

Learning From Our Mistakes: How Not to Confront White Supremacist Violence

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Learning from mistakes requires acknowledging them, which can only come with constant and rigorous evaluation of policies and practices, and independent oversight.

INTRODUCTION

As a Federal Bureau of Investigation (“FBI”) agent who worked on successful, proactive undercover domestic terrorism operations for almost a decade before 9/11, and as a whistleblower who reported continuing mismanagement of counterterrorism cases to Congress after 9/11, I have seen the intelligence agencies’ failure to submit their policies and practices to objective evaluation undermine their ability to know what works and what doesn’t. The failure to protect against the January 6, 2021 attack on the U.S. Capitol has followed a pattern that has become all too familiar since 9/11. Immediately after an attack law enforcement was clearly not prepared for, intelligence agency leaders claim they saw no intelligence predicting the assault, despite the attackers’ public declarations of their violent intentions. Shortly thereafter, leaks and investigations reveal that numerous critical warnings had come in from the field, yet managers overlooked or

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ignored this reporting and failed to move resources in time to prevent the attack. But rather than identify the information management problems and reform them, agency leaders exploit the failure to seek new powers.

Ever since the racist murder of nine worshipers at the Mother Emanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015, current and former Justice Department officials have been lobbying for a broad new domestic terrorism statute, which they claim is needed to help the FBI and federal prosecutors more effectively respond to white supremacist and far-right militant violence.¹ The proponents of a new law seek to mirror what they say are more robust legal authorities that make it easier to investigate and prosecute international terrorism cases.² These arguments both underestimate the existing tools available to prosecute domestic terrorism, and vastly overstate the success of law enforcement actions against international terrorism since 9/11. These misimpressions reveal not only that the Justice Department and FBI haven't learned from their mistakes, but that they are eager to repeat them.

One of the early errors the Bush administration made after 9/11 was to treat the al Qaeda attacks as a "new" kind of warfare.³ Of course, terrorism wasn't new. The Ku Klux Klan and other white supremacist groups had terrorized non-white and non-Protestant Christian communities since the end of the Civil War, using violence specifically intended to deny them the free exercise of their civil rights. Advocates for a new domestic terrorism statute often state that there is currently no law prohibiting domestic terrorism, which would be shocking if it wasn't so obviously false. The Justice Department successfully prosecuted terrorism cases in criminal courts for years before 9/11 and is doing so to this day. We should draw on that counterterrorism knowledge and experience instead of the tactics of the last two decades, which have proven to be both ineffective and counterproductive.

I. THE LONG HISTORY OF PROSECUTING DOMESTIC TERRORISTS SHOWS EXISTING LAWS ARE EFFECTIVE

There is a long history of using the criminal justice system to prosecute domestic terrorists. The Justice Department was established in 1870 to enforce legal protections for newly emancipated African Americans against this tide of racist violence. The Enforcement Acts, including the Ku Klux Klan Act of 1871, established the legal framework the Justice Department used to successfully prosecute hundreds of Klansmen in federal courts, decimating the organization over just a few years. While adverse Supreme Court decisions and a lack of political will undermined the effectiveness of these laws as Reconstruction ended, allowing the

1. *A Discussion With DOJ's Domestic Counterterrorism Coordinator*, GEO. WASH. UNIV. PROGRAM ON EXTREMISM (Jan. 9, 2018), <https://perma.cc/ZUH9-6HHK>.

2. Mary McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE BLOG (Aug. 21, 2017, 1:59 PM), <https://perma.cc/7QRT-GGHD>.

3. *Full Text: Bush Discusses U.S. War on Terrorism*, WALL ST. J. (Oct. 12, 2001, 5:39 AM), <https://perma.cc/VT4V-RZH5>.

Klan to reconstitute in 1915, the Justice Department effectively revived their use during the civil rights era. They remain the foundation of current federal civil rights laws the Justice Department uses to prosecute hate crimes, various forms of discrimination, and police brutality.

Today, in addition to these civil rights laws there is an entire chapter in the U.S. criminal code devoted to “terrorism.”⁴ It lists fifty-seven federal crimes of terrorism, fifty-one of which apply to acts the statute defines as “domestic terrorism.” There are also dozens of other powerful federal statutes — specifically organized crime, violent crimes, and conspiracy laws — that are regularly and effectively used in domestic terrorism prosecutions. Contrary to the assumptions of promoters of a new domestic terrorism law, to the extent there is a gap in effectiveness between Justice Department prosecutions of domestic versus international terrorism, it is international terrorism cases that lag. Justice Department records claim that it prosecuted twice as many domestic terrorism cases as international terrorism cases over the last ten years.⁵ This success was achieved despite the fact that the FBI deprioritizes domestic terrorism by devoting only 20 percent of its counterterrorism resources to these investigations.⁶

It is true that the Justice Department has not aggressively or systematically focused on these broad domestic terrorism laws to prosecute white supremacist or far-right militant violence, choosing instead to prioritize investigations of environmentalists and racial justice activists the FBI called “Black Identity Extremists.”⁷ But this failure is a matter of policy choices made at the Justice Department and FBI. Justice Department officials over multiple administrations could have changed these policies any time, including after the 2015 Charleston murders, the 2017 Unite the Right Rally vehicle attack, the 2018 Tree of Life Synagogue shooting, or the nativist murders at the 2019 El Paso Walmart. But they did not. Broader domestic terrorism laws will not solve the problem of the Justice Department’s deprioritizing these investigations.

II. OVERESTIMATING SUCCESSES IN INTERNATIONAL COUNTERTERRORISM RISKS REPEATING ERRORS

In addition to underestimating the power of existing domestic terrorism laws to prosecute white supremacists, the proponents of a new statute significantly overstate the Justice Department’s performance in the international terrorism arena as efforts worthy of replication. In fact, many of the Justice Department’s tactics in

4. 18 U.S.C. ch. 113B.

5. See *FY 2019 Domestic Terrorism Prosecutions Twice Number for International Terrorism*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Aug. 29, 2019), <https://perma.cc/TE6W-N566>; see also MICHAEL GERMAN & SARA ROBINSON, *WRONG PRIORITIES ON FIGHTING TERRORISM* 17 (BRENNAN CTR. FOR JUSTICE 2018), <https://perma.cc/GKW2-WBXP>.

6. Laura Strickler, Julia Ainsley & Ken Dilanian, ‘We Have a Problem,’ *Federal Agencies Scramble to Fight Domestic Terror with Limited Resources*, NBC NEWS (Aug. 5, 2019), <https://perma.cc/7R5E-Z2PD> (quoting FBI counterterrorism official Michael McGarrity).

7. Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists’*, FOREIGN POL’Y (Oct. 6, 2017, 11:42 AM), <https://perma.cc/9H5K-TNBW>.

investigating and prosecuting international terrorism cases have been abusive, divisive, and ineffective as counterterrorism measures.

The primary statute that advocates of a new law claim gives international terrorism investigators a leg up over their colleagues working domestic terrorism is the material support statute. The statute has two parts. The first, 18 U.S.C. §2339A, prohibits material support toward the commission of one of the fifty-seven federal crimes of terrorism mentioned above (fifty-one of which can be applied to domestic acts). This material support charge can be, and in rare instances has been, used in cases the Justice Department categorized as domestic terrorism. It is used rarely because the evidence necessary to prove that someone materially supported a federal crime of terrorism could also be used to level a conspiracy charge. Most prosecutors would prefer to use conspiracy laws (sometimes called “the prosecutor’s darling” because of their broad scope and significant penalties) simply because their parameters are better defined through decades of case law.⁸

The second part of the material support statute, 18 U.S.C. §2339B, prohibits the provision of any kind of support to a group the U.S. government designates as a foreign terrorist organization, or FTO. This law is rooted in the president’s broad foreign policy powers under the International Economic Emergency Powers Act (“IEEPA”) to impose economic embargoes on foreign nations, organizations, or individuals that allegedly pose a threat to the United States. There is no similar authority to designate domestic terrorist groups or bar their support, which is ironic considering the material support statute was passed in response to the Oklahoma City bombing, the deadliest domestic terrorism attack in history. Any attempt to treat domestic organizations like FTOs would undoubtedly infringe on free association rights guaranteed by the First Amendment. Though there are scores of foreign white supremacist and far-right militant groups in other countries that engage in terrorist violence that endangers Americans, the U.S. government has only ever designated one, the Russian Imperial Movement, as an FTO, and that one not until 2020.⁹ Instead, the FTO list is predominantly filled with Muslim groups, which reinforces Islamophobic notions linking Muslims to terrorism and substantiates terrorist group narratives that the West is anti-Islam.

The reach of section 2339B is exceptionally broad, barring the provision of any tangible or intangible support to a designated FTO, even when such support was not intended to, and did not in fact, further any violent, criminal, or terrorist activity. The Supreme Court ruled that providing advice or training designed to dissuade the FTO from engaging in terrorism could result in charges under this law. The only exceptions are for medicine and religious materials. The government can deem anyone, including a U.S. citizen, who provides support to an FTO a Specially Designated Global Terrorist and subject them to sanctions, making it

8. Solomon A. Klein, *Conspiracy: The Prosecutor’s Darling*, 24 BROOK. L. REV. 1, 1 (1957).

9. Jessica Donati, *U.S. Labels Russian White Supremacist Group as Global Terrorist*, WALL ST. J. (Apr. 6, 2020, 3:56 PM), <https://perma.cc/NH55-RDPE>.

illegal for anyone else to provide material support to that person, in an ever-widening ripple effect. The government has even claimed the authority to freeze an organization's assets pending an investigation into whether it provided material support to an FTO.¹⁰

Section 2339B's power is that it allows the government to prosecute individuals two or three degrees separated from any actual acts of violence committed by the FTO. Proponents of a new domestic terrorism law are correct that international terrorism prosecutors rely heavily on this statute. Justice Department records analyzed by the Intercept show that prosecutors laid material support charges against fifty-three percent of terrorism defendants.¹¹

III. TARGETING PEOPLE WHO ARE NOT COMMITTING TERRORIST ACTS OR SUPPORTING VIOLENCE IS NOT AN EFFECTIVE COUNTERTERRORISM STRATEGY

The idea behind the material support law was that FTOs needed resources and personnel in order to survive, organize, and acquire the materials to carry out attacks. Choking off these resources by criminalizing any material support to these organizations, even when unconnected to any specific act of violence, the proponents of this law argued, was an essential element to preventing terrorism. After almost 25 years it is clear this law does not meet its purpose in reducing the size or capabilities of designated FTOs.

The United States designated Hamas as an FTO in 1997. It has continued carrying out sophisticated attacks against Israel, Egypt, and rival Palestinian factions over the decades since. It also gained in political popularity, winning control of the Palestinian government through democratic elections in 2006. Similarly, the U.S. designated al Qaeda as an FTO in 1999, yet it organized successful attacks against the USS Cole in Yemen in 2000 and the 9/11 attacks, the deadliest in history, a year later. Al Qaeda continues to operate in Afghanistan despite almost two decades of U.S. military operations, and now has a multitude of affiliates spread across the globe. According to a 2021 U.S. Treasury Department report, al Qaeda "is gaining strength in Afghanistan," continues to receive funds from supporters, and successfully disburses them across the Afghanistan/Pakistan border to its affiliates.¹² The primary weapon in the legal and financial wars on terrorism, the designation of Foreign Terrorist Organizations, has not had its intended effect.

10. *Kindhearts Case Timeline*, CHARITY AND SECURITY NETWORK (July 9, 2010), <https://perma.cc/HT2B-2AX9>.

11. *Trial and Terror*, INTERCEPT (May 14, 2021), <https://perma.cc/ZH4S-AAAG>.

12. Gregory Sullivan, *Operation Inherent Resolve – Summary of Work Performed by the Department of the Treasury Related to Terrorist Financing, ISIS, and Anti-Money Laundering for First Quarter Fiscal Year 2021*, DEP'T OF TREAS. (Jan. 4, 2021), <https://perma.cc/7ZGR-7F29>.

IV. ABUSES OF COUNTERTERRORISM AUTHORITIES DIVIDE COMMUNITIES AND UNDERMINE PUBLIC SUPPORT

Meanwhile, the broad scope of chargeable activity under this law opened the door to abusive investigations and prosecutions of people who were not involved in terrorism, undermining support for counterterrorism policies. The breadth of the material support law created perverse incentives for the government to inflate counterterrorism arrest statistics by manufacturing terrorist plots and then foiling them, to great fanfare.

After 9/11, the Bush administration used these authorities to shutter at least nine Muslim charities across the United States, often without ever bringing criminal charges.¹³ The government effectively put these charities, such as the KindHearts Foundation, out of business by engaging in highly publicized raids and freezing their funds without due process, and provided no forum for them to clear their names. The Justice Department did successfully prosecute the largest Muslim charity in the United States, the Holy Land Foundation (“HLF”), for providing material support to Hamas.¹⁴ The government didn’t argue that HLF gave money directly to Hamas, nor that its donations were somehow diverted to Hamas. It acknowledged that the HLF sought advice from the U.S. government regarding how to conduct its charitable works within the law, and that all of its donations went to their intended recipients, none of which were designated as FTOs. Instead, the government argued that any charity provided to needy children and families in the Palestinian territories ultimately benefitted Hamas. Jurors in the first trial failed to reach a verdict, but the government won convictions at a second trial. Five HLF leaders were sentenced to long prison terms. This unjust prosecution, targeting prominent members of the Muslim community who were not alleged to have supported or been involved in any acts of violence, did no harm to Hamas. Instead, it inflicted a wound on Muslim Americans, painting them as a suspect community and inhibiting the free exercise of their faith, which requires charitable giving.

This was no accident. The FBI and Justice Department had adopted a discredited theory of terrorist radicalization that identified common Muslim religious and social practices as evidence of a progression toward violence.¹⁵ The FBI produced grossly anti-Muslim training materials that stigmatized Middle Eastern culture as backward and violent, and promoted its biased radicalization theory to state and

13. NATHANIEL J. TURNER, U.S. MUSLIM CHARITIES AND THE WAR ON TERROR: A DECADE IN REVIEW (Kay

Guinane & Suraj K. Sazawal eds., Charity and Security Network 2011), <https://perma.cc/4VTD-LVMW>.

14. See Hollander Nancy, *The Holy Land Foundation Case: The Collapse of American Justice*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 45 (2013).

15. See FEDERAL BUREAU OF INVESTIGATION, THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD (2006), <https://perma.cc/PK9J-6TGJ>.

local law enforcement, business groups, and community organizations.¹⁶ In spreading anti-Muslim bias and nativism, the FBI created a pathway for white supremacist and far-right militant groups to find common cause with law enforcement officers.

The FBI also initiated mosque outreach programs that morphed into broad intelligence collection and informant development efforts. In 2014, Attorney General Eric Holder announced a new and expanded anti-terrorism program called countering violent extremism (CVE), which almost exclusively targeted Muslim communities, reinforcing common Islamophobic tropes that Muslim American communities harbored terrorists.¹⁷ CVE programs offered grants to community groups willing to participate in programs that included trainings to spot and report indicators of radicalization among youth and adults in Muslim communities. The FBI established “Shared Responsibility Committees” consisting of police officers, teachers, social workers, religious leaders, and public health practitioners to evaluate individuals for signs of radicalization and counsel them under FBI guidance or refer them to law enforcement.¹⁸ CVE effectively divided Muslim communities into cooperators, who agreed to participate in this type of government programming and received benefits and privileged access, and opponents, who resisted it as stigmatizing and harmful and were treated with suspicion.

Of course, there are no terrorist profiles, reliable indicators, or discernable pathways to becoming a terrorist, much less ones a lay person could accurately apply. The FBI itself proved incapable of discerning the intentions of several individuals it had under investigation before they committed deadly terrorist attacks, including David Headley, Nidal Hasan, Tamerlan Tsarnaev, and Omar Mateen, to name a few.

The Justice Department often referred to CVE as an opportunity to “off ramp” wayward individuals from the path to radicalization. In reality it acted as an on-ramp to subject individuals to more intensive government scrutiny. The FBI had adopted an aggressive methodology for sting operations as a primary counterterrorism tool. These sting operations didn’t typically target people who were members of a terrorist organization or involved in terrorist plots but rather individuals who had expressed support for an FTO, an interest in traveling to a conflict zone, or antipathy toward the U.S. government. Interpreting these as signs of radicalization, the FBI would develop a plan to induce them to commit an illegal act, so they could make an arrest.

An FBI informant or undercover operative would introduce themselves as members or associates of an FTO. The government agent would encourage the

16. Spencer Ackerman, *FBI Teaches Mainstream Muslims are ‘Violent, Radical,’* WIRED (Sept. 14, 2011, 8:45 PM), <https://perma.cc/T3Y2-TCX6>.

17. FAIZA PATEL & MEGAN KOUSHIK, *COUNTERING VIOLENT EXTREMISM* 28 (2017), <https://perma.cc/5U5L-UEWP>.

18. Julian Hatttem, *Key Dem Wants Watchdog to Probe Little-Known FBI Program*, HILL (Apr. 29, 2016, 5:08 PM), <https://perma.cc/MJT7-WXKH>.

individual to assist in some action, perhaps sending money or materials to the FTO, or travelling abroad to join the group, or developing a terrorist plot. The undercover agent would then provide all the materials and incentives necessary to secure the target's cooperation, sometimes offering money or jobs, and other times companionship or religious salvation. The FBI would at times produce a theatrical show, often involving fake bombs, armed drones, or missiles, and a dramatic finale in which the target is instructed to trigger the explosion only to be arrested instead by a waiting SWAT team.

But these stings are resource intensive operations with little counterterrorism benefit. The targets of these investigations aren't actually terrorists. They have no affiliation with the FTO they are charged with supporting, and any material benefit to the FTO is entirely imaginary. The FBI's approach does provide the FTO with free publicity, however, that aggrandizes its reach and capabilities, and frightens the public. ISIS didn't need to organize an attack in the United States to terrorize Americans, the FBI produced the attacks for them.

One FBI operation used three separate informants to befriend Nicholas Young, a Washington, D.C. Metro Police officer and Muslim convert, to try to convince him to break the law.¹⁹ Over six years he resisted the informants' ploys, but finally when one pretended to go to Syria and join ISIS he asked for money, and Young sent his ersatz friend a \$245 gift card. Prosecutors charged Young with providing material support to ISIS, convicted him at trial, and a judge sentenced him to 15 years in prison. ISIS didn't actually receive the \$245 gift card, nor know about the informant's imaginary allegiance. The FBI likely didn't believe Young posed a threat of violence, as it allowed him to remain a police officer and carry a firearm during the entirety of the 6-year operation. The operation manufactured a crime for the purpose of producing a statistical accomplishment for the international terrorism program.

Other sting operations produced more dangerous results. A Portland, Oregon sting operation provided a young Muslim man with a fake truck bomb that he tried to detonate at a downtown Christmas tree lighting ceremony. The sensationalized reporting of the manufactured plot exacerbated inter-religious tensions in the wider community, and a young man burned down a local mosque in retaliation.²⁰ So the FBI's fake terrorist attack spawned a real one.

V. WAR ON TERRORISM TACTICS ARE UNHELPFUL TO COMBAT WHITE SUPREMACIST VIOLENCE

Part of the reason FBI agents feel compelled to manufacture cases in the international terrorism program is that, luckily, foreign terrorist organizations are not very active inside the United States. But FBI leaders continue to prioritize

19. Murtaza Hussain, *Widely Reported D.C. Metro Police "Terrorism" Arrest Involved Gift Cards, Not Violence*, INTERCEPT (Aug. 3, 2016, 6:21 PM), <https://perma.cc/J55H-Q4FT>.

20. Maxine Bernstein, *Man Accused of Hate Crime in Corvallis Mosque Arson*, OREGONIAN (Jan. 10, 2019), <https://perma.cc/5Q2X-G2HP>.

international terrorism investigations, assigning the bulk of counterterrorism agents these investigations. Agents assigned to investigate international terrorism have to produce results, whether real FTOs are active in their territories or not.

White supremacists and far-right militants, on the other hand, regularly engage in a significant amount of violence and criminal activity that often receives insufficient law enforcement attention. FBI agents won't need to scour social media to find someone saying something provocative so they can start a sting operation. They won't have to do outreach to local Christian churches to find someone who will help them identify the racists among them who might be vulnerable to Klan recruitment. They don't need "see something, say something" campaigns that would only inundate them with a flood of unhelpful leads. They just need to start paying greater attention to the violent crimes these groups are actually committing on a regular basis. Investigating these cases will help build an intelligence base that is focused on criminal activity, not religion, ethnicity, or ideology. The counterterrorism, homeland security, and intelligence enterprises built since 9/11 failed to adapt to the gathering threat from white supremacists and far-right militants whose increasingly public violence was too often countenanced by law enforcement officials because it was directed against their critics.

The attack on the Capitol should be a wake-up call that the wasteful, ineffective, and divisive tactics used to fight international terrorism need to be retired, not replicated. Congress already passed all the laws necessary to properly investigate and prosecute white supremacist and far-right militant violence. What we need is an evidence-based and crime-focused national strategy, and greater public accountability over counterterrorism resources to ensure the Justice Department is properly prioritizing the deadliest threats.
