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"Countering Domestic Terrorism: Examining the Evolving Threat"

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I. INTRODUCTION

Domestic terrorism is not a new phenomenon. In various guises, it has been with us throughout our history. At certain times it has loomed especially large. Racist political violence reached epic proportions in the aftermath of the Civil War in the South. Anarchists in the late 19th and early 20th centuries (many of whom were U.S. citizens, notwithstanding contemporaneous perceptions that anarchist violence stemmed from abroad) left a mark that included the assassination of a president. A virulent strain of hostility to the federal government spawned the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995. The list is, alas, a long one.

We may be on the cusp of, or perhaps even in the midst of, another such period. Concern about domestic terrorism—especially (but not only) racially-motivated terrorism—had been growing steadily even before the El Paso attack. FBI Director Wray testified in July, before the Senate Judiciary Committee, about a rise in the rate of domestic terrorism arrests, noting that it had reached rough parity with international terrorism arrests. That has led to debate regarding how many such cases there actually are (a topic to which I will return below), but whatever the precise number the fact remains that the public has grown very concerned about the problem of domestic terrorism, and for good reason.

The surge in interest in domestic terrorism raises an important question: Do we have the right arrangement of laws and policies to respond appropriately to this challenge?

It is impossible to answer that question definitively. Even one death from terrorism seems too many, after all, yet very few of us would want to live within the sort of system that would be necessary to get anywhere close to eliminating all such risk. The types of surveillance and arrest powers needed to eliminate danger altogether would produce a world quite inconsistent with our traditions, chilling political dissent and sending the rate of "false positives" (*i.e.*, situations in which the government takes an action against someone out of a mistaken belief that he or she has done or will do something harmful) through the roof. When we seek the optimal calibration of our counterterrorism laws and policies, therefore, we have little choice but to engage in a rough sort of balancing: with decidedly-imperfect information and with different views about the weight to give to competing values, we trade-off safety gains with other values, striving to

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maintain an optimal balance even as technological, political, and other background conditions evolve in ways that disrupt previously-settled expectations. Such balancing projects thus require perpetual attention, and in light of recent events the present moment seems a particularly apt time to turn attention to our domestic terrorism laws, policies, and practices.

My aim with this testimony is to help with that project by drawing lessons from the post-9/11 project of rebalancing our counterterrorism laws and policies to respond more assertively to the international terrorist threat posed by al Qaeda. There are important differences between the domestic terrorism and international terrorism problem sets, to be sure, but even the differences can be instructive.

II. THE POST-9/11 TERRORISM-PREVENTION PARADIGM FOR INTERNATIONAL TERRORISM

The U.S. government's post-9/11 counterterrorism framework is most famous, of course, for its military and covert action components. However central those measures have been to the post-9/11 framework, though, I will not explore them here; military force and other manifestations of the armed conflict model simply have no place in a discussion of our current domestic terrorism challenges.

What does that leave? Quite a lot.

Despite the (understandable) tendency to focus on the military dimensions of post-9/11 counterterrorism, there have always been critical non-military dimensions to post-9/11 counterterrorism policy. Some of those non-military dimensions (for example, changes to the legal and policy frameworks of the immigration laws) are not sufficiently relevant to the current wave of domestic terrorism concerns so as to warrant discussion here. The real action, instead, has to do with new or invigorated approaches to both prosecution and investigative authorities, approaches that combined to form what I have described as the "terrorism-prevention paradigm."[1]

Put simply, the point of the terrorism-prevention paradigm was to drive both FBI investigators and Justice Department prosecutors to focus more on interventions that might prevent attacks in the first place, in contrast to a more-reactive approach. Here is how I described it in a 2005 article:

> The precise moment when this shift occurred may have been captured in Bob Woodward's account of policymaking within the Bush Administration in the days and weeks immediately following 9/11. Woodward describes a meeting of the National Security Council shortly after the attack, during which new FBI Director Robert Mueller mentioned the need to take care that evidence not be tainted in the event of subsequent arrests and prosecutions. This reference to the traditional role of federal law enforcement

[1] Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Law and the Demands of Prevention*, 42 HARVARD JOURNAL ON LEGISLATION 1-90 (2005) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=587442). *See also* Robert M. Chesney, "Anticipatory Prosecution in Terrorism-Related Cases," in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR (Worrall & Nugent, eds., SUNY Press 2007) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=944117).

> prompted Attorney General John Ashcroft to interrupt. Woodward provides the following account: "Let's stop the discussion right here, [Ashcroft] said. The chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it."
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> That moment symbolized a dramatic change in priorities not only for the FBI but for the Justice Department as a whole. As Ashcroft explained to the Senate Judiciary Committee a few weeks later, "[o]ur fight against terrorism is not merely [or] primarily a criminal justice endeavor[.] [I]t has to be a defensive and preventi[ve] endeavor . . . [w]e must prevent first; prosecute second."
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> It is one thing to declare prevention to be an overriding priority, but quite another to operationalize that concept. What precisely has the Justice Department done to translate these words into action, and do any of these changes provide policymakers with a plausible alternative to military detention of potential sleepers within the United States? These questions require a survey of the multi-tiered law enforcement strategy adopted by the Justice Department in response to the prevention imperative.[2]

In that article, I went on describe the multi-pronged FBI/DOJ approach to terrorism prevention that emerged in the following years. I set forth the key insights below, updating to account for more recent developments. The first subpart discusses "untargeted" prevention strategies, while the second addresses situations in which the government suspects that a particular person might carry out an act of terrorism.

A. Untargeted Prevention

A key strategy for DOJ involves what we might call "untargeted prevention." The idea here is to generate preventive benefits even without knowing the identity of those who might cause harm. How? By systematically eroding access to important resources that might be used by a would-be terrorist, including not just directly-dangerous resources but also other resources that might directly or indirectly facilitate an organization's ability to cause harm.

Several key examples of this strategy are not specific to the international terrorism setting. This includes enhanced efforts to investigate and prosecute violations of laws relating to money laundering, identity fraud, and immigration fraud. Another example of untargeted prevention, however, involves a statute that is very much focused on international terrorism: 18 U.S.C. 2339B (the second of two "material support laws," this one enacted in 1996).

This statute makes it a felony to provide "material support or resources"—that is, just about any form of tangible or intangible services or things, including providing others or even one's own self as "personnel"—to certain recipients. It does not require any showing that the defendant knew or intended that the support they provided would further a criminal act. Indeed, it is possible that a 2339B defendant had only the most-wholesome of intentions. This matters not, so long as they knew or should have known that the recipient of their aid is a foreign organization that is on the State Department's list of formally-designated "foreign terrorist

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[2] *Sleeper Scenario*, *supra* note 1, at 27-28.

organizations" ("FTOs"), or at least that they knew or should have known that the recipient organization engages in the sort of activity that would support such a designation. In this sense, 2339B functions like an across-the-board embargo of FTOs, much as one could see in the more-familiar setting of embargoes of foreign states. And while few if any FTOs are entirely dependent on US-based resources for their survival, the basic concept underlying 2339B is that cutting off access to US sources might at least somewhat erode the ability of FTOs to cause harm (either in the direct sense of denying them access to directly-dangerous materials, or in the indirect sense of denying them access to funds (or fungible resources that would free up funds) that could be used directly for harmful purposes).

The 1996 material support statute was used in only a handful of cases during its first five years of existence, but it has been a mainstay of international terrorism cases ever since. Many if not most of those instances fit the untargeted-prevention model. Some, however, are better understood as examples of targeted prevention, as I will explain below.

B. Targeted Prevention

As important as untargeted prevention may be, the most critical task for the terrorism-prevention paradigm involves incapacitating potentially-dangerous persons before than can cause harm. This scenario is the most acute one both in terms of the benefits to be had (for prevention of a terrorist attack is far more valuable than a post-hoc intervention, at least from the point of view of the victims and their loved ones) and the costs that might be entailed (for the chances of an error on the government's part—of a "false positive—are higher insofar as the government is intervening well before any attempt or completed act occurs).

There are several options for pursuing targeted prevention, and all have been significant for the terrorism-prevention paradigm.

First, federal criminal law includes a variety of inchoate crime statutes that can be used for pre-attack intervention. Such charges can allow for arrest and prosecution at a surprisingly early stage along the continuum that runs from mere inclinations to completed operations. Indeed, therein lies a difficult policy challenge. On one hand, attaching liability at an early stage along that continuum is very attractive, as it allows the government to act well before the moment of harm draws close, thereby reducing the risk that the harm will materialize before the government quite manages to make an arrest. But the same quality increases the risk of what some would characterize as the "precrime" or "Minority Report" problem: *i.e.*, the risk that charges will fall on someone who would not in fact have gone on to commit a harmful act.[3] These are two sides to the same coin.

Conspiracy charges can raise this issue. While usually conspiracy charges specify some particularized object of the conspiracy, the fact remains that the object need not be reduced to

[3] *The Minority Report* is a famous novella by Philip K. Dick, contemplating a world in which law enforcement officials rely on psychics to arrest people before they can carry out a future crime, while still charging them for that future crime (thus "precrime"). It was popularized further in a Tom Cruise movie.

specifics of where, when, or how.[4] The prosecution of Jose Padilla (an American citizen once widely-described as the "dirty bomber," Padilla was held in military detention in the United States for a long period prior to being transferred for prosecution in federal court) illustrates this well. When he moved for a bill of particulars seeking elaboration of the object of the murder conspiracy with which he had been charged, the response from prosecutors was framed broadly in terms of agreement to participate in al Qaeda's generalized plans to carry illegal acts of violence, without specification as to a particular target, means, or occasion. On that view, the government could have arrested Padilla (assuming he could be located and apprehended) at a very early and indeterminate stage; the fact that he was not arrested until al Qaeda dispatched him back to the United States, and that the public heard an earful about his involvement in various possible plots, obscured this insight about the potential reach of conspiracy liability.

A separate instrument for preventive intervention involves another material-support statute: 18 USC 2339A, enacted in 1994. In contrast to 2339B (discussed above), 2339A has nothing to do with FTOs as such, nor embargo concepts. Instead, it is best to think of 2339A as an enhanced aiding-and-abetting statute. It makes it a felony to provide "material support or resources" to *anyone*—whether related to an FTO or not—so long as the defendant intended or at least knew that the recipient of the aid would use the aid in furtherance of any of more than a dozen listed predicate offenses (thus the analogy to aiding-and-abetting). In this sense, 2339A functions somewhat like conspiracy charges: the government need not await an actual or attempted act of violence, but simply must show a knowing or intentional step taken to aid one of the listed predicate crimes.

From the prosecutor's perspective, both conspiracy and 2339A are particularly useful. Add in the idea that one can *attempt* to violate 2339A, or even *conspire* to do so, and the options for preventive intervention extend still further. But these charging options won't always be there when the government is investigating a potentially-dangerous person. What then?

This brings us to the "Al Capone" strategy. The idea here is that prosecutors can opt to make use of fortuitously-available charges, ones that may have little or no relation to the suspicions that lead the government to suspect the person may commit a terrorist act. Just as the violent mobster Capone was taken down for tax-avoidance rather than for the various murders in which he was involved, a terrorist might be arrested for identity fraud rather than a terrorism offense. On this model, in short, any available charge will do so long as otherwise legitimate; the larger goal of incapacitation is served (at least for a time) even if the labeling of the charges fails to reveal the connection to terrorism suspicions.

To give an example: let's say that we have a person whom the government suspects might be inclined to commit a terrorist act, but for whatever reason terrorism-related charges cannot be brought. If that person has engaged in credit-card fraud, however, or has lied to FBI investigators during an interview, the person may be prosecutable nonetheless. This is helpful from the point of view of reducing the risk of a violent act, and so long as the actual charge is

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[4] Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 425-502 (2007) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=932608).

well-founded it does not seem unfair to the defendant. The government on this model is simply allowing terrorism-related concerns help it decide how to allocate its prosecutorial and investigative resources in relation to other offense categories.

I pause here to note that the Al Capone strategy gives rise to the potential for statistical anomalies, and thus to confusion for those who are trying to understand the scope and efficacy of counterterrorism investigations and prosecutions. The potential mismatch between initial FBI investigative interests and the eventual, actual charges can result in both undercounting of counterterrorism efforts (when someone focuses on the types of eventual charges and thus misses the underlying counterterrorism interest) and overcounting of them (when someone focuses on the investigative categorization without accounting for whether mere suspicions were ever really put to the test). For similar reasons, analysis of the resulting sentences in such cases may prove to be a poor guide to their underlying significance.[5] This is something to bear in mind as Congress ponders the path forward for domestic terrorism legal and policy frameworks and seeks data regarding current efforts.

It also is worth noting that 2339B (the FTO embargo provision) plays a special role in the Al Capone strategy, one that is easy to overlook given that 2339B on its face is an untargeted-prevention statute focused expressly on terrorism. The idea is that 2339B, on its face and as described above, appears to be no more than an embargo statute that furthers counterterrorism in a generalized way, limiting group access to useful resources. On that view, a prototypical 2339B defendant is not necessarily personally dangerous; they may be making *others* more capable of harm, but they themselves may be harmless in a direct sense. But what if that's not the case? What if we have a person who is quite dangerous, yet the government cannot mount a conspiracy case, a 2339A case, or some unrelated case based on tax fraud or the like? If the person is in contact with an FTO, there is a very good chance that he or she will take steps at some point that open the door towards a 2339B material support charge. Indeed, if the person is a member under the direction and control of the FTO, there's no need to prove any particular conduct apart from that status—and the ability to arrest based simply on membership status is an especially powerful—though risky—tool for preventive intervention.

The utility of 2339B for preventive prosecution grows further, moreover, once one considers how it interacts with the practical consequences of an investigative approach in which an undercover officer or confidential informant interacts with a suspected terrorist. The relationships that unfold in such situations have the benefit (at least sometimes) of allowing for highly-controlled development of the situation, gradually revealing (or, as critics would say, changing) what the suspect is capable and willing to do. In practice, this means that the government to some extent can calibrate the moment in time when liability for material support—or better yet, *attempted* provision of material support—will attach.

That model is, of course, another two-edged sword. The very same qualities that make it so

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[5] *See* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Cases: Conviction and Sentencing Data in Light of the "Soft Sentence" and "Data Reliability" Critiques,* 11 LEW. & CL. L. REV. 851 (2007) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005478).

useful for ex ante prevention also increase the risk of false-positive interventions—*i.e.*, situations in which the suspect would not have gone on to cause harm if left to their own devices. And here we come to one of the great and intractable dilemmas of counterterrorism policing: the tension between reaping the substantial benefits of the undercover-attempt model and incurring the substantial individual and social costs of increased false-positives. Reasonable minds will differ on how best to strike the balance on that dimension, but all should acknowledge that the stakes are high in both directions.

There are other tools for targeted prevention. For example, the centuries-old statute allowing for the detention of material witnesses to crimes has been used as another Al Capone-style ground for incapacitation. But the general thrust of the prevention-charging model is clear enough at this point, so let's now turn our attention to the role of investigative practices and authorities in the overall terrorism-prevention paradigm.

C. Investigative Practices and Authorities

We have touched already upon one of the critical investigative practices that support the terrorism-prevention paradigm: vigorous reliance upon both undercover officers and confidential informants. To that account we should now add that its utility for counterterrorism has increased substantially in recent years thanks to the rise of social media.

Social media, to be sure, has been a boon to malicious organizations and individuals. Because it removes the mediating functions associated with traditional mass media, social media provides such actors with far more capacity to share their propaganda than would have been the case two decades ago. The Islamic State famously made much hay from this, reaping extraordinary recruitment benefits. But this, again, is a two-edged sword. The same openness—the same lack of editorial mediation—that allows a potential-recruit to be identified by the Islamic State creates intelligence-collection and evidence-gathering opportunities for law enforcement and intelligence agencies as well. When one looks through the endless array of indictments of U.S. persons arrested for attempting to provide material support to the Islamic State in recent years, what one finds again and again is that the defendant first was identified as dangerous via public social media postings, and then brought into sustained contact with an undercover officer or confidential informant. That sequence (and variations upon it) has been the engine driving the FBI's impressive run of counterterrorism arrests in recent years. It is a powerful, if underappreciated, testament to the value of combining open-source intelligence (OSINT) collection and analysis with the use of undercover officers and confidential informants for counterterrorism purposes.

What about surveillance and other collection authorities? International terrorism can be investigated not only through a domestic criminal paradigm but also through a foreign-intelligence collection paradigm. The latter capacity unlocks a panoply of authorities that do not require the same sort of proof-of-crime showings that one associates with ordinary law enforcement. Some are expressly designed to function with respect to U.S. person targets (for example, "traditional" FISA Title I electronic surveillance orders). Others compel cooperation from U.S. companies that are in a position to assist in acquiring communications (for example,

FISA Section 702) or other information (for example, national security letters and so-called "Section 215" orders). And since one of the most notable innovations of the post-9/11 world was the elimination of the "wall" that previously prevented criminal investigators and foreign-intelligence collectors and analysts from integrating their efforts, those charged with investigation of international terrorism are in a good position to benefit from the full range of investigative powers today.

III. A TERRORISM-PREVENTION PARADIGM FOR DOMESTIC TERRORISM?

So, should some or all aspects of the post-9/11 terrorism-prevention paradigm be mapped on to the domestic terrorism context today? Let's consider that question first in relation to substantive criminal law, before turning to investigative issues.

A. Do We Need New Federal Crimes?[6]

As an initial matter, it is clear from the discussion above in Part II that there are many aspects of the terrorism-prevention paradigm that depend simply on prosecutorial judgment rather than on the creation of novel forms of criminal liability. This is true in particular for the Al Capone model, and it is true too for the use of standard-issue inchoate crimes such as conspiracy. There is no need for new legislation to use those tools in the domestic terrorism setting. They no doubt are used at times in the domestic terrorism setting, and the decision to use them more extensively is a question of resources and policy preference rather than having the right authorities.

As Part II also made clear, however, there are some terrorism-specific statutes that play an important role in the prevention paradigm, both in the untargeted and targeted settings. Some of these are specific to the international terrorism context. And so the question arises: do we need new federal statutes along any of those lines, for the domestic terrorism context?

Some think the answer is a clear yes. Especially since the El Paso attack, we have heard repeated calls for legislation along those lines. Most notably, the El Paso terrorist attack seems to have revived interest in the possibility of making "domestic terrorism" a federal offense. The FBI Agents Association, for example, renewed its earlier call to take that step (see here for a very useful explainer from Charlie Savage in the *New York Times*, and also this insightful piece from Adam Goldman, also in the *Times*, from early June of this year).

Do the various arguments for creating at least some type of new federal domestic terrorism statute hold water? Here are some of the key considerations:

1. Do we need a federal domestic terrorism law in order to enable prosecution (or sufficiently serious punishments) of persons actually involved in terrorist attacks?

No. We do not have a situation in which persons who are involved in domestic terrorist attacks somehow end up walking free (or getting improperly light sentences) due to a gap in the scope or

[6] This section is a modified version of an essay I wrote for *Lawfare* on August 8. *See* Robert Chesney, *Should We Create a Federal Crime of "Domestic Terrorism"?* (available at https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism).

calibration of criminal laws. This is true regardless of the scope of federal criminal law, in fact, for the *states* are the primary source of criminal law in the American system, and every state has a wide array of general-purpose state criminal laws applicable to terrorist acts (murder, attempted murder, conspiracy, destruction of property, and so forth). In some states, moreover, capital charges are available in at least some circumstances. The El Paso shooter, for example, now faces capital murder charges in the Texas state court system.

To be sure, many states do not have capital punishment, and Congress thus *might* be making a practical difference if it provides a nationwide capital option via creation of a new federal domestic terrorism offense. Is that enough on its own to carry the argument, however? I am doubtful, for federal law *already* does this to a substantial extent. As discussed in the next section, the common claim that federal criminal law—and even the subpart of federal criminal law that is terrorism-specific—does not address domestic terrorism is partially incorrect.

2. There already are federal domestic terrorism laws on the books

It is true that we do not have a single, sweeping statute purporting to criminalize *all* domestic terrorism as such. Yet we *do* have several federal terrorism statutes that apply even in the purely domestic context.

To assess the argument for adding a new domestic terrorism offense, therefore, it makes sense to start by identifying just what gaps remain once one accounts for the existence of these current statutes. Title 18 of the U.S. Code contains most federal criminal laws, and it includes a chapter (Chapter 113B) titled "Terrorism." This is where one finds a variety of federal terrorism-related statutes, including most of the ones commonly used in prosecuting *foreign* terrorism cases. But not all the "terrorism" crimes listed here are limited to international or foreign fact patterns. Some apply just as well to domestic terrorism.

Take one of the most significant of these crimes: 18 U.S.C. § 2332a. This one, alas, has an unfortunately misleading title, one that makes it sound as if the statute would come into play only quite rarely: "Use of Weapons of Mass Destruction." Naturally, one would think that this statute makes it a federal offense to use, attempt to use, or conspire to use nuclear, radiological, chemical or biological weapons. And it does do all that. But, critically, it *also* covers the use of regular explosives—that is, *non*-WMD explosives. And it does *not* require any showing of a transnational or foreign element in the fact pattern. It is enough if there is an interstate commerce element, as is generally required with most federal criminal laws (in order to bring those laws into the scope of federal lawmaking power to begin with, via the interstate commerce authority of Article 1, Section 8, of the Constitution). The point being: This is a key terrorism statute, and it is perfectly available for domestic terrorism cases that involve bombings. Indeed, it was a key charge in the case of Cesar Sayoc, a domestic terrorist who just got a 20-year sentence for attempting to mail bombs to a large number of public figures.

Similarly, 18 U.S.C. § 2332f, also part of the "Terrorism" chapter, addresses the bombing of public places, infrastructure, transportation and the like. And both 2332a and 2332f bear the possibility of the death penalty. And then there is 18 U.S.C. § 2339C ("Prohibitions Against the Financing of Terrorism"). Section 2339C makes it a crime to collect funds knowing or intending

that the funds will be used to commit various predicate acts, most of which have an international connection but one of which encompasses attacks on civilians meant to intimidate a population where an element of interstate commerce is present (see the subtle combination of 2339C(a)(1)(B) and 2339C(b)(1)(G)(ii)). Further, we also have 18 U.S.C. § 2339(a), which prohibits harboring or concealing a person you reasonably believe has committed or is going to commit certain offenses, including a violation of the "WMD" (i.e., explosives) statute described above (i.e., 18 U.S.C. § 2332a).

This brings us to the 1994 material support law (18 U.S.C. § 2339A), which as noted above functions like an aiding-and-abetting statute in that it makes it a felony to provide material support or resources to anyone—including purely-domestic individuals or groups—with knowledge or intent that the assistance will be used to facilitate any of a long list of predicate federal crimes. Most of those predicate offenses are not relevant to the domestic terrorism scenario, to be sure, but some are. For example, 2339A applies when the support is used to facilitate a violation of 18 U.S.C. § 1114 (murder of U.S. government officials), or 2332a and 2332f (both discussed above). To that extent, the remarkable breadth of the "material support" concept can be brought to bear in cases of those who assist at least some domestic terrorism scenarios.

So what does this leave missing? Two gaps stand out.

First, as El Paso illustrates, terrorist attacks can be devastating without the use of explosives. The statutes listed above do not appear to reach most gun-based scenarios—although 2332a does come into play for some guns, because it incorporates by reference the definition of a destructive device found in 18 U.S.C. § 921(a)(4) and, thus, reaches weapons that "expel a projectile by the action of an explosive or other propellant … [if it has a] barrel with a bore of more than one-half inch in diameter." This is a concrete difference between the current approach to criminalizing domestic terrorism as compared to foreign/transnational terrorism, for in the latter scenario it generally would be possible to turn to a statute—18 U.S.C. § 2332b ("Acts of Terrorism Transcending National Boundaries")—that does not distinguish based on the means of violence employed.

Second, the partial availability of a material-support charge under 2339A is just not nearly as useful, from the law enforcement perspective, as having access to the version of material support provided in 18 U.S.C. § 2339B (i.e., the embargo-style 1996 statute that prohibits material support to designated *foreign* terrorist organizations). The reason why is clear (and helped significantly in gaining passage of 2339B in the first place): It is comparatively hard to show a person knows or intends to support a particular criminal act but comparatively easy to show they knew or should have known that their support was going to the benefit of a specific organization. This is why I wrote, above, that 2339B opens the door to anticipatory prosecutions of persons whom the government thinks are personally dangerous but cannot yet be linked to particular conspiracies, attempts or completed acts of violence, but who can at least be shown to have given something of value to a designated foreign terrorist organization (including providing themselves as "personnel" subject to the group's direction and control, thereby encompassing the status of active membership). Some bemoan that scope and some applaud it, but either way the point for

present purposes is that it is not available in the domestic terrorism context; we do not have a proscribed-organizations list for domestic terrorist groups, let alone a prohibition on providing material support or resources to such groups.

Should that change? I do not think so.

As an initial matter, it should be obvious that the First Amendment frictions associated with proscribing organizations in this manner—the limitation on free association and expression—become more profound where the object of proscription is a domestic organization rather than a foreign one. Even if those concerns can be overcome, though,[7] there are powerful reasons not to open that can of worms too readily. One need only ponder a world in which the power of such a designation is in the hands of one's ideological opponents in order to appreciate how quickly the mechanism could become a focal point for intensely-divisive decisions. In that regard, it is worth noting that the Board of Supervisors for the City and County of San Francisco recently passed a resolution denouncing the NRA as a domestic terrorist organization. One might try to police against unwarranted designations through statutory safeguards regulating the designation process, of course, but it would be an extraordinary risk to take. Meanwhile, it is worth underscoring that the current wave of concern about domestic terrorism does not appear rooted in the existence of organization-directed violence of the type associated with the familiar examples in the FTO setting. Taking all of that together, and it seems the case for an organization-based approach cannot be made as things currently stand, and even if it could probably still would not warrant the constitutional and political-stability risks. The idea of having "DTOs" just as we have FTOs is a Pandora's Box. Let's keep it closed.

To sum up: When people say that we lack a federal criminal law for domestic terrorism, this is only partially accurate. We do have such laws when it comes to explosives, and those laws apply not just to the direct perpetrators but also to those who harbor, finance, or otherwise materially support them. Federal law also is effective at reaching domestic terrorists who attack federal officers and installations. What is missing is

> (a) the domestic terrorism scenario in which the weapon is a firearm below a certain size (though such scenarios may yet be covered by federal hate crimes liability), and
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> (b) a framework for proscribing organizations and thereby criminalizing material support to such groups (including becoming a person subject to the group's orders).

Closing the former gap might serve a useful signaling function, underscoring that domestic terrorism and international terrorism are despicable in equal measure. Closing the latter gap, however, would be unwise.

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[7] *Cf.* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (upholding 2239B against First Amendment challenge); Scales v. United States 367 U.S. 203 (1961) (upholding "membership" clause of the Smith Act against First and Fifth Amendment challenges).

3. What issues do proposals to criminalize "domestic terrorism" raise?

Consider first federalism concerns. This is the idea that passage of a federal domestic terrorism statute would mark still another expansion of federal criminal law (and therefore federal enforcement capacity) into a domain previously belonging exclusively to the states. That is an argument that has some merit, though some will find it only a modest objection as compared to potential enforcement benefits such as increased resources available to investigate and pursue such threats and the narrative symbolism of so visibly stamping certain conduct with the terrorism label.

Bearing in mind that much domestic terrorism already can be reached by existing federal terrorism laws, or else by other federal criminal laws (such as hate crime), the degree of encroachment here may actually be rather limited, making the case for closing the gap similarly weaker as to increased resources but still relatively strong as to narrative symbolism. But, of course, much would depend on the precise details of such a statute.

What might such a law look like, and what concerns apart from federalism might it raise?

One oft-cited proposal, elaborated on *Lawfare* by Mary McCord and Jason Blazakis, would take the transnational terrorism offense noted above (18 U.S.C. § 2332b) and simply restate it in a manner that would apply to domestic terrorism. McCord and Blazakis pitched the idea this way:

> Based roughly on current 18 U.S.C. § 2332b, the statute could make it a federal criminal offense to kill, kidnap, maim, commit an assault resulting in serious bodily injury or an assault with a dangerous weapon, or destroy property causing significant risk of serious bodily injury, when done with one of the intents included in the current federal definition of domestic terrorism: (1) to intimidate or coerce a civilian population, (2) to influence the policy of government by intimidation or coercion, or (3) to affect the conduct of a government. The statute should apply to attempts and conspiracies too.[8]

Similarly, some have proposed simply attaching criminal penalties to the existing statutory definition of "domestic terrorism" found in 18 U.S.C. § 2331(5) (a definition that currently is there simply to provide meaning when that phrase is used in a handful of other statutes, such as certain sentence-enhancement provisions). Roughly speaking, it tracks with the 2332b-based model described above. Both approaches, in short, are agnostic as to the means of violence associated with an incident; what matters instead is the coercive intent and motivations of the perpetrator.

Indeed, these approaches might encompass even assaults carried out with mere fists and feet, if harmful enough. Section 2331(5)(A) requires that the act in question be "dangerous to human life," after all, while 2332b(a)(1) requires serious bodily injury, use of a "dangerous weapon," or "substantial risk of serious bodily injury." That would certainly close the gap noted above. But

[8] Mary B. McCord & Jason M. Blazakis, "A Road Map for Congress to Address Domestic Terrorism," LAWFARE (Feb. 27, 2019) (available at https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism).

would it perhaps bring within the scope of "terrorism" scenarios that are too far afield from the moral core of that label?

That question forces our attention to an important but little-discussed aspect of a key element in common terrorism definitions: the idea that not all violent acts (of whatever type) are encompassed, but rather only those that are accompanied by an intent either to impact government policy or to intimidate or coerce a "civilian population." In paradigm cases of terrorism such as the 9/11 attacks, these elements seem easy to apply. And so too with scenarios that are clearly outside the scope of terrorism, such as a financially-motivated robbery involving a fatal shooting. But what about marginal cases? And more specifically, what about situations that do have an element of intimidation to them, but intimidation that is narrow in scope and associated with lesser forms of violence?

Depending on how carefully the elements of a terrorism offense are framed, the door might be opened for applying the terrorism label in circumstances that seem remote from the core meaning of the term. Might an act of thuggery involving an unwelcome protester at a political rally be categorized as domestic terrorism, on the theory that, given the political context, the defendant could be viewed as using force to intimidate a civilian population? Congress would do well to err on the cautious side if it sails into these waters.

B. Do We Need New Investigative Authorities?

As described in Part II, the terrorism-prevention paradigm is not a function solely of substantive criminal charging options. It is, every bit as much, a function of investigative authorities and practices as well. And so the question arises whether there are significant gaps between the investigative models for international terrorism and domestic terrorism, and if so whether those gaps can and should be closed.

As an initial matter, it is likely that a substantial amount of OSINT-style social media monitoring relating to domestic terrorism already takes place, and that undercover officers and confidential informants also are employed to some extent. Whether these tools are employed in the domestic setting with anything comparable to the scale of their use in the international terrorism setting is impossible to say from an outsider's perspective, but certainly a worthy question to consider. That said, it bears emphasis that these practices are not without cost from a First Amendment perspective, and that cost is likely to be higher in the context of purely-domestic investigations.

We can be confident, in contrast, that certain other important investigative tools from the international terrorism setting have not been carried over to the domestic terrorism scenario. Specifically, we can be confident that the panoply of foreign-intelligence collection tools noted above has not been carried over. It can't be, at least not without major legislative changes.

There is a reason for this. In the famous "Keith Case" in 1972, the Supreme Court considered the government's view that collection of domestic intelligence for security purposes (*i.e.*, collection of information about wholly-domestic security threats, in contrast to collection of "foreign intelligence" either from inside or outside the United States) should be treated as exempt from the Fourth Amendment warrant requirement even where the nature of the collection

intruded on a reasonable expectation of privacy, as in the case of wiretapping. After first noting that it was taking no position on whether that might be the right answer with respect to *foreign* intelligence, SCOTUS firmly rejected the government's position as to *domestic* intelligence. SCOTUS emphasized that, in order for domestic intelligence collection to continue other than through criminal investigative means, Congress would have to enact a statutory framework analogous to the warrant systems used in criminal investigations.[9]

It was an invitation that went unanswered. By the mid-1970s, in the wake of endless leaks and Congressional investigations involving allegations of intelligence abuses, it had become quite difficult to imagine Congress creating a "Domestic Intelligence Surveillance Act." Instead, in 1978, Congress took up the task of creating such a system exclusively for use in relation to *foreign* intelligence collection—*i.e.*, FISA. Since then, FISA has been altered and expanded in various ways, but no one has ever pushed seriously for a DISA. The idea smacks of authoritarian excess even in the best of times (which these are not). Even if such a measure would pass constitutional muster under the Keith Case, therefore, the case has not been made for making the attempt.

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I thank you for giving me the opportunity to testify before you, and for the attention you are giving to this important topic. I look forward to your questions.

Prof. Robert Chesney

[9] United States v. United States District Court, 407 U.S. 297 (1972). The case is known as the Keith Case because the district judge whose order became the subject of the Supreme Court's review (following a mandamus petition that yielded the awkward combination of party names just cited) was Damon Keith.