

# Wrong Priorities on Fighting Terrorism

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## Introduction

After the al Qaeda attacks of September 11, 2001, the U.S. Department of Justice named terrorism prevention its number-one mission.<sup>1</sup> But it does not treat all terrorism with the same urgency. For many Americans, this disparity became evident when Dylann Roof assassinated Reverend Clementa Pickney and eight members of his Mother Emanuel African Methodist Episcopal Church in Charleston, South Carolina, in June 2015.

In interviews, then-FBI Director James Comey refused to call the attack an act of terrorism, aggravating long-standing complaints that the Justice Department did not view domestic terrorism involving racist, Islamophobic, anti-Semitic, homophobic, and anti-immigrant violence from the far right as a national security problem on par with terrorist acts committed by Muslims.<sup>2</sup>

These concerns grew more pronounced as Donald Trump's bigoted campaign rhetoric inspired rallies around the country in which neo-Nazis, white nationalists, proto-fascists, and far-right militias openly engaged in violence. This included beatings, stabbings, and shootings of counter-protesters and journalists, with little interference from law enforcement at the time and just a handful of belated federal prosecutions.<sup>3</sup>

Many in federal law enforcement blamed their inadequate response to rising far-right violence on a lack of

statutory authority to prosecute white supremacists and others as domestic terrorists. As a result, Justice Department officials have called for a new statute that would create a domestic terrorism offense, perhaps modeled on the international terrorism statutory regime. But this approach is misguided.

This is the first in a series of white papers exploring the federal government's problematic responses and non-responses to domestic terrorism. In this paper, we show that existing statutes have long provided substantial authority for the federal government to investigate and prosecute acts of domestic terrorism.

One of the co-authors of this paper has personal experience investigating violent white supremacists and anti-government militia members as an FBI undercover agent in the 1990s. That work demonstrates that traditional law enforcement tools provide ample authority to proactively prevent acts of domestic terrorism through criminal investigation and prosecution.

Data produced by the federal government, supplemented with research from academic institutions and advocacy organizations, shows that far-right violence, sometimes categorized as hate crimes or civil rights violations, is severely under-addressed as a matter of Justice Department policy and practice, rather than a lack of statutory authority.

Moreover, there is reason to fear that new laws expanding the Justice Department's counterterrorism powers will not make Americans safer from terrorist violence. Instead, they may further entrench existing disparities in communities the government targets with its most aggressive tactics, with serious implications for Americans' free speech, association, and equal protection rights.

This paper argues that rather than expanding counterterrorism powers that could be further abused to target

protesters and political dissidents instead of terrorists, Congress should intensify its oversight of federal counterterrorism and civil rights programs to ensure that security resources are directed toward the deadliest threats and all Americans receive equal protection under the law. Congress must require that counterterrorism resource decisions be based on objective evaluations of the physical harm different groups pose to human life, rather than on political considerations that prioritize the safety of some communities over others.

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## Arbitrary Distinctions Between Terrorism Based on Race, Ethnicity, and Ideology

Since 9/11, the Justice Department has prioritized "international terrorism" investigations, which in practice primarily target Muslims, over "domestic terrorism" investigations, which do not.<sup>4</sup> International terrorism investigations often involve aggressive monitoring and infiltration of Muslim, Arab, Middle Eastern, South Asian, and African American communities throughout the United States.

The rationale is to preemptively identify and selectively prosecute "radicalized" individuals who might express opposition to United States foreign policies or support for groups that the United States designates as foreign terrorist organizations but that have not attempted to commit violent acts.<sup>5</sup> The federal government's "domestic terrorism" efforts, on the other hand, investigate and prosecute only a small percentage of the violent acts committed by racists, white nationalists, and other far-right militants.

In fact, as discussed further below, the distinctions the government makes between international and domestic terrorism are often arbitrary, based on misunderstandings of terrorist motivations and behaviors, and have little to do with objective assessments of the physical threats the different groups pose to Americans. Yet the Justice Department devotes far more resources to cases it describes as "international" terrorism than "domestic" terrorism.

The FBI ranked counterterrorism as its number-one priority after the 9/11 attacks, and by 2004, 3,255 of its field agents worked counterterrorism, which included both international and domestic terrorism.<sup>6</sup> The FBI does not reveal how many agents it assigns to international terrorism investigations. But according to a 2010 Justice Department Inspector General audit, the number of FBI field agents assigned to domestic terrorism investigations averaged less than 330 from 2005 through 2009, which

was the last year figures were published.<sup>7</sup> Together, these numbers suggest that the FBI assigns significantly more agents to international terrorism probes than it does to domestic ones.

Further, within the field of domestic terrorism, the Justice Department has a history of minimizing far-right violence while aggressively targeting minority activists and far-left protest movements. The latter group has engaged in civil disobedience and vandalism but statistically has presented a much lower danger to human life, which is a key element of the federal definition of terrorism. In 2005, for example, the FBI declared ecoterrorists the number-one domestic threat, despite not a single fatal attack in the United States attributable to protest groups that the government deems "environmental extremists."<sup>8</sup>

A 2010 Justice Department Inspector General report criticized a number of FBI Joint Terrorism Task Force investigations of animal rights, peace, and social justice advocates for treating trespassing, nonviolent civil disobedience, and vandalism as "acts of terrorism."<sup>9</sup> Likewise, in the weeks before the deadly Charlottesville, Virginia, "Unite the Right" rally, the FBI's Domestic Terrorism Analysis Unit warned law enforcement that "Black Identity Extremists" posed a deadly threat, despite the fact that no such movement exists.<sup>10</sup> The Justice Department hesitated to bring federal charges after a series of violent far-right riots around the country, in Sacramento, Anaheim, and Seattle before Charlottesville, left counter-protesters stabbed, beaten, and shot.<sup>11</sup>

By contrast, federal prosecutors aggressively pursued more than 200 felony conspiracy cases against activists and journalists who attended a January 20, 2017, anti-Trump protest, where some in the crowd broke store windows and set a limousine on fire.<sup>12</sup> After two trials of the first dozen activists ended with acquittals and a

judge ruled prosecutors illegally withheld evidence from defense attorneys, the Justice Department dropped the remaining cases.<sup>13</sup> Treating civil disobedience and property crimes as “terrorism” diverts resources from more serious and deadly crimes, chills political activism, and undermines public confidence in apolitical and equitable law enforcement.<sup>14</sup>

### 1. Statutory Terrorism Definitions Are Being Ignored

Both international and domestic terrorism are defined in federal law. Statute 18 U.S.C § 2331(5) defines domestic terrorism as activities that “involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, appear to be 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, and occur primarily within the territorial jurisdiction of the United States.”<sup>15</sup> Despite Comey’s reticence to describe Roof’s racist attack as an act of domestic terrorism, it clearly fits within this definition — a criminal act dangerous to human life intended to intimidate a civilian population.

International terrorism, defined at 18 U.S.C. § 2331(1), uses the same descriptive language but states that the acts must occur outside the territorial jurisdiction of the United States or “transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”<sup>16</sup> Neither definition assigns criminal penalties, so while some Justice Department officials lament there isn’t a crime of “domestic terrorism,” the same is true for “international terrorism.”<sup>17</sup>

Another statute, 18 U.S.C. § 2332b, establishes criminal penalties for “acts of terrorism transcending national boundaries,” but it references neither definition under § 2331 and instead creates its own. It prohibits violent acts in the United States that create a substantial risk of serious bodily injury in circumstances that may obstruct interstate or foreign commerce and are calculated to affect the U.S. government.<sup>18</sup> Though it is used primarily to target “international” terrorism, it is also applicable to what the Justice Department regards as “domestic” terrorism, so long as some part of the crime occurs outside the United States.<sup>19</sup>

In practice, however, the Justice Department ignores these statutory definitions and distinguishes cases as domestic or international primarily based on the perpetrators’ perceived ideologies, rather than where their attack occurred

or whether they crossed United States or international borders to commit it.

The FBI characterizes domestic terrorism as violent acts perpetrated “by individuals and/or groups inspired by or associated with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature.”<sup>20</sup> More simply, it has suggested domestic terrorism is “Americans attacking Americans based on U.S.-based extremist ideologies.”<sup>21</sup> In contrast, it defines international terrorism as acts perpetrated by those affiliated “with designated foreign terrorist organizations or nations (state-sponsored).”<sup>22</sup>

The Justice Department similarly identified domestic terrorist threats as those emanating from particular ideological viewpoints, such as “animal rights extremists, ecoterrorists, anarchists, antigovernment extremists such as ‘sovereign citizens’ and unauthorized militias, black separatists, white supremacists, and antiabortion extremists,” without regard to the nationality of the attacker or the location of the attack.<sup>23</sup>

These informal definitions are misleading, however, as ideologies and ideological movements are not cabined by national borders.<sup>24</sup> American white supremacists, for example, are influenced by British Israelism (a racist interpretation of Christianity justifying British colonization of nonwhite nations), National Socialism (a German political philosophy), and Odinism (an ancient Norse religion), among other ideologies that clearly did not originate in

## Hate crimes...are severely under-addressed by federal law enforcement

and are not exclusive to the United States. White supremacist, anti-Semitic, fascist, and ethno-nationalist groups in the U.S. regularly associate with like-minded groups in Canada, Europe, Russia, and elsewhere. The British white nationalist who murdered Jo Cox, a member of the U.K. Parliament, was reportedly a supporter of an American neo-Nazi group.<sup>25</sup> Some violent white supremacist groups such as Volksfront, Blood and Honor, and Hammerskins maintained international chapters or factions. British, American, European, and Australian nationalists have joined Nazi-affiliated fighting groups in the Ukraine, such as Right Sector and Azov Battalion.<sup>26</sup>

Though many of these foreign groups are violent and treated as terrorists in their own countries, the United States designates few of them as foreign terrorist organizations, so American support for or association with

these groups is not treated as “international terrorism.” Interestingly, the Trump administration’s National Strategy for Counterterrorism, unveiled on October 4, 2018, acknowledges that some of these nationalist and neo-Nazi organizations threaten American lives, naming the Nordic Resistance Movement and Britain’s banned National Action Group as two examples.<sup>27</sup> However neither appear on the U.S. State Department’s list of foreign terrorist organizations.<sup>28</sup>

Conversely, the Justice Department characterizes American Muslims plotting violence in the U.S. with no assistance from foreign groups as “international” terrorists, arguing they are “inspired by” foreign terrorist organizations. Often this is based on scant evidence, like visiting a website or watching a video. For instance, former FBI Director Comey did not hesitate to label a July 2015 mass shooting that killed three U.S. Marines and a Navy sailor in Chattanooga, Tennessee, a terrorist attack “motivated by foreign terrorist organization propaganda.”<sup>29</sup> He acknowledged, however, that the FBI could not determine which terrorist group’s messaging might have influenced the shooter, Muhammad Abdulazez, who was killed at the scene and left behind no explanation for his actions.<sup>30</sup> Like Roof, Abdulazez was an American citizen who acted alone, entirely inside the U.S., with no support from any foreign terrorist groups. The crucial difference was that Abdulazez was Muslim and Roof was not.

The federal government characterizes American Muslims acting in the U.S. with no direct connection to foreign terrorist groups not as “domestic” terrorists but as “homegrown violent extremists” (HVEs). This nomenclature has no connection to any statutory definition but is treated in practice as a form of “international” terrorism due to their purported “inspiration” from designated foreign terrorist groups. In written testimony provided for the Senate Homeland Security Committee on October 10, 2018, FBI Director Christopher Wray reiterated the FBI’s assessment that “HVEs are the greatest threat to the Homeland.”<sup>31</sup>

The categorization of American Muslims as “international” terrorists has negative consequences. It reinforces Islamophobic notions that Muslims are alien to the U.S. and pose a greater terrorist threat to Americans. It also provides the government with an array of national security tools that allow for broader, more secretive, and less accountable investigations than those available in domestic terrorism cases.<sup>32</sup> Linking a person to an international group, even if only in “inspiration,” allows the government to use electronic surveillance tools designed to capture foreign spies. These include the Foreign Intelligence Surveillance Act wiretaps and National Security Letters to

obtain subscriber information from telecommunications companies, credit reporting agencies, and financial institutions. The government’s use of these tools receives less independent scrutiny than traditional criminal warrants and grand jury subpoenas, which are approved by judges and often made part of the public record.<sup>33</sup>

Federal law gives the government nearly unfettered authority to designate foreign groups, nations, and individuals as “specially designated global terrorists” and “foreign terrorist organizations.”<sup>34</sup> The government needs only a reasonable suspicion that the entity is involved in terrorism to justify a designation, a very low legal standard that can be based on secret evidence the designated entity is unable to see or rebut. The material support statute, further described below, imposes severe criminal penalties on anyone who knowingly provides material support to a designated foreign terrorist organization, regardless of whether such support was intended to assist in the group’s violent or criminal activities.<sup>35</sup> This overbroad statute has led to perverse results.

The Justice Department charged and convicted five leaders of the Holy Land Foundation, formerly the largest Muslim charity in the United States, under this material support statute, among other offenses. The foundation provided charitable contributions to organizations in the occupied Palestinian territories that were not designated as foreign terrorist organizations, but federal prosecutors later claimed these groups were controlled by the terrorist group Hamas, which was designated as one.

The prosecutors did not allege that the foundation financed Hamas directly or that its charitable donations were diverted to Hamas or that it otherwise supported acts of violence in the Palestinian territories. Prosecutors acknowledged the aid went to its intended charitable ends. Instead, the government argued that the foundation’s charitable efforts in the occupied territories helped Hamas win the “hearts and minds” of the Palestinian people and freed it to use its resources for criminal purposes. It did not matter that the U.S. Agency for International Development had funded these same charitable organizations.<sup>36</sup> The five defendants were convicted and sentenced to a total of 180 years in prison, sending a deep chill throughout the charitable sector.<sup>37</sup>

The material support statute also incentivizes the use of sting operations that manufacture charges where no ties to real terrorist groups exist and no acts of violence are contemplated. For instance, the FBI conducted a five-year sting operation targeting Nicholas Young, a Muslim American police officer in Washington, D.C., using several different informants to befriend him. One cemented

a relationship with Young over a two-year period then pretended to join ISIS in Syria. The informant reached out to Young pleading for money, and in July 2016 Young sent him a \$245 gift card. Young was charged and convicted for attempting to provide material support to ISIS, and despite the de minimis amount of money involved, Young was given a 15-year sentence.<sup>38</sup>

The majority of the international terrorism cases the Justice Department characterizes as ISIS-related involve material support charges, and 61 percent use undercover agents or informants, including every case in which the FBI claimed to have interdicted alleged terrorist plots.<sup>39</sup> Clearly, not all of these cases involve abuses of the material support statute to punish charitable donations in conflict zones like in the Holy Land Foundation prosecution or manufactured crimes as in the Young case, but given such problematic examples, all deserve heightened scrutiny.<sup>40</sup> Troublingly, this overbroad authority that the FBI has abused in the international terrorism context appears to be what the Justice Department hopes to mirror with a new domestic terrorism statute.

## 2. The Justice Department Calls for Expanded Statutory Authority for Domestic Terrorism

After Roof's attack on the Mother Emanuel Church, the Obama administration began working on a legislative proposal for Congress that would create a federal crime of domestic terrorism, an effort that has continued in the Trump administration.<sup>41</sup> In October 2015, John Carlin, then-assistant attorney general for national security, cited

a lack of "tools or structures" available for prevention and accountability in domestic terrorism cases as compared to international terrorism.<sup>42</sup> Thomas Brzozowski, the counsel for domestic terrorism at the Justice Department, claimed that the lack of a federal statute "sows confusion" and that a crime of domestic terrorism would help create a "common vocabulary."<sup>43</sup>

Mary McCord, the former head of the National Security Division at the Justice Department, claimed that a federal crime of domestic terrorism would equate it with international terrorism.<sup>44</sup> FBI Director Christopher Wray acknowledged that internal discussions about a domestic terrorism statute continue under the Trump administration, saying the FBI "can always use more tools in the toolbox" in the "domestic terrorism space."<sup>45</sup> In April 2018, Thomas O'Connor, the head of the FBI Agents Association, urged Congress to "fix the problem by amending the U.S. Code to make domestic terrorism a crime."<sup>46</sup>

These pleas for a new domestic terrorism statute are misplaced. The Justice Department has robust authority to prosecute domestic terrorism committed by far-right groups and others. It simply chooses not to prioritize these cases as a matter of policy and practice. Providing the Justice Department and FBI additional authority through a new domestic terrorism statute would not likely remedy this lack of attention. It would only provide more avenues to target the protest movements and political dissidents they have deemed as the most serious threats, despite the lack of fatal attacks.

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# A Robust Statutory Framework for Prosecuting Domestic Terrorism Already Exists

Historically, "terrorism" was a rhetorical term rather than a legal one. Rather than trying to craft a statute prohibiting "terrorism," which has long been a contentious and politically freighted term, Congress passed laws prohibiting the offenses terrorists often committed, such as bombings, air piracy, kidnappings, assaults on government officials, and the possession or use of certain weapons, among others.

In the 1980s and early 1990s, members of Congress began introducing bills in both chambers that sought to criminalize material support for terrorism.<sup>47</sup> These bills faced significant bipartisan resistance based on their potential to infringe on Americans' First Amendment rights. Democratic senator Howard Metzenbaum called the bills "a throwback to the McCarthy era."<sup>48</sup> Republi-

can senator Jeremiah Denton concluded that the proposal was "too loosely written" and "seemed to include even speech."<sup>49</sup> Given such criticisms, these early bills failed.<sup>50</sup> But in 1994, the first material support for terrorism prohibition, codified at 18 U.S.C. § 2339A, became law.<sup>51</sup>

Statute 18 U.S.C. § 2339A criminalizes material support that facilitates the commission of any one of 57 previously enacted terrorism-related offenses, which are explicitly listed in the statute.<sup>52</sup> Statute 18 U.S.C. § 2332b(g)(2) defines these 57 predicate offenses as "federal crime(s) of terrorism."<sup>53</sup> A review of these 57 federal crimes of terrorism reveals that 51 of them, or 89 percent, are applicable to both international and domestic terrorism. Each of these 51 offenses can be independently used to prosecute cases of domestic terrorism, providing numerous options

**FIGURE 1: Predicate Offenses Listed in 18 U.S.C. § 2339A that Can Apply in Cases of Domestic Terrorism**

No.	Predicate Offense Listed in 18 U.S.C. § 2339A, as Codified in the U.S. Code	Summary of Offense
1	18 U.S.C. § 32	Destruction of aircraft or aircraft facilities
2	18 U.S.C. § 37	Violence at international airports
3	18 U.S.C. § 81	Arson within special maritime and territorial jurisdiction
4	18 U.S.C. § 175	Prohibitions with respect to biological weapons
5	18 U.S.C. § 175b	Possession of a biological agent or toxin by restricted persons, including those with criminal background or mental incompetency
6	18 U.S.C. § 175c	Knowing production or transfer of the variola virus
7	18 U.S.C. § 229	Prohibitions on the development, acquiring, or transfer of any chemical weapon
8	18 U.S.C. § 351	Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault
9	18 U.S.C. § 831	Prohibited transactions involving nuclear materials
10	18 U.S.C. § 832	Participation in nuclear and weapons of mass destruction threats to the U.S.
11	18 U.S.C. § 842(m)	Import or export any plastic explosive without a detection agent
12	18 U.S.C. § 842(n)	Ship, transport, receive, possess any plastic explosive without a detection agent
13	18 U.S.C. § 844(f)	Maliciously damage, destroy by means of fire or explosive any building or other real or personal property of the U.S.
14	18 U.S.C. § 844(i)	Maliciously damage, destroy by means of fire or explosive any building or other real or personal property used in interstate or foreign commerce
15	18 U.S.C. § 930(c)	Killing any person with a firearm or other dangerous weapon in federal facilities
16	18 U.S.C. § 1030(a)(1)	Knowingly access a computer and obtain restricted information with reason to believe that it could be used to injure the U.S. or advantage a foreign nation
17	18 U.S.C. § 1030(a)(5)(A) with damage as listed in 1030(c)(4)(A)(i)(II)–(VI)	Knowingly transmit program or code that intentionally causes damage to a protected computer, where damage either causes physical injury, modification or impairment of medical treatment, threat to public health or safety or damage affects computer used in furtherance of justice, national defense, or national security
18	18 U.S.C. § 1091	Genocide, whether in time of peace or war with specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group
19	18 U.S.C. § 1114	Killing or attempting to kill any officer or employee of the U.S.
20	18 U.S.C. § 1116	Murder or manslaughter of foreign officials, official guests, or internationally protected persons
21	18 U.S.C. § 1203	Hostage taking
22	18 U.S.C. § 1361	Willful injury or depredation against any property of the U.S.
23	18 U.S.C. § 1362	Willful or malicious destruction of any of the works, property, or material of any communication line, station, or system
24	18 U.S.C. § 1363	Willful and malicious destruction or injury of property within special maritime or territorial jurisdiction of U.S.



**FIGURE 1:**(CONTINUED)

25	18 U.S.C. § 1366	Destruction of an energy facility
26	18 U.S.C. § 1751	Presidential and Presidential staff assassination, kidnapping, and assault
27	18 U.S.C. § 1992	Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air
28	18 U.S.C. § 2155	Destruction of national-defense materials, premises, or utilities
29	18 U.S.C. § 2156	Production of defective national-defense material, premises, or utilities
30	18 U.S.C. § 2280	Violence against maritime navigation
31	18 U.S.C. § 2280a	Violence against maritime navigation and maritime transport involving weapons of mass destruction
32	18 U.S.C. § 2281	Violence against maritime fixed platforms
33	18 U.S.C. § 2281a	Use of explosive or radioactive material or noxious substance against or on fixed platform when purpose is to intimidate a population or compel government or organization to do or abstain from an act
34	18 U.S.C. § 2332a	Use of weapons of mass destruction within the U.S.
35	18 U.S.C. § 2332b	Acts of terrorism transcending national boundaries
36	18 U.S.C. § 2332f	Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities
37	18 U.S.C. § 2332g	Missile systems designed to destroy aircraft
38	18 U.S.C. § 2332h	Radiological dispersal devices
39	18 U.S.C. § 2332i	Acts of nuclear terrorism
40	18 U.S.C. § 2339	Harboring or concealing terrorists, with respect to certain statutes
41	18 U.S.C. § 2339C	Unlawfully or willingly provide or collect funds with intention that they be used to carry out an act intended to cause death or substantial bodily injury to a civilian, when purpose is to intimidate a population or compel a government or international organization to do or abstain from an act
42	42 U.S.C. § 2122	Prohibitions governing atomic weapons
43	42 U.S.C. § 2283	Protection of nuclear inspectors
44	42 U.S.C. § 2284	Sabotage of nuclear facilities or fuel
45	49 U.S.C § 46502	Aircraft piracy
46	49 U.S.C § 46504	Assault of a flight crew member or attendant with a dangerous weapon
47	49 U.S.C § 46505(b)(3)	Placing or attempting to place an explosive or incendiary device on an aircraft
48	49 U.S.C § 46505(c)	Using dangerous weapon during flight, placing or attempting to place dangerous weapon, loaded firearm, or explosive or incendiary device during flight, with willful or reckless disregard for safety of human life
49	49 U.S.C § 46506	Application of certain criminal laws to acts on aircraft if homicide or attempted homicide is involved
50	49 U.S.C § 60123	Knowing and willful violation of a) marking requirements of pipeline facilities in the vicinity of demolition, excavation, tunneling, or construction, b) safety standards, inspection, or maintenance requirements, allowing access to records, conduct risk analysis and integrity management, c) unauthorized disposal within right-of-way of pipeline
51	49 U.S.C. § 60123(b)	Knowing and willful damaging or destroying of interstate gas pipeline facility

for prosecutors to address these threats. Section 2339A additionally criminalizes anyone who “provides material support or resources,” “conceals or disguises the nature, location, source, or ownership of material support or resources,” or prepares for, attempts, or conspires to provide such support, when the individual knows or intends such support “be used in preparation for, or in carrying out” one of the 57 predicate offenses.<sup>54</sup>

Congress passed a second material support prohibition, 18 U.S.C. § 2339B, in 1996, and this has proved the more controversial statute.<sup>55</sup> Where § 2339A criminalizes material support for terrorism crimes, both international and domestic, § 2339B criminalizes material support to certain designated foreign terrorist organizations. The criminal intent, or *mens rea*, requirements also differ. § 2339A only criminalizes support that the defendant knows will be used to further a terrorism-related criminal offense. In contrast, § 2339B prohibits providing any support, expert advice, or resources to a group or individual the defendant knows has been designated a foreign terrorist organization, even if such support did not, and was not intended to, assist the group’s criminal activities, as in the Holy Land Foundation case discussed above. Recognizing that the First Amendment’s free speech and association rights prevent Congress from prohibiting Americans from joining or advocating on behalf of domestic groups, § 2339B only bans material support to foreign terrorist organizations.

The limited application of § 2339B to international terrorism cases has apparently led to a misperception that § 2339A also does not apply to domestic terrorism cases.<sup>56</sup> It is therefore worth reviewing the 51 predicate offenses listed in § 2339A that cover domestic activities, which can be found in Figure 1. (Fig. 1 does not include 6 other statutes listed in 18 U.S.C. § 2339A that apply only to international terrorism.)<sup>57</sup>

Many cases prosecuted under these 51 statutes meet the definition of domestic terrorism as codified in federal law. Kevin Harpham, who in 2011 planted a bomb along the route of a Martin Luther King, Jr., memorial march, pled guilty to a violation of 18 U.S.C. § 2332(a)(2), one of the offenses listed in § 2339A, and defined as a “federal crime of terrorism” in § 2332b(g)(5).<sup>58</sup> Likewise, Taylor Michael Wilson, a white supremacist who breached the secure area of an Amtrak train while armed with a gun and ammunition, was charged with violating 18 U.S.C. § 1922, another offense listed in these statutes.<sup>59</sup> While not every act prosecuted under these statutes rises to the level of seriousness deserving the terrorism label, these examples certainly did, and Justice Department officials did not hesitate to rhetorically describe these crimes as acts of terrorism in public statements and in the

courtroom.<sup>60</sup> The 51 predicate offenses listed in § 2339A provide substantial authority to prosecute and punish domestic terrorists.

Indeed, the Justice Department has used one of the predicate offenses, the 18 U.S.C. § 2332b prohibition against “transnational” terrorism, to prosecute a case against a U.S. citizen whose animus against the U.S. government was personal rather than political. Edward Nesgoda, a former New Jersey police officer, stockpiled firearms and explosives and threatened to blow up a county courthouse in a child support dispute. The federal indictment alleged this act “would have obstructed, delayed or affected interstate or foreign commerce had the offense been consummated.” Nesgoda pled guilty to possession of an unregistered explosive device.<sup>61</sup> During a state prosecution for assaulting two police officers during the search of his residence, New Jersey State Police reportedly referred to him as a “domestic terrorist.”<sup>62</sup>

It is worth noting that 13 of the 51 offenses outlined in Figure 1 involve chemical, biological, radiological, or nuclear weapons.<sup>63</sup> While offenses involving such weapons may seem more relevant to cases of “international” terrorism than “domestic,” the opposite is true. According to one study analyzing post-9/11 terrorism cases, not a single “homegrown jihadist extremist” is known to have acquired or used chemical, biological, radiological, or nuclear weapons in the United States. On the other hand, 16 so-called “domestic” terrorists have “deployed, acquired, or tried to acquire” such weapons during this period, including 13 labeled as “right-wing,” one labeled “left-wing,” and two labeled “idiosyncratic.”<sup>64</sup>

While the majority of § 2339A prosecutions have been against people who materially supported acts of international terrorism, at least four people involved in domestic terrorism have also been charged under this statute.<sup>65</sup> The Justice Department’s use of this statute in prosecuting domestic terrorism cases contradicts later claims that a new law is needed.

The first use of § 2339A in a domestic terrorism prosecution occurred in 1996, just two years after the statute became law. Seven people associated with the West Virginia Mountaineer Militia had assembled explosives in a plot to blow up a new FBI building. Two of the seven, Floyd Raymond Looker and James R. Rogers, were charged with violating 18 U.S.C. § 2339A. A jury convicted Looker, the leader of the group, of conspiracy to manufacture explosives. Following the conviction, he pled guilty to several other charges, including providing material support to terrorists under § 2339A. Rogers, a lieutenant in a local fire department, gave the militia photographs of the blue-



prints for the facility that his firehouse had on file. He too was charged with violating § 2339A.<sup>66</sup>

The most recent case, in 2012, involved Ku Klux Klansman Glendon Scott Crawford, who was involved in designing, building, and testing a radiation dispersal device he planned to use against Muslim Americans. Crawford persuaded Eric Feight to join in his scheme, and Feight provided a remote control for the device. Crawford was initially charged with violating § 2339A but was later convicted on other charges. Feight pled guilty to providing material support under § 2339A.<sup>67</sup>

As we've seen, § 2339A and its 51 predicate offenses that apply domestically provide ample authority to prosecute domestic terrorism cases. But federal law also provides many other appropriate alternatives.

## 1. Other Federal Statutes Can Be Used to Prosecute Crimes by Far-Right Extremists

### Additional Federal Statutes Used in Domestic Terrorism Cases

Justice Department data reveals that it uses federal laws beyond those included as predicate offenses in § 2339A to prosecute domestic terrorism cases. The Justice Department's Executive Office for U.S. Attorneys (EOUSA) operates a system known as the Legal Information Office Network System (LIONS) to track the government's criminal enforcement efforts.<sup>68</sup> Each time federal prosecutors become involved in an investigation, including when it is referred to their office by a federal agency such as the FBI, they create a record in the system. Information about the person being investigated, the nature of the offenses, the relevant judicial district, the referral agency, dates when indictments were filed, conviction records, and sentencing information are all entered into this database.<sup>69</sup>

LIONS categorizes cases in specific program areas, which are periodically updated and published by the EOUSA in an appendix to the LIONS User's Manual.<sup>70</sup> The most recent code list, published in June 2017, includes the following program areas under the general heading of terrorism:

- 071 International Terrorism Incidents Which Impact U.S.
- 072 Domestic Terrorism
- 073 Terrorism Related Hoaxes
- 076 Terrorist Financing
- 077 Export Enforcement Terrorism-Related
- 07H Critical Infrastructure Protection

Additional relevant program areas include:

05F Civil Rights – Racial Violence, including Hate Crimes  
05H Civil Rights – Hate Crimes Arising out of Terrorist Attacks on US

Brief descriptions of some of the program areas are included in the code list.<sup>71</sup>

The EOUSA publishes files with caseload data on a monthly basis in response to ongoing Freedom of Information Act requests from the Transactional Records Access Clearinghouse (TRAC), a Syracuse University data collection and research organization.<sup>72</sup> TRAC obtains these records and makes the data available to the public on a searchable database.<sup>73</sup>

It is important to note at the outset that federal audits have repeatedly shown that the EOUSA data is unreliable, beginning with a 2003 Government Accountability Office (GAO) report that highlighted inaccuracies in the Justice Department's terrorism-related statistics due to a lack of internal controls.<sup>74</sup> Audits by the Justice Department Inspector General confirmed these conclusions.<sup>75</sup> The Inspector General's latest report, in 2013, found that the "EOUSA inaccurately reported all 11 statistics we reviewed," most by "significant margins."<sup>76</sup> While it credited the Justice Department with revising its procedures based on previous audits, the audit ultimately concluded that "implementation of the revised procedures was not effective to ensure that terrorism-related statistics were reported accurately."<sup>77</sup>

Foremost among the deficiencies in the Justice Department's domestic terrorism prosecution data is the failure to include public docket numbers, which would allow researchers to link the EOUSA records to actual court cases. Without these docket numbers, the public cannot fully comprehend what criminal conduct the Justice Department considers to be domestic terrorism or which groups receive the most attention from federal law enforcement and prosecutors. The Brennan Center and Charles Kurzman, a University of North Carolina sociology professor, are suing the Justice Department to obtain these docket numbers under the Freedom of Information Act.<sup>78</sup> Until Congress or the courts require the Justice Department to publish the docket numbers, the LIONS data remains the best available source of information about federal domestic terrorism investigations.

According to the EOUSA data collected by TRAC, the Justice Department filed 412 prosecutions under the LIONS program area of "072 Domestic Terrorism" during the five-year period from FY 2013 to FY 2017. At least 66 different statutes, many of which were not predicate offenses under § 2339A, were listed as lead charges

**FIGURE 2: List of statutes used as lead charges in four or more domestic terrorism prosecutions from FY 2013 to FY 2017 that are not listed as predicate offenses in 18 U.S.C. § 2339A**

No.	U.S. Code	Summary of Statute	No. of Prosecutions Listing Statute as Lead Charge	Percentage of Total Prosecutions Listing Statute as Lead Charge
1	18 U.S.C. § 372	Conspiracy to impede or injure person holding public office	57	13.8%
2	18 U.S.C. § 875	Transmittance of interstate communication containing demand for ransom for kidnapped person, extortion, threat to kidnap, threat to injure property or reputation	43	10.4%
3	26 U.S.C. § 5861	Manufacturing, importing, or dealing in fire-arms without paying tax	21	5.1%
4	18 U.S.C. § 922	Importing, manufacturing, or dealing in fire-arms or ammunition in interstate commerce without a license	18	4.4%
5	18 U.S.C. § 871	Threats against President and successors to the Presidency	17	4.1%
6	18 U.S.C. § 115	Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member	16	3.9%
7	18 U.S.C. § 371	Conspiracy to defraud the United States	13	3.2%
8	18 U.S.C. § 876	Mailing threatening communications	11	2.7%
9	18 U.S.C. § 1038	False information and hoaxes	10	2.4%
10	18 U.S.C. § 111	Assaulting, resisting, or impeding certain officers or employees	7	1.7%
11	18 U.S.C. § 1521	Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title	7	1.7%
12	18 U.S.C. § 1001	Falsifying, concealing, making material false statement within the jurisdiction of the executive, legislative, or judicial branch of government	4	1.0%
13	18 U.S.C. § 1343	Fraud by wire, radio, or television	4	1.0%
14	18 U.S.C. § 1951	Interference with commerce by threats or violence	4	1.0%
15	18 U.S.C. § 43	Force, violence, and threats involving animal enterprises	4	1.0%
16	18 U.S.C. § 514	False or fictitious instrument, document, obligations	4	1.0%
17	21 U.S.C. § 841	Manufacturing, distributing or dispensing a controlled substance	4	1.0%

**FIGURE 3: Federal Hate Crimes Laws**

No.	U.S. Code	Title of Statute	Summary of Statute	No. of Times was Lead Charge in LIONS Hate Crimes Program Areas from FY 2013 to FY 2017
1	18 U.S.C. § 249	The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009	Criminalizes willful case of bodily injury using a dangerous weapon because of the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability	36
2	42 U.S.C. § 3631	Criminal Interference with Right to Fair Housing	Criminalizes the use or threat to use force to interfere with housing rights because of the victim's race, color, religion, sex, disability, familial status, or national origin	0
3	18 U.S.C. § 247	Damage to Religious Property, Church Arson Prevention Act	Criminalizes the intentional defacement, damage, or destruction of religious real property because of the religion or because of the race, color, or ethnic characteristics of the people associated with the property. Also criminalizes obstruction of any person in their free exercise of religious beliefs	3
4	18 U.S.C. § 245	Violent Interference with Federally Protected Rights	Criminalizes the use of force or willful interference in a person's participation in a federally protected activity like public education, employment, jury service, among others, because of their race, color, religion, or national origin	5
5	18 U.S.C. § 241	Conspiracy Against Rights	Criminalizes conspiracy to injure, threaten, or intimidate a person in the free exercise or enjoyment of any right or privilege secured under the Constitution or laws of the United States	12

in these 412 cases.<sup>79</sup> It is important to note that this data neither identifies docket numbers nor distinguishes cases by the perceived ideological motivation, so it would be extremely difficult for researchers to determine how many of these prosecutions involve far-right violence against persons versus milk releases by animal rights activists, for example.<sup>80</sup>

While a careful review of this data could yield errors in the Justice Department's designation of cases as domestic terrorism, the list of lead charges still reveals interesting options open for federal prosecutors to pursue domestic terrorists. Figure 2 identifies a list of statutes not included as predicate offenses in § 2339A that were used in at least four prosecutions categorized by EOUSA as domestic terrorism cases.

These statutes provide copious authority to prosecute domestic terrorism cases. But in addition to these offenses, federal hate crimes statutes represent yet another available statutory alternative.

**Federal Hate Crimes Statutes**

The Justice Department devotes more resources to crimes it labels as "terrorism" because they inflict a communal injury beyond those suffered by the direct victims of the attack and are often committed by organized groups or movements that will continue to present a threat after an individual attacker is imprisoned. Hate crimes are likewise often committed by organized racist, homophobic, or xenophobic far-right groups or movements, with the same intent to threaten entire communities. As such, federal hate crimes statutes, which can carry significant penalties,

**FIGURE 4: Federal statutes not included in the five federal hate crimes laws identified by the Justice Department that were used to prosecute hate crime incidents from FY 2013 to FY 2017**

No.	U.S. Code	Summary of Statute	No. of Times Was Lead Charge in LIONS Hate Crimes Program Areas from FY 2013 to FY 2017
1	18 U.S.C. § 371	Conspiracy to defraud the United States	4
2	22 U.S.C. § 2778	Control of arms exports and imports	4
3	18 U.S.C. § 1951	Interference with commerce by threats or violence	3
4	18 U.S.C. § 875	Transmittance of interstate communication containing demand for ransom for kidnapped person, extortion, threat to kidnap, threat to injure property or reputation	3
5	8 U.S.C. § 1325	Improper entry by alien	2
6	18 U.S.C. § 844	Importing, manufacturing, dealing, transporting, distributing explosive materials or withholding information or making fictitious statements regarding explosive materials	2
7	18 U.S.C. § 922	Importing, manufacturing, or dealing in firearms or ammunition in interstate commerce without a license	2
8	18 U.S.C. § 2261A	Stalking	1
9	18 U.S.C. § 876	Mailing threatening communications	1

are also used to punish acts of violence committed by white supremacists, neo-Nazis, and other far-right terrorists. The Justice Department convicted Dylann Roof, for example, of federal hate crimes and civil rights charges for which he received a death sentence.<sup>81</sup> Where these crimes involve criminal acts dangerous to human life that are intended to intimidate or coerce a civilian population, they also fit the federal statutory definition of domestic terrorism. Justice Department officials could have correctly labeled Roof’s attack an act of terrorism, even as they successfully prosecuted him for hate crimes.

Five federal laws are designed to combat hate crimes.<sup>82</sup> According to EOUSA data analyzed by TRAC, the Justice Department filed 78 prosecutions from FY 2013 to FY 2017 under the LIONS subcategories of “05F – Civil Rights – Racial Violence, including Hate Crimes” and “05H – Civil Rights – Hate Crimes Arising out of Terrorist Attacks on US.”<sup>83</sup> Of these 78 prosecutions, 56 involved defendants whose lead charges were violations of one of the five federal hate crimes statutes, outlined in Figure 3.<sup>84</sup>

In addition to these five statutes, the Department of Justice often charges offenses under other statutes to prosecute hate crimes. Nine other federal statutes were the lead charges in the remaining 22 prosecutions filed from FY 2013 to FY 2017 under the two LIONS hate crimes categories.<sup>85</sup> These statutes are listed in Figure 4, which also includes the number of times that the particular statute was a lead charge during that five-year period. Taken together, these 14 statutes (the five listed in Figure 3 and the nine listed in Figure 4) allowed federal prosecutors to file charges in hate crimes incidents, which may have also met the definition of domestic terrorism in some cases. While not all hate crimes would fit the definition of domestic terrorism, this data still provides useful information about additional statutes federal law enforcement can use to combat domestic terrorism. With such a variety of tools available to prosecutors, the need for new federal legislation on domestic terrorism is further called into doubt.

As explained in further detail below, however, this data

**FIGURE 5: Conspiracy statutes listed as the lead charge in domestic terrorism and hate crimes cases from FY 2013 to FY 2017**

No.	U.S. Code	Summary of Statute	No. of Prosecutions Listing Statute as Lead Charge
1	18 U.S.C. § 241	Conspiracy to injure, threaten, or intimidate a person in free exercise or enjoyment of any right or privilege secured under Constitution or U.S. laws	12
2	18 U.S.C. § 371	Conspiracy to defraud the United States	17
3	18 U.S.C. § 372	Conspiracy to impede or injure person holding public office	57

also makes clear that the federal government prosecutes just a tiny number of the estimated 250,000 annual hate crimes reported in Justice Department victim surveys. For the FBI, labeling an attack as a hate crime rather than an act of terrorism deprioritizes the investigation. Counterterrorism is the FBI's number-one priority, while civil rights violations like hate crimes rank fifth.<sup>86</sup>

## 2. Other Statutes Serve Similar Prevention Purposes as Material Support Charges

Some in federal law enforcement may argue that the consequences of a successful terrorist attack are so dire that new laws are needed to give prosecutors a means to prosecute members of domestic terrorist organizations before a specific hate crime or one of the 51 applicable predicate offenses listed in 18 U.S.C. § 2339A can be completed. But in these cases, other charges, including conspiracy and racketeering, already provide prosecutors ample flexibility to address serious criminal activities that pose a significant danger to human life. As with the material support to foreign terrorist organization prohibition under § 2339B, civil libertarians and criminal justice reform advocates have long maintained that these statutes give prosecutors overly broad discretion to charge and severely punish people only tangentially involved in serious criminal activity.<sup>87</sup> Nonetheless, the availability of these broad authorities and the Justice Department's reliance on them to prosecute far-right violence undercut any claim that a new domestic terrorism statute is necessary.

### Conspiracy

Conspiracy statutes provide substantial recourse to charge individuals before they successfully complete a hate crime or terrorist attack. Conspiracy liability attaches when a person agrees to accomplish unlawful ends and takes any overt act in furtherance of the scheme. This gives investigators and prosecutors the ability to charge these individuals long before a plot reaches fruition.<sup>88</sup> According to EOUSA data collected by TRAC, the Justice Department used three

conspiracy statutes as lead charges to prosecute dozens of hate crimes and domestic terrorism cases between FY 2013 and FY 2017.<sup>89</sup> They are outlined in Figure 5.

Conspiracy liability is also often included in the text of criminal offenses. This means that a person who conspired to commit a given offense can be charged under that statute, even if the offense has yet to be carried out. A review of the 51 applicable predicate offenses listed in 18 U.S.C. § 2339A shows that 31 of them allow prosecution for conspiracy to commit the crime.<sup>90</sup>

### Racketeering

The goal of prohibiting material support to foreign terrorist organizations under § 2339B is to denigrate and ultimately destroy these dangerous organizations by starving them of resources. The Racketeer Influenced and Corrupt Organizations Act (RICO) provides a similar mechanism for federal prosecutors to dismantle domestic terrorism organizations by targeting them as corrupt criminal enterprises.<sup>91</sup> RICO increases penalties and expands statutes of limitations to reach the activities of all participants in the criminal organization, and it has proven useful in prosecuting white supremacist groups.

In 2006, for example, the Justice Department charged dozens of members of the Aryan Brotherhood under RICO for their involvement in as many as 32 murders and attempted murders in maximum-security prisons.<sup>92</sup> In 2012, 34 alleged members of the Aryan Brotherhood of Texas were indicted on RICO charges.<sup>93</sup> And earlier this year, in March 2018, seven people tied to the Aryan Circle were charged with racketeering following the murder of Clifton Hallmark.<sup>94</sup>

### Interstate Transportation to Riot

Many of the participants at the violent far-right rallies that left journalists and counter-protesters beaten, stabbed, shot, and even killed around the country over

the last two and a half years used social media to promote their intention to commit violence at these events.<sup>95</sup> In October 2017, journalists with *ProPublica* documented how white nationalist members of the “Rise Above Movement” produced YouTube videos promoting violence they committed at far-right rallies in Berkeley, California, before traveling to Charlottesville, Virginia, where they again attacked counter-protesters.<sup>96</sup> Federal anti-rioting charges seem tailor-made to address this violence.

Statute 18 U.S.C. § 2101 criminalizes interstate travel or the use of interstate commerce to incite, organize, promote, encourage, or participate in a riot, or commit, aid, or abet a violent act during a riot.<sup>97</sup> Two months after *PBS Frontline* aired a documentary highlighting *ProPublica*’s re-

porting on the Rise Above Movement, the Justice Department charged eight members of the group with rioting and conspiracy charges in October 2018.<sup>98</sup> Questions remain regarding why the federal government didn’t take earlier advantage of the rioting statute and why it charged so few of those who committed violence at these events.

The range of statutes used in domestic terrorism and hate crimes cases shows an incredibly wide variety of tools available to federal prosecutors, contradicting the argument that additional statutory authority is needed to combat far-right violence. So why does the Justice Department fail to prioritize the prevention and prosecution of these crimes to more effectively address this threat to American security?

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## Failing to Evaluate the Domestic Terrorist Threat

Domestic terrorism is a blind spot in the Justice Department’s counterterrorism strategy because the government does not collect reliable data to accurately assess the scope or nature of the threat this violence poses to Americans. As explained above, EOUSA data is often unreliable and remains far from comprehensive. Other data that the government collects is often flawed, miscategorized, and incomplete.

The lack of data about violations of domestic terrorism and hate crimes statutes contrasts greatly with other programs, such as bank robberies. Each year, the FBI publishes a detailed report of violations of the federal bank robbery statutes.<sup>99</sup> The 2016 report, for example, outlined information regarding 4,251 violations of 18 U.S.C. § 2113, the Federal Bank Robbery and Incidental Crimes Statute, and 36 violations of 18 U.S.C. § 1951, which addresses interference with commerce by threats of violence. For each violation of the two statutes, the report broke down the number, race, and sex of the perpetrators; the occurrences by day of week and time of day; the modus operandi used; and injuries, deaths, and hostages taken, among other factors.<sup>100</sup> The high level of detail in the assessed factors suggests that the FBI has an intimate understanding of each statutory violation.

The lack of accurate and accessible data about domestic terrorism allowed the Trump administration to manipulate its terrorism data for political purposes. In January 2018, the Departments of Justice and Homeland Security published a misleading report that claimed, “Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign Born.”<sup>101</sup> This conclusion, an attempt to justify the administra-

tion’s ban on immigrants from several Muslim-majority nations, could only be reached by ignoring attacks by domestic terrorists.<sup>102</sup>

Requiring the Justice Department to produce detailed reports on all potential violations of the federal domestic terrorism and hate crimes statutes, whether prosecuted by federal, state, or local authorities, would force the FBI to become sufficiently familiar with each incident and develop relevant details about both the perpetrator and the victim of each crime. These reports would provide invaluable data for calibrating counterterrorism and law enforcement resources, and would assist in developing appropriate responses designed to protect all American communities from violence.

In the absence of accurate data from the federal government, academic institutions, advocacy organizations, and think tanks have attempted to gather data from media sources and court records to get a picture of the domestic terrorism threat. Each entity uses its own definitions of what constitutes a terrorist attack, varying from vandalism to mass murder. They often characterize the nature of ideological movements differently and cover different time periods, resulting in strikingly divergent data sets that make any comparisons or comprehensive assessments of the various threats exceedingly difficult.

Despite these limitations, two facts become clear: First, when using the most salient measurement based on the federal statutory definition of terrorism as acts harmful to human life — i.e., the number of resulting fatalities — it becomes clear that far-right violence poses as great or greater a threat than any other form of terrorism. Second, hate crimes — in the form of racist, Islamophobic,

anti-Semitic, homophobic, and anti-immigrant violence—are severely under-addressed by federal law enforcement.

The U.S. Government Accountability Office (GAO) issued a 2017 report citing data from the Extremist Crime Database (ECDB), a project of the University of Maryland. It identified 225 fatalities resulting from “homegrown” extremists in the U.S. from September 12, 2001, to the end of 2016. Nearly half — 106 fatalities — resulted from what the study characterized as “far-right” violence, while 119 people were killed by “radical Islamist violent extremists.”<sup>103</sup>

The public policy think tank New America studied “jihadist terrorism or related crimes” from September 11, 2001, until 2018 and identified 104 fatalities stemming from such crimes. While not the primary focus of the study, it did identify 81 fatalities resulting from domestic terrorism during that period, including 73 victims of “far-right wing” attacks, along with eight killed in “black separatist/nationalist/supremacist” attacks.<sup>104</sup>

David Neiwert, a journalist and researcher at the Investigative Fund, created a database of U.S. terror attacks. He found 176 total fatalities from 2008 to 2016, with 79 fatalities resulting from attacks by “right-wing extremists,” 90 deaths from “Islamist domestic terrorism,” and seven more resulting from “incidents related to left-wing ideologies, including ecoterrorism and animal rights.”<sup>105</sup>

All three of these studies are likely to undercount far-right violence by significant margins, as they rely primarily on media reports and responding law enforcement agencies’ characterization of the crimes rather than objective assessments based on victim and witness statements and other evidence. Studies have demonstrated that U.S. news media disproportionately covers attacks perpetrated by Muslims, up to 357 percent more than acts deemed “terrorism” but perpetrated by non-Muslims.<sup>106</sup> The study found some terrorist events receive no media coverage. Violent acts not deemed “terrorism” by the authorities or the media, or defined as “hate crimes” rather than terrorism, obviously are not counted.

Arie Perlinger at West Point’s Combating Terrorism Center identified a much greater number of deaths resulting from far-right violence, documenting 607 fatalities from 1990 through 2011, which included 306 deaths from 2001 through 2011, a timeframe more easily compared with the others.<sup>107</sup> His data set was much broader than those used in the other studies and includes data from a more varied list of sources. In particular, his count included all violent attacks “affiliated with far-right associations”

or that were “intended to promote ideas compatible with far-right ideology,” including hate crimes.<sup>108</sup> Perlinger’s study did not collect data regarding attacks from other ideological movements, however.<sup>109</sup>

Figure 6 shows the results of the four studies. The fact that these data sets vary so significantly — with GAO counting more than 20 percent more domestic terrorism fatalities than New America over a similar time period and Perlinger finding almost triple those documented by GAO — highlights the inadequacy of the available official data and the problems private groups encounter when trying to fill that gap with their own research. This is, to say the least, a suboptimal approach to tracking information that is essential to protecting American security.

Three studies show the number of domestic terrorism fatalities is just slightly less than the number of fatalities recorded from “Islamist” or “Jihadist” attacks. None approach the fatalities from far-right attacks the Perlinger study documented, however, which included hate crimes.

As previously noted, understanding the relationship between domestic terrorism and hate crimes is important in evaluating the overall threat from far-right extremism,

## U.S. news media disproportionately covers attacks perpetrated by Muslims

as many hate crimes may also meet the federal definition of domestic terrorism. The Justice Department’s research arm, the Bureau of Justice Statistics, conducts periodic victim surveys, which recorded approximately 250,000 hate crimes per year from 2004 to 2015.<sup>110</sup> This number towers above the number of hate crimes reported by state and local law enforcement agencies and published in the FBI’s Uniform Crime Report (UCR), which is one of the only sources of annual hate crime statistics.

In 2016, police agencies reported 4,720 hate crimes against persons to the FBI.<sup>111</sup> The UCR data is widely recognized as flawed, in that not all states and localities have hate crimes statutes and many that do irregularly enforce them or fail to submit reports to the FBI. California law enforcement agencies reported 931 hate crimes in 2016 (in a state with a population of 40 million), while those in Georgia, Alabama, Mississippi, and Louisiana combined (with a total population of 23 million) reported less than 100.<sup>112</sup> While 15,254 state and local law enforcement agencies, representing 89.7 percent of the U.S. popu-

**FIGURE 6: Comparison of Fatalities Resulting from Domestic Terrorism and International Terrorism Attacks**

Study	Period Covered in Study	Domestic Terrorism Fatalities	“Islamist” or Jihadist” Fatalities
U.S. GAO (citing UMD ECDB) <sup>133</sup>	9/12/2001-12/31/2016	106	119
Bergen, et al., <i>New America</i> <sup>134</sup>	2002-2018	81	104
Neiwert, <i>Investigative Fund</i> <sup>135</sup>	2008-2016	86	90
Perlinger, <i>Combating Terrorism Center</i> <sup>136</sup>	2001-2011	306	N/A

lation, participated in the UCR program in 2016, only 1,776 agencies, or 11 percent, reported any hate crimes.<sup>113</sup> Despite this under-reporting, from 2001 to 2016, UCR data showed 130 people were victims of murder or non-negligent manslaughter resulting from hate crimes.<sup>114</sup>

Federal hate crimes prosecutions are even more rare. Federal cases filed under the LIONS subcategories of “05F Civil Rights – Racial Violence, including Hate Crimes” and “05H Civil Rights – Hate Crimes Arising out of Terrorist Attacks on US” show an average of 19 hate crimes prosecutions per year.<sup>115</sup> According to other Justice Department data, 258 defendants were charged between 2009 and 2016 under federal hate crimes statutes, which comes out to an average of 36 cases per year.<sup>116</sup> Regardless of which Justice Department data set is correct, the extreme disparity in victim reports of hate crimes compared with the number of federal prosecutions is remarkable.

Clearly not all hate crimes recorded in victim surveys or documented by state and local law enforcement agencies would necessarily fit the federal definition of domestic terrorism or be fairly attributed to far-right violence. But some undoubtedly would. Failing to regard deadly far-right violence as “terrorism,” when both violent and nonviolent crimes perpetrated by Muslims are routinely treated as such, reduces the relative import of far-right violence in the Justice Department bureaucracy. It also sends a public message that the security of minority communities is not a top priority.

When white supremacist James Alex Fields rammed his car into counter-protesters during the 2017 “Unite the Right” rally in Charlottesville, Virginia, killing Heather Heyer and injuring dozens of others, the Justice Department and the

FBI announced that they would open a civil rights investigation.<sup>117</sup> This statement inferred a deprioritization and narrowing of the scope of the investigation in a manner contrary to written FBI policy. While counterterrorism remains the FBI’s top priority, investigating civil rights violations ranks fifth.<sup>118</sup> The FBI’s 2010 Civil Rights Program Policy Implementation Guide states that if the subject of a hate crime investigation has “a nexus to any kind of white supremacy extremist group” the case should be opened as both a domestic terrorism and a civil rights case.<sup>119</sup> This rule is clearly designed to ensure the investigation of a hate crime is broad enough to include an examination of any domestic terrorist organization that may have aided and abetted the violence and is resourced commensurate with its rank as a top priority.

The FBI’s decision to declare the Heyer murder a civil rights investigation suggested it prejudged the attack as unrelated to the white supremacist riot that precipitated it. It further indicated that the FBI would not likely seek to identify potential coconspirators who may have assisted his attack. The Justice Department ultimately charged Fields with federal hate crimes violations but did not identify any other white supremacists who may have conspired in or materially supported his act of violence at the rally that weekend.<sup>120</sup>

Such arbitrary distinctions in how the Justice Department might categorize a violent racist attack can distort policymakers’ perceptions of the threat posed by far-right terrorism throughout the country. Counterterrorism is the FBI’s number-one priority, so acknowledging that certain far-right violence and hate crimes fit the statutory definition of domestic terrorism would convey to victims and the public at large that the Justice Department takes



preventing attacks against minority and disenfranchised communities as seriously as it takes any other violent actions it calls “terrorism.” The Justice Department needs no new authorities to amend its priorities in this manner.

### 1. Imprecise Comparisons of Terrorism Threats

In the absence of accurate federal data, several scholars have attempted to document terrorism-related fatalities in order to compare the relative threats from different terrorist movements. Three of the studies cited above compared the number of U.S. fatalities resulting from what they term “Islamist” or “Jihadist” attacks in the United States with those committed by “domestic” or “far-right” terrorists. This is a flawed methodology that misleads more than it informs. Groups like al Qaeda, ISIS, and Hezbollah might all be called “Jihadist” or “Islamist,” but they have divergent political goals and ideologies, and have been warring against each other in Syria, Iraq, and elsewhere. That mass shooter Omar Mateen declared allegiance to all three groups during his 2016 attack on an Orlando nightclub that killed 49 people demonstrated his lack of knowledge of these groups, rather than his commitment to them.<sup>121</sup>

Likewise, white supremacists violently feud over ideological differences, informant concerns, and personal animosities, often with fatal consequences that rarely get measured as hate crimes or domestic terrorism. And lumping white supremacists into a category of “far-right extremists” that includes antiabortion and antitax zealots is not necessarily an effective way to evaluate any of these individual threats.

Moreover, because the number of terrorism-related fatalities from any source is low, a single attack can easily shift the balance on this macabre scorecard. Recent evidence that Stephen Paddock, who killed 58 people in a 2017 mass shooting in Las Vegas, harbored far-right extremist views would sway this comparison, just as Omar Mateen’s Orlando attack did the year before.<sup>122</sup> In practice, these studies tend to measure violence committed by Muslims in the U.S. (regardless of their lack of connections to actual terrorist groups) against a small fraction of the violence committed by non-Muslims. Beyond these clear shortcomings, the results of these studies also do not support the Justice Department’s failure to prioritize racist, Islamophobic, anti-Semitic, homophobic, and anti-immigrant violence as a serious national threat to American security.

Perhaps one way to measure the relative threat from what the DOJ categorizes as domestic and international terrorism is the number of federal prosecutions in each category. Despite its subordination of domestic terrorism in its counterterrorism strategy, the Justice Department

filed 870 domestic terrorism prosecutions over the last 10 years, more than twice the 433 international terrorism cases it filed in that period.<sup>123</sup> Though these cases are less publicized, and therefore do not receive the same press coverage, such statistics are not surprising given the higher rate of domestic terrorist activity and the layered statutory framework that has developed to address it. It is not known how many of these domestic terrorism prosecutions involved far-right violence, however, as the Justice Department does not publish docket numbers that would allow researchers to link the prosecutions it labels as “domestic terrorism” to the actual cases.

But there is a better way to address threats to American security — by focusing on violence rather than ideology. Fortunately, terrorism is rare in the U.S. and, with the exception of outlying mass-casualty attacks like 9/11 and the Oklahoma City bombing, the number of annual terrorist fatalities is relatively small compared to those we experienced as recently as the 1970s.<sup>124</sup> The fatalities resulting from terrorist attacks make up a tiny percentage of deaths from criminal violence in the U.S., which are also significantly lower than just a few decades ago but still average almost 16,000 per year, according to UCR data.<sup>125</sup> According to the Extremist Crime Database data cited in the 2017 Government Accountability Office report,<sup>126</sup> international and domestic terrorism fatalities combined constituted only 0.095 percent of all criminal homicides recorded from 2002 through 2016.<sup>127</sup> Half of the violent crime in the U.S. goes unsolved, which in 2016 included 40 percent of homicides and 60 percent of rapes.<sup>128</sup> A disproportionate share of these unsolved cases involve crimes against black and brown victims.<sup>129</sup>

A concerted effort by federal law enforcement to address violent crime more generally would ensure that resources are allocated in a manner correlated to the threat posed by the different groups whose violence meets the statutory definition of terrorism and not by their perceived ideologies or antipathy to U.S. government policies.

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# Recommendations

## 1. Reject Calls to Create a New Domestic Terrorism Crime

Congress and other stakeholders should categorically reject calls for a new federal statute that gives federal law enforcement greater authorities or resources to investigate and prosecute domestic terrorism. As detailed above, such legislation is unnecessary and would likely intensify the existing discriminatory impacts of domestic terrorism investigations and prosecutions that are targeted at groups protesting government policies rather than those committing violent acts dangerous to human life. Expanding the Justice Department's counterterrorism powers without demanding clear and fact-based threat assessments, improved data collection, and increased oversight would only allow the continued disproportionate targeting of minorities and political dissidents as subjects of domestic terrorism investigations, without providing them protection from the most serious threats they face.

## 2. Improve Congressional Oversight of Counterterrorism Resources

As demonstrated above, data collection about both domestic terrorism and hate crimes is rife with error, often arbitrary, and based on vague and conflicting categorization schemes. Congress should require federal law enforcement to revamp its data collection policies and practices and ensure that the various government entities that collect data use similar metrics and definitions. In this regard, the FBI's data collection regarding bank robberies could serve as a model. Just as the bank robbery data used indicators that are relevant to that particular crime, Congress should standardize the metrics that must be collected in each instance of domestic terrorism or hate crimes. This data could include information about the defendants and their affiliations as well as the victims; information about the plot; and the federal, state, and local agencies that were involved, among other factors.

A 2017 Congressional Research Service report outlined why a "regular public accounting" on domestic terrorism is needed.<sup>130</sup> It explained that such reporting would allow policymakers to compare domestic terrorist threats, measure them against threats posed by "homegrown violent jihadist activity," help them "assess the effectiveness of the government's response," and inform Congress's "allocation of resources to specific federal counterterrorism efforts."<sup>131</sup>

The federal government's accurate collection and objective analysis of terrorism data is crucial to developing effective policies and practices that improve security for all Americans. Without additional transparency in counterterrorism

performance, policymakers will have no way to reverse the disparate treatment that undermines trust in law enforcement in disenfranchised communities that are too often over-policed as terrorism suspects and underserved as terrorism victims. Bills introduced in the U.S. Senate in 2017 and in the House of Representatives in 2018 would require the attorney general and secretary of homeland security to conduct annual assessments of the white supremacist threat and collect data regarding domestic terrorism activities and enforcement measures.<sup>132</sup> These bills are a major step forward in accountability. But they also create new domestic terrorism offices within these agencies, as well as a Domestic Intelligence Executive Committee, which would need close supervision to ensure they are not turned into alternative means of collecting information about innocent Americans' First Amendment activities. We urge Congress to proceed with caution.

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