



Program on Extremism

THE GEORGE WASHINGTON UNIVERSITY

# FILLING THE GAP IN OUR TERRORISM STATUTES

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## About the Program on Extremism

The Program on Extremism at George Washington University provides analysis on issues related to violent and non-violent extremism. The Program spearheads innovative and thoughtful academic inquiry, producing empirical work that strengthens extremism research as a distinct field of study. The Program aims to develop pragmatic policy solutions that resonate with policymakers, civic leaders, and the general public.

### About the Author

Mary McCord serves as Senior Litigator from Practice at the Institute for Constitutional Advocacy and Protection as well as Visiting Professor of Law at Georgetown University Law Center. McCord was the Acting Assistant Attorney General for National Security at the U.S. Department of Justice from 2016 to 2017 and served as Principal Deputy Assistant Attorney General for the National Security Division (NSD) from 2014 to 2016.

Joining NSD put McCord in charge of the Division's nearly 400 employees, who

collectively are tasked with carrying out the counterterrorism, counterespionage, and counterintelligence functions of the Justice Department. In her post, McCord interacted with the 94 U.S. Attorney's Offices across the country.

Previously, McCord worked for nearly twenty years at the U.S. Attorney's Office for the District of Columbia. Among other positions, she served as a Deputy Chief in the Appellate Division, overseeing and arguing hundreds of cases in the U.S. and District of Columbia Courts of Appeals.

She also served as the Criminal Division Chief, where she oversaw all criminal prosecutions in federal district court. McCord graduated from Georgetown University Law School and subsequently served as a law clerk for Judge Thomas Hogan of the U.S. District Court for the District of Columbia.

*The views expressed in this paper are solely those of the author, and not necessarily those of the Program on Extremism or the George Washington University.*

It's been just over two years since the Unite the Right rally in Charlottesville, Virginia, during which James Fields, who had attended and marched with white supremacist, neo-Nazi, and neo-Confederate organizations, rammed his car into a group of counter-protestors, killing Heather Heyer and seriously injuring dozens more. Although his crime appeared to meet the federal definition of domestic terrorism—a crime of violence intended “to intimidate or coerce a civilian population,” “to influence the policy of a government by intimidation or coercion,” or “to affect the conduct of a government by mass destruction, assassination, or kidnapping”<sup>1</sup>—Fields was not charged with a terrorism crime. Nor were the suspects in Pittsburgh, Poway, or El Paso, who committed mass shootings using assault rifles to further white supremacist and anti-immigrant ideologies. That is because there is no federal terrorism crime that applies to acts that otherwise meet the definition of domestic terrorism in the U.S. Code, but are committed with firearms or vehicles—two of the most common means used to commit terrorist attacks both in the U.S. and abroad—and are not connected to a State-Department-designated foreign terrorist organization (FTO).

Had any of these attackers pledged their allegiance to Abu Bakr al-Baghdadi, the leader of ISIS, prior to their attacks (like the shooters in San Bernardino and Orlando in 2015 and 2016), they almost certainly would be charged with multiple terrorism crimes. The difference in treatment is a result of our suite of terrorism statutes, which skews toward international terrorism and terrorism in the homeland committed using weapons of mass destruction or directed at U.S. government officials or property. It provides no penalty for the terrorist whose attack is not in furtherance of the goals of an FTO like ISIS or al Qaeda and who uses a firearm or vehicle as the weapon of choice. Nor does it provide a penalty for stockpiling firearms with intent to commit a mass shooting in furtherance of political or social ideologies that are not connected to an FTO.

To be specific, the U.S. Code defines both “international terrorism” and “domestic terrorism” exactly the same way, except that “international terrorism” occurs “primarily outside the territorial jurisdiction of the United States, or transcend[s] national boundaries,”<sup>2</sup> while “domestic terrorism” occurs “primarily within the territorial jurisdiction of the United States.”<sup>3</sup> But these definitions do not create the terrorism

offenses that appear in Chapter 113B of Title 18 of the U.S. Code, titled “Terrorism.” The crimes in that chapter prohibit: using weapons of mass destruction;<sup>4</sup> acts of terrorism transcending national boundaries;<sup>5</sup> engaging in financial transactions with countries that support international terrorism;<sup>6</sup> bombing places of public use, government facilities, public transportation systems, and infrastructure facilities;<sup>7</sup> possessing, using, or threatening to use a missile system designed to destroy aircraft;<sup>8</sup> using or attempting to use a radiological dispersal device;<sup>9</sup> acts of nuclear terrorism;<sup>10</sup> harboring or concealing terrorists;<sup>11</sup> providing material support to terrorists;<sup>12</sup> providing material support to a designated foreign terrorist organization;<sup>13</sup> financing terrorism;<sup>14</sup> and receiving military-type training from a designated foreign terrorist organization.<sup>15</sup>

In addition to the crimes included in the “Terrorism” chapter of the U.S. Code, others are defined as “federal crimes of terrorism” for certain purposes, and include things like using or attempting to use biological weapons; kidnapping or assassination of certain U.S. and foreign government officials; and attacks on U.S. government property. But *none* of these crimes apply to terrorist attacks committed based on what are commonly thought of as “domestic” political and social ideologies like white supremacy when committed with a firearm or vehicle. This double standard fails account for the moral equivalency of killing innocents based on a desire to create a white ethno-state and killing innocents in furtherance of Islamist jihad. The failure also leaves law enforcement without important tools for integrating the investigation and prosecution of “domestic” terrorism into the national counterterrorism program—a program focused on *prevention* of terrorist acts in the homeland and not merely on prosecutions after the harm already has been done.

A federal terrorism statute applicable to crimes of violence committed in the territorial jurisdiction of the U.S., when committed with one of the intents included in the definitions of both international and domestic terrorism, regardless of the ideology behind it, would fill this gap. Such a statute could be modeled after the current crime titled “acts of terrorism transcending national boundaries,” 18 U.S.C. § 2332b, which applies to specific enumerated crimes of violence in circumstances where there is both “conduct occurring outside of the United States in addition to conduct occurring in the United States.”<sup>16</sup> But the new statute would require no “conduct occurring outside of the United States.” Instead, it could apply to the same enumerated crimes as § 2332b—

killing, kidnapping, maiming, committing assault resulting in serious bodily injury or assault with a dangerous weapon, or destroying property in circumstances creating a substantial risk of serious bodily injury—when committed with the intent “to intimidate or coerce a civilian population,” “to influence the policy of a government by intimidation or coercion,” or “to affect the conduct of a government by mass destruction, assassination, or kidnapping.” Like § 2332b, the statute should apply to attempts and conspiracies as well. And, logically, it should include the same penalties as § 2332b, for there is no reason to treat terrorist attacks in the U.S. any differently depending on whether they have a connection to conduct overseas or are entirely homegrown. Its jurisdictional bases—necessary to establish that the crime affects interstate commerce and is thus within congress’s power to legislate—should include all of those found in § 2332b, but also borrow from the federal hate crimes statute. That statute provides that the jurisdictional bases may also be satisfied if the offense occurs “during the course of, or as a result of, the travel of the defendant or the victim (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce,”<sup>17</sup> or if the defendant “employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce.”<sup>18</sup>

To fully fill the gap in current law also would require an amendment to 18 U.S.C. § 2339A: “providing material support to terrorists.” (This should not be confused with 18 U.S.C. § 2339B: “providing material support or resources to designated foreign terrorist organizations.”) Section 2339A makes it illegal to “provide material support or resources or conceal[s] or disguise[s] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of” any one of a list of enumerated federal crimes of terrorism. If a new crime of terrorism within the territorial jurisdiction of the United States were added to this list, it would provide a terrorism charge for people like Christopher Paul Hasson, the Coast Guard lieutenant who stockpiled firearms, ammunition, and other equipment (thus concealing the nature, location, and ownership of resources) with intent to commit mass shootings to establish a white homeland (an act of terrorism in the territorial jurisdiction of the U.S., as it would be defined under a new statute to be included in the list of enumerated crimes). Because no terrorism crime applied to his conduct, Hasson was indicted for unlawful possession of a silencer,

possession of firearms by a drug addict, and possession of controlled substances,<sup>19</sup> none of which carries a substantial penalty, and which hampered the government in its efforts to detain him pretrial.<sup>20</sup>

A statute applicable to terrorist crimes of violence in the U.S., whether motivated by Islamist extremism, white nationalist extremism, or any other extremism, would bring moral equivalency to how we investigate and prosecute terrorism in the homeland and would express society's condemnation for terrorism regardless of the ideology behind it. This is important in and of itself. It would help educate the public that "terrorism" does not refer only to "Islamist extremist terrorism." It would provide for better record-keeping and data analysis of the terrorist threat in the U.S. because all crimes prosecuted under the statute, like all other federal terrorism crimes prosecuted in the U.S., would be coordinated and approved by the National Security Division of the Department of Justice. With better data and analysis would come greater efforts to counter the drivers of terrorist violence without singling out any particular group for those efforts. And a new statute would direct more resources toward combating what the FBI has acknowledged to be the greatest terrorist threat in the U.S.: more deaths here have been caused by "domestic" terrorists than "international" terrorists in recent years, and the majority of the FBI's domestic terrorism investigations involve white-supremacist or white-nationalist ideology.<sup>21</sup> It also would integrate the investigation and prosecution of *all* terrorism, not just "international" terrorism, more fully into the national counterterrorism program—a program designed to *prevent* terrorist attacks by aggressive use of law-enforcement tools like online undercover personas and sting operations, and more coordinated sharing of information between the U.S. government and foreign allies and between the U.S. government and state and local law enforcement.

Critics of a new terrorism offense worry that it would give law enforcement officials, and the FBI in particular, new authorities that could be misused to infiltrate organizations based on their expression of viewpoints protected by the First Amendment. But the FBI's Domestic Investigations and Operations Guide (DIOG) forbids using any otherwise authorized investigative tool (including undercover and sting operations) based solely on First-Amendment-protected activity.<sup>22</sup> Instead, the FBI must predicate the use of its tools on information that a crime is being, or may be,

committed.<sup>23</sup> That standard would apply to investigations into whether someone like Christopher Paul Hasson is or may be committing or attempting to commit a crime of terrorism within the territorial U.S. or is or may be concealing resources for use in such a crime.

Importantly, the new statute proposed here would *not* involve designating domestic organizations as terrorist organizations. Although violence and incitement to violence are not protected by the First Amendment, hateful speech and the right to assemble with others to express hateful speech, generally are protected. Most domestic organizations, including those whose members might at various times advocate violence, also engage in First-Amendment-protected activity, which would make any attempt to designate them as terrorist organizations immediately vulnerable to constitutional challenge. Because the new statute would not designate domestic terrorist organizations, it would not provide any end-run around the DIOG's proscription on using investigative tools based solely on First-Amendment-protected activity.<sup>24</sup>

Nor would a new statute unduly expose internet service providers to criminal responsibility for the misuse of their platforms to encourage or solicit terrorist violence. These providers are generally protected from civil liability for most of the content on their platforms by the Communications Decency Act,<sup>25</sup> but they are not exempt from responsibility for violations of federal criminal law. The terrorism statute proposed herein, like all of the terrorism crimes in the U.S. Code, requires specific intent. Whether it is the intent to intimidate or coerce a civilian population or influence governmental policy through intimidation or coercion, or the provision of support or resources (including services) knowing or intending that they be used in the commission of a terrorist crime, internet service providers and platforms would incur criminal responsibility only where they have the requisite intent. Deliberately putting their heads in the sand would raise the same concerns under a new statute that it does under existing law, and responsible service providers and social media platforms would be well advised to implement protocols to ferret out and quickly take down content that encourages or solicits terrorist acts.

To ensure compliance with the Constitution and to ensure that law enforcement resources are put toward the most significant threats, any new terrorism statute should

include oversight. The FBI and Department of Justice should be required to report annually on the number of “domestic” and “international” investigations opened and closed during the previous year, and the number of arrests, indictments, and convictions obtained, along with the charges associated with each. The reporting of investigations should include the category of the threat being investigated: FTO-related extremism, white racially motivated extremism, other racially motivated extremism, anti-government/anti-authority extremism, animal rights/environmental extremism, and any other category used by the FBI or pertinent to congress’s oversight role. With this reporting, as well as data gathered and submitted on incidents of terrorism in the U.S., Congress and the American people should be able to assess for themselves whether the FBI is appropriately prioritizing the most significant terrorist threats.

But congressional oversight should not be the extent of it. Implementation of a new terrorism statute should be reviewed by the Privacy and Civil Liberties Oversight Board (PCLOB), an independent, bipartisan agency within the executive branch established in August 2007 “(1) [t]o review and analyze actions the executive branch takes to protect the nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties and (2) [t]o ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the nation against terrorism.”<sup>26</sup> The PCLOB has undertaken important reviews of intelligence-collection programs in the past, and recently announced a new oversight review of the use of facial recognition and other biometric technologies in aviation security. Its public reports have contributed greatly to transparency in the U.S. counterterrorism program, of which any new terrorism statute would be a part.

With the continuing rise of extremist violence in the U.S., more discussion has been occurring about whether a new terrorism statute is needed. Although not a panacea, a statute that provides the mandate and predicate for launching additional investigations, using appropriate law enforcement tools, into white supremacist and other extremist violence, while respecting constitutional rights, is an important piece of any whole-of-government, whole-of-America, response.

## References

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<sup>1</sup> 18 U.S.C. § 2331(5).

<sup>2</sup> 18 U.S.C. § 2331(1).

<sup>3</sup> 18 U.S.C. § 2331(5).

<sup>4</sup> 18 U.S.C. § 2332a.

<sup>5</sup> 18 U.S.C. § 2332b.

<sup>6</sup> 18 U.S.C. § 2332d.

<sup>7</sup> 18 U.S.C. § 2332f.

<sup>8</sup> 18 U.S.C. § 2332g.

<sup>9</sup> 18 U.S.C. § 2332h.

<sup>10</sup> 18 U.S.C. § 2332i.

<sup>11</sup> 18 U.S.C. § 2339.

<sup>12</sup> 18 U.S.C. § 2339A.

<sup>13</sup> 18 U.S.C. § 2339B.

<sup>14</sup> 18 U.S.C. § 2339C.

<sup>15</sup> 18 U.S.C. § 2339D.

<sup>16</sup> For example, Justin Sullivan was charged with and pleaded guilty to attempting to commit an act of terrorism transcending national boundaries after he conspired with a Syria-based ISIS member online to conduct mass shootings in North Carolina and Virginia and agreed to make a video of the attacks for ISIS—thus involving conduct both outside and inside the United States. See Press Release, U.S. Dep’t of Justice, Office of Public Affairs, North Carolina Man Sentenced to Life in Prison for Attempting to Commit an Act of Terrorism Transcending National Boundaries (June 27, 2017), available at <https://www.justice.gov/opa/pr/north-carolina-man-sentenced-life-prison-attempting-commit-act-terrorism-transcending>.

<sup>17</sup> 18 U.S.C. § 249(a)(2)(B)(i).

<sup>18</sup> 18 U.S.C. § 249(a)(2)(B)(iii).

<sup>19</sup> Press Release, U.S. Dep’t of Justice, U.S. Attorney’s Office (D. Md.), Christopher Hasson Facing Federal Indictment for Illegal Possession of Silencers, Possession of Firearms by a Drug Addict and Unlawful User, and Possession of a Controlled Substance (Feb. 27, 2019), available at <https://www.justice.gov/usao-md/pr/christopher-hasson-facing-federal-indictment-illegal-possession-silencers-possession>.

<sup>20</sup> *Judge Blocks Release of Coast Guard Officer Accused of Drafting Hit List*, CBS (May 13, 2019, 6:02 PM), <https://www.cbsnews.com/news/christopher-hasson-coast-guard-accused-hit-list-remains-detained-judges-order-today-2019-05-13/>.

<sup>21</sup> *Hearing Before the H. Comm. on Oversight and Reform, Subcomm. on Civil Rights and Civil Liberties* (June 4, 2019) (testimony of Michael C. McGarrity, Ass’t Dir., Counterterrorism Div., Fed. Bureau of Investigation), available at <https://oversight.house.gov/legislation/hearings/confronting-white-supremacy-part-ii-adequacy-of-the-federal-response>; *S. Judiciary Comm.: Oversight of the Fed. Bureau of Investigation* (July 23, 2019) (testimony of Christopher Wray, Dir., Fed. Bureau of Investigation), available at <https://www.judiciary.senate.gov/meetings/07/23/2019/oversight-of-the-federal-bureau-of-investigation>.

<sup>22</sup> Federal Bureau of Investigation, Domestic Investigations and Operations Guide, § 4.2, available at: <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version%20Part%20001%20of%20002/view>.

<sup>23</sup> *Id.* § 6.5.

<sup>24</sup> I have advocated elsewhere that the State Department should consider designating *foreign* white-supremacist groups as terrorist organizations if they meet the criteria in 8 U.S.C. § 1189(a): (1) the organization must be foreign; (2) the organization must engage in terrorist activity or retain the capability and intent to engage in terrorist activity or terrorism; and (3) the terrorist activity or terrorism of the organization must threaten the security of U.S. nationals or the national security of the U.S. Several foreign neo-Nazi groups would appear to meet these criteria. Designation of these groups would make it illegal under 18 U.S.C. § 2339B for individuals and companies knowingly to provide them with material support or resources, including, money, equipment, and services. See Mary B. McCord, *White Nationalist Killers Are Terrorists. We Should Fight Them Like Terrorists.*, WASH. POST (Aug. 8, 2019), [https://www.washingtonpost.com/outlook/white-nationalist-killers-are-terrorists-we-should-fight-them-like-terrorists/2019/08/08/3f8b761a-b964-11e9-bad6-609f75bfd97f\\_story.html](https://www.washingtonpost.com/outlook/white-nationalist-killers-are-terrorists-we-should-fight-them-like-terrorists/2019/08/08/3f8b761a-b964-11e9-bad6-609f75bfd97f_story.html).

<sup>25</sup> 47 U.S.C. § 230.

<sup>26</sup> See PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, <https://www.pclob.gov/> (last visited Aug. 19, 2019).