



## Another Big "Terrorism" Bill is Not the Answer

Wesley S. McCann, George Mason University

*This memo deals with a terrorism bill that is being considered by Congress right now.*

### The Domestic Terrorism Prevention Act of 2021

A bipartisan effort is underway to pass major legislation to aid and enlarge the capacity of law enforcement and homeland security efforts in countering domestic terrorism. Unfortunately, the newly **proposed legislation** -which was also proposed in 2020- is riddled with issues; both conceptual and practical. First, the bill conflates "hate crime" and "terrorism" by calling on the government to track and study hate crime that has a "nexus to" domestic terrorism. In theory and in practice, these are not the same crimes. However, there is some level of overlap amongst these two crimes. This overlap is a legal one, however, as policymakers have failed to distinguish between the two over the last few decades. In fact, scholars have argued that statutes covering "terrorism" and "hate crime" **are often too similar** to be distinguishable. The bill also creates new domestic terrorism units, offices, and one "Domestic Terrorism Counsel" which will head the "Domestic Terrorism Office" within the Department of Justice. The bill itself does not define the core functions or purpose of said counsel or how it be filled. These proposals in turn create more overlapping counterterrorism bureaucracy without resolving some of the underlying conceptual issues inherent in the very laws they are enforcing.

The bulk of the bill is focused explicitly on "white supremacy" and "neo-nazi" style terrorism as well. While these forms of terrorism are an issue in the Western world in general, they make up only one part of the "far-right" that has been largely ignored in recent decades. Furthermore, this enunciation ignores anti-government groups and militias who are arguably a bigger threat given their interest in biological and chemical weapons and stockpiling and open carrying of weapons. In fact, such actors are **more active** in pursuing these than most groups abroad. It seems that waiting until 2021 to mandate biannual reports on the state of racist terrorism in the United States seems a bit late anyways, and while such reports are still valuable, they fail to address bigger issues. In fact, the Department of Homeland Security tried to **signal over a decade ago** that right-wing extremism was on the rise again; much to no avail. What will improve by passing this bill in its current form then?

Lastly, the bill itself relies on the established definition of "domestic terrorism" without enacting an actual criminal statute for it. And it does all of this while requiring the Department of Justice, FBI, and Department of Homeland Security to provide resources and training to local enforcement in "understanding, detecting, deterring, and investigating acts of domestic terrorism and White supremacist and neo-Nazi infiltration of law enforcement and corrections agencies." This is noble in design, but again falters due to conceptual issues.

These are just a few of the shortcomings of the proposed bill, but they are demonstrative of knee-jerk political reactions to events rather than careful analysis of a complex problem. Do we need to study the nature and scope of the far-right terrorism threat in America? Without a doubt.

Can this bill push us further in that direction? Potentially. Does realigning the security and intelligence apparatus to focus more on domestic threats seem reasonable? Absolutely. The aforementioned issues, however, if left unresolved, would undermine any progress such a bill could accomplish. So what can be done?

### Baby steps in the right direction

More efficient steps in the right direction should include: 1) a "domestic terrorism" statute; 2) clarifying counterterrorism priorities; 3) data repositories; 4) evaluation of existing counterterrorism strategies and programs; and 5) the enforcement of existing anti-paramilitary laws. This is not exhaustive by any means, but

the bill in its current form would almost entirely exclude these steps; except for more data collection efforts, and even then, it is not clear whether these data would be shared with the public. Nevertheless, each of these steps are intertwined and related.

The biggest concern with recent legislation and the aforementioned bill is the failure to create a "domestic terrorism" statute. This could very easily be made analogous to the "acts of terrorism transcending national boundaries" (18 U.S.C. § 2332b) statute by changing the jurisdictional elements. Congress could excise 18 U.S.C. § 2332b from Title 18 and instead create two separate forms of "terrorism"- international and domestic modeled after their existing definitions listed in § 2331(1) and § 2331(5) and corresponding penalties in § 2332b. This would make the enforcement of terrorism more parsimonious for federal authorities. Some may argue this is not necessary since we already have dozens of laws on the books to prosecute domestic acts of terrorism, such as homicide, property crime, and obtaining weapons of mass destruction statutes as well as civil rights laws. However, the fact remains that federal criminal statutes specific to "terrorism" are a mess and they need cleaning up. Such an effort would only make counterterrorism efforts more nuanced while avoiding the cliff of becoming more of a police state.

Any additional statutes or revisions to existing statutes should also include conspiracies and attempts. Furthermore, 18 U.S.C. § 2339a would also need to be revised if a domestic terrorism statute were established so that those who stockpile weapons, for example, can also be prosecuted for "material support". These changes have been echoed by others as well. Such a domestic terrorism statute would thus have enormous ramifications for countering growing threats in the U.S. The addition would help to bridge the gaps in investigating and prosecuting all types of terrorism regardless of where they occur, all the while making domestic priorities a larger part of the national counterterrorism program.

Nevertheless, any changes to existing terrorism statutes should be accompanied by changes to existing "hate crime" statutes (e.g. 18 U.S.C. § 241; § 245; § 247; § 249). This is because of their definitional and legal overlap. Scholars have postulated that "hate crime" and "terrorism statutes should be amended in tandem. Policymakers can excise existing statutes for both crimes and

instead retain sentencing enhancements (e.g. § 3A1.4) for each based on ideological motivations or biases. It seems more tenable for policymakers to redefine "hate crime" as lacking a social or political goal. This would enable enforcement agencies to distinguish between an assault motivated by racial animus from a group attacked motivated by a desire for a race war. Terrorism is fundamentally political and thus centers on goal-oriented actions that induce political or social change. Statutes should reflect this reality. Another route for policymakers is to better operationalize "ideology", "bias", and "prejudice" as they appear in their respective iterations within federal criminal law.

Absent the foregoing changes to hate crime statutes, both terrorism and hate crime will remain mushed together without a refining of these statutory elements; making it hard to collect viable data, study various trends, and subsequently, make better policy. A more simplistic but legally arduous route could be to get rid of "terrorism" and "hate crime" statutes and create a more flexible statute to combat "extremism". This could be analogous to the growth of "theft" statutes to combat the vast array of property crimes that occur in the real and digital realms. Such a statute would still need to consider the definitional elements mentioned above as well as take into consideration the spectrum that is extremism. Furthermore, the statute would have to focus more on individual beliefs as the motivation rather than a simple bias versus political goal dichotomy. Put simply, the statute may be more parsimonious for enforcement officials to use, but theoretically it may prove difficult to lay out proper goal lines to demarcate where ordinary crime crosses into extremism.

Connect to the definitional issue is the issue of enforcement priorities. The Congressional Research Service (CRS) has indicated that it is unclear how the Department of Justice or FBI determine who constitutes a domestic terrorism threat. The question remains- "[h]ow does a particular brand of dissent become ripe for description by DOJ and the FBI as driving a "domestic terrorism" threat?" During his tenure, J. Edgar Hoover ignored threats posed by white supremacists and southern mobs in order to carry out his overstated war on communism. The Congressional hearings of the 1970s demonstrated that the FBI (and CIA) had massively overstated their legal authority in clamping down on domestic political movements, namely on the left. However, those were the political priorities of the day. This has only shifted partially to countering Islamic extremism, albeit largely abroad, and vis-à-vis the military. Moving forward, policymakers in concert with practitioners and scholars need to establish clear enforcement priorities based on articulable facts and empirical evidence that is proportional to the respective threat(s).

A recent proposal is to create a “domestic terrorism list”. Even if policymakers refined criminal statutory definitions of terrorism, this list would almost certainly be abused. Little effort is needed to see the long and grotesque history of the federal government’s- namely **Hoover’s FBI**- abuses in countering the domestic threat pursuant to a “list”. Ironically, this history was primarily focused on the “far-left”, hence why many criminal statutes in the U.S. on unlawful assembly and riot have to be read from the right. The same is true of our immigration laws and their **convergence with criminal law** over the last two hundred years. The CRS has already **indicated that such a list** would potentially violate the First Amendment anyways. Many of the material support statutes have been challenged on these very grounds. Put simply, *more* laws is not necessarily the answer here, clearer definitions and enforcement priorities are. Academics, practitioners, and policy experts should weigh in on how to better allocate federal resources to fight domestic threats without expanding the War on Terror.

One of the biggest issues in understanding terrorist threats is data. Several government databases that were viably defined but lacked oversight gave way to the public-private sector after 9/11. The primary source that has emerged is the Global Terrorism Database (GTD) at START, which is located at the University of Maryland. Efforts by START researchers over the last two decades have enabled a boom in terrorism research by professors and scholars alike across more than a dozen different databases. However, research findings and subsequently, policy recommendations, are only as good as the data. The GTD is the most used database at START by far, but it is prisoner to **many issues**; namely that the conceptualization of “terrorism” is spotty at times (e.g. sometimes conflates “terrorism” with “hate crime” or “guerrilla warfare” with “terrorism”), it is the amalgamation of over a dozen different databases that were defined and created differently over the last half century, and it relies purely on open-source data. Thus, it is unclear at times *what* is being measured.

It must be stated that even official data sources are subject to limitations. This is why criminologists examine official data reports alongside victimization surveys to assess the unknowns- or “dark figure of crime”. The complete relegation of data collection to academics is not inherently bad, but a database that is comprised of official reports would be both supplemental and academically useful. For example, the Uniform Crime Reports housed by the FBI already collects data on “Hate Crime” incidents. However, this is voluntary, is subject to massive **underreporting at times**, and also conceptually muddy given that thousands of law enforcement agencies independently determine what “hate crime” is when submitting their reports. This is why refining what “domestic terrorism” and “hate crime” are per federal criminal statute is essential.

**It is also not clear that our government has** a central repository of terrorism incidents. Congress could mandate reporting of domestic terrorism by law enforcement agencies across the country in the same manner that hate crime is mandated. Third parties could then assess and validate this database, which would give it legitimacy overtime while corrections are made. A different route for constructing a government database would be analogous to the State Department’s “Country Reports on Terrorism” which are also mandated by law. Such a database would need third-party oversight for there to be legitimacy. This could come in the form of an oversight panel comprised of academics, lawyers, former practitioners, former military leaders, and members of the private sector who specialize in analyzing terrorism. Such a panel would need to be nonpartisan and would be focused primarily on ensuring the database is being objectively constructed and that practitioners are adhering to a priori definitions of terrorism (or extremism).

Another step could involve evaluating *current* domestic mechanisms, such as Joint Terrorism Task Forces (JTTFs), Fusion Centers, and the efficacy of resources poured into local law enforcement since 2001. This is also not completely separate from having clearer enforcement priorities, as fusion centers have had issues with targeting **lawful political activity**. Furthermore, fusion centers have been criticized for providing useless intelligence, all the while federal agencies **have failed** to monitor and evaluate funding used in these efforts. It seems that creating a commission or panel to monitor counterterrorism funding decisions would incentivize practices that are cost-effective and evidence-based. This is also why more federal funding should be allocated to the study of counterterrorism programs and policies. To date, federal grants have been mostly focused on allocating monies to scholars to research radicalization processes, prevention, and reentry efforts, so more could be allocated for the study of evidence-based counterterrorism strategies, as the **current literature** on the subject is quite bleak.

The last, and ironically most obvious change that can be made moving forward is for state and federal authorities to *actually* enforce anti-militia laws. The overlap amongst domestic terrorism and militias in the United States is quite formidable, and needs to be taken seriously. Addressing this has almost nothing to do with the Second Amendment either. All 50 states have constitutional or statutory provisions that limit or bar activities by private militias or paramilitaries. It comes down to awareness about enforcement tools.

Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP) studied this issue and found that all states have at least one legal way to combat militias: "(1) constitutional provisions requiring the subordination of the military to civilian authorities; (2) statutes restricting unauthorized private militia activity; (3) anti-paramilitary-activity criminal laws; and (4) prohibitions on the false assumption of the uniform or duties of a peace officer or member of the military." In fact, 48 states have at least one law concerning the former, in that private armies may violate their state's constitution by way of usurping military authority. It remains unclear as to why these statutes are rarely enforced, as militias were quite present during the civil unrest that engulfed the country during the summer of 2020 as well as elections. Again, another reason as to why *more* laws is not always better- sometimes we already have the tools we need.

This is a serious issue because there has been a **massive growth in militias** since the early 1990s, with a large increase since 2008. However, we do not have any real clear data on this because it is unclear whether the government tracks such movements or groups, or even considers them a threat. The history of militias in the United States is quite long, but it is almost entirely contained on the far-right with heavy doses of white supremacy, anti-Semitism, and Christian Identity observance sprinkled in. Unless the federal government is willing to enact federal legislation outlawing militias, or at the very least allocating resources to collect data so their behavior can be monitored and studied, then such bills like the Domestic Terrorism and Prevention Act of 2021 may miss the forest through the trees like many prior bills.