. § 2331(5), the action must cause “danger[ ] to human life.”<sup>187</sup> It is important to note that danger to human life is an essential element because it sets apart those ordinary criminal offenses from eligibility for the heightened sentencing available for actions amounting to domestic terrorism. In so doing, the requirement of danger to human life serves to protect the integrity of the domestic terrorism designation by way of reserving such a characterization to only the most serious crimes. However, while domestic terrorism actions must pose danger to human life, the act itself need not be one with a violent nature.<sup>188</sup> The FBI has acknowledged the fact that domestic terrorism is not solely perpetuated by way of violent actions.<sup>189</sup> Rather, in the modern era, there have been instances in which completely nonviolent crimes have been considered domestic terrorism.<sup>190</sup> In cases where nonviolent actions are determined to be domestic terrorism, there must nonetheless be a danger presented to human life, however that danger or threat may merely be a consequence of the otherwise nonviolent terrorist act rather than a direct threat. For example, in our modern world, it is not unimaginable that actions compromising vital divisions of our nation’s infrastructure, although not directly threatening to human life, may create circumstances in which there is real danger to citizens’ safety and well being. This recognition is important, as the lack of a violent crime requirement dramatically increases the scope of those actions that are considered dangerous to human life and eligible for a domestic terrorism designation. While certainly this requirement serves to limit those actions that may be subject to a domestic terrorism classification, the restrictiveness of the limitation has been greatly diminished in the post-9/11 era<sup>191</sup> and the boundary is blurred. However, this Note need not explore the question of where that boundary exists because, as detailed below, the danger to human life posed by political swatting is rather evident.

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187 18 U.S.C. § 2331(5)(A).

188 See CHANG, *supra* note 104, at 44–45 (suggesting that the broadened definition of domestic terrorism in the PATRIOT Act is such that even nonviolent, and yet confrontational, protestors may be subject to investigation as domestic terrorists).

189 BJELOPERA, *supra* note 76, at 1–2 (stating that not all terrorist actions need to be inherently violent or intend physical harm to victims, and discussing some nontraditional and nonviolent terrorist acts, some of which have grown as domestic terrorists become more internet savvy).

190 See, e.g., Brenner & Goodman, *supra* note 86 (stating that nonviolent cyberterrorism is the wave of the future and discussing the damaging impacts of such cyberterrorism).

191 Theresa M.B. Van Vliet, *Anti-Terror Law Will Impact Telecom and Internet Providers*, COUNSEL’S ADVISORY (Washington Legal Foundation), Jan. 2, 2002 (characterizing the PATRIOT Act as making sweeping changes to the law with the intention of drastically expanding the authority of law enforcement in approaching actions related to terrorism).

In the case of political swatting, there is substantial danger to human life as such actions create dangerous circumstances. The crimes of fraud at the core of swatting are not themselves violent or directly threatening to human life, but nonetheless create the requisite “danger to human life” necessary to satisfy the domestic terrorism test requirement. As stated above, under the expanded concept of acts of domestic terrorism in the post-9/11 era, actions subject to a terrorism designation need not directly harm or threaten harm to victims.<sup>192</sup> Rather, where actions create dangerous circumstances, or an environment in which a threat to human life is evident and danger imminent, those actions satisfy the “danger to human life” requirement for a domestic terrorism characterization.

Therefore, although the crimes of fraud arising in incidents of swatting are not themselves violent, when they catapult an unsuspecting political commentator into a situation in which he or she is staring down the barrel of a rifle at a SWAT team member, armed and ready to shoot, there is clear danger to human life. SWAT teams are deployed not only with the authorization, but often with the expectation of the need for lethal force in their response.<sup>193</sup> So, when a SWAT team enters a residence or business, there is a substantial risk of a mistaken use of force by either the victim in shock and defense, or the SWAT team operating on false information of an ongoing threat.<sup>194</sup> Further, as stated above, police responses in incidents of political swatting not only potentially threaten the lives of the unsuspecting victims, but equally endanger the lives of responding officers and innocent members of the community, further validating the argument that acts of political swatting do in fact pose very real danger to human life.<sup>195</sup> Regardless of the fact that, to date, injuries resultant from swatting have been limited in number and severity, “[i]t’s only a matter of time before someone gets seriously injured,”<sup>196</sup> and the practice of addressing instances of political swatting as acts of domestic terror need not wait until such serious injury occurs as the danger is presently evident. For this reason, political swatting meets the second prong of the six-part domestic terrorism test requiring that the allegedly terrorist actions create danger to human life.

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192 See Dyson, *supra* note 78, at 6 (expressing the fact that many domestic terrorism acts result solely in property damage rather than harm to persons, therein implying that not all domestic terrorism acts must result in harm to individuals in order to meet the threshold for such legal classification).

193 See Singh, *supra* note 28, at 680–81 (explaining SWAT teams’ role as responders in highly tense crisis situations requiring heavy weaponry and advanced training).

194 *Don’t Make the Call*, *supra* note 7 (“[O]fficers are placed in danger as unsuspecting residents may try to defend themselves.”).

195 *Id.* (“The community is placed in danger as responders rush to the scene, taking them away from real emergencies.”); see also *The Crime of ‘Swatting’*, *supra* note 5 (discussing incidents that have harmed both officers, as well as civilians who have “suffered mild heart attacks” as a result of the shock experienced when the SWAT teams enter their homes).

196 *The Crime of ‘Swatting’*, *supra* note 5 (quoting Kevin Kolbye, the assistant special agent in charge of the FBI’s Dallas division) (internal quotation marks omitted).

### 3. In Violation of the Criminal Laws of the United States or of Any State

Under the PATRIOT Act, Congress did not create an independent crime of “domestic terrorism.” Instead, the domestic terrorism classification was merely intended to build upon the existent criminal laws and provide prosecutors a tool to more harshly pursue punishment of criminal acts that were ideologically motivated and otherwise terrorist in nature.<sup>197</sup> Further, the domestic terrorism classification was purposed to permit additional punishment, where necessary, for a criminal act carried out in the United States where the context in which that crime occurred demanded greater recourse.<sup>198</sup> As such, in order for there to be a valid claim that an action constitutes domestic terrorism under the statutory definition laid out in section 802 of the PATRIOT Act, and codified at 18 U.S.C. § 2331(5), the action must be one that is in “violation of the criminal laws of the United States or of any State.”<sup>199</sup> The action must itself be independently in violation of the criminal laws of the United States because a prosecution will be brought not on charges of domestic terrorism, but rather on charges corresponding to the particular criminal law which the act violates.<sup>200</sup> The statute does not require that the underlying crime be of a particular class of crimes, but only that the action alone would merit criminal charges.<sup>201</sup> The nature of the act as violative of federal or state criminal laws serves as an essential prerequisite, without which the context and intent of the actions would be irrelevant as there could be no prosecution—and domestic terrorism characterization—for an action that is not in violation of criminal law.

Political swatting satisfies the requirements of this particular element of the domestic terrorism test in that such actions are in violation of the criminal laws of the United States. This fact is supported by evidence of past convictions of swatters on grounds that they acted in violation of federal conspiracy laws, including both conspiracy against individuals<sup>202</sup> and conspir-

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197 PRESERVING LIFE AND LIBERTY, *supra* note 90, at 1 (“Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by [terrorism].”).

198 ACLU PATRIOT Act Discussion, *supra* note 94 (discussing the fact that the PATRIOT Act expanded the definition of domestic terrorism, but did not expand the conduct that may be investigated as domestic terrorism because it did not create new criminal acts).

199 18 U.S.C. § 2331(5)(A) (2012).

200 RILEY & HOFFMAN, *supra* note 55, at 4 (explaining that terrorists are convicted of “the accompanying crimes, such as murder, weapons violations, and so forth, that constitute their terrorist acts”).

201 18 U.S.C. § 2331(5)(A) (indicating that Congress did not contemplate any particular type of crime necessary to carry a domestic terrorism characterization because the code section lacks any clarification or qualification of the requirement that the act be in violation of the criminal laws of the United States or corresponding state); *see* United States v. Arnaout, 431 F.3d 994, 1000–01 (7th Cir. 2005); United States v. Graham, 275 F.3d 490, 517–18 (6th Cir. 2001).

202 18 U.S.C. § 241.

acy to defraud the government.<sup>203</sup> These past successful convictions of individuals engaged in swatting conspiracies, including the cases of Matthew Weigman and Carlton Nalley referenced previously,<sup>204</sup> confirm that swatting is seen as a serious violation of criminal conspiracy laws meriting lengthy convictions. Further, there has been some recent passage of swatting-specific legislation in various states classifying the action as criminal and in violation of the criminal laws of the states that have passed such legislation.<sup>205</sup> Similar action has been contemplated at the federal level as there has been a recent push for investigating swatting as a specific federal criminal action.<sup>206</sup> Although such legislation has yet to be introduced or passed at the federal level, merely an expression by some of the desire to investigate illustrates a general negative sentiment towards swatting and suggests that prosecutions of swatting incidents are favored regardless of the theory of criminal liability argued.

#### 4. “Appear to be Intended” to Coerce or Intimidate

The threat and fear associated with terrorism is largely due to the fact that it is highly coercive and capable of impacting the lives of its targets not only in the present, but also well into the future. Therefore, when courts make determinations as to whether or not a given act is one of terrorism, a major consideration is the extent to which there was the intention of coercing or intimidating the victims and greater target population, therein creating the lingering psychological repercussions characteristic of terrorist acts.<sup>207</sup>

However, in recognition of the difficulty in proving the subjective state of mind of the alleged terrorist actor, and consistent with the post-9/11 broadened view of terrorism, the modern domestic terrorism definition softened the mens rea standard by requiring only a showing that the alleged terrorist actions “appear to be intended” to coerce or intimidate.<sup>208</sup> Facially this may appear to be far too permissive; however, because presumably there was at least some mens rea requirement for proving the underlying criminal action and there are five other factors that must be proven in order for there to be a domestic terrorism designation, the low bar set by this requirement is not unduly expansive. The appearance of an intention to coerce or intimidate in cases of domestic terrorism is best determined in looking at the

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203 18 U.S.C. § 371.

204 *Supra* notes 45–47 and accompanying text.

205 *See, e.g.,* Brumfield, *supra* note 6, at 588–89 (discussing the introduction of chapter 284 in California as a means of creating greater punishment for swatting cases, including a requirement to serve at least 120 days in county jail).

206 *See* Chambliss Letter, *supra* note 52 (letter from U.S. Senator Saxby Chambliss calling for investigation and action to address the rising swatting threat experienced in states nationwide).

207 RILEY & HOFFMAN, *supra* note 55, at 3 (emphasizing the importance of psychological repercussions as an element of terrorism determinations).

208 18 U.S.C. § 2331(5)(B).



nature of actions. Actions fueled by and designed in furtherance of motives to instill fear, maximize publicity, and create deep-seated psychological repercussions are generally viewed as being those supporting the appearance of an intention to coerce or intimidate.<sup>209</sup> Examples of this are present in looking at the actions of antiabortion domestic terrorists and eco-terrorists. In both eco-extremism and antiabortion radicalism, the actions taken against civilian individuals, such as scientists or doctors in positions of prominence in their fields, were perceived as intending to intimidate and coerce a broader audience holding beliefs for which those individuals were symbolic.<sup>210</sup> The choice of the victims reflected a desire to maximize publicity, and send a message far broader than a threat to the individual victims. Their status as symbols of the beliefs opposed by the terrorists made them ideal targets for an attack on the philosophy they represented. Similarly, the horrific nature of the terrorist activities undertaken, ranging from severe property damage to murder,<sup>211</sup> was intended to instill in those with analogous ideals a fear for their lives.

Under that relaxed standard, a determination that political swatting of notable figures heavily involved in advocacy of a particular political viewpoint appears intended to intimidate or coerce the civilian population into sharing their political orientation is a defensible interpretation. Further, the nature of swatting is such that it elicits a high degree of fear and social anxiety capable of breeding lasting psychological repercussions.<sup>212</sup> As noted previously, one of the means by which terrorist actions create environments of fear and alarm is by carrying out their threats or attacks with an eye towards maximizing publicity. In both of the instances referenced earlier in this Note,<sup>213</sup> the swatting incidents targeted public figures that stand as symbols of their respective political beliefs.<sup>214</sup> In so doing, the immediate threat conveyed to the swatting victims is equally conveyed to their audiences and others who share their political orientations. In addition to the publicity generated around the attacks, further social anxiety spawns from the violative nature of the attacks as they occur in the victims' homes. In the United States, the sanctity of the home has long been regarded as deserving of "overriding

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209 See RILEY & HOFFMAN, *supra* note 55, at 2–4.

210 See BJELOPERA, *supra* note 76, at 12–13 (explaining attacks on scientists and doctors as tactics to attack a particular viewpoint).

211 *Id.* at 11–12.

212 See, e.g., Ellis & Fuchs, *supra* note 9 (citing a teenaged gamer who was a swatting victim, and his fear in the wake of the attack, as he stated "I was like, Oh my God, I'm going to die" (internal quotation marks omitted)); Saenz, *supra* note 13 (quoting Patrick Frey as saying, "It's a phone call that could have gotten me killed," indicating a strong sense of fear on the part of Frey in the wake of the swatting attack (internal quotation marks omitted)).

213 *Supra* notes 49–51 and accompanying text.

214 Erik Erickson is the editor-in-chief of RedState.com, a conservative website, and a conservative CNN political contributor. See Collins, *supra* note 13. Patrick Frey is a deputy district attorney, and well-known conservative blogger under the name of Patterico. See Sexton, *supra* note 13.

respect.”<sup>215</sup> Therefore, when an attack on an individual and their political views breaches the sanctity of one of the most private and protected areas in American society, there naturally is a high degree of uneasiness and concern.

However, perhaps the most powerful source of fear created by incidents of political swatting, and the aspect of such attacks with the greatest contribution to lasting psychological repercussions, is the fact that the danger is created by manipulation of civilians’ most accessible means of security. In communities across the country, there is a sense of security in knowing that law enforcement is readily available in the form of local police. In fact, in everyday life, local police offer the *sole* form of readily accessible security available to the average American. Therefore, when swatting attacks manipulate the primary source of security into being a source of threat and danger to the victims they are sworn to protect, fear and terror are natural.<sup>216</sup> Exploitation of police response as a means of creating a threat elicits a feeling of helplessness in victims and others sharing the political or social stance for which the victims were targeted.

Clearly, in light of the foregoing reasons, swatting in the political arena can be understood as being perpetrated with the intention of intimidating individuals of counter viewpoints into silence, and such actions create deep-seated fear in communities of individuals sharing the targeted beliefs. Therefore, such actions possess the fundamental elements of general terrorism definitions and meet one of the key statutory requirements with respect to the “domestic terrorism” definition outlined in 18 U.S.C. § 2331(5).<sup>217</sup>

## 5. A Civilian Population

In order for an action taken to stifle a societally held ideology or viewpoint, the acts of coercion and intimidation must target a “civilian population,” which necessarily implies an impact on a party larger than a single individual. A dictionary definition of a population is a body of individuals “having a quality or characteristic in common.”<sup>218</sup> With the rise of special interest terrorism, and the increased acceptance of specific ideals as grounding for terrorism claims, there has been a natural expansion of what is considered a population for purposes of the statutory definition. As the issues underlying terrorism have grown in specificity, the “populations” subjected to coercion and intimidation due to their views on those issues are smaller in

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215 *Payton v. New York*, 445 U.S. 573, 601 (1980) (stating that in the United States, there is an “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic”).

216 The unanimity of the attacker and the exploitation of the security arm of the government to carry out the attack are particularly alarming and strike deeper fear into the target population. Brenner and Goodman elaborated upon this concept of the unanimity of the attacker as a “terror multiplier” in their discussion of cyberterrorism. Brenner & Goodman, *supra* note 86, at 28.

217 18 U.S.C. § 2331(5) (2012).

218 *Population*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/population> (last visited Apr. 4, 2015).

size. The fact that domestic terrorism designations are permitted to stand when acts are taken against these smaller groups indicates that “a population,” for purposes of the domestic terrorism definition, is not necessarily a substantial fragment of society. In modern domestic terrorism cases, the nature of the underlying issue determines what constitutes a population.<sup>219</sup> Additionally, in cases where the underlying political agenda or ideology is one in which there are two prominently held views around which society bifurcates, courts have found that those ascribing to a viewpoint on each side of the issue constitute a population.<sup>220</sup> An example of this is the case of antiabortion terrorism, in which the issue consists of two dominant views: pro-life and pro-choice. For purposes of terrorism designations, the courts have found that those individuals ascribing to a viewpoint on one side of the issue are properly considered a population.<sup>221</sup> The case of political swatting presents a parallel situation in which there are two dominant viewpoints held on the issue and therefore a similar treatment of the collective group ascribing to each viewpoint as constituting a population is proper.

In the case of political swatting, there are potentially two populations that are subjected to coercion or intimidation at the hands of the swatters. First, the ardent followers of the particular political figures targeted may constitute a population provided there is some collective body of those followers. However, the stronger argument is that there exists a population in the general group of believers who ascribe to the political ideology for which the targeted political figure serves a representative. In the case of the political swatting instances mentioned previously, both commentators represented the conservative, Republican viewpoint in American politics. The politically motivated actions taken against them were intended not only to victimize them, but also to reach all those of a similar political orientation. This argument is particularly analogous to the case of antiabortion terrorism in that there exist two dominant viewpoints, here conservative rather than liberal, which is symbolized by the victimized commentators. Therefore, similar to antiabortion terrorism, the individuals holding the beliefs that were targeted by the political swatting attack represent a population capable of satisfying a domestic terrorism classification.

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219 The advent of special interest terrorism has led to terrorist actions based on more specific issues and viewpoints, and therefore, terrorism designations on the basis of those narrow viewpoints implies that the number of individuals constituting a population cannot be a static consideration, but rather will vary on the basis of the particular issue underlying the viewpoint motivating the attack and the size of the audiences concerned.

220 See, e.g., Mason, *supra* note 154, at 797 (mentioning that cases of terrorism grounded in the abortion debate have been found to be acts of terrorism, thereby suggesting that courts are comfortable with the pro-life vs. pro-choice division creating two populations).

221 See *supra* note 161 (noting Attorney General John Ashcroft’s acknowledgment of antiabortion attacks as capable of constituting domestic terrorism, therein implying that victims of those special interest actions constitute a population sufficient to support a domestic terrorism classification for acts against them).

## 6. Actions Occurred in the Territorial United States

The final requirement for a domestic terrorist classification is that the acts occur in the territorial United States.<sup>222</sup> With respect to the six-part test, this element is the most obvious, and requires no substantial explanation. The adjective “domestic” plainly implies that any action meeting such designation must occur within the United States.<sup>223</sup> Therefore, the analysis is simple, and when applied to political swatting it is plain. The past instances of swatting indisputably occurred in the United States and therefore subsection 18 U.S.C. § 2331(5)(C) poses no objection to characterizing those actions as forms of domestic terrorism.

### C. Policy Concerns in Favor of the Application of Domestic Terrorism Sentencing

While the post-9/11 era has expanded those instances in which domestic terrorism exists,<sup>224</sup> the breadth and flexibility of the section 802 definition requires restraint on the part of authorities in applying the definition so as not to overstep the bounds of constitutional protections when criminal law would suffice. Additionally, there must be cautious application of the domestic terrorism classification in order to protect the integrity and significance of that characterization. An overly broad application of what constitutes domestic terrorism threatens to water down the force of the designation and in so doing, diminishes the power or gravity of future characterizations of domestic terrorism. Therefore, even in instances where the provisions of the domestic terrorism definition are met, it is essential to view the policy implications so as to determine whether a domestic terrorism classification is prudent and the heightened punishments deserved.

With regard to political swatting, there are strong public policy concerns in favor of classifying swatting used as a political weapon as domestic terrorism. The freedom of political discourse is not only a valuable, but also a vigorously protected aspect of the American way of life.<sup>225</sup> One of the most fundamental of rights, guaranteed to Americans in the First Amendment, is the right to freedom of expression.<sup>226</sup> Such freedom of expression requires the freedom to engage in political discourse and voice opinions across the political spectrum.

In addition to the value of protecting expression to preserve the integrity of the Constitution, protection of political expression is socially desirable

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222 18 U.S.C. § 2331(5)(C).

223 *Domestic*, MERRIAM-WEBSTER.COM, [www.merriam-webster.com/dictionary/domestic](http://www.merriam-webster.com/dictionary/domestic) (last visited Apr. 4, 2015).

224 ACLU PATRIOT Act Discussion, *supra* note 94 (“Section 802 of the USA PATRIOT Act (Pub. L. No. 107-52) expanded the definition of terrorism to cover ‘domestic,’ as opposed to international, terrorism.”).

225 *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (describing the freedom of thought and speech as “the matrix, the indispensable condition, of nearly every other form of freedom”).

226 U.S. CONST. amend. I.

as it is necessary for a flourishing democracy. At its core, democracy is rooted in the voice of the people. Freedom of expression is necessary to permit individuals to express their opinions and ensure their ability to vote for representation consistent with their beliefs. It is through the free exchange of ideals that social development occurs and advancement is achieved in areas where change is necessary. Finally, it is a primary function of the American government to provide a space in which an individual may engage in self-realization. That self-realization cannot be achieved when particular ideals are barred from discussion or made unattractive due to threat of harm to holders of that viewpoint.

An additional policy consideration in cases of swatting is that of the direct burdens placed on local communities and local authorities. In recent years with the contraction of the U.S. economy, many communities have been marred by budget constraints requiring severe cut-backs in their operations.<sup>227</sup> As mentioned earlier in this Note, SWAT responses create a substantial financial burden, with costs reaching into the thousands of dollars for every deployment. Therefore, continued instances of fraudulent 911 reports aimed at intimidating politically adversarial ideals have the potential to place already budget-constrained communities in increasingly dire financial straits and limit the effectiveness of their law enforcement bodies. Perhaps even more burdensome is the precarious predicament encountered by local authorities in communities facing increasing prevalent false reports. Authorities may be more hesitant to respond with full force for fear of an unnecessary deployment of resources in response to a false report. Authorities will be forced to choose between a full response, therein sacrificing response capability to simultaneous situations, resulting in the possibility of an inadequate response to an actual serious and violent incident. This uncertainty interferes with the ability to conduct effective law enforcement and generates inefficiency in policing efforts. At an even more fundamental level, such challenges drastically increase risk to the community and its citizens. Such serious societal harms are certainly deserving of heavy punishment for purposes of ensuring justice. In addition to that retributivist justification, the harms posed by swatting must be punished to ensure that they are heavily deterred. Such justice and deterrence would be achieved by characterizing political swatting incidents as acts of domestic terrorism deserving of increased punishment under the stiffer sentencing guidelines permitted for acts of domestic terror.

#### CONCLUSION

While certainly not every instance of swatting merits treatment as an act of domestic terrorism, and the story of the teenaged gamer, Paul Horner, mentioned at the outset of this Note would be an absurd application of the domestic terrorism enhancement, all cases illustrate the substantial danger

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<sup>227</sup> See Nagourney & Lovett, *supra* note 7 (discussing police department budget cuts and the financial strain created by swatting attacks).

created by acts of swatting. Those dangers, when applied in the political realm, offer a situation in which acts of swatting should be properly branded as domestic terrorism meriting the elevated sentencing requirements that come with that characterization. Support for such characterization of political swatting as domestic terrorism is rooted in the expanded definition of domestic terrorism developed in the PATRIOT Act. The fact that political swatting meets the statutory requirements for domestic terrorism in section 802, weighed against the strong public policy concern of protecting freedom of political discourse, not only permits, but necessitates the treatments of such acts of swatting as domestic terrorism to ensure adequate recourse and effective deterrence of this dangerous, and potentially crippling, political threat.