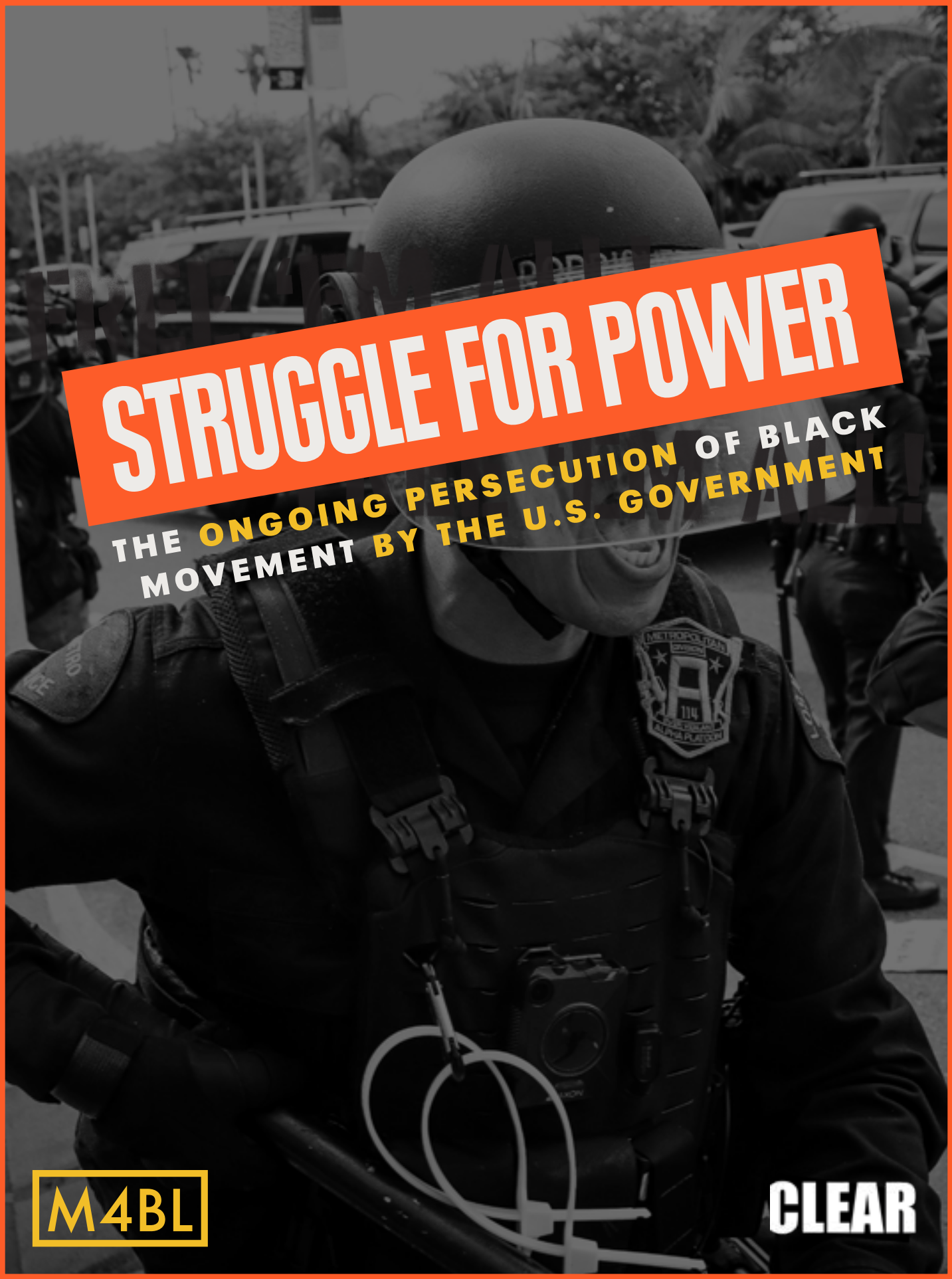
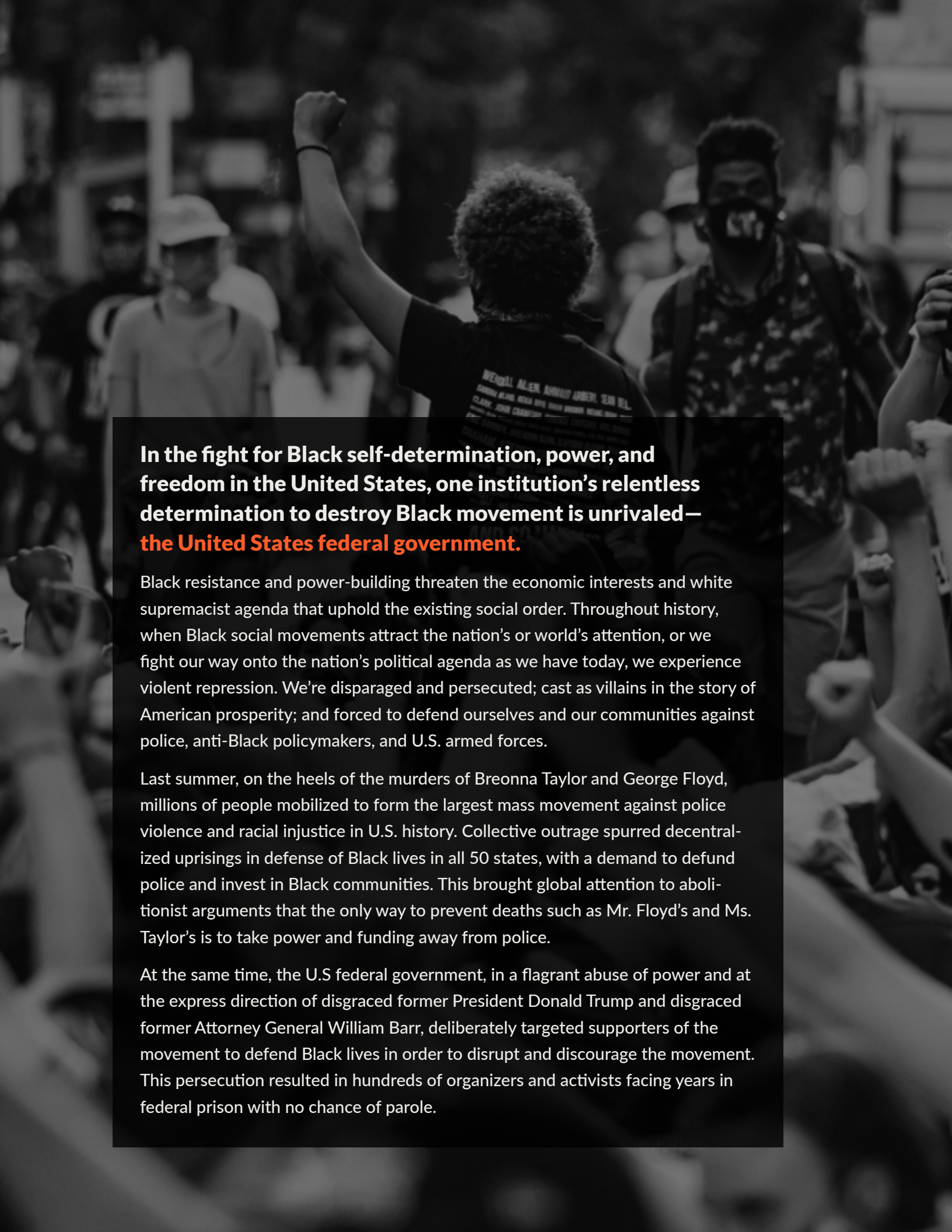


STRUGGLE FOR POWER

THE ONGOING PERSECUTION OF BLACK MOVEMENT BY THE U.S. GOVERNMENT

M4BL

CLEAR



In the fight for Black self-determination, power, and freedom in the United States, one institution's relentless determination to destroy Black movement is unrivaled—the United States federal government.

Black resistance and power-building threaten the economic interests and white supremacist agenda that uphold the existing social order. Throughout history, when Black social movements attract the nation's or world's attention, or we fight our way onto the nation's political agenda as we have today, we experience violent repression. We're disparaged and persecuted; cast as villains in the story of American prosperity; and forced to defend ourselves and our communities against police, anti-Black policymakers, and U.S. armed forces.

Last summer, on the heels of the murders of Breonna Taylor and George Floyd, millions of people mobilized to form the largest mass movement against police violence and racial injustice in U.S. history. Collective outrage spurred decentralized uprisings in defense of Black lives in all 50 states, with a demand to defund police and invest in Black communities. This brought global attention to abolitionist arguments that the only way to prevent deaths such as Mr. Floyd's and Ms. Taylor's is to take power and funding away from police.

At the same time, the U.S federal government, in a flagrant abuse of power and at the express direction of disgraced former President Donald Trump and disgraced former Attorney General William Barr, deliberately targeted supporters of the movement to defend Black lives in order to disrupt and discourage the movement. This persecution resulted in hundreds of organizers and activists facing years in federal prison with no chance of parole.

For more than a century, the U.S. federal government has actively attempted to suppress Black social movements in order to control Black mobility and quell collective action and power. In 1910, just two years after the Bureau of Investigation (BI) was created (the "federal" was added in 1935), there was a series of brutal lynchings across the country. Under the direction of the White House and Department of Justice, the agency refused to investigate the violent murders, claiming they had "no authority… to protect citizens of African descent in the enjoyment of civil rights generally."[1]

Fifty-three years later, in the summer of 1963, after brutal attacks on Southern civil rights organizers, 250,000 people assembled for the March on Washington for Freedom and Jobs—a massive mobilization that demonstrated the power and influence of the Black-led civil rights movement. Shortly afterward, FBI Director J. Edgar Hoover ratcheted up the surveillance and interrogation of Black movement leaders in the Black Panther Party, as well as Fannie Lou Hamer, Angela Davis, Martin Luther King, Jr., and Malcolm X, all in a deliberate bid to infiltrate, penetrate, disorganize, and disrupt the Black movements for rights, power, and freedom, and to preserve the established white supremacist order.

To Hoover, the Black Panther Party for Self-Defense was "the greatest threat to the internal security of the country." The FBI's COINTELPRO program targeted Chairman Fred Hampton and the Illinois chapter of the party to disrupt and undermine the movement. In December 1969, the Chicago police raided 21-year-old Hampton's home, murdering him and his defense captain, Mark Clark.

Another half-century later, the struggle continues. In 2017, the FBI's Counterterrorism Division invented a brand-new label, designating the movement in defense of Black lives as "Black Identity Extremists," or BIEs. Mobilizing the charged post-9/11 vocabulary of so-called "extremism" in this manner served to broadly categorize Black activists as threats to national security, justifying an intensification of government surveillance, domination, and punishment.

Over time, strategies for Black resistance have constantly adapted to counter the prevailing political and social conditions of white supremacy, domination, and exclusion. Four centuries ago, enslaved Africans on slave ships refused to eat, starving themselves to death rather than succumbing to forced captivity. Slave revolts, boycotts, freedom rides, arming Black communities with guns, and protests have also been used to pave the way for Black sovereignty.

No matter the strategy, the federal government has remained committed to undercutting radical organizers for racial justice and Black power whose insistence on exercising their inherent rights threatens white Americans' political and social

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1 O'Reilly, K. (1991.) *Racial Matters: The FBI's Secret File on Black America 1960–1972*. The Free Press.

dominance. Each of these transgressions is a direct response from the U.S. government to the perceived threat of Black power, and for each, the government constructed a justification to use their power to surveil, exploit, dominate, or punish Black freedom movements.

The summer of 2020 uprisings in defense of Black lives followed suit, but also represented a turning point with respect to policing and prosecution. The federal government spread anti-BLM propaganda, cast protesters as "violent radicals," and charged them with inflated federal indictments that carry significantly harsher penalties than local charges, all in an attempt to wrest power from local communities that had taken to the streets nationwide.

This research continues the work of our fore-elders in documenting our struggle for power and the massive resources and time the U.S. federal government spends to destroy our movement for rights, freedom, and power. For a comprehensive framework for a society that values Black lives, repairs past harms, and invests in Black communities, check out the Movement for Black Lives' **Vision for Black Lives** policy platform.

ABOUT THE PUBLISHERS

The Movement for Black Lives (M4BL) is a national network of over 150 leaders and organizations creating a broad political home for Black people to learn, organize and take action. M4BL includes activists, organizers, academics, lawyers, educators, health workers, artists and more, all unified in a radical vision for Black liberation and working for equity, justice, and healing.

The Creating Law Enforcement Accountability & Responsibility Clinic (CLEAR) is housed at Main Street Legal Services, Inc., the clinical arm of the City University of New York (CUNY) School of Law. CLEAR primarily aims to address the legal needs of Muslim and all other clients, communities, and movements in the New York City area and beyond that are targeted under the guise of national security and counterterrorism. CLEAR's work is defined by its relationships with communities and movements whose members wish to transform or abolish the law enforcement policies and practices affecting them. CLEAR's community-oriented and movement-building approach combines free legal representation with other services directed at meeting the fuller range of client, community, and movement concerns and objectives.

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EXECUTIVE SUMMARY

In response to concerns about the use of federal criminal charges against protesters supporting racial justice and the movement to defend Black lives during the summer 2020 uprising, Movement for Black Lives (M4BL) tasked one of its partner legal organizations, the Creating Law Enforcement Accountability & Responsibility clinic (CLEAR), to analyze and document this nationwide trend.

M4BL and CLEAR recognize the long history of government surveillance and targeting of Black-led movements, including but not limited to such programs as COINTELPRO, which was deployed to disrupt the work of the Black Panther Party and other organizations fighting for Black liberation in the United States.

Acknowledging this lineage, this report analyzes the 326 criminal cases initiated by U.S. federal prosecutors over alleged conduct related to the uprising and protests in the wake of the murder of George Floyd, from May 31, 2020 to October 25, 2020.

The empirical data and findings in this report largely corroborate what Black organizers have long known intellectually, intuitively, and from lived experience about the federal government's[2] disparate policing and prosecution of racial justice protests and related activity.

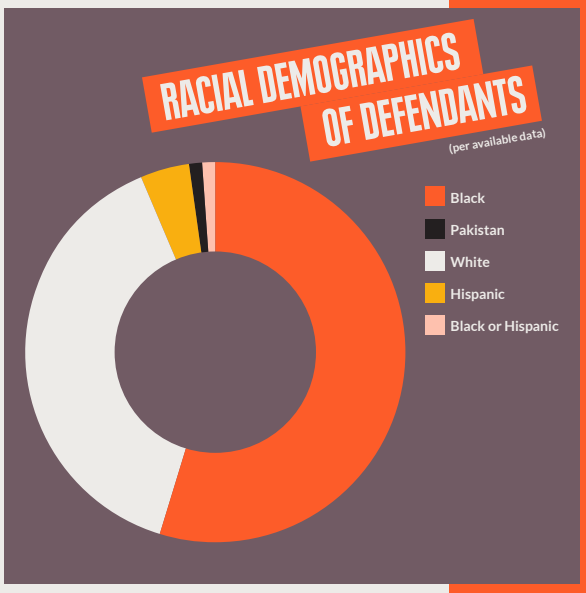
The report's key findings include the following:

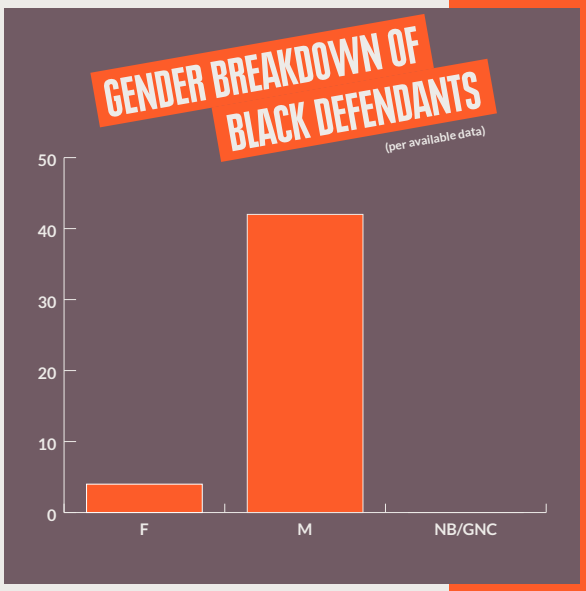
- Much of the drive to use federal charges against protesters stemmed from top-down directives from former President Donald J. Trump and Attorney General William Barr. These directives, meant to disrupt the movement, were the primary reason for the unprecedented federalization of protest-related prosecutions seen in 2020.

2 For the purposes of this report, "government" refers to the U.S. federal government or its agencies.

- The government rhetoric in these directives and U.S. Department of Justice press releases regarding the protests in support of the movement to defend Black lives painted an image of protesters as "violent radicals." Additionally, the government justified the expanded use of its authority and deployment of federal enforcement due to what it claimed was local and state leaders' "abdication of their law enforcement responsibilities in deference to this violent assault." The government's rhetoric concerning the protests in support of the movement to defend Black lives contrasts with its rhetoric surrounding COVID-19 anti-mask protests that were happening during the same time period, where, for example, Trump called anti-mask protesters "very good people" and encouraged local leaders to negotiate with them.
- The government exploited the expansive federal criminal code in order to assert federal jurisdiction in cases that bore no federal interest. The government most frequently claimed federal jurisdiction based on alleged conduct either occurring on federal property or affecting property which receives federal funding, including state and local government property. This is followed closely by cases where the government bent over backwards to assert federal jurisdiction through an extremely attenuated nexus with interstate commerce.
- The government greatly exaggerated the threat of violence from protesters as the purported justification in its policing and prosecution of protest-related activity. The vast majority of charges brought were for non-violent offenses or offenses that were potentially hazardous but were restricted to property destruction, not violence against people. Notably, the only two violent charges related to murder were brought against counter-protester members of the Boogaloo Bois, a far-right paramilitary faction that includes many white supremacists (sometimes referred to as "Bugaloo Bois").
- Highlighting the government's aggressive assertion of federal jurisdiction and its naked attempts at disrupting the movement to defend Black lives, in **92.6%** of the cases **there were equivalent state level charges** that could have been brought against defendants.
    - Among those cases where comparable state level charges could have been brought, **88% of the federal criminal charges** carried more severe potential sentences than the equivalent state criminal charges for the same or similar conduct.
    - The possibility of harsher outcomes in the federal criminal punishment system—and the anticipated disruptive effect of that possibility on the movement—seems to have driven the government's aggressive assertion of federal jurisdiction over conduct that typically would have been prosecuted by state authorities, if at all.

- Race data was only available for 89 **(27%)** of the defendants.
  - Of the 89 defendants with available race data, **52% were identified as Black;**
    - Of the Black defendants, **91% were identified as male;**
  - The known proportion of Black defendants compared to the proportion of Black people in the United States, per the latest census data, indicates that Black defendants were dramatically overrepresented.
- Out of 326 cases, the report identified 84 cases **(25.8%) where prosecutors "stacked charges" against defendants** with multiple redundant charges being brought arising from the same facts—leading to far more severe potential sentences against defendants.
- 72 cases **(22.1%)** involved charges with **mandatory minimum sentences.**
- 67 cases **(20.6%)** involved charges of **inchoate offenses,** or offenses where the defendant is alleged to have attempted, conspired, or aided and abetted an underlying crime without having actually committed the underlying criminal conduct.
- Protest-related prosecutions by federal authorities generally did not correlate to population size, as one might expect, but rather to the deployment of federal law enforcement to police protests. This suggests that the deployment of federal law enforcement functions as a self-fulfilling prophecy, leading to more prosecutions, and serving to legitimize in circular fashion the alarmist rhetoric that led to the deployment in the first place.
- Portland, Oregon leads in the number of charges brought for protest-related activity, making up a whopping **29% of federal charges.** Chicago, Las Vegas, Washington D.C., and Minneapolis follow.





- **83%** of charges (271 out of 326) were brought **in states with Democratic leadership,** while only **17%** of charges (55 out of 326) were brought in states with Republican leadership. This stands in stark contrast to the fact that **46%** of states had Democratic leadership and **54%** of states had Republican leadership at the time of the uprising.

- Federal protest charges were disproportionately brought in jurisdictions that Trump designated as "anarchist cities" – Washington D.C., New York, Seattle, and Portland – both prior to (**37%**) and after Trump's designation (**47%**).
- The most common charge brought was **arson (32.21%),** which prosecutors used to capture a broad range of acts not limited to the setting of a fire, such as adjusting a cloth that was said to aggravate the fire or "conspiring" to commit an arson through possession of a Molotov cocktail. Arson was followed by **civil disorder (15.03%); assaulting an officer (13.80%);** and **felon-in-possession (9.20%).** Assaulting an officer, similar to arson, captures a broad range of acts not limited to the use of actual physical force against an officer, such as pointing a laser pointer in the general direction of the police.
- Federal prosecutors weaponized their prosecutorial discretion with more malleable charges such as felon-in-possession by bringing federal cases against protesters with prior criminal convictions in service of the larger political objective of disrupting an unprecedented, nationwide mass mobilization demanding racial justice.
- While the vast majority of charging documents and related Department Of Justice press releases are silent as to the involvement of the Joint Terrorism Task Force (JTTF), there were **20 cases which explicitly referenced JTTF involvement.** Meanwhile, none of the cases specifically referenced Operation Legend. Absence of this information does not indicate absence of involvement. Rather, it leaves the level of involvement as an open question. One likely explanation for the lack of this data is that the government sought to conceal the participation of these two law enforcement partnerships.

While the Trump administration sounded alarms about the presence of "Antifa" and violent anarchists at protests for racial justice, only one criminal complaint ascribed the defendant's affiliation to "Antifa", and one recounted a defendant's self-identification as an anarchist.

Part One of the report provides context and background to the uprising. Part One also begins to explain the principal disparities in consequences stemming from federal charges, as compared to state charges: plea and conviction rates, the proximity of carceral facilities, and the unavailability of parole.

Part Two documents the shifting government rhetoric regarding protests in the movement to defend Black lives and the statements from the government indicating or expanding the deployment of federal resources against the movement. While the Department of Justice initially condemned the murder of George Floyd and appeared to express some sympathy toward protesters, it quickly shifted its tone the following day to condemn the protests and maintained that same tone in future press releases and other statements. This stands in contrast to government rhetoric

regarding the anti-mask protests that were occurring during the COVID-19 pandemic, concurrent to the protests in support of the movement to defend Black lives.

Part Three explains both the scope of protest-related charges captured in this report and the methodology used to identify and extract the data analyzed in the report and the procedural posture of the cases, as of June 20, 2021.

Part Four explains the various data points analyzed and their significance and lays out key research findings. Specifically, Part Four analyzes how the government attempted to assert federal jurisdiction over acts that normally would have been investigated and prosecuted by state authorities, if at all. Additionally, it examines the types of federal charges brought for protest-related activity and unpacks the acts actually captured under these charges and whether they matched government rhetoric painting protest-related activity as violent and dangerous. It also examines the breakdown of defendants by race and affiliation, as well as by location – including as between states with Democratic versus Republican leadership and as between cities labeled as "anarchist jurisdictions" by President Trump and the Department of Justice versus cities that were not so designated. Part Four also analyzes how prosecutors weaponized their discretion against defendants by stacking charges, utilizing charges involving mandatory minimum sentences, and charging defendants for inchoate offenses. Finally, Part Four examines the level of involvement of the JTTF and Operation Legend, two federal-local partnerships, in the prosecutions.

Part Five compares the federal statutes under which the defendants were charged to similar state-level statutes under which defendants could have been charged, to gauge any disparities in sentencing.

Part Six concludes with some key recommendations, many of which echo those already articulated by movement actors, including passage of the **BREATHE Act, amnesty for all protesters**, **reparations** for victims of protest prosecutions, and the abolition of JTTF partnerships. It also suggests future research to explore related to the government's criminalization of protest.

PART ONE
INTRODUCTION

Beginning in the summer of 2020, widespread protests swept through America as part of an unprecedented uprising for racial justice and police accountability. Following the murders of George Floyd in Minnesota,[3] Ahmaud Arbery in Georgia,[4] Breonna Taylor in Kentucky,[5] and the many other named and unnamed people who were victims of police violence, calls for racial justice, abolition, defunding the police, and investing in Black communities erupted nationwide. From small towns to major cities across the United States, uprising and demonstrations arranged by organizers and activists coalesced with spontaneous protest as unseen numbers of people took to the streets in a spirit of collective outrage. As these protests grew in size, so too did the police response. Videos of police assaulting protesters using dangerous tactics such as shooting tear gas and so-called "less-lethal" rounds (which, despite their name, can cause serious injury or death[6]) went viral on social media.[7] Additionally, as the protests and the movement grew more powerful, federal law enforcement increasingly involved itself in the policing of protests, with federal agents deployed to cities nationwide.[8]

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3 N.Y. Times, *What We Know About the Death of George Floyd*, N. Y. Times (Dec. 9, 2020), https://www.nytimes.com/article/george-floyd.html

4 Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. Times (Nov. 13, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

5 Richard A. Oppel Jr., *What to Know About Breonna Taylor's Death*, N.Y. Times (Oct. 30, 2020), https://www.nytimes.com/article/breonna-taylor-police.html.

6 *See* Janet Loehrke, '*Less Lethal' Can Still Maim and Kill*, USA Today (Jun. 20, 2020), https://www.usatoday.com/in-depth/news/2020/06/20/less-lethal-rubber-bullet-protester-pepper-ball-tear-gas-injured-blinded/5343717002/.

7 *The World Is Watching*, Amnesty International, https://www.amnestyusa.org/worldiswatching/ (last accessed April 7, 2021); Tobi Thomas, N*early 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, Guardian (Oct. 29, 2020), https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest

8 *See, e.g.*, U.S. Dep't of Homeland Sec., *DHS Announces New Task Force to Protect American Monuments, Memorials, and Statutes* (Jul. 1, 2020), https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues ("DHS is answering the President's call to use our law enforcement personnel across the country to protect our historic landmarks."). *See also* Kevin Liptak, *Trump Announces 'Surge' of Federal Officers to Chicago*, CNN (Jul. 22, 2020), https://www.cnn.com/2020/07/22/politics/donald-trump-federal-law-enforcement-chicago-albuquerque/index.html (discussing the deployment of federal law enforcement officers to Portland and Chicago to tamp down on protests).

Along with the deployment of federal law enforcement officers and agents, another element appeared: the federalization of protest-related charges. Typically, state and local governments and law enforcement agencies are responsible for addressing alleged unlawful activity at protests. This iteration of uprising to defend Black lives represented a turning point with respect to policing and prosecutions, with the federal government taking things into its own hands by deploying federal law enforcement, even in cities where protests had remained non-violent and where local officials either outright declined that assistance or cautioned against it. There were over 326 instances where instead of, or in addition to, state criminal charges, the federal government filed federal criminal charges against people for conduct that was connected to the protests, justified seemingly by Trump's baseless rhetoric that these protests were marked by "violence and mob intimidation."[9]

Federalization represents a real threat to defendants because of pronounced differences in severity between federal and state criminal laws. As discussed below, federal charges very often carry greater sentences than state criminal charges for the same conduct. Moreover, federal criminal cases result in convictions at an astoundingly high rate. While state criminal legal systems are still rife with systemic issues like institutional racism, their conviction and plea rates are lower than those in the federal system; New York[10] and Oregon,[11] the two states with the highest number of federalized protest-related cases, have felony conviction rates anywhere from 5% to nearly 40% lower than the federal conviction rate. According to the Pew Research Center, fewer than 1% of federal criminal defendants in 2018 went to trial and won their case.[12] Due in part to the coercive power that federal prosecutors hold to stack redundant charges against defendants and the severity of federal penalties, which can entail mandatory-minimum sentences, 90% of federal criminal cases result in a defendant accepting a guilty plea to reduce the number of years to be spent in prison.[13]

Next, if found guilty and sentenced to imprisonment, someone convicted of a federal crime will be incarcerated in a federal prison instead of a state prison.[14] This oftentimes means being incarcerated much farther away from their family than if

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9 Exec. Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence (Jun. 26, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-american-monuments-memorials-statues-combating-recent-criminal-violence/.

10 *Dispositions of Adult Arrests*, N.Y. State Div. of Crim. Just. Serv. (June 2021), https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/NewYorkState.xls.

11 Michael Weinerman, *Felony Case Processing Trends in Oregon*, Or. Criminal Justice Commission, https://www.oregon.gov/cjc/CJC%20Document%20Library/FCPReport.pdf (last accessed Dec. 18, 2020).

12 John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial*, Pew Research Center (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

13 *Id.*

14 Nancy G. La Vigne, *The Cost of Keeping Prisoners Hundreds of Miles from Home*, Urban Institute (Feb. 3, 2014), https://www.urban.org/urban-wire/cost-keeping-prisoners-hundreds-miles-home.

they were in a state prison. Finally, when convicted of a federal crime and sentenced to prison, unlike for most state criminal convictions, there is no chance of parole. The Sentencing Reform Act of 1984 eliminated the federal parole system.[15] While most states offer some form of parole, those convicted of federal crimes must serve at least 85% of their sentence.

PART TWO

FEDERALIZATION AS A MEANS OF DISRUPTION

Initially, the government conveyed a sympathetic message regarding George Floyd's murder and the collective outrage and mobilization of protests within the United States that followed. But the tone quickly turned oppositional when, soon thereafter, the government unleashed its expansive powers against the movement to defend Black lives under the guise of combatting "terrorism."

In a statement on May 29, 2020, former Attorney General Barr called George Floyd's murder "harrowing to watch and deeply disturbing."[16] However, Barr's tone regarding the protests rapidly shifted: on May 30, 2020, only one day after the prior statement, Barr claimed that "anarchistic and far left extremists" were hijacking the protests.[17] He also described "outside radicals and agitators" who were allegedly crossing state lines to protest and stated that "it is a federal crime to cross state lines or to use interstate facilities to incite or participate in violent rioting. We will enforce these laws."[18] The following day, Barr released another statement announcing that all 56 regional offices of the FBI's Joint Terrorism Task Force (JTTF) would be used to quell what he described as "domestic terrorism."[19]

JTTFs are partnerships between the FBI and local, municipal, state and/or other federal law enforcement agencies around the country. First established in New York City in 1980, the number of JTTFs increased exponentially after September 11, 2001 to

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15 Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2020).

16 William P. Barr, U.S. Dep't of Justice, Statement on the Death of Mr. George Floyd (May 29, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-death-mr-george-floyd.

17 William P. Barr, U.S. Dep't of Justice, Statement on the Death of Mr. George Floyd (May 30, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots.

18 *Id.*

19 William P. Barr, U.S. Dep't of Justice, Statement on the Death of Mr. George Floyd (May 31, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism.

"address terrorist networks operating around the world."[20] Today, there are about 200 task forces around the country, including at least one in each of the FBI's 56 regional field offices, all of which were mobilized as per Barr's announcement.[21]

The mission of JTTFs is "to leverage the collective resources of the member agencies for the prevention, preemption, deterrence, and investigation of terrorist acts that affect U.S. interests, to disrupt and prevent terrorist acts, and to apprehend individuals who may commit or plan to commit such acts."[22] A 2016 report by the U.S. Department of Justice, the FBI's parent agency, defines disruption as "the result of direct actions and may include but is not limited to the arrest; seizure of assets; or impairing the operational capabilities of the key threat actor."[23] Practically, for activists, disruption is interference with organizing and movement building through a range of tactics, including increased social media monitoring, surveillance at protests, interrogations of those perceived to be leaders or otherwise associated with activism, and the use of informants.

Neither the strategy of disruption nor its associated tactics are novel when it comes to protests for racial justice. The same language was used by the FBI to describe the purpose of COINTELPRO, a counterintelligence program initiated in the 1950s to "expose, disrupt, discredit, or otherwise neutralize the activities of the Black nationalists."[24] Moreover, FBI documents from the 1960s discussing the use of COINTELPRO against Black organizers and Department of Justice press releases in 2020 discussing federal deployment against the movement to defend Black lives both employed similarly warped characterizations. In a COINTELPRO-related letter, the FBI described Black Nationalists as having "backgrounds of immorality, subversive activity, and criminal records.[25] In press releases related to the 2020 uprising, the Department of Justice described those involved in the uprising as "radicals and agitators"[26] and "anarchistic and far left extremists, using Antifa-like tactics … to promote [ ] violence."[27]

The government argued that the deployment of federal law enforcement was necessary because major cities such as Portland, Seattle, and New York City – all three

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20 *Partnering with Domestic and International Counterparts*, U.S. Dep't of Justice, https://www.justice.gov/archive/911/counterparts.html (last accessed April 7, 2021).

21 *Joint Terrorism Task Forces*, Fed. Bureau of Invest., https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last accessed Dec. 16, 2020).

22 Office of the Dir. of Nat'l Intelligence, Counterterrorism Guide for Public Safety Personnel, https://www.dni.gov/nctc/jcat/index.html (last accessed May 11, 2021)

23 U.S. Dep't of Justice, FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan, Section II. Performance Information by Strategic Goal/Objective, https://www.justice.gov/doj/file/824716/download (last accessed Dec. 16, 2020).

24 *FBI COINTELPRO – Aug. 25, 1967*, Nation of Islam (transcribing Aug. 25, 1967 internal agency letter from the FBI director to FBI field offices describing COINTELPRO).

25 *Id.*

26 William P. Barr, U.S. Dep't of Justice, Statement on the Death of Mr. George Floyd (May 30, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots.

27 *Id.*

of which have Democratic leadership and were labeled "Anarchist" cities by Trump – allowed "violent radical agitators who have hijacked peaceful protest[s]."[28] The government's heated rhetoric was an attempt to provide pretextual cover for its true motives in deploying federal agents and law enforcement: to disrupt movement building and discourage protests.

Just a few days after Barr unleashed the JTTFs against the movement, on June 1, 2020, Trump claimed that cities and states were failing to stop the protests and accordingly, he would be "mobilizing all available federal resources — civilian and military — to stop the rioting and looting."[29] Proclaiming his intent to override the measures taken by state and local governments, Trump stated: "If a city or a state refuses to take the actions that are necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them."[30] In a later statement, Trump said, of the federal law enforcement officers, "[t]hey grab a lot of people and jail the leaders. These are anarchists."[31] In this same statement, Trump asserted that the Democratic leaders in cities such as Portland and Chicago were scared of the protesters and had no idea how to suppress the protests.[32] Not even a week after these comments, Trump signed an Executive Order calling for increased federal involvement in stopping the protests and ensuring what he described as "order."[33] This Executive Order declared that the "state and local public officials' abdication of their law enforcement responsibilities in deference to this violent assault must end."[34]

"In effect, Operation LeGend was stretched beyond its original and unrelated purpose in order to contribute to the federal effort to disrupt the movement."

In a leaked memo from Barr to U.S. Attorneys in early September 2020, Barr stressed that federal prosecutors should aggressively go after protesters who "cause violence," claiming that in some cases, the U.S. attorneys should even pursue

28 William P. Barr, U.S. Dep't of Justice, Statement on the Death of Mr. George Floyd (May 31, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism

29 Statement by the President, White House (Jun. 1, 2020), https://web.archive.org/web/20200611050322/https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/.

30 *Id.*

31 Remarks by President Trump on Phase Four Negotiations, White House (Jul. 20, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-phase-four-negotiations/.

32 *Id.*

33 Exec. Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence, *supra* note 8.

34 *Id.*

sedition charges against protesters.[35] Consistent with that practice, after District Attorney Mike Schmidt in Portland, Oregon declined to file state charges against nearly 500 protesters, the FBI Special Agent in Charge of the Portland Division, Renn Cannon, stated that the FBI would begin taking a larger role in investigating crimes allegedly committed at racial justice protests.[36] The U.S. Attorney in Oregon added: "We're doing it because we believe in having an impact at ending this violence."[37] Shortly thereafter, federal prosecutors there and in states across the country began bringing more federal cases against protesters.

Contemporaneous with the summer uprising, Trump and Barr also expanded the use of another multi-agency law enforcement operation, Operation Legend, to eight cities, many of which had Democratic or liberal leadership. These cities are Chicago (200+ federal agents);[38] Albuquerque (35 federal agents);[39] Cleveland (25 federal agents);[40] Milwaukee (25 federal agents);[41] Detroit (42 federal agents);[42] St. Louis (50 federal agents);[43] Memphis (24 federal agents);[44] and Indianapolis (40 federal agents).[45]

Operation Legend started in Kansas City after a four-year-old boy, LeGend Taliferro, was shot and killed while asleep in his home. This incident prompted the Kansas City mayor to write to the Missouri governor, stating that Kansas City is at a "crisis point" and asking for state legislative action to "address how [the city] can provide more tools for law enforcement and prosecutors to interrupt conspiracies to commit murder and other violent acts."[46] This served as the inspiration for the Department

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35 Michael Balsamo, *Justice Dept.: Sedition Charge May Apply to Protest Violence*, Associated Press (Sep. 17, 2020), https://apnews.com/article/state-courts-violent-crime-arson-violence-crime-cbca8672a70f-9f170a086a7a252a751e.

36 Conrad Wilson, *Trump Administration Brings Federal Charges Against Portland Protesters*, NPR (Sep. 30, 2020), https://www.npr.org/2020/09/30/918572968/trump-administration-brings-federal-charges-against-portland-protesters

37 *Id.*

38 U.S. Dep't of Justice, Department of Justice Announces Expansion of Operation Legend to Chicago (Jul. 22, 2020), https://www.justice.gov/usao-ndil/pr/department-justice-announces-expansion-operation-legend-chicago.

39 U.S. Dep't of Justice, Attorney General William P. Barr Joins President Donald J. Trump to Announce Expansion of Operation Legend (Jul. 22, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-joins-president-donald-j-trump-announce-expansion-operation.

40 U.S. Dep't of Justice, *Operation Legend Expanded to Cleveland, Detroit, and Milwaukee* (Jul. 29, 2020), https://www.justice.gov/opa/pr/operation-legend-expanded-cleveland-detroit-and-milwaukee.

41 *Id.*

42 *Id.*

43 U.S. Dep't of Justice, *Operation Legend Expanded to St. Louis to Confront Violent Crime* (Aug. 6, 2020), https://www.justice.gov/usao-edmo/pr/operation-legend-expanded-st-louis-confront-violent-crime.

44 U.S. Dep't of Justice, *Operation Legend Expanded to Memphis and St. Louis* (Aug. 6, 2020), https://www.justice.gov/opa/pr/operation-legend-expanded-memphis-and-st-louis.

45 U.S. Dep't of Justice, *Operation Legend Expanded to Indianapolis* (Aug. 14, 2020), https://www.justice.gov/opa/pr/operation-legend-expanded-indianapolis.

46 *White House Announces 'Operation: Legend' Effort in Kansas City*, KCTV5 (July 8, 2020), https://www.kctv5.com/news/local_news/white-house-announces-operation-legend-effort-in-kansas-city/article_e9dc0ed4-c167-11ea-9d49-db66381e8a2c.html.

of Justice to create Operation Legend on July 8, 2020, "to fight the sudden surge of violent crime, beginning in Kansas City, MO."[47] During the protests, Trump and Barr then used Operation Legend to intensify the federal offensive against protesters and the movement itself. In effect, Operation Legend was stretched beyond its original and unrelated purpose in order to contribute to the federal effort to disrupt the movement. For example, in Trump's July 22, 2020 briefing statement on the expansion of Operation Legend to Chicago and Albuquerque, Trump stated:

> *In recent weeks, there has been a radical movement to defund, dismantle, and dissolve our police departments. Extreme politicians have joined this anti-police crusade and relentlessly vilified our law enforcement heroes. To look at it from any standpoint, the effort to shut down policing in their own communities has led to a shocking explosion of shootings, killings, murders, and heinous crimes of violence. This bloodshed must end. This bloodshed will end.*[48]

The heavy federal law enforcement deployment and use of federal charges stand in stark contrast to Trump's response to anti-lockdown (COVID-19) protests happening around the same time, in which he used liberation rhetoric and encouraged people to protest against state COVID-19 restrictions on businesses and residents nationwide.[49] For example, during the anti-lockdown protests in Michigan weeks after the murder of George Floyd, the Trump administration did not call for federal law enforcement to be deployed to defend the Michigan state government, nor did the Trump administration file federal criminal charges against any protester, even though these protests included armed people entering the state capitol waving threatening signs that included slogans such as "Tyrants get the rope."[50] Instead, Trump supported the protesters, tweeting: "These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal."[51] And while the Trump administration persistently characterized protests to defend Black lives as violent and dangerous, one study found that more than 93% of demonstrations from May 24 to August 22 connected to the movement to defend Black lives

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47 U.S. Dep't of Justice, *Attorney General William P. Barr Announces Launch of Operation Legend* (July 8, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-legend.

48 Remarks by President Trump on Operation Legend: Combatting Violent Crime in American Cities, White House (July 22, 2020), https://web.archive.org/web/20200723023012/https://www.whitehouse.gov/briefings-statements/remarks-president-trump-operation-legend-combatting-violent-crime-american-cities/.

49 Craig Mauger, *Protesters, Some Armed, Enter Michigan Capitol*, Detroit News (Apr. 30, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/04/30/protesters-gathering-outside-capitol-amid-covid-19-restrictions/3054911001/.

50 Id.

51 Kevin Liptak, *Trump Tweets Support for Michigan Protesters*, CNN (May 1, 2020), https://www.cnn.com/2020/05/01/politics/donald-trump-michigan-gretchen-whitmer-protests/index.html.

did not entail any violence or destructive activity.[52]

The aforementioned statements, the government's deployment of federal law enforcement against the movement to defend Black lives, and its contrasting response to the COVID-19 protests further make clear that the government's response was fundamentally a means to disrupt the movement to defend Black lives.

Placing the Federal Government's Attempt to Criminalize Protest in Historical Context

Throughout the 1960s, protests against institutional racism, segregation, discrimination, and violence, were often met with severe and violent repression at the hands of state and federal authorities.[53] For example, when Watts exploded in August 1965 after its Black residents had suffered decades of abuse by a violent and racist Los Angeles Police Department, 14,000 law enforcement members were deployed, along with members of the National Guard.[54] In 1968 alone, the federal government deployed the National Guard eight times in response to civil unrest. In the wake of the assassination of Rev. Martin Luther King, Jr., in 1968, "in what was probably the largest single deployment of military and paramilitary forces for a civilian purpose since the Civil War, 34,000 National Guardsmen, 21,000 federal troops, and thousands of local police were brought in to quell the 'disturbances.'"[55] These deployments, however, came at the request of local officials because they believed they could not control events themselves. In more recent times, President George H.W. Bush dispatched 3,000-4,000 army troops and marines, along with 1,000 riot-trained federal law officers, to respond to the rioting in Los Angeles, California in the wake of the Rodney King verdict.[56] A heavy-handed federal response to protests for racial justice is far from unprecedented.

What was unique about the Trump administration's response to the Summer 2020 protests for racial justice was the fact that the deployment of federal law enforcement was not in response to calls by local officials to quell civil unrest, but rather an

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52 Dr. Roudabeh Kishi & Sam Jones, US Crisis Monitor, Demonstrations & Political Violence in America: New Data for Summer 2020, 4 (2020). *See also* Erica Chenoweth & Jeremy Pressman, *Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, Harvard Radcliffe Inst. (Oct. 20, 2020), https://www.radcliffe.harvard.edu/news-and-ideas/black-lives-matter-protesters-were-overwhelmingly-peaceful-our-research-finds (collecting and analyzing data from protests from May to June 2020 and finding that "[t]he Black Lives Matter uprisings were remarkably nonviolent. When there was violence, very often police or counterprotestors were reportedly directing it at the protestors.")

53 Peniel E. Joseph, *How Will the Protests End? History Tells Us Much Depends on How Government Responds*, Nat'l Geo. (Jun. 12, 2020), https://www.nationalgeographic.com/history/article/how-will-protests-end-history-says-depends-government-response.

54 *Id.*

55 Mitchel P. Roth, A History of Crime and the American Criminal Justice System (3rd ed. 2018).

56 Jeff Wallenfeldt, *There's a Riot Goin' On: Riots in U.S. History (Part Two)*, Encyclopedia Brittanica, https://www.britannica.com/list/theres-a-riot-goin-on-riots-in-us-history-part-two (last accessed June 20, 2021).

unprovoked, top-down effort to criminalize protest more generally.[57] While the federal government had a historical record of deploying federal troops or the National Guard in response to local officials' requesting assistance to quell riots or unrest, the Trump administration deployed federal law enforcement officers to engage in domestic policing even in cities where protests had remained non-violent and local officials either outright declined that assistance or cautioned against it.[58]

Legal scholars across the political spectrum recognized the unprecedented nature of this deployment of federal officers "as a just run-of-the-mill domestic policing force," noting that it remains "fundamentally a local law enforcement responsibility to maintain order and protect lives and property."[59] While the Trump administration employed rhetoric reminiscent of past administrations that deployed federal troops where federal law was being subverted by local officials who openly defied federal court orders to desegregate, there wasn't "anywhere near the same kind of consensus at the federal level that federal authority [was] actually being subverted" during the Summer 2020 uprising.[60] The Trump administration's open characterization of the surge of federal law enforcement officers into American cities as "classic crime fighting," purportedly to combat violent crime, is a salient feature setting apart the federal response in 2020 from previous responses to civil unrest or racial justice protests.[61]

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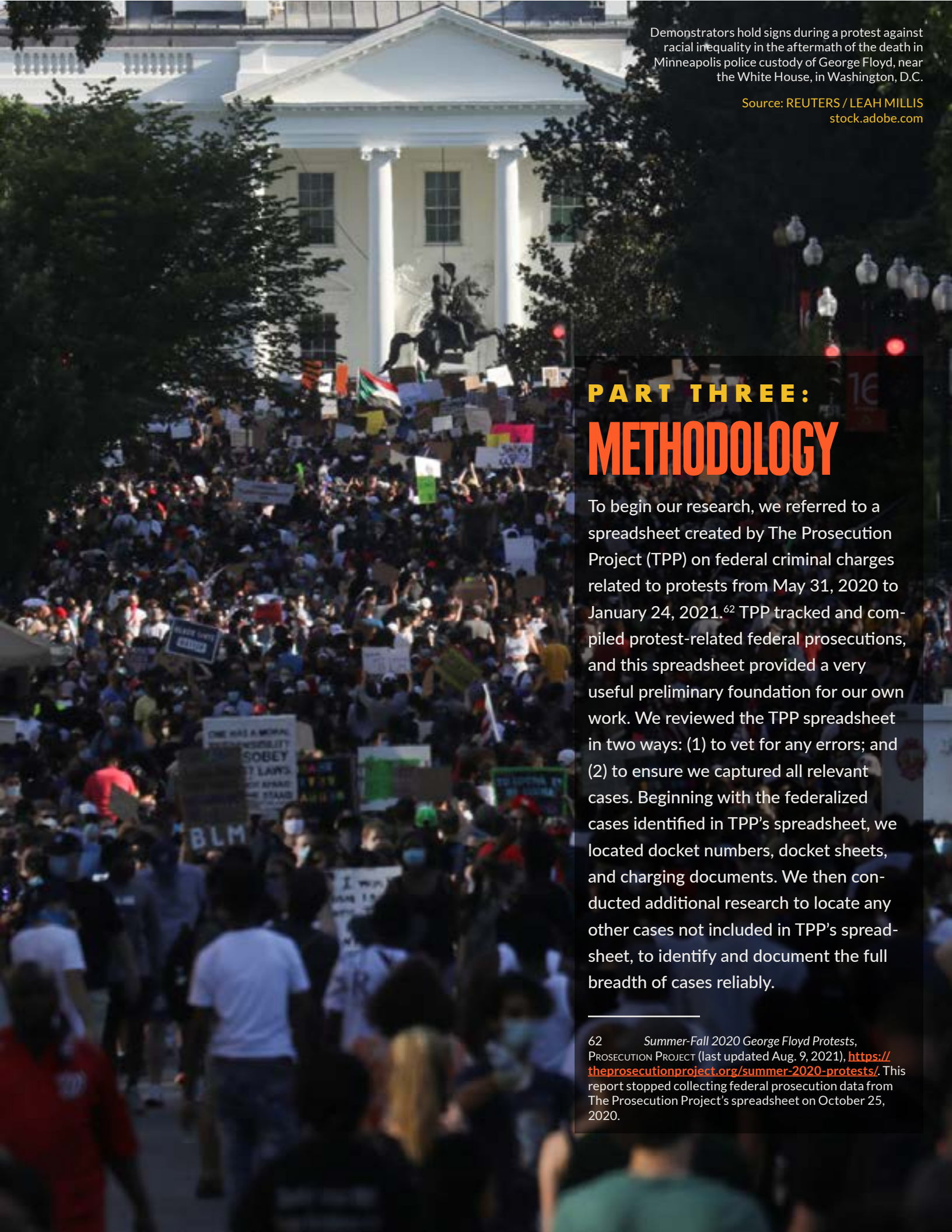
57 Emily Badger, *How Trump's Use of Federal Forces in Cities Differs From Past Presidents*, N.Y. Times (July 23, 2020) https://www.nytimes.com/2020/07/23/upshot/trump-portland.html.

58 It remains difficult to quantify how the federal deployment during the Summer 2020 uprising compares to previous federal deployments in terms of resulting federal prosecutions because there are no published studies with federal prosecution data from previous federal deployments.

59 *Id.*

60 *Id.*

61 *Id.*



Demonstrators hold signs during a protest against racial inequality in the aftermath of the death in Minneapolis police custody of George Floyd, near the White House, in Washington, D.C.

Source: REUTERS / LEAH MILLIS
stock.adobe.com

PART THREE:

METHODOLOGY

To begin our research, we referred to a spreadsheet created by The Prosecution Project (TPP) on federal criminal charges related to protests from May 31, 2020 to January 24, 2021.[62] TPP tracked and compiled protest-related federal prosecutions, and this spreadsheet provided a very useful preliminary foundation for our own work. We reviewed the TPP spreadsheet in two ways: (1) to vet for any errors; and (2) to ensure we captured all relevant cases. Beginning with the federalized cases identified in TPP's spreadsheet, we located docket numbers, docket sheets, and charging documents. We then conducted additional research to locate any other cases not included in TPP's spreadsheet, to identify and document the full breadth of cases reliably.

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62 *Summer-Fall 2020 George Floyd Protests*, Prosecution Project (last updated Aug. 9, 2021), https://theprosecutionproject.org/summer-2020-protests/. This report stopped collecting federal prosecution data from The Prosecution Project's spreadsheet on October 25, 2020.

Source: Julian Leshay / Shutterstock.com

Having curated an exhaustive list of federal protest-related criminal cases in this manner, we then conducted an independent review of the criminal complaints and affidavits that supported these federal charges. These documents form the basis for a prosecution and outline the government's case against a defendant, typically including an affidavit sworn out by a federal law enforcement official, which is a document summarizing the events leading to the charge as described by the affiant under the penalty of perjury. For cases where federal criminal charges were filed but where we were unable to access the criminal complaints and affidavits, we utilized other primary sources issued in connection with many of these prosecutions, such as official Department of Justice press releases. Finally, we looked to local and national news reporting on cases for additional details where needed.

We then extracted and analyzed the data. As part of our analysis, we classed each charge into broad categories, such as arson, felon in possession of a firearm, and civil disorder to supply more context beyond the federal statute charged alone. We also examined whether the charge was inchoate, meaning that the individual was charged for taking a step toward the commission of a crime, even if the alleged crime itself never took place. We also identified whether prosecutors were stacking charges against defendants and whether defendants faced potential mandatory minimum sentences.

We further identified what the government claims as the basis for federal jurisdiction, typically by looking to the manner in which the affidavit in support of the charge connects the alleged crime either to interstate commerce or to federal law directly. Next, we identified the closest, roughly equivalent state law pursuant to which a given crime could have been charged had it not been federalized.

In addition, we analyzed the procedural posture of each case, such as whether the case was dismissed or still pending.

Certain categories of information, like the race and affiliation of a defendant, and the level of involvement of Operation Legend and JTTF, were only available in a minority of cases, but we still captured that information to the extent possible.

Defining "Protest-Related"

This report set out to capture as much data as possible about prosecutions related to protests after the killing of George Floyd in the summer of 2020.

For the purposes of this report, a broad definition of "protest-related" was utilized. This report considered a federal criminal prosecution protest-related *if the individual was arrested in connection with protests in support of the movement to defend Black lives.* Accordingly, a determining factor to consider a federal criminal prosecution to be protest-related was whether the law enforcement and prosecutorial practices or actions leading to the charge were in reaction to protests. Under this definition, an individual who clearly did not participate in or support protests but who was arrested and charged for being out past a curfew imposed to curb protests, for example, would qualify as a "protest-related" prosecution.

Limitations

This report utilized primary sources such as affidavits in support of criminal charges to collect and represent data, which means we necessarily had to rely on the narratives of law enforcement officers who authored the affidavits. In many cases, these law enforcement officers were not present at the scene and had no personal knowledge of the alleged crime.

The primary limitation we confronted was the nature and availability of charging documents. In some cases, the sworn affidavits supporting the charges were under seal or otherwise unavailable, leaving us to rely on charging documents that included little more than the defendant's name and the statute(s) they were being charged under. In cases where we could access the sworn affidavits, the majority of affidavits omitted certain information that we sought to extract, such as the race of the defendants and the level of JTTF and Operation Legend involvement. We also set out to analyze the breakdown of defendants by affiliation, in order to capture the extent to which any organized groups and individuals alleged to be tied to "Antifa" were targeted for federal prosecution, but the majority of the charging documents did not reference any such affiliations.

Procedural Posture

Data was finalized for the purposes of this report on June 2, 2021, at which point the vast majority of charges were still pending. "Pending" simply means that the case is proceeding through pretrial motions or discovery, no plea agreement had been accepted, and the case had not been tried or dismissed. Statistically, the vast majority of criminal cases in the United States—97% of federal cases, and 94% of state cases—are pled out without going to trial.[63]

As of June 2, 2021, out of a total of 326 cases, there are:

- 205 pending cases, including:
  - 148 cases that are still awaiting trial;
  - 46 cases where the defendant accepted a plea agreement but is still awaiting sentencing and/or other judgments from the court;
  - 9 cases where the defendant pled guilty (not pursuant to a plea agreement) but is still awaiting sentencing and/or other judgments from the court;
  - 2 cases where the defendant was found guilty at trial but is still awaiting sentencing and/or other judgments from the court.
- 109 closed cases, including:
  - 67 cases where the government dismissed the case;
  - 31 cases where the defendant accepted a plea agreement and was sentenced;
  - 8 cases where the defendant pled guilty without an agreement and was sentenced;
  - 1 case where the defendant was found guilty at trial and was sentenced; and
  - 2 cases that were closed for other reasons.
- 12 cases where the procedural posture could not be determined.

63 Dep't of Just., Bureau of Just. Statistics, Sourcebook of Criminal Justice Statistics Online Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (last visited Dec. 7, 2020).

PART FOUR

THE DATA

Sources of Federal Jurisdiction

Federal criminal jurisdiction has expanded in waves based on developing social and political trends throughout the history of the United States.[64] Early federal criminal jurisdiction, for example, was limited to crimes of special federal interest or when "regular" crimes occurred in special federal spheres.[65] While Congress began expanding the scope of federal criminal jurisdiction with the Civil Rights Act of 1866 which attempted, but failed to deliver, federal protection to victims of racial discrimination, it was Congress's efforts to create commerce-based criminal jurisdiction for crimes related to vice that effectively utilized the doctrine of interstate commerce to federalize criminal law.[66] This expansion, which continued to take place well into the 1930's, laid the foundation for the rapid explosion of federal criminal laws within the past 50 years, as Congress passed a series of omnibus (sweeping) crime bills which created new federal crimes at an unprecedented pace.[67] In 1997, the American Bar Association had concluded that over 40% of federal criminal laws had been passed within the prior 30 years alone.[68]

The federalization of criminal laws in the United States also stretched the concept of federal criminal jurisdiction to its theoretical limits.[69] While federal crimes previously required some explicit interstate nexus to the underlying crime, the omnibus bills simply created a pre-textual connection to federal jurisdiction.[70] A couple of notable examples are federal firearms laws and the federal carjacking law, which established federal jurisdiction for offenses as long as the firearm or

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64 *See, e.g.*, Kathleen F. *Brickey, Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1137-1145 (Spring 1995) (discussing the development of federal criminal law and federal jurisdiction); *See also* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 979-981 (Apr. 1995) (discussing the accelerated pace of the expansion of the federal government's criminal authority in the last quarter of the twentieth century, especially in the 1980s and 1990s).

65 *See* Brickey, *supra* note 62, at 1138.

66 *Id.* at 1140-2

67 *Id.* at 1143-1145. *See also* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753–754 (Feb. 2005).

68 AM. BAR ASSOC., FEDERALIZATION OF CRIMINAL LAW 7-11 (1997).

69 *See* Brickey, *supra* note 62, at 1163 n. 154 (noting how the federal carjacking statute—enacted by congress to express outrage at the death of a woman who was killed inadvertently during the theft of her vehicle—effectively applied to every car theft since its jurisdictional base applied if a vehicle was transported, shipped, or received in interstate commerce).

70 *See id.* at 1149 n. 100 (recounting how Congress, in passing the Comprehensive Drug Abuse Prevention and Control Act of 1970, created the jurisdictional basis to federally prosecute all drug offenses by assuming that most controlled substances flow through interstate commerce and concluding that it would be impossible to differentiate between those manufactured and distributed intrastate versus interstate).

vehicle was *ever* transported in interstate commerce—effectively creating federal jurisdiction over almost every, if not every, firearm/vehicle in the United States.[71] The expansively broad language utilized here and in other criminal statutes effectively allows federal prosecutors to bring federal charges against individuals for crimes that have little to no relation to matters of special federal interest.[72] This not only exposes those defendants to all of the coercive power the federal government wields,[73] it also exposes them to double jeopardy, as defendants could be prosecuted for the same crime twice—in both federal and state/local courts.[74] Additional critiques have been levied against this seemingly never ending expansion of federal criminal jurisdiction for clashing with values of decentralization and creating a dual-tiered criminal punishment system.[75]

Against this backdrop, the instant report analyzes how protest-related charges were federalized. One of the more significant and disturbing conclusions derived from the data analyzed within this report is the remarkable extent to which federal prosecutors exploited the expansive federal criminal code in order to pursue cases that bore no federal interest and which normally would be brought by local prosecutors, in state courts, under state law, if at all.

Breaking down the charges in the dataset by the sources of federal jurisdiction claimed by prosecutors reveals the following: federal prosecutors are equipped with a variety of methods to establish federal jurisdiction against defendants because federal criminal statutes create overbroad bases of criminal jurisdiction, and also because federal courts, up until now, have not meaningfully reigned in prosecutors' efforts to stretch the meaning of those laws. For example, federal criminal statutes create blanket federal jurisdiction for crimes against federal employees or taking place on or against federal property.[76] While these criminal laws may not seem uniquely problematic, since they at least feign some federal interest, they nevertheless cover conduct which could be prosecuted at a local level, such as assaulting an officer or destruction of property. But, in the

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71 *See* 8 U.S.C. § 922; 18 U.S.C. § 2119.

72 *See* Brickey, *supra* note 62, at 1162 ("Many federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest.").

73 Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 231-232 (Dec. 2007) ("[O]ver-criminalization is worse in the federal context: its costs are greater there and its amelioration less likely.").

74 Tucker Higgins, *Supreme Court Allows States and the Federal Government to Prosecute a Person For the Same Crime, Upholding a Longstanding Rule*, CNBC (Jun. 17, 2019), https://www.cnbc.com/2019/06/17/scotus-allows-states-and-federal-government-to-prosecute-a-person-for-the-same-crime.html.

75 *See* Beale, *supra* note 62, at 993-996 (finding that the seemingly never-ending expansion of federal criminal jurisdiction clashes with the "values of decentralization promoted by [ ]federalism", such as permitting local conditions to tailor policy preferences on criminal justice, which then allows for political accountability for those preferences enacted locally); Beale, supra note 65, at 763-764 (arguing that because "the bulk of the cases that fall within the terms of most federal criminal statutes will be prosecuted under state laws that cover much of the same ground," notably harsher sentencing disparities under federal law create a dual-tiered system of criminal punishment where some defendants will suffer more severe sentencing outcomes for seemingly no rhyme or reason).

76 *See*, e.g., 18 U.S.C. § 1361; 40 U.S.C. § 1315; 18 U.S.C. § 111(a)(I).

overwhelming majority of cases that this report analyzed, even that minimum level of federal interest in the alleged crimes was lacking.

For example, the federal arson statute, 18 U.S.C. § 844, has subsections which not only vest federal jurisdiction over offenses against any property which belongs to an entity which receives any federal funding but against *any* property which simply *affects* interstate commerce.[77] This report found that the broad parameters of the statute were heavily utilized against defendants who had allegedly damaged or attempted to damage local police vehicles, police precincts, or government buildings and/or property. Unfortunately, because federal courts have accepted such arguments in the past,[78] the government's argument to support a finding of federal jurisdiction in these cases on interstate commerce grounds was to simply assert that these local governmental entities affect interstate commerce. Where the government attempted to establish federal jurisdiction because the entity received some federal funding, criminal complaints would simply assert, often without any reference to government funding data, that the local government or police department received some form of federal financial assistance—as nearly all local governments and police departments do. One of the shocking practices uncovered by this report was that federal prosecutors not only cited multiple jurisdictional subsections of the arson statute on single count indictments against some defendants[79]—presumably to leverage against jurisdictional challenges—but that federal prosecutors in some cases also brought *multiple charges* against defendants for the attempted arson of a single police vehicle, simply by using the different jurisdictional bases that the arson statute affords.

> *Prosecutors are charging Lore-Elisabeth Blumenthal[80] with four counts of arson for allegedly attempting to burn two police vehicles. Prosecutors are bringing multiple counts for each attempted arson by relying on separate provisions of the federal arson statute, claiming that the police vehicles belonged to a police department which received federal funding, which implicates 18 U.S.C. § 844(f), and because the same police vehicles affected interstate commerce, which implicates 18 U.S.C. § 844(i). As a result, Blumenthal now*

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77 18 U.S.C §§ 844(f); 844(i).

78 *See, e.g., United States v. Laton*, 352 F.3d 286, 300 (6th Cir. 2003) ("When it crafted § 844(i) to encompass the arson of police stations, Congress recognized that the provision of emergency services by municipalities can affect interstate commerce in the active sense of the phrase.") (internal citations omitted); see also Belflower v. United States, 129 F.3d 1459, 1462 (11th Cir.1997) (holding that § 844(i) covered the destruction of a deputy's police car as having "a significant impact on interstate commerce" because the deputy's duties included patrolling traffic and making arrests on an interstate highway, issuing citations to out-of-state drivers, participating in interstate narcotic investigations, assisting out-of-state authorities in apprehending suspects, recovering stolen property from other states, and attending law enforcement training sessions in other states).

79 Single count indictments technically allege the defendant committed a single crime, but prosecutors can claim that the defendant's alleged conduct implicated multiple criminal statutes or subsections on that single count. Prosecutors often do this when citing multiple statutes to establish a sentencing enhancement.

80 *United States v. Blumenthal*, No. 2:20-cr-00233 (E.D. Pa. Aug 05, 2020).

faces the possibility of being convicted on four separate counts, each of which carries a minimum sentence of five and a maximum of twenty years in federal prison.

The government also frequently argues federal jurisdiction exists in cases involving arson against local businesses based on connections to interstate commerce as flimsy as the fact that a small local coffee shop buys its napkins and cups over state lines and has some online presence, albeit very limited.[81] Arguably even more absurd, in firearms cases, the government uses as a basis for jurisdiction the fact that the gun in question was manufactured in another state from where the defendant was arrested, even where there is no evidence that the defendant themselves ever crossed state lines with the weapon because the federal felon-in-possession of firearms statute does not require such a finding in order to establish jurisdiction.

Ivan Jacob Zecher[82] is facing felon-in-possession of a firearm charges for allegedly having been in possession of a makeshift Molotov cocktail made out of an empty alcohol bottle and some combustible liquid. Prosecutors are alleging that they have federal jurisdiction because Molotov cocktails fit the definition of "firearm," and because the empty liquor bottle was manufactured in a different state. Prosecutors did not bother speculating whether Zecher purchased the liquor bottle across state lines because the bottle, like any firearm, comes under federal jurisdiction as long as it ***ever*** *crossed state lines.*

A number of charges were federalized based on exceptionally vague connections to interstate commerce. A civil disorder statute used repeatedly against defendants criminalizes any act or attempted act "to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder."[83] In practice, this meant that as long as law enforcement officers declared a protest to be a "civil disorder," any act by a protester that in any way could be argued to affect the law enforcement officer's "official duties" would be prosecutable under federal law, so long as the civil disorder could be said to have affected interstate commerce. For example, one defendant in Portland is facing federal criminal charges after they allegedly interfered with officers who were attempting to arrest someone else.[84] In the affidavit in support of these charges, an FBI Special Agent claimed

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81 *United States v. Barnett*, No. 1:20-cr-00018 (W.D. Pa. filed June 9, 2020). *See* Anjali Kamat, *Go After the Troublemakers*, Reveal (Nov. 1, 2020) (explaining how federal prosecutors characterized how a local coffee shop engages in "interstate commerce" in order to allege federal jurisdiction, despite the shop owner's objections to such characterization), https://revealnews.org/article/go-after-the-troublemakers/.

82 *United States v. Zecher*, No. 3:20-cr-00078 (M.D. Fla. Jun 10, 2020).

83 8 U.S.C. § 231(a)(3).

84 *United States v. Aviles*, No. 3:20-cr-00453 (D. Or. filed Sept. 24, 2020) (Brown Aff. ¶ 6).

that federal criminal charges were warranted because this alleged conduct "took place during a civil disorder that adversely affected interstate commerce."[85]

> *Prosecutors are charging Tia Deyon Pugh[86] for civil disorder for allegedly breaking the window of a city police vehicle in Mobile, Alabama. In order to argue that federal jurisdiction exists, the government used an unusually specious basis, even among the more egregious charges here. The government argued that her actions impacted interstate commerce because the larger group of protesters Pugh was a part of was moving in the direction of an interstate highway. The group never reached the highway, because local police preemptively shut down the on-ramps providing access to the highway. The government claims its own preemptive shut down of the on-ramps caused traffic delays and therefore impacted interstate commerce.[87]*

Case Breakdown by Jurisdictional Basis

BASIS FOR FEDERAL JURISDICTION	QUANTITY	% OF THE 326 CASES
Federal Property (offense took place on or against federal property)	51	15.64%
Federal Officer/Official (assaulting/threatening/impersonating)	48	14.72%
Interstate Commerce – Building/Business engaged in interstate commerce	47	14.42%
Interstate Commerce – Firearm (Firearm/ammunition sold and/or transported in interstate commerce)	45	13.80%
Interstate Commerce – Civil disorder (obstructed interstate commerce)	41	12.58%
Interstate Commerce – Police vehicle (either the vehicle itself or the police department which owns the vehicle engages in or affects interstate commerce)	35	10.74%
Local Government Receives Federal Financial Assistance – Police vehicle	30	9.20%
Molotov Cocktail – not registered with National Firearms Registration and Transfer Record (NFRTR)	19	5.83%
Interstate Commerce – Internet (using an instrument of interstate commerce to incite riots, make threats, or distribute info related to explosives)	17	5.21%
Bank (insured by FDIC)	9	2.76%

85 *Id.* at ¶ 8.

86 *United States v. Pugh*, No. 1:20-cr-00073-TFM (S.D. Ala. filed Jun. 24, 2020).

87 In other cases involving local police vehicles, federal prosecutors relied on federal funding contributions to local governments/police departments to justify federal jurisdiction. As Mobile, AL, where charges are being brought against Ms. Pugh, does receive some federal funds according to 2019 budget documents, it is unclear why prosecutors here opted to rely on the highway rationale.

BASIS FOR FEDERAL JURISDICTION	QUANTITY	% OF THE 326 CASES
Unclear	7	2.15%
Interstate Commerce – Police department conducts business in interstate commerce	6	1.84%
Interstate Commerce – Unspecified	5	1.53%
Local Government Receives Federal Financial Assistance – Building	5	1.53%
Special Aircraft Jurisdiction (aiming laser pointer at any aircraft in the United States)	4	1.23%
Interstate Commerce – Interstate highway (affected movement on highway)	3	0.92%
Interstate Commerce – Molotov cocktail (bottle/gasoline was purchased or transported in interstate commerce)	2	0.61%
Local Police (murder & attempted murder of local police officer who was assisting federal officer or employee)	2	0.61%
Interstate Commerce – Body armor (sold or offered for sale in interstate commerce)	1	0.31%
Interstate Commerce – Telephone (making threats using an instrument of interstate commerce)	1	0.31%
Immigration (illegal reentry into the United States)	1	0.31%
Interstate Commerce – Vehicle (via federal carjacking statute)	1	0.31%
Firearm – not registered with National Firearms Registration and Transfer Record (NFRTR)	1	0.31%
Interstate Commerce – Traveled to incite riot	1	0.31%
Interstate Commerce – ATM (attempted arson on an ATM machine)	1	0.31%

Categories of Criminal Charges

Breaking down the charges in our dataset by type of alleged criminal act reveals the following: by far the most common category identified comprised **arson charges (32.21%),** followed closely by **civil disorder charges (15.03%), assaulting an officer charges (13.80%),** and **felon in possession of a firearm charges (9.20%).**

Unsurprisingly, the data does not support the government's claims of violence and intimidation. There are numerous cases where the federal government filed charges against people for conduct as minor as failing to obey an order from a federal agent, or for pointing a laser pointer in the direction of the police (not at a particular officer). In one Department of Justice press release characterizing the movement as hijacked by "violent agitators" based on 74 federalized criminal cases,[88] 37 cases were for assaulting an officer—a misnomer when considering the offending conduct included things like pointing lasers at law enforcement or using, as federal agents themselves described, "flimsy" plastic shields in encounters

88 U.S. Dep't of Justice, 74 People Facing Federal Charges for Crimes Committed During Portland Demonstrations (Aug. 27, 2020), https://www.justice.gov/usao-or/pr/74-people-facing-federal-charges-crimes-committed-during-portland-demonstrations.

with law enforcement;[89] 17 cases were for failing to obey a lawful order, a nonviolent (in)action; and 11 of those cases involved charges for conduct so minor, the defendants were issued citation violations. Moreover, the rhetoric of government press releases concerning protest-related crimes, particularly on charges of arson or assaulting an officer, gives a misleading impression of the severity of the actual conduct and alleged harm, based on an in-depth review of the range of activities captured under those charges.

Arson charges appear to be the most common basis for federalization for a number of reasons. Given the Department of Justice's rhetoric regarding the use of federalized charges to go after so-called "violent radicals,"[90] defendants accused of acts such as burning unoccupied police vehicles, or throwing Molotov cocktails into unoccupied spaces became opportune political targets, as federal prosecutors and Department of Justice officials were able to rely on the stigma of branding someone an "arsonist" to delegitimize protesters in keeping with the government's false narrative. While federal law enforcement may rarely if ever be able to point to the "organizers and instigators" who they claim are the targets of their actions, the government can, and does, target those accused of arson with particular relish.

Perhaps most importantly, prosecutors have broad discretion in how to charge arson, such that even benign or innocuous conduct is captured under arson. Moreover, prosecutors can elect to bring more severe charges without needing more severe facts to support them. The most commonly used arson charge, 18 U.S.C. § 844(a)(1), has a maximum penalty of ten years imprisonment. This statute outlines penalties for violating an extensive range of prohibitions on possessing and transporting explosives, incendiary devices, or other "destructive devices".[91] What counts as such a 'device' is extremely broad and includes possession of a Molotov cocktail—which can simply be a bottle of an alcoholic beverage with a rag placed inside—or other improvised fire-starters. 18 U.S.C. § 844(f)(1) provides for penalties of five to twenty years for actual or attempted damage to or destruction of any property of the federal government "or any institution or organization receiving federal financial assistance," which means the vast majority—if not all—of state and local government property.

> *At a protest in Utah, a woman named Lateesha Richards[92] was charged with arson after taking a selfie near an already-burning police car and tossing a small piece of clothing inside. Richards was*

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89 U.S. Dep't of Justice, Seven Arrested, Facing Federal Charges After Weekend Riots at Hatfield Federal Courthouse (Photo) (July 7, 2020), https://www.justice.gov/usao-or/pr/seven-arrested-facing-federal-charges-after-weekend-riots-hatfield-federal-courthouse.

90 William P. Barr, U.S. Dep't of Justice, Statement on Riots and Domestic Terrorism (May 31, 2020) https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism.

91 18 U.S.C. §§842(a)-(i), (l)-(o).

92 *United States v. Newbins et al.*, No. 2:20-cr-00182 (D. Utah filed Jun 29, 2020).

not present for or in any way involved in the act of setting the car on fire. Even so, federal prosecutors claim that the small piece of clothing Richards threw into the already burning and overturned police car "acted as kindling and increased the size of the flames." For this, she faces five to twenty years in federal prison and a $250,000 fine.

Another individual, Jahjuan Sabb,[93] from Troy, New York, was charged under 18 U.S.C. § 842(p)(2)(A) with "Teaching the making or use of an explosive," a related arson statute typically reserved for those who share bomb-making instructions, on the basis of a rambling Facebook Live broadcast. The transcription of Sabb's alleged "bomb-making instructions" reads as follows: "Right now, save all glass bottles. Throw some, throw a rag in there, glass bottle, throw a rag in there, fill it [stutters] fill half of this shit up with uhhhhh, fill half of this shit up with ummmm lighter fluid, you feel me?" The broadcast contained no further elaboration or demonstration of the instructions. Sabb is also being charged with making interstate threats on the basis of statements in this same Facebook Live broadcast encouraging protesters to converge on local police stations "without warning."

Additionally, if the government argues that the alleged conduct created a "substantial risk of injury to another person," the sentence can be increased from five to twenty years to seven to forty years under subsection (f)(2), giving federal prosecutors sweeping discretion to apply the sentencing enhancement broadly. In practice, this translated into a prosecutor using their discretion to apply the sentencing enhancement to an individual for burning an empty police vehicle.[94]

In North Carolina, Andrew Salvarani Garcia-Smith[95] is being charged under "18:844(f)(1) Malicious Destruction of Property with Fire/Explosives" with the f(2) sentencing enhancement. Federal prosecutors are applying this enhancement because Garcia-Smith lit ***himself*** *on fire while throwing a Molotov cocktail during a protest, suffering serious burns to his upper body. No one else was injured.*

Civil disorder and assaulting an officer, the second and third most common charges among the data, are both charges that are also broad enough to encompass benign or innocuous conduct. Acts underlying civil disorder charges in the cases reviewed for this report ranged from breaking a window to petty vandalism. Meanwhile, "assaulting an officer" could mean as little as aiming a laser pointer in the general direction of police.

93 *United States v. Sabb*, No. 1:20-cr-00274 (N.D.N.Y. filed Jun. 6, 2020).

94 *United States v. Dudley*, No. 3:20-mj-03019-TJB (D.N.J. filed Jun. 16, 2020).

95 *United States v. Garcia-Smith*, No. 5:20-cr-00304-M (E.D.N.C. filed Jun. 24, 2020).

The data reveals that the best predictor for these two charges was the presence and involvement of federal law enforcement officers in the policing of protests, as the vast majority of civil disorder and assaulting-an-officer charges were brought in Portland—a city that had an outsized presence of federal law enforcement officers at the behest of the Trump administration. These charges are seemingly brought against protesters as a tactic by law enforcement to clear protesters from designated federal areas in Portland, as sworn affidavits in support of criminal complaints are sparse with details—often only referencing that the defendants were in a general area to be cleared and resisted.

Felon-in-possession charges appeared to be brought as often as they were due largely, again, to the ease with which prosecutors can secure convictions. Any individual "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" is guilty of violating 18 U.S.C. § 922(g)(1) for merely possessing a firearm. Moreover, federal law defines "firearm" to include so broad a range of devices that even improvised devices like Molotov cocktails (or a rag in an alcohol container) qualify. This means prosecutors have an exceptionally easy time arguing cases under this statute, as prosecutors already have all of the evidence they need if an individual with a qualifying prior offense is arrested with a "firearm," even if they did nothing else that could support criminal charges. This also further exacerbates racial disparities in the federal criminal punishment system as Black individuals are convicted for felonies at a higher rate than other racial groups,[96] and thus disproportionately bear the brunt of these laws.[97]

> *In one case, Justin Coffman,[98] a bassist in a Tennessee punk band, posted promotional photos and videos for his band that included a scene where Coffman is standing near a city court building holding fake Molotov cocktails. The photos and videos were not taken during any protest or demonstration. These fake Molotov cocktails were essentially bottles with rags in them but no flammable liquid and were merely created as props for their band's promotional material. Even so, based on these photos, law enforcement officers obtained a state search warrant for Coffman's residence and while conducting this search found marijuana and two firearms. The federal government filed a relatively rare charge against Coffman: "Unlawful User of Drugs in Possession of Firearms." Justin is now facing up to ten years in federal prison and a $250,000 fine.[99]*

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96 Sarah K. S.. Shannon et. al. *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010*, Demography 1795-1818 (2017).

97 Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143 (2018).

98 *United States v. Coffman*, No. 1:20-cr-10048 (W.D. Tenn. filed Sept. 10, 2020).

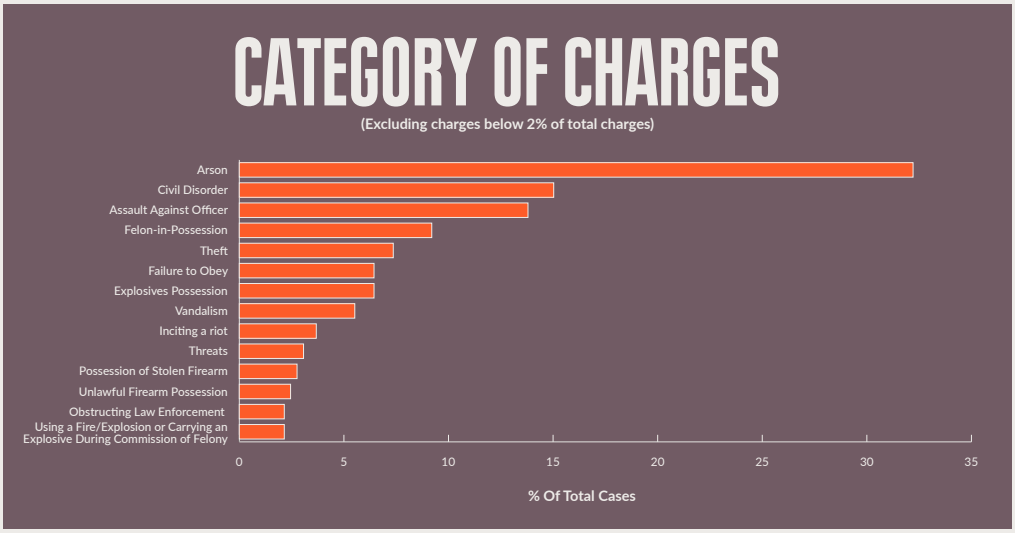
99 Ryan J. Reilly, *Feds Cite Pot Possession to Charge Anarchist Bassist Who Posed With Fake Molotov Cocktail*, Huffington Post (Oct. 16, 2020), https://www.huffingtonpost.ca/entry/anarchist-band-trump-doj-justin-coffman.

There was a total of 402 charges with identifiable categories.

FREQUENCY AND PROPORTION OF CHARGES BY CATEGORY

The data below is presented in order of decreasing frequency.

CATEGORY OF CHARGE	# OF CASES	% OF 326 CASES
Arson	105	32.21%
Civil Disorder	49	15.03%
Assault Against Officer	45	13.80%
Felon-in-Possession	30	9.20%
Theft	24	7.36%
Failure to Obey	21	6.44%
Explosives Possession	21	6.44%
Vandalism	18	5.52%
Inciting a riot	12	3.68%
Threats	10	3.07%
Possession of Stolen Firearm	9	2.76%
Unlawful Firearm Possession	8	2.45%
Obstructing Law Enforcement	7	2.15%
Using a Fire/Explosion or Carrying an Explosive During Commission of Felony	7	2.15%
Entering Bank with Intent to Commit Felony	5	1.53%
Disorderly Conduct	4	1.23%
Drug User-in-Possession	4	1.23%
Aiming Laser at Aircraft	4	1.23%
Violation of Airspace	3	0.92%
Impersonating an Officer	2	0.61%
Murder	2	0.61%
Carjacking	1	0.31%
Exposing Information of Protected Individual	1	0.31%
Extortion	1	0.31%
Felon-in-Possession of Body Armor	1	0.31%
Illegal Transport of Firearm Across State Lines	1	0.31%
Distribution of Information Relating to Explosives	1	0.31%
Creating a Hazard	1	0.31%
Destruction of a Motor Vehicle	1	0.31%
Interfering with an Agent	1	0.31%
Illegal Re-entry into United States	1	0.31%
Possession of a Hoax Device	1	0.31%
Perjury	1	0.31%



Federal Statutes Used to Support Charges

The data below presents the most common federal statutes used to support charges along with brief descriptions, followed by a list of federal statutes which were less-commonly used. This is a tally of the number of cases where a given statute has been used and does not account for multiple counts of the same statute in an individual case, or multiple subsections of the same statute being cited against the same defendant.

Data is presented below from most to least common, in the following format: [Statute (code citation): # of instances, % of total—name of statute or description]. All statutes which appeared more than twenty times are named and described.

- 18 U.S.C. § 844: 105, or **32.2%** of total—on unlawful acts relating to fire and explosives:
  This was the most common statute federal prosecutors used to charge individuals for protest-related activity. Most individuals charged with arson, with possessing Molotov cocktails, or committing any offense relating to fire/explosives are charged under subsections of this statute. Moreover, prosecutors often charged defendants with different subsections of this statute to support higher sentencing ranges.

  > *The subsection of the statute charged, taken alone, is very often not representative of the facts underlying the charge. Kevin Benjamin Weier,[100] charged in Portland, is facing five to twenty years in prison on charges of attempted arson of a federal building under 18 U.S.C. § 844(f)(1) for allegedly approaching an already-burning fire against the side of a courthouse, adjusting a single piece of wood, and walking away. Weier was not alleged to have been involved in starting the fire, nor did he know who started it.*

100 *United States v. Weier*, No. 3:20-cr-00263 (D. Or. filed Jul 23, 2020).

- 18 U.S.C. § 231: 57, or **17.48%** of total—"Civil Disorders":
  This statute addresses teaching or demonstrating the use of firearms or explosives, transporting firearms or explosives, or committing "any act to obstruct, impede, or interfere with any fireman or law enforcement officer" in furtherance of or during a civil disorder (defined broadly as "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual"). Individuals were charged under this statute for conduct ranging from allegedly smashing the window of a police vehicle to allegedly providing glass bottles to someone who later made them into Molotov cocktails.
- 18 U.S.C. § 922: 49, or **15.03%** of total—"Possession of a Firearm":
  This statute criminalizes possessing a firearm under various circumstances, including simply if the individual possessing the firearm is a felon; if the individual possessing the firearm was previously convicted of domestic violence; if the individual possessing the firearm is a "drug user."
- 18 U.S.C. § 111: 47, or **14.42%** of total—"Assaulting, resisting, or impeding certain officers or employees":
  Penalties for violations of this statute range greatly. An individual charged with violating this statute can face as low as a one year maximum for simple charges like impeding/interfering, up to eight years if 'physical contact' with the officer occurs and up to 20 years if a 'deadly or dangerous weapon' is used or if bodily injury to the officer results. Significantly, things like aiming laser pointers towards officers were considered to be "physical contact" by prosecutors.
- 18 U.S.C. § 2: 34, or **10.43%** of total—"Principals":
  This statute is commonly known as the inchoate offense of "aiding and abetting". Prosecutors will charge defendants with this statute along with an underlying criminal offense when they allege the defendant assisted another in the commission of a crime or commanded them to do so.
- 40 U.S.C. § 1315: 21, or **6.44%** of total—Offenses involving damage to public property, owned, occupied, or secured by the Federal government.
  - 41 C.F.R. § 102-74.385: 22, or **6.75%** of total—"Policy concerning conformity with official signs and directions":
    This is a 'failure to comply with a lawful order' regulation, used most often in cases where, for example, individuals failed to disperse from federal property after being told to do so. The regulation is enforceable through the statute outlined above.
- 26 U.S.C. § 5861: 21, or **6.44%** of total—A range of offenses pertaining to receiving, possessing, or transferring illegal firearms, which includes make-shift Molotov cocktails.

OTHER STATUTES

Please find other statutes listed below by frequency in descending order, with short descriptions or the title of the statute where self-evident.

- 18 U.S.C. § 371: 17—A general conspiracy statute. Conspiracy is a charge alleging a defendant conspired with others towards the commission of a crime (regardless of whether the crime in question was ever carried out). For this reason, it is always tied to another criminal statute in charging.
- 18 U.S.C. § 1361: 17—Depredation against federal property.
- 18 U.S.C. § 2101: 12—"Riots", including offenses ranging from actually committing an act of violence to merely traveling over state lines, or using interstate communications like phones or the Internet, with the intention of inciting a riot.
- 18 U.S.C. § 2113: 10—Bank robbery and incidental crimes.
- 18 U.S.C. § 2118: 7—Robberies and burglaries involving controlled substances.
- 18 U.S.C. § 875: 5—Interstate threatening communications.
- 41 C.F.R. § 102-74.390: 5—Outlining various 'disorderly conduct'-style offenses prohibited on federal property.
- 18 U.S.C. § 39A: 4—Aiming a laser pointer at an aircraft.
- 41 C.F.R. § 102-74.380: 3—Certain protections applied on federal property, including property damage and 'creating any hazard'.
- 49 U.S.C. §§ 40103: 3—Sovereignty and use of airspace.
- 49 U.S.C. §§ 46307: 3—Violation of national defense airspace.
- 18 U.S.C. § 5871: 3- Unlawful possession of a destructive device
- 18 U.S.C. § 842: 2—Unlawful acts relating to importing, manufacturing, etc. of explosives.
- 18 U.S.C. § 912: 2—False impersonation of a federal officer or employee.
- 18 U.S.C. § 1114: 2—Killing or attempting to kill any federal officer or employee.
- 18 U.S.C. § 1951: 2—Interference with commerce by threats or violence.
- 8 U.S.C. § 1326: 1—Reentry of removed aliens.
- 18 U.S.C. § 33: 1—Destruction of motor vehicles or facilities
- 18 U.S.C. § 115: 1—Influencing, impeding, or retaliating against a federal official by threatening or injuring a family member.
- 18 U.S.C. § 119: 1—Protection of 'restricted personal information' of certain federal officials.
- 18 U.S.C. § 931: 1—Prohibition of felons from owning or purchasing body armor.
- 18 U.S.C. § 1001: 1—False statements.
- 18 U.S.C. § 1369: 1—Destruction of veterans' memorials.
- 18 U.S.C. § 2119: 1—Carjacking.

Location

Data on the city and state in which defendants were arrested is provided below. In general, federalizations of protest prosecutions do not appear to correlate to population size, as one might expect, but rather to the deployment of federal law enforcement to police protests. For example, Rochester, New York, where federal law enforcement agencies worked closely with local authorities to police protests and investigate protest-related crimes,[101] accounts for more federalized prosecutions than the entirety of New York City, despite having a population of just over 200,000 compared to NYC's population of 8.4 million. Portland, Oregon, which made headlines due to the deployment of the Department of Homeland Security Border Patrol Tactical Unit, also appears far out of proportion relative to its size, with over seven times the number of defendants of its closest runner-up.[102] This again appears to be due to the uniquely extensive and protracted use of federal law enforcement agencies to police protests in Portland.[103] This strongly suggests that deployment of federal law enforcement functions as a self-fulfilling prophecy, leading to more prosecutions, and, in a circular way, legitimizing the alarmist rhetoric that led to the deployment in the first place.

BREAKDOWN BY CITY

CITY, STATE & POPULATION SIZE	# OF FEDERAL PROSECUTIONS
Portland, Oregon (pop. 654,741)	95
Chicago, Illinois (pop. 2,693,976)	15
Las Vegas, Nevada (pop. 651,319)	12
Washington D.C. (pop. 705,749)	12
Minneapolis, Minnesota (pop. 429,606)	11
Pittsburgh, Pennsylvania (pop. 300,286)	11
Rochester, New York (pop. 205,695)	11
New York City (Brooklyn/Manhattan), New York (pop. 8,336,817)	11
Philadelphia, Pennsylvania (pop. 1,584,064)	10
Seattle, Washington (pop. 753,675)	10
Louisville, Kentucky (pop.)	9
Cleveland, Ohio (pop. 381,009)	7
Madison, Wisconsin (pop. 259,680)	6

101 U.S. Dep't of Justice, Rochester Man Arrested on Arson Charges Related to May 30 Protests in Rochester (Aug. 6, 2020), https://www.justice.gov/usao-wdny/pr/rochester-man-arrested-arson-charges-related-may-30-protests-rochester.

102 Mike Baker, Thomas Fuller, and Sergio Olmos, *Federal Agents Push into Portland Streets, Stretching Limits of Their Authority*, N.Y. Times (Jul. 31, 2020), https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html.

103 Due to the opaque nature of federal law enforcement deployment, CLEAR has not been able to correlate the rates of deployment between cities or states and arrest data. In summer 2020, CLEAR co-filed a FOIA request with M4BL regarding the deployment of federal law enforcement against the movement. While the FBI's response to the FOIA is still pending, CLEAR hopes that in its response, the FBI releases records that could help illuminate these statistics.

CITY, STATE & POPULATION SIZE	# OF FEDERAL PROSECUTIONS
Salt Lake City, Utah (pop. 200,567)	6
Buffalo, New York (pop. 255,284)	5
Gainesville, Georgia (pop. 43,232)	5
St. Paul, Minnesota (pop. 308,096)	5
Vacaville, California (pop. 100,670)	5
Charleston, South Carolina (pop. 137,566)	4
Dallas, Texas (pop. 1,343,573)	4
St. Louis, Missouri (pop. 300,576)	4
Trenton, New Jersey (pop. 83,203)	4
Baton Rouge, Louisiana (pop. 220,236)	3
Apple Valley, Minnesota (pop. 55,135)	2
Columbia, South Carolina (pop. 131,674)	2
Erie, Pennsylvania (pop. 95,508)	2
Fargo, North Dakota (pop. 124,662)	2
Fayetteville, North Carolina (pop. 211,657)	2
Kenosha, Wisconsin (pop. 99,944)	2
Los Angeles, California (pop. 3,979,576)	2
Milwaukee, Wisconsin (pop. 590,157)	2
Nashville, Tennessee (pop. 5,554)	2
Oakland, California (pop. 433,031)	2
Providence, Rhode Island (pop.179,883)	2
Raleigh, North Carolina (pop. 474,069)	2
San Diego, California (pop. 1,423,851)	2
Atlantic City, New Jersey (pop. 37,743)	1
Austin, Texas (pop. 978,908)	1
Boston, Massachusetts (pop. 692,600)	1
Champaign, Illinois (pop. 88,909)	1
Columbus, Ohio (pop. 898,553)	1
Denver, Colorado (pop. 727,211)	1
Houston, Texas (pop. 2,320,268)	1
Indianapolis, Indiana (pop. 876,384)	1
Jackson, Tennessee (pop. 67,191)	1
Jacksonville, Florida (pop. 911,507)	1
Kansas City, Missouri (pop. 495,327)	1
Knoxville, Tennessee (pop. 187,603)	1
La Mesa, California (pop. 59,249)	1
La Quinta, California (pop. 41,748)	1
Lubbock, Texas (pop. 258,862)	1
Memphis, Tennessee (pop. 651,073)	1
Mobile, Alabama (pop. 188,720)	1
Naperville, Illinois (pop. 148,449)	1
Norfolk, Virginia (pop. 242,742)	1

CITY, STATE & POPULATION SIZE	# OF FEDERAL PROSECUTIONS
Orlando, Florida (pop. 287,442)	1
Page, Arizona (pop. 7,529)	1
Pasadena, California (pop. 141,029)	1
Peoria, Illinois (pop. 110,417)	1
Reno, Nevada (pop. 255,601)	1
Richmond, Virginia (pop. 230,436)	1
Tampa, Florida (pop. 399,700)	1
Troy, New York (pop. 49,154)	1
Wilmington, Delaware (pop. 70,166)	1
Worcester, Massachusetts (pop. 185,428)	1
Centralia, Illinois (pop. 12,210)	1
Savannah, Georgia (pop. 144,464)	1
Iowa City, Iowa (pop. 75,130)	1
Omaha, Nebraska (pop. 478,192)	1
North Little Rock, Arkansas (pop. 65,903)	1
Santa Monica, California (pop. 90,401)	1

BREAKDOWN BY STATE

STATE	# OF FEDERAL PROSECUTIONS
Oregon	95
New York	28
Pennsylvania	23
Illinois	19
Minnesota	18
California	15
Nevada	13
Washington D.C.	12
Washington	10
Wisconsin	10
Kentucky	9
Ohio	8
Texas	7
South Carolina	6
Utah	6
Georgia	6
Missouri	5
New Jersey	5
Tennessee	5
North Carolina	4
Florida	3

STATE	# OF FEDERAL PROSECUTIONS
Louisiana	3
Massachusetts	2
North Dakota	2
Rhode Island	2
Virginia	2
Alabama	1
Arizona	1
Colorado	1
Indiana	1
Iowa	1
Nebraska	1
Arkansas	1
Delaware	1

THE NUMBERS BY STATES WITH DEMOCRATIC VERSUS REPUBLICAN GOVERNORS

The following is a breakdown of charges between states with Democratic versus Republican governors, to answer the question of whether there was a disparity in the data, in light of the government's rhetoric described above, accusing leadership in Democratic states of failing to adequately respond to protest-related activity as an excuse to ramp up deployment of federal law enforcement.

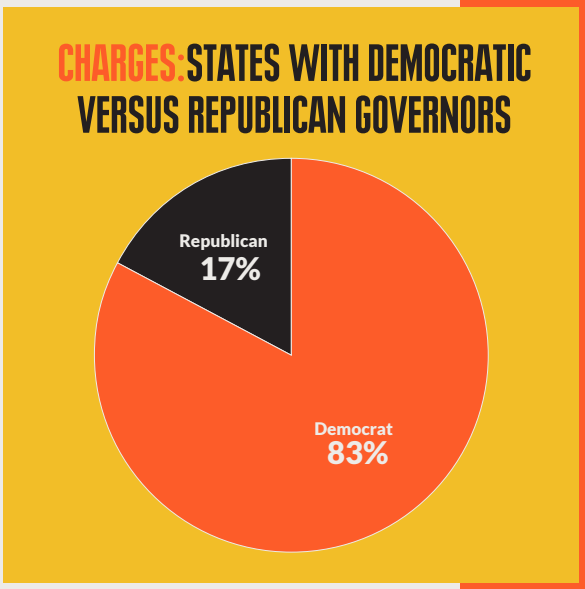
Of the 326 federal cases reviewed, 271 **(83%)** were brought in states with Democratic governors, with only 56 **(17%)** brought in states with Republican governors. Based on this data, it is clear that Democratic states are overrepresented in terms of the number of federal prosecutions occurring therein.[104] This disparity is even more stark when considering that, at the time of the uprising, the proportion of states with Republican leadership **(54%)** exceeded that of states with Democratic leadership **(46%).**

CORRELATION WITH TRUMP ADMINISTRATION'S DESIGNATION OF "ANARCHIST JURISDICTIONS"

On September 2, 2020, President Trump issued an official policy memorandum that sought to review federal funding to state and local governments that were

104 It is conceivable that states with electorates that skewed Republican featured fewer protests, resulting in fewer cases. However, there is no reliable quantitative data publicly available regarding the frequency of protests in each state.

"permitting anarchy, violence, and destruction in American cities."[105] The memo asked the Attorney General to identify these "anarchist jurisdictions," but explicitly cited four cities as examples: Seattle, Washington; Portland, Oregon; New York City, New York; and Washington, D.C. President Trump was transparent about his disdain for protesters, the Democratic leadership of these cities, and the efforts to defund or divest from police departments within these cities.



The Trump memo, and a subsequent Department of Justice press release,[106] identified Seattle Mayor Durkan's rejection of federal law enforcement involvement in responding to the "Capital Hill Autonomous Zone" (CHAZ) as one of the reasons Seattle should be deprived of federal funding. The Trump memo and Department of Justice press release also called out state and local officials in Portland for not having responded forcefully enough to racial justice protesters and for rejecting offers of federal law enforcement intervention. The memo and press release likewise identified New York City Mayor Bill de Blasio and New York Governor Andrew Cuomo for rejecting federal law enforcement assistance in responding to a spike in violent crime in New York City. In doing so, it cited misleading statistics of violent crime increases over the previous year as evidence that Mayor de Blasio and the New York City Council's plan to cut the NYPD budget was responsible for this spike in violence. The statistics, citing year-to-year increase in gun violence, ignored more probable causes such as the intervening COVID-19 pandemic.[107] Lastly, the Trump memo also pointed to Washington, D.C. Mayor Muriel Bowser not responding forcefully enough to protesters as an example of "policies that allow crime and lawlessness to multiply…requiring me to call in the National Guard to maintain law and order in the Nation's Capital."

Related to these blatantly self-serving attempts by the Trump administration to restrict funding to these cities in retaliation for rejecting federal law enforcement intervention, this report examined whether there was any correlation between federal protest arrests recorded within the identified cities and the timing of Trump's

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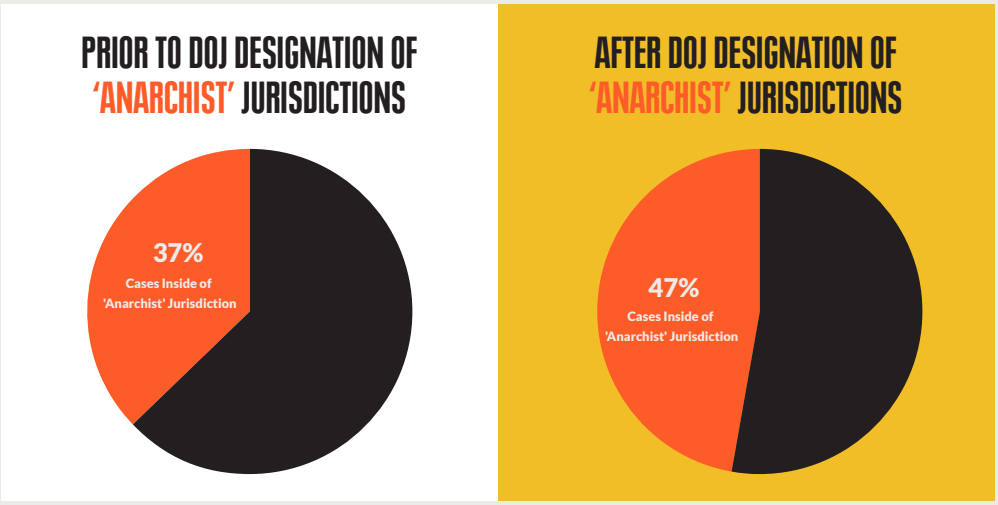
105 Presidential Memorandum on Reviewing Funding to State and Local Government Recipients that are Permitting Anarchy, Violence, and Destruction in American Cities, White House (September 2, 2020), https://web.archive.org/web/20210101150210/https://www.whitehouse.gov/presidential-actions/memorandum-reviewing-funding-state-local-government-recipients-permitting-anarchy-violence-destruction-american-cities/

106 *Department of Justice Identified New York City, Portland and Seattle as Jurisdictions Permitting Violence and Destruction of Property*, Office of Pub. Affairs, Dep't of Justice (September 21, 2020), https://www.justice.gov/opa/pr/department-justice-identifies-new-york-city-portland-and-seattle-jurisdictions-permitting.

107 Ali Watkins, *Violent Year in New York and Across United States as Pandemic Fuels Crime Spike*, N.Y. *Times* (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/nyregion/nyc-2020-crime-covid.html.

attempt to restrict federal funding therein. The data shows that federal prosecutors and law enforcement were very actively pursuing charges against protesters in these cities *prior* to the release of Trump's policy memorandum. At the time of Trump's memo, **37%** of all protest-related charges in the entire country came from the four cities cited in the memo. Although there is a limited sample size of cases to examine after Trump released his policy memo, as federal protest-related charges began to taper off towards the beginning of Fall 2020, **47%** of protest-related charges brought between September 2020 and November 2020, after Trump targeted these cities to restrict federal funding, came from those four cities.



The Coercive Tactics Federal Prosecutors Use to Secure Pleas

Due to the creation of mandatory minimum sentencing, broad criminal statutes, inchoate offenses, and permissive charging rules which allow prosecutors to overcharge defendants, federal prosecutors have uniquely coercive powers within the American criminal punishment system.[108] While federal plea bargains used to leave unfettered discretion to judges to sentence defendants, changes in criminal laws, including mandatory minimums and the creation of the United States Sentencing Guidelines, effectively shifted that power to prosecutors.[109] With this shift, one of

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108 *See* Brown, *supra* note 71, at 273 ("While more crimes add to prosecutors' charge-stacking options, it is the sentencing implications of those charges--whether they carry mandatory penalties and whether sentences on separate charges will run concurrently--that make charge-stacking and bargaining a powerful force."). *See also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63 (2012) (documenting how generally coercive plea bargaining works); *see also* Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System-and What Can Be Done About It*, 111 Nw. U. L. Rev. 1429, 1430–33 (2017) ("[P]rosecutors, rather than judges, now effectively determine the sentences to be imposed in most cases. They do this in plea bargains hammered out in the prosecutors' offices in unrecorded conversations with defense counsel--sessions in which, because of the pressure on defendants to reduce their sentencing exposure, the prosecutors effectively hold most of the cards.").

109 *See* Rakoff, *supra* note 105, at 1433 (2017) ("What can be done about this unfortunate shift of power from judges to prosecutors, that is, from neutrals to advocates? The most obvious, and best, solution would be a repeal of mandatory minimum and career offender laws [something the federal judiciary has requested for several decades] and a considerable reduction in the sentences "recommended" by sentencing guidelines.").

the greatest factors in the outcome of a federal criminal case became the charging decisions of the federal prosecutor.[110]

The effect of this unchecked coercive power has been disastrous for criminal defendants within the federal criminal punishment system: mass incarceration;[111] innocent people pleading guilty;[112] and vast sentencing disparities.[113] Federal prosecutors have become so successful at utilizing their coercive power, that the practice of pre-textual charging—or charging defendants with no intent of actually taking them to trial on those charges—is now a uniquely federal problem.[114] The data on plea bargaining rates bears this out, as roughly 15 to 20% of federal criminal offenses went to trial through most of the twentieth century until the 1970s compared to only 2.9% as recently as 2015.[115] This report analyzes the ways in which federal prosecutors exercised their discretionary, coercive power against protesters.

STACKED CHARGES (HORIZONTAL OVERCHARGING)

Out of 326 cases, there were 84 (25.8%) where defendants were overcharged with stacked offenses.

There are two different types of overcharging: "horizontal" and "vertical".[116] While horizontal overcharging entails bringing multiple unreasonable and redundant charges against a single defendant,[117] vertical overcharging involves prosecutors

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110 *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (2014) ("Furthermore, the prosecutor controls the decision to charge the defendant with a crime. Indeed, the law of every US jurisdiction leaves this to the prosecutor's unfettered discretion; and both the prosecutor and the defense lawyer know that the grand jury, which typically will hear from one side only, is highly likely to approve any charge the prosecutor recommends.").

111 Rakoff, *supra note* 105, at 1430–33.

112 *Id.* ("Another effect has been to cause innocent people to plead guilty in order to avoid the risk that, if they go to trial and are convicted on the heavy and multiple charges that prosecutors now typically include in indictments [in part to promote plea bargaining), they will face huge sentences that most judges will have little power or incentive to mitigate. For instance, of the more than 340 convicted felons who, through the work of the Innocence Project, were subsequently exonerated and freed, a full 10% had pleaded guilty to crimes that they were later proved to have never committed.")

113 *Id.* ("The sentencing discrepancies [i.e., substantially different sentences for the same crime] that the statutory sentencing guidelines were intended to reduce still occur. Even more troubling is that without oversight, no one can even begin to measure the extent of such discrepancy.")

114 Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 583 (2005) ("Pretextual charging is primarily a phenomenon of the federal criminal justice system, where law enforcers are less politically accountable than in state justice systems.")

115 Rakoff, *supra* note 105, at 1430-1433 (2017)

116 Kyle Graham, *Overcharging*, 11 Ohio St. J. Crim. L. 701, 703-705 (2014); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 85 (2012); Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G. REP. 284, 287.

117 Graham, *supra* note 113, at 703-704 (2014).

attempting to charge a defendant with a crime more severe than the facts actually support.[118] Prosecutors utilize both types of overcharging to coerce defendants to accept plea bargains.[119]

Overcharging is uniquely prevalent within the federal context.[120] While several theories have been offered,[121] one explanation for why this problem is unique in federal criminal law looks to the Federal Rules of Criminal Procedure ("FRCrP").[122] Adopted by Congress in 1946, the FRCrP deepened federal prosecutors' advantage, making it easier to bring and consolidate charges against defendants, relaxing pleading requirements, and removing a discovery phase in criminal litigation.[123] As one scholar argues, this was by design, to equip federal prosecutors with the tools to criminalize marginalized communities under race-neutral cloaks of prosecutorial discretion:

> *[T]he new criminal rules denied defendants, often litigants of color, any power to discover information. Instead, the new criminal rules emboldened the prosecutor to bring charges and control what facts to withhold from or share with the defendant. An essential feature of the criminal template's design--to insert a white gatekeeper with unreviewable discretion who could distribute benefits and burdens across racial lines--was an established Jim Crow strategy to maintain the racial order.*[124]

Horizontal overcharging or "stacked charges", for the purposes of this report is defined as instances where multiple seemingly redundant charges were being brought based on the same set of facts. For example, when an individual who stole a gun from a licensed gun store was charged with both theft from a federal firearms licensee and possession of stolen firearms, the individual was considered to be facing horizontal overcharging or "stacked charges."[125] This definition does not

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118 *Id.*

119 *Id.*

120 *See, e.g., id.* at 703 ("This study reveals the United States Attorney's offices that have produced patterns of charging and conviction over this span that raise yellow, if not red, flags regarding systemic overcharging.").

121 *See, e.g.*, William J. Stuntz, T*he Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519–21 (2001) (arguing that overcharging likely results from the expansive federal criminal code); H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking A Balance in Gang Prosecution*, 18 U. Pa. J.L. & Soc. Change 341, 364 (2015) (arguing that coercive plea-bargaining acts as a perverse incentive to overcharge defendants).

122 *See* Ion Meyn, *The Haves of Procedure*, 60 Wm. & Mary L. Rev. 1765, 1794 (2019) (discussing the divide between civil and criminal procedure and how the FRCP preserves prosecutorial advantage). *See also* Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 Ariz. L. Rev. 1, 23–25 (2021) (exploring the significance of drafting the rules of procedure within the social and political forces of Jim Crow and finding that the most influential of the criminal template's authors embraced Jim Crow norms); *see also* Maddy Gates, *Use the Rules of Criminal Procedure to Limit Prosecutors' Power*, Harv. C.R.-C.L. L. Rev. (Mar. 11, 2020) (discussing how prosecutors take advantage of current federal criminal procedure rules).

123 Gates, *supra* n. 119.

124 Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 Ariz. L. Rev. 1, 25 (Spring 2021).

125 *United States v. Kelly et al.*, No. 3:20-cr-00300-B (N.D. Tex. filed Jun. 23, 2020).

include defendants who faced multiple charges on different factual bases, such as where an individual arrested for arson was then also charged with possession of a firearm that was on their person at the time of their arrest, or individuals who faced multiple counts of the same charge stemming from multiple acts, such as where an individual who burned five cars was facing five counts of arson.

> *Among the most egregious cases of charge stacking are the well-publicized prosecutions of Colinford Mattis and Urooj Rahman,[126] who are accused of burning a single unoccupied NYPD vehicle, and who are facing up to life in prison under a laundry list of arson and explosives charges.[127]*
>
> *Another individual, Samantha Shader, is being charged under an identical set of stacked charges for a separate arson of an unoccupied NYPD vehicle on the same evening. Although the incidents were entirely unrelated, prosecutors seem to have recycled the extremely unique and lengthy list of charges between cases.*

Out of 326 cases, 72 (22.1%) involve charges with mandatory minimum sentences.

MANDATORY MINIMUMS

Along with the proliferation of federal criminal laws,[128] there was also an increase in the number of crimes carrying mandatory minimum sentences.[129] With the passage of modest criminal punishment reform—like the Fair Sentencing Act of 2010—there has been a gradual reduction in the prevalence of convictions which entail mandatory minimum sentencing, especially for drug offenses.[130] "However, mandatory minimums are still woven into the framework of the criminal justice system" and, as recent as 2016, federal drug offenders convicted of charges with mandatory minimum sentencing still received sentences three times as long as drug offenders who

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126 *United States v. Mattis et al.*, No. 1:20-cr-00203-BMC (E.D.N.Y. filed Jun. 11, 2020).

127 The laundry list of statutes that Mr. Mattis and Ms. Rahman are being charged under is as follows: 18 U.S.C. §§ 231(a)(3) (2018); 18 U.S.C. § 844(c)(1) (2018); 18 U.S.C. § 844(f)(1) (2018); 18 U.S.C. § 844(h)(1) (2018); 18 U.S.C. § 844(1) (2018); 18 U.S.C. § 844(n) (2018); 18 U.S.C. § 924(c)(I)(B)(ii) (2018); 18 U.S.C. § 924(d)(1) (2018); 18 U.S.C. § 982(a)(2) (2018); 18 U.S.C. § 982(b)(1) (2018); 18 U.S.C. § 2 (2018); 18 U.S.C. § 3551 et seq. (2018); 26 U.S.C. § 853(p) (2018); 26 U.S.C. §§ 5861(d) (2018); 26 U.S.C. § 5861(f) (2018); 26 U.S.C. § 5872(a) (2018); and 28 U.S.C. § 2461(c) (2018).

128 *See* Discussion in Part IV - Sources of Federal Jurisdiction (discussing the expansion of federal criminal laws, and relatedly, of federal jurisdiction).

129 Neily, *supra* note 113, at 286-287.

130 Melissa Johnson, *Reversing the Evils of Federal Mandatory Minimum Sentences: Is Clemency the Only Answer?*, 33 J. Civ. Rts. & Econ. Dev. 385, 397–98 (2020).

were convicted of charges that didn't carry mandatory minimums.[131]

Opposition to mandatory minimums is prevalent and unsurprising, due to the myriad ways in which federal mandatory minimums have been proven to be disastrous.[132] Federal mandatory minimums eliminate judicial control over sentencing which prevents judges from being able to look into the particular history of a defendant or the facts surrounding their crime to determine an appropriate punishment;[133] cause a prevalence of severe criminal punishments, often against non-violent offenders;[134] rapidly increase the federal prison population;[135] cause widespread disparity in charging decisions against defendants accused of the same offense;[136] and most glaringly, lead to widespread racial disparities in sentencing, resulting in Black defendants suffering far more severely than white defendants for the same crimes.[137] In particular, as discussed earlier, mandatory minimums have become a tool for federal prosecutors seeking to coerce defendants to accept a plea bargain.[138] A notable example, 18 U.S.C. § 924(c), requires a mandatory consecutive escalating sentence for using or carrying a firearm while committing various drug crimes or crimes of violence, including a mandatory 25 years for each subsequent offense for repeat violators.[139]

> *The most egregious example of federal prosecutors exploiting mandatory minimum laws to punish a protester is that of Mujera Benjamin Lungaho, who is facing a potential 30-year mandatory minimum sentence for allegedly setting an unoccupied police car on fire.[140] By arguing that Lungaho "used an incendiary device during a crime of violence," prosecutors are attempting to increase the mandatory minimum from 5 years to 30 years.*

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131 *Id.* at 397–398 (2020).

132 *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 17 (2010) ("The growing opposition to mandatory minimums goes beyond the usual suspects [e.g., judges, legal scholars, criminal defenders, and civil liberties groups] and includes conservative commentators, politicians, and the general public.").

133 *Id.* at 1.

134 *Id.*

135 Rakoff, *supra* note 105, at 1430-1433.

136 *See* Chief Judge Patti B. Saris, *Sentencing Reform*, Boston B.J., 6 (Summer 2015) ("The Commission found that certain severe mandatory minimum sentences lead to disparate charging decisions by prosecutors and to vastly different sentences for similarly situated offenders.").

137 U.S. Sentencing Comm'n, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 148 (2011), https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system. *See also* Rebecca Wasif, *Reforming Expansive Crime Control & Sentencing Legislation in an Era of Mass Incarceration: A National and Cross-National Study*, 27 U. Miami Int'l & Comp. L. Rev. 174, 186-192 (2019) (finding that while sentencing enhancements which increased the minimum sentence had a significant impact across racial groups, "African-American offenders were more significantly affected.").

138 *See, e.g.*, Robert E. Scott William, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1965 (1992) ("[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining.").

139 Wasif, *supra* note 134, at 186-192, for a discussion of the penalties under 18 U.S.C. § 924(c).

140 *United States v. Lungaho et al.*, No. 4:20-cr-00288 (E.D. Ark. filed Oct. 6, 2020).

Protesters in the 2020 racial justice uprising were charged with crimes which carried mandatory minimum sentencing at a *higher* rate than the proportion of federal offenders who were subject to mandatory minimums in 2010.[141] While much needed reforms to mandatory minimum sentencing for *non-violent* drug offenses has slowed the usage of charges which carry mandatory minimums, a lack of reform on what are perceived to be "violent" offenses such as arson, allowed federal prosecutors to once again weaponize mandatory minimums against defendants—often people of color.[142] The majority of the mandatory minimum sentences found in this report were under the arson statutes, 18 U.S.C. § 844(i), (f), and (n), which carry minimums of 5 years (or 7 years with a sentencing enhancement).

Out of 326 cases, 67 (20.6%) included inchoate offenses.

INCHOATE OFFENSES

Inchoate crimes are defined by two features: "(1) incomplete conduct toward some ultimate offense (this is what makes the crime inchoate, rather than consummate); and (2) the actor's firm commitment to the performance of the as-yet-unperformed conduct that would complete that offense."[143] This report considers crimes of "attempt," "conspiracy," and "aiding & abetting" (sometimes referred to as "accomplice") to be inchoate offenses. Examining the inchoate protest-related charges reveals that these charges appeared quite frequently within the context of arson or theft cases, where the government could often simply point to the presence of a defendant near a fire and hold them responsible as an accomplice[144] or co-conspirator,[145] or charge someone for unsuccessfully trying to loot something.[146]

The theory behind criminalizing these inchoate crimes is that they should be punished because the actor had a firm commitment to complete an offense and engaged in some conduct towards it.[147] One glaring injustice, however, is that under federal criminal law, inchoate offenses carry the same sentence as the underlying offense. In practice, that means defendants are treated as if they *actually* committed the underlying offense, even where the firmness of their commitment was questionable or where their "firm commitment" to commit a crime led to no

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141 U.S. Sentencing Comm'n, *supra* note 134, at 148.

142 *See* Discussion in Part Four - Race (discussing findings related to the protest-related arrest and prosecution of people of color).

143 Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 Ohio St. J. Crim. L. 751, 755 (2012).

144 *United States v. Matchett et al.*, No. 2:20-cr-00368 (E.D. Pa. filed Oct. 20, 2020).

145 *United States v. Lungaho et al.*, No. 4:20-cr-00288 (E.D. Ark. filed Oct. 6, 2020).

146 *United States v. Ocampo-Tellez et al.*, No. 1:20-cr-00331 (N.D. Ill. filed Jun. 30, 2020).

147 Cahill, *supra* note 140, at 755.

cognizable harm. For example, some defendants faced the same potential sentence for attempting to burn a police car—without even coming close to damaging it—as other defendants who *actually* destroyed police cars.[148]

Accomplice and aiding/abetting crimes are similarly problematic, especially within the context of mass protests, as the government simply needs to prove that a defendant "embrace[s] the crime of another and consciously do[es] something to contribute to its success."[149] Liability applies even if the accomplice did not aid in each of the underlying elements of the offense.[150] Thus, a defendant's level of participation can be relatively minimal, yet they can still be found to be just as liable as the actual perpetrator of the offense.[151]

Accomplice liability was a particularly disturbing tool utilized against protesters as it offered prosecutors the ability to collectively punish protesters. Prosecutors could simply allege an individual they sought to target shared a similar criminal purpose as someone else who was present at the same protest with them and committing some crime. They would then point to something the targeted person did which could be construed as assisting the person who actually committed a crime. In practice, this meant that an individual engaging in conduct as innocuous as taking a selfie near an already-burning police car and then throwing a single scrap of paper into that police car rendered that individual liable to the same punishment as the person who actually set the car on fire.[152]

Conspiracy crimes are another especially disturbing tool that can, and has, led to unjust prosecutions and punishments of innocent people.[153] As former U.S. Supreme Court Justice Robert Jackson warned, the crime of conspiracy "constitutes a serious threat to fairness in our administration of justice" because it is "so vague that it almost defies definition."[154] Justice Jackson later would offer an even more prescient description of criminal conspiracy as "a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary."[155]

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148 *Compare United States v. Jenkins*, No. 1:20-cr-00639 (S.D.N.Y. filed Sep. 16, 2020), and *United States v. Andrews*, No. 1:20-cr-00508 (N.D. Ohio filed Sep. 3, 2020), *with United States v. Wilson*, No. 2:20-cr-00516 (C.D. Cal. filed Oct. 9, 2020).

149 Congr. Research Serv., Accomplices, Aiding and Abetting, and the Like: An Overview of 18 U.S.C. § 2 Summary (Feb. 14, 2020), https://fas.org/sgp/crs/misc/R43769.pdf.

150 *Rosemond v. United States*, 572 U.S. 65, 72-73 (2014) ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one [or some] of a crime's phases or elements.")

151 Congr. Research Serv., *supra* note 147, at 2-4.

152 18 U.S.C. § 2(a); *United States v. Matchett et al.*, No. 2:20-cr-00368 (E.D. Pa. filed Oct. 20, 2020).

153 *See* Brent E. Newton, *The Antiquated "Slight Evidence Rule" in Federal Conspiracy Cases*, 1 J. App. Prac. & Process 49, 49–50 (1999) ("Few, if any, areas of criminal law raise the specter of convicting the innocent--or the marginally culpable--more than federal conspiracy law.").

154 *Krulewitch v. United States*, 336 U.S. 440, 446, 450 (1949) (Jackson, J. concurring).

155 *Dennis v. United States*, 341 U.S. 494, 572 (1951) (Jackson, J. concurring).

Conspiracy crimes essentially boil down to proving a simple agreement between two or more persons to commit an offense[156]—almost always based on circumstantial evidence—and, in some cases,[157] to commit some overt act in furtherance of that agreement. While circumstantial evidence can be enough to prove an individual entered into a conspiracy, the defense of withdrawal actually requires some objective proof.[158] Prosecutors utilize conspiracy laws in a pervasive manner, particularly within the federal context.[159] Conspiracy is uniquely problematic within criminal law: due to the inherent vagueness in trying to define an unlawful objective or an agreement to commit a crime;[160] the prevalence and permissive use of hearsay evidence to establish a criminal objective and/or agreement;[161] the possibility of criminalizing protected First Amendment activity;[162] the permissibility, and well-established practice, of charging and punishing defendants twice—both for the underlying offense and again for the underlying conspiracy;[163] subjecting defendants to being vicariously liable for all the criminal conduct of their co-conspirators that result from the conspiracy, even when the defendants have no knowledge or participation in their coconspirators unrelated criminal conduct;[164] and prosecutorial practices of charging conspiracy offenses against women who are in relationships with individuals who are targets of federal law enforcement.[165]

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156 Newton, *supra* note 150, at 49-50.

157 *See* Aliza Hochman Bloom, *Time and Punishment: How the ACCA Unjustly Creates A "One-Day Career Criminal"*, 57 Am. Crim. L. Rev. 1, 4 (Winter 2020) ("While this federal conspiracy statute requires an overt act, various other federal statutes proscribe conspiracy separately from the substantive counts, and the conspiracy provision attaches as a subsection to the substantive part of that statute. For example, the Controlled Substances Act, a federal statute directed at drug sale and distribution, contains its own conspiracy provision… As the Supreme Court has clarified, conspiracy codified by the Controlled Substances Act does not require a defendant commit any overt act.")

158 *Id.* at 3-6 (2020).

159 *See, e.g., id.* at 3 ("[C]onspiracy continues to be one of the most commonly charged federal crimes. Federal courts have noted the prevalence with which prosecutors choose to charge a conspiracy count, noting that 'rare is the case omitting such a charge.' Although it has been the subject of significant scholarly and judicial criticism, courts consistently uphold the use of conspiracy, which has been referred to as 'a cornerstone of criminal law.') (internal citations omitted).

160 *See* Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy As Free Expression*, 76 Alb. L. Rev. 697, 711–13 (2013) (The vagueness inherent in the crime of conspiracy has been the subject of much criticism, leading one commentator to suggest that, '[i]n the long category of crimes there is none . . . more difficult to confine within the boundaries of definitive statement than conspiracy.'")

161 *See id.* at 711–13 (2013) ("The hearsay exception for criminal conspiracy has also been criticized. While in theory the existence of a conspiracy must be established before hearsay evidence is admitted, the Supreme Court has declared that the government may use the co-conspirators' statements to help demonstrate the existence of the conspiracy as well as any particular defendant's participation in it.")

162 *See* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. Pa. J. Const. L. 865, 917 (2013) ("[I] t should be clear at this point that conspiracy law puts serious pressure on the principles of free speech."). See also Bloom, supra note 154, at 3–6 ("Others contend that permitting punishment to attach at that very 'early' moment of the agreement results in overbroad penalization with potential infringement of First Amendment speech rights.").

163 *See* Bloom, *supra* note 154, at 3–6 ("Critics argue that conspiracy is duplicative because the conduct that is the purpose of the parties' agreement should otherwise be covered by criminal codes, and thus every time it is prosecuted along with the substantive offense, it constitutes double punishment.").

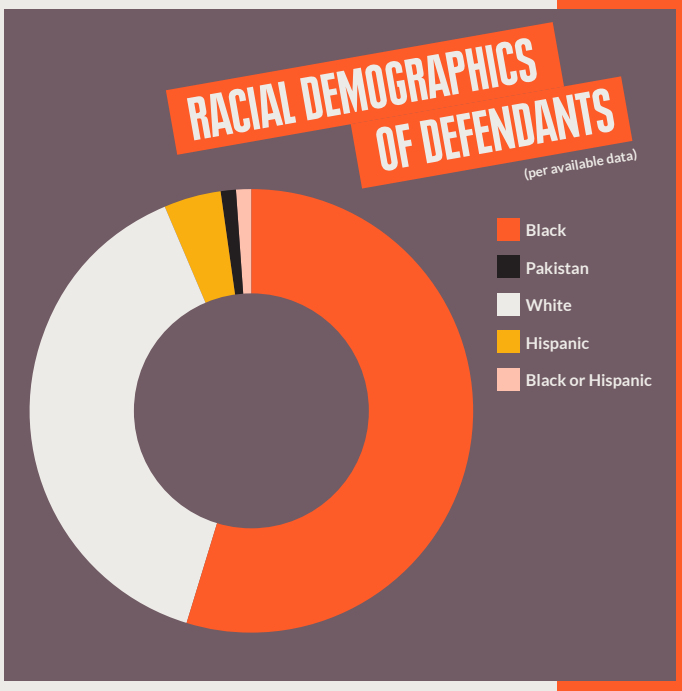
164 *See* Newton, *supra* note 150, at 49–50 ("The danger to a defendant charged with conspiracy is not only that he or she will be held criminally liable for the offense of conspiracy itself, but also that he or she will be vicariously liable for any substantive offense committed by another conspirator "in furtherance of" the conspiracy. This 'powerfully broad' doctrine of vicarious liability … extends to offenses in which a defendant did not participate or of which the defendant did not have any actual knowledge.") (internal citations omitted).

165 *See* Wasif, *supra* note 134, at 186–92 ("[U]nder federal conspiracy laws, these women can be arrested,

The most egregious example of federal prosecutors exploiting conspiracy laws to punish protesters is that of Brandon Michael Althof Long and Devon Bryce Poland, who were charged with allegedly conspiring to riot, cause a civil disorder, and use a fire or an explosive to commit a felony—a charge that carries a potential 20-year sentence.[166] Federal law enforcement initially stopped Long and Poland for being outside past curfew. After searching their vehicle, and finding a firearm, law enforcement obtained a search warrant to look through their phones. Federal prosecutors pointed to a Facebook messenger conversation between the two defendants where they allegedly discussed going to watch and possibly participate in the riots to argue they had formed a criminal conspiracy.

Race

In breaking down defendants by race, this report relied on race identifications mentioned explicitly in affidavits supporting criminal complaints or elsewhere in official charging documents.[167] In a limited number of cases, the race of a defendant was also identified from publicly available resources such as Department of Justice Press Releases, news articles, or public jail records. For the purposes of this report, race determinations were not made by examining photographs of defendants which were, in some cases, included in affidavits supporting the criminal complaints or news articles.



Race designations were clear and available for only 89 defendants amongst the data analyzed in this report. Among this group, the demographics are as follows:

The available data demonstrates that the majority of protest-related prosecutions,

prosecuted, and held liable for the entire quantity of drugs involved in activities of their boyfriends and sentenced under mandatory minimum laws despite their minimal involvement in the underlying conduct that constituted the crime.)

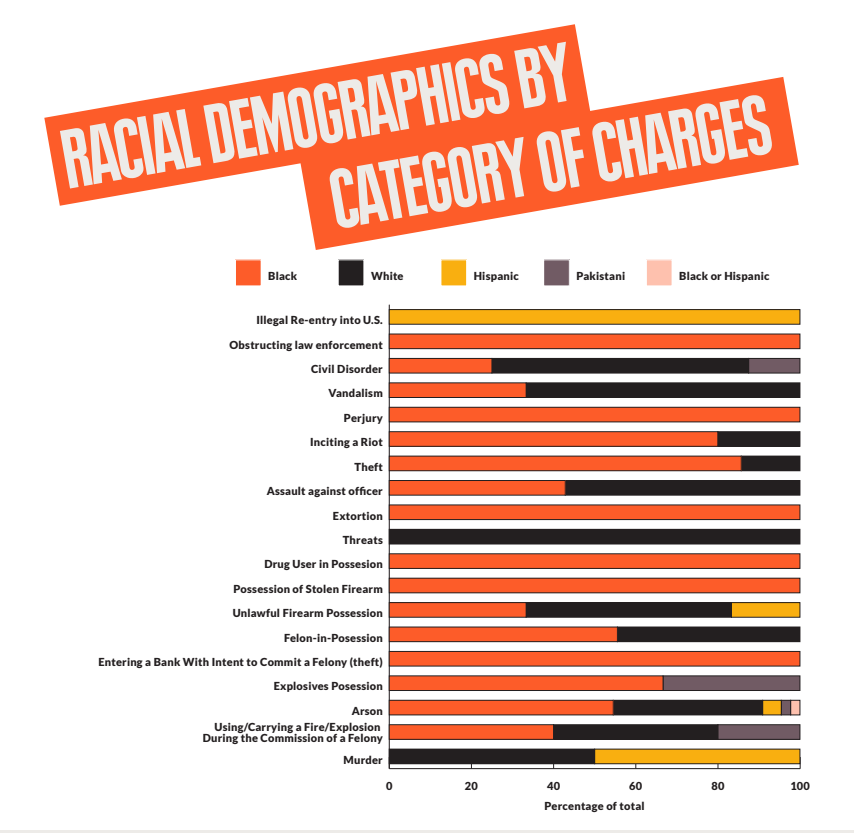
166 *United States v. Althof Long et al*, No. 1:20-cr-00290 (N.D. Ohio filed Jun 11, 2020).

167 The authors recognize that the racial definitions used by the government are often overbroad and unrepresentative. For example, many individuals hold Hispanicity as an ethnic category (rather than a racial category) not at all exclusive with whiteness or Blackness. While the data would ideally reflect such nuances, our reliance on mostly government materials lacking defendant self-identifications made it impossible to do so accurately and without guesswork.

52%, were brought against defendants identified as being Black. The data indicates that Black protesters were disproportionately subject to federal protest-related charges. Juxtaposing this data with current census data, which finds individuals who identify as Black making up 13.4% of the population in the United States,[168] shows an overrepresentation of Black protesters in federal protest-related prosecutions as compared to the Black population nationwide.

MOST COMMON CHARGES BROUGHT AGAINST BLACK DEFENDANTS

The most common charges brought against Black defendants were arson (24), theft (6), and felon-in-possession (5). While this is not wholly inconsistent with the most common charges brought against defendants broadly, this report found that Black defendants generally faced more severe charges compared to white defendants. Not only were Black defendants more likely to face arson, explosives, or firearms



charges compared to white defendants, they were also overwhelmingly more likely to face theft-related charges. The percentage of Black defendants facing theft-related charges equaled more than six times the percentage of white defendants facing similar charges. White defendants on the other hand were much more likely to face civil disorder or vandalism charges—charges which carry far less severe sentences, and no mandatory minimums.

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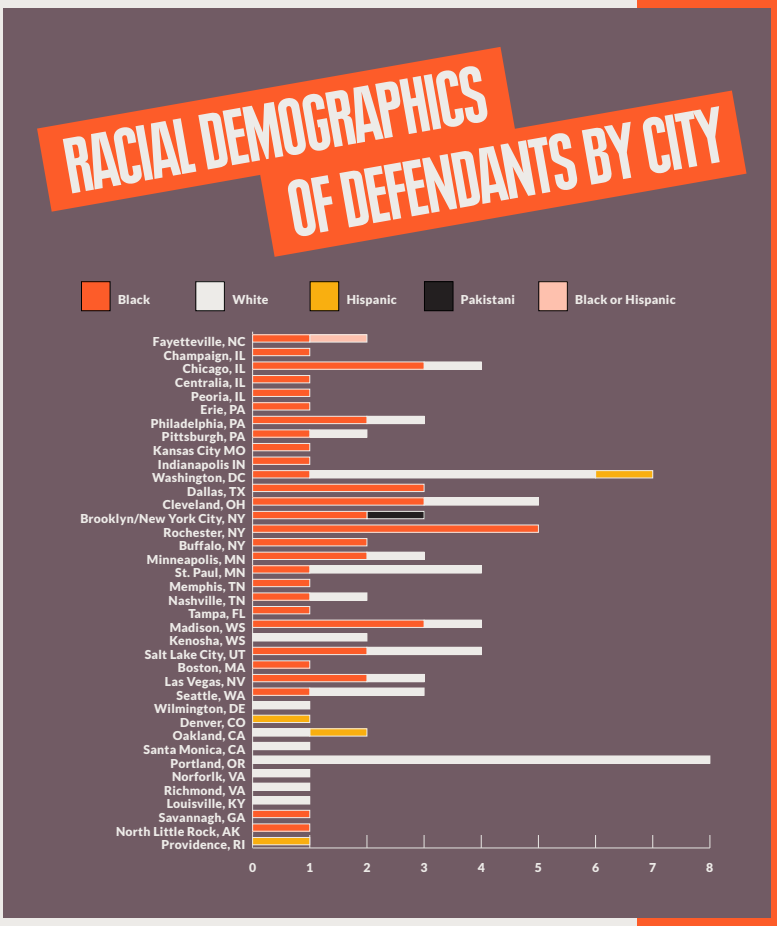
168 *QuickFacts –United States*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045219 (last accessed May 10, 2021).

RACIAL DEMOGRAPHICS OF DEFENDANTS BY CITY



Going beyond the total quantities, this report also examined whether there were trends within specific cities that might demonstrate more clearly a bias by specific United States Attorneys and regional federal law enforcement field offices in pursuing charges more aggressively against Black or non-white defendants. Outliers like Portland, where all of the 8 identified racial classifications of defendants were white, skew the data to *over represent* white defendants who faced federal protest-related charges. This is because not only are Portland's racial demographics disproportionately white,[169] white protesters in Portland were also reported as having "shielded" Black protesters from law enforcement during protests.[170] Thus, this report also explores race data by city where defendants were arrested or charged to see if any patterns emerge.

The research shows that among the 38 cities where at least one defendant's race was recorded, 24 cities had more Black and/or Hispanic defendants than white defendants, and 4 cities had the same number of Black and/or Hispanic defendants as white defendants. In total, **73.7%** of the cities had the same or greater number of Black and/or Hispanic defendants than white defendants. Removing Portland as an outlier from the total set of data, the percentage of Black defendants in protest-related federal prosecutions increases to **56.8%.**

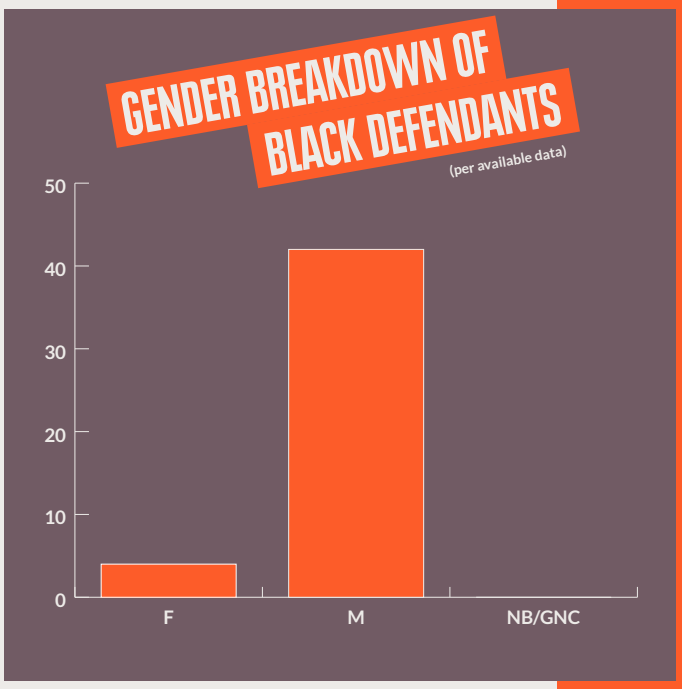
BREAKDOWN OF BLACK DEFENDANTS BY GENDER

Of the Black defendants, there was a significant difference between the number of Black defendants identified as male—42 out of 46 **(91%)**—and Black

169 *QuickFacts—Portland city, Oregon; United States*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/portlandcityoregon,US/PST045219 (indicating that while 13.4% of Americans identify as "Black Only", only 5.8% of residents of Portland identify themselves the same way) (last accessed April 14, 2021).

170 Thomas Fuller, *How One of America's Whitest Cities Became the Center of the B.L.M. Protests*, N.Y. Times (July 29, 2020), https://www.nytimes.com/2020/07/24/us/portland-oregon-protests-white-race.html.

defendants identified as female—4 out of 46 **(9%)**. This is out of proportion as compared to the gender breakdown of white defendants (**86.5%** identified as male, **13.5%** identified as female). There were no defendants identified as gender non-confirming/non-binary.



Federal-Local Partnerships: Joint Terrorism Task Forces and Operation Legend

Another data point examined was the frequency with which Joint Terrorism Task Forces (JTTFs) were involved in the charges being brought. The JTTF's involvement was of interest due to the fact that all 56 regional offices of the JTTF were deployed against the movement in May 2020, as described above.

There were **20 cases** that explicitly made mention of JTTF involvement, typically with the officer who completed the affidavit in support of arrest identifying themselves as part of the JTTF. It must be noted that the absence of data expressly indicating the JTTF's involvement does not mean that the JTTF was in fact only involved in 20 cases. Rather, JTTF may have been involved in more cases, even where reference to such involvement may be absent, and the omission of this information may have been meant to obscure such involvement. For the purposes of this report, however, cases are included only where this involvement was made explicit. This report was unable to identify any pattern to identified JTTF involvement in these cases, and whether or not affiant law enforcement officers mention JTTF involvement in their affidavits seemed arbitrary.

Next, an examination of whether and how Operation Legend, a partnership between federal and local law enforcement, was a factor in these federal prosecutions revealed no references to Operation Legend in any of the charging documents. The Operation's involvement was of interest due to the fact that the Department of Justice press releases about expanding Operation Legend indicated a real threat that the operation would be deployed against the movement, similar to the JTTFs. The absence of evidence for Operation Legend involvement in these prosecutions does not necessarily signify absence of involvement.

Affiliations

Among the 326 cases, **41** mentioned a defendant's beliefs or associations, **34** of which were in support of racial justice & the movement to defend Black lives. These typically appeared in passing comments referring to the defendants posting "#BLM" on Facebook, or their statements to officers that they were protesting police brutality and racial injustice rather than as allegations of formal affiliation with any particular movement or organization. None of the sworn affidavits identified the defendants as leaders or organizers, even though in at least one highly visible case, federal authorities charged a local organizer and leader in Philadelphia with a litany of contrived protest-related charges.

> *Anthony David Ale Smith ("Ant Smith"), one of the lead organizers of the Philadelphia Coalition for Racial and Economic Legal Justice (Philly for REAL Justice), was arrested and charged with aiding and abetting civil disorder and the arson of a police vehicle.[171] Smith was arrested after the FBI raided his home with an arrest warrant almost five months after the alleged arson and civil disorder had occurred. Smith is not alleged to have started the fire in the police car, but is nevertheless facing felony arson charges with a minimum 7 to maximum 65-year sentence for throwing a single piece of paper into an already burning police vehicle.[172] While the federal prosecutor has tried to portray these charges as being unrelated to Smith's activism and organizing,[173] the government zealously (but unsuccessfully) pursued pre-trial detention by relying on Smith's social media posts where he called on police to "quit your day job," or said "Yall: we not doing enough. We need to get armed. Outsiders destroying the community or threatening black life need to be dealt with. Police, proud boys, or politician! It don't matter!"[174]*

In certain cases where the individuals charged were there to oppose the protests, we identified them as "counterprotesters." For the purposes of this report, "counterprotesters" are defined broadly as individuals who seem to have been motivated by an opposition to the protests or who made explicitly white nationalist or white supremacist statements, and include individuals who impersonated the police in order to "help" them against protesters,[175] an individual who called

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171 Jeremy Roebuck, *Feds Arrest Prominent West Philly Activist, 2 Others in Case Tied to Torched Police Cars During Protests*, Philadelphia Inquirer (Oct. 28, 2020), https://www.inquirer.com/news/philly-protests-anthony-smith-arrested-fbi-federal-charges-20201028.html.

172 *United States v. Matchett et al.*, No. 2:20-cr-00368 (E.D. Pa. filed Oct. 20, 2020).

173 Rachel M. Cohen, *Philadelphia Teacher Faces 65 Years in Prison After Another Person Torched a Police Car During a Protest*, Appeal (Dec. 9, 2020), https://theappeal.org/philadelphia-teacher-protest/.

174 Victor Fioreillo, *Judge Sends Anthony Smith Home After Receiving More Than 70 Letters of Support for the Activist*, PhillyMag (Nov. 11, 2020), https://www.phillymag.com/news/2020/11/11/anthony-smith-philadelphia-release/.

175 U.S. Dep't of Justice, Convicted Felon Charged with Impersonating a Deputy United States Marshal (Jun. 3, 2020), https://www.justice.gov/usao-mdfl/pr/

in racist bomb threats to pro-BLM Black churches,[176] and crimes committed by self-identified Boogaloo Bois,[177] a far-right paramilitary faction that includes many white supremacists. This report identified 12 individuals as counterprotesters, with an additional four individuals who seemed likely to fit that classification but where insufficient information was available to say so conclusively. Nearly half of this group was identified as Boogaloo Bois, with the remainder being isolated individuals whose crimes appear to be animated by anti-protest sentiment. Two individuals are charged with impersonating a federal officer while attempting to "help" police against protesters.[178]

In only one case was an individual identified as a possible Antifa member, and even then the affidavit cabined that description as him "espousing beliefs consistent with 'Antifa,'" likely because of images or text posted on social media showing support for Antifa, although in no case was any formal connection evident.[179] While right-wing journalists routinely characterized some of these charges as being brought against Antifa members or individuals attending Antifa riots in Portland, no sworn affidavits or criminal complaints articulated such connections. Further, many of those ascribed as Antifa members by right-wing media were charged for acts like aiming laser pointers at law enforcement or using, as federal law enforcement officers described, "flimsy" plastic shields in encounters with law enforcement at protests—hardly the type of violent "terrorist" acts that the Trump administration suggested were taking place. Notably, no individuals accused of such a group affiliation have been identified by the government as "organizers" or directors of coordinated protest and/or criminal activity, who the Department of Justice originally stated would be the targets of federal charges.

convicted-felon-charged-impersonating-deputy-united-states-marshal-george-floyd-protest

176 *Feds: North Carolina Man Pleads Guilty to Threatening to Burn Black Church*, Associated Press (Aug. 6, 2020), https://apnews.com/article/virginia-beach-norfolk-virginia-racial-injustice-07ff3d2a8c8213cc0c0bad-2a41cb7422

177 U.S. Dep't of Justice, Federal Grand Jury Indicts Three Men for Seeking to Exploit Protests in Las Vegas (Jun. 17, 2020), https://www.justice.gov/usao-nv/pr/federal-grand-jury-indicts-three-men-seeking-exploit-protests-las-vegas-and-incite.

178 *United States v. Mobley*, No. 6:20-cr-00098-CEM-EJK (M.D. Fla. filed Jun. 22, 2020); United States v. Sanns, No. 2:20-cr-00265 (D. Nev. filed Sep. 29, 2020).

179 *United States v. Howe*, No. 6:20-mj-04198 (W.D.N.Y. filed Sep. 25, 2020).

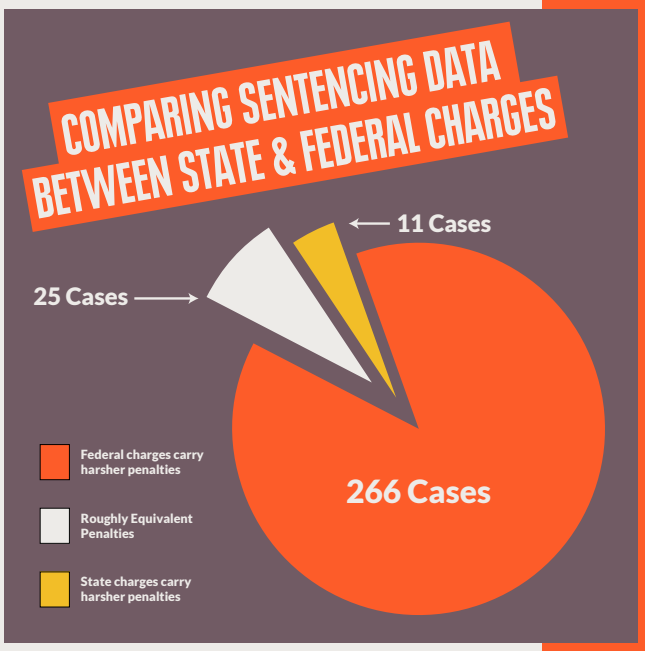
PART FIVE:

COMPARISON OF FEDERAL PENALTIES VS. STATE-LEVEL

302 of the 326 federal cases brought against protesters, or **92.6%** of the cases, could have been charged under equivalent state or local laws. In the 24 cases where it was not possible to identify any equivalent state-level charge, the alleged crimes either were only punishable under federal law, such as when the offense involved crossing state lines, or were committed in states that simply choose not to criminalize the conduct which was subject to federal criminal liability. For example, many states do not criminalize possession of firearms by felons, and some states have no firearms registration or licensure requirements whatsoever, meaning there is no equivalent under state law to violations of federal firearms laws in those states.

In 266 out of the 302 cases **(an overwhelming 88% of cases)**, federal penalties were clearly harsher[180] than those of the identified equivalent state statutes, with higher sentencing maximums and (if applicable) minimums.

In 11 out of the 302 cases, state-level statutes carried harsher penalties than equivalent federal statutes. These 11 cases are all arson charges, as state arson statutes can have broad classifications for what can count as first degree, as well as wide sentencing ranges. Georgia and Florida, for example, have unusually harsh and broad arson statutes, which make it easier to potentially classify arsons as first degree. In Utah, arson under a certain statute can carry a life sentence, whereas the federal equivalent maxes out at 20 years.



180 While this analysis cannot capture nuances such as variations in prosecutorial practices between jurisdictions or the potential for stacking charges, it is meant to demonstrate how potential sentencing outcomes are impacted by the decision to bring federal, as opposed to state, charges. Charges are defined as 'harsher' based primarily on maximum sentences. Where federal and state maximums are equivalent, the charge with the highest minimum sentence has been deemed harsher, where applicable.

In conjunction with the (1) astoundingly high conviction and plea rate in the federal criminal punishment system, (2) the typically greater distance separating federal prisons from an incarcerated person's loved ones, and (3) the unavailability of parole in federal sentences,[181] it is evident that the federalization of protest-related charges is a punitive measure meant to disrupt the work towards racial justic

PART SIX

RECOMMENDATIONS

The list below includes movement-building, advocacy, and legislative recommendations that aim to mitigate the harms of federalization and prevent its use by the government to stifle protest-related activity and disrupt the movement to defend Black lives.

- **SHARE THIS REPORT WITH YOUR PEOPLE**
- Push for the passage of the **BREATHE Act**
- Call for **amnesty for all protesters** involved in the uprising in support of the movement to defend Black lives
- Organize **against anti-protest legislation** in your state or locality
- Demand **reparations** **from the government** that includes acknowledgement of and an apology for the long history of targeting movements in support of Black life and Black liberation
- Weaken the ties between state/local and federal law enforcement by:
  - Organizing for the **abolition of the JTTF** in your locality
  - Pushing for the **redistribution of state and federal resources away from policing** and punishment and toward collective care; and
  - Demanding local authorities **pledge not to participate in federal prosecutions of protesters** by barring local employees from testifying for the prosecution.

In addition to the above, we suggest pursuing research in the future between the presence of white supremacist groups in a particular state and the frequency of charges brought in that state, which could bring to light the influence that such white supremacist groups have on policing by the government against the movement for Black liberation.

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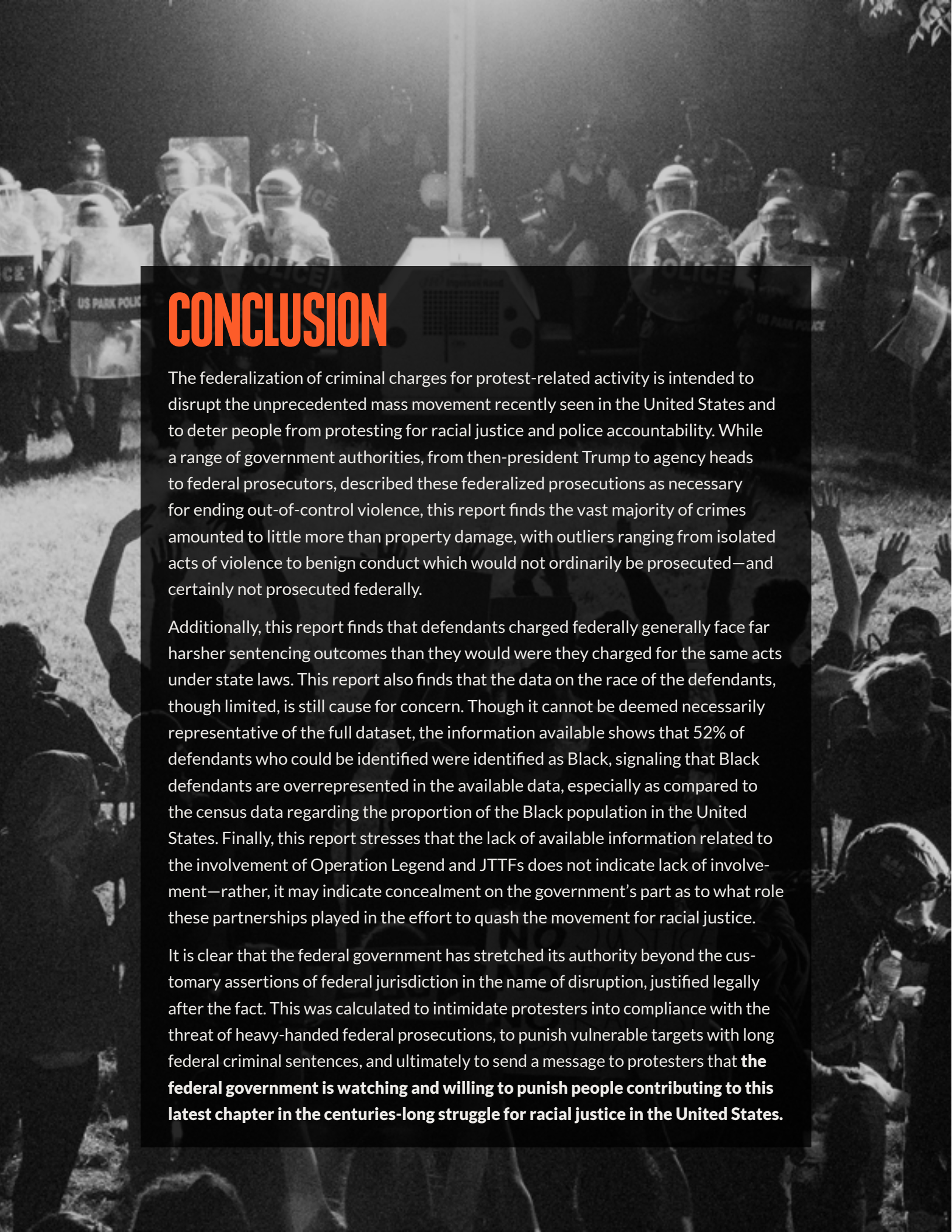
181 *See* Discussion in Part I (highlighting the higher conviction and plea rates, proximity of correctional facilities upon conviction, and unavailability of parole for federal charges).



CONCLUSION

The federalization of criminal charges for protest-related activity is intended to disrupt the unprecedented mass movement recently seen in the United States and to deter people from protesting for racial justice and police accountability. While a range of government authorities, from then-president Trump to agency heads to federal prosecutors, described these federalized prosecutions as necessary for ending out-of-control violence, this report finds the vast majority of crimes amounted to little more than property damage, with outliers ranging from isolated acts of violence to benign conduct which would not ordinarily be prosecuted—and certainly not prosecuted federally.

Additionally, this report finds that defendants charged federally generally face far harsher sentencing outcomes than they would were they charged for the same acts under state laws. This report also finds that the data on the race of the defendants, though limited, is still cause for concern. Though it cannot be deemed necessarily representative of the full dataset, the information available shows that 52% of defendants who could be identified were identified as Black, signaling that Black defendants are overrepresented in the available data, especially as compared to the census data regarding the proportion of the Black population in the United States. Finally, this report stresses that the lack of available information related to the involvement of Operation Legend and JTTFs does not indicate lack of involvement—rather, it may indicate concealment on the government's part as to what role these partnerships played in the effort to quash the movement for racial justice.

It is clear that the federal government has stretched its authority beyond the customary assertions of federal jurisdiction in the name of disruption, justified legally after the fact. This was calculated to intimidate protesters into compliance with the threat of heavy-handed federal prosecutions, to punish vulnerable targets with long federal criminal sentences, and ultimately to send a message to protesters that **the federal government is watching and willing to punish people contributing to this latest chapter in the centuries-long struggle for racial justice in the United States.**