

Domestic Terrorism: Some Considerations

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Introduction

Mass shootings and other recent events have led to suggestions for (1) making domestic terrorism a [separate](#) federal crime; (2) affording law enforcement agencies [authority](#) comparable to that which they enjoy in cases of international terrorism; and (3) [adjusting](#) existing federal law enforcement priorities to place greater emphasis on domestic terrorism.

Domestic terrorism as a separate federal crime

Existing federal law defines domestic terrorism but does not outlaw it by name. Section [2331\(5\)](#) of the federal criminal code defines domestic terrorism as a life-endangering federal or state crime, committed within the United States, with the apparent intent to coerce or intimidate a civilian population or influence government policy or conduct. Domestic terrorism, by name, is not a federal crime, but the conduct that Section 2331(5) describes is already a state or federal crime under some other name. With or without a terrorist motive, life-endangering misconduct – homicide or assault – is a crime under the laws of each of the fifty states and the District of Columbia. Homicide is a federal offense or a sentencing factor for dozens of federal crimes with various jurisdictional predicates (*e.g.*, [killing](#) a federal officer or employee). Violence directed against particular segments of the population often constitutes a federal [civil rights](#) or [hate crime](#) offense. Several federal criminal provisions already use domestic terrorism as defined in Section 2331(5) as an [element](#) of a separate crime or as a sentence [enhancement](#).

Section 2331 also defines international terrorism without making it a separate crime. However, Congress has enacted criminal statutes focused on international terrorism that also might appear to have no domestic terrorism equivalents. For example, the federal crime of providing [material support](#) to a designated foreign terrorist organization has no similarly captioned counterpart on the domestic side. Yet here too, the basis for criminal liability has a different name. Beneath the surface, co-conspirator and accomplice liability look much like providing material support. An individual who [aids or abets](#) (provides material support for) someone else's commission of a federal crime, such as [murdering](#) members of a church congregation or [assassinating](#) a Member of Congress, may be prosecuted as an accomplice before the fact. Prosecution is [only](#) possible, however, if the underlying crime, the murders or the assassination, actually occur. Conspiracy suffers no such limitation. Federal [conspiracy](#) is an agreement of two or more individuals to commit a federal crime, complete when some step is taken toward that criminal objective.

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When an individual knowingly provides material support to a confederate's plan to commit a murder or an assassination, the crime is complete though the murder or assassination may never be carried out. Nevertheless, some may feel that federal criminal law should reflect the view that violence committed for terrorist purposes, like commission of a hate crime, is more egregious than violence committed for other reasons.

Congress seems to have sufficient constitutional authority to convert Section 2331(5) into a separate federal crime of domestic terrorism – outlawing life-endangering conduct that violates a federal or state law when committed with terrorist intent. The principal obstacle would appear to be the need to drop, or find a federal jurisdictional “hook,” for instances when the offense involves a violation of state law but not of federal law. Models might be found in the federal [hate crime](#) statute that lists a wide range of federal jurisdictional options or the Armed Career Criminal Act (ACCA) that uses convictions for various state crimes as the basis for sentencing enhancement upon federal conviction for unlawful possession of a firearm.

Domestic Intelligence Gathering v. Foreign Intelligence Gathering

Under existing federal law, domestic intelligence gathering and foreign intelligence gathering are different. The threshold for domestic authority to investigate is suspicion of a crime – past, present, or future. The threshold for foreign authority to investigate is suspicion of foreign activity – criminal or benign. Domestic investigations are conducted with an eye to prosecution. Foreign investigations are conducted with an eye to prosecution, negotiation of international agreements, or diplomatic responses. As a consequence, the law governing domestic law enforcement surveillance authority differs from the law governing foreign surveillance authority. For instance, federal courts may [issue](#) law enforcement wiretap orders upon a finding of probable cause that a particular crime has been, is being, or will be committed; foreign intelligence surveillance courts may [issue](#) foreign intelligence surveillance orders upon a finding of probable cause to believe that the target of the surveillance is a foreign power or the agent of a foreign power. A federal magistrate may [issue](#) a search warrant for evidence in a criminal case based on probable cause. A foreign intelligence magistrate may [order](#) a third party to surrender any tangible item based on reasonable cause to believe the item is relevant to a foreign intelligence investigation of a foreign national. Federal law authorizes federal agencies to [issue](#) administrative subpoenas in health care fraud, child pornography, and controlled substance investigations; but not for crimes described as domestic terrorism in Section 2331(5). Foreign intelligence officials may [issue](#) national security letters for customer information, relevant to a foreign intelligence investigation, from communication carriers, financial institutions, and consumer credit agencies. Federal prosecutors may [serve](#) grand jury subpoenas to secure evidence for presentation to a federal [grand jury](#) investigation into the possible commission of a federal crime.

Budgetary concerns and constitutional principles – including federalism and the rights to free speech, free association, peaceable assembly, petition for the redress of grievances – may complicate the task of conferring domestic law enforcement with the tools of foreign intelligence gathering. Since Section 2331(5) was enacted as part of the USA PATRIOT Act, there have been [suggestions](#) that it might be used against [protesters](#) of [all](#) political stripes. The difficulty is in separating violence from protesters in order to curb violent protests. Protesters enjoy [First Amendment](#) protections; violence does not. In 2010, the Supreme Court [held](#) that the [statute](#) prohibiting providing material support to foreign terrorist organizations could constitutionally be applied to prohibit “advocacy . . . directed to, coordinated with, or controlled by foreign terrorist groups.” In *dicta*, however, the Court cautioned that constitutionally the presence of foreign element may impact the analysis, [observing](#) that “[w]e also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.” Many years earlier, the Court had noted that Fourth Amendment limitations on warrantless surveillance of domestic terrorists did not necessarily [apply](#) to surveillance of foreign terrorists, “[w]e have not

addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”

Increased Focus on Domestic Terrorism

Since 9/11, foreign terrorism has been a federal law enforcement priority. So far in this Congress, Members have introduced legislation to afford domestic terrorism higher priority. For example, [H.R. 1931](#) (Rep. Schneider)/[S. 894](#) (Sen. Durbin) would (1) establish domestic terrorism components in the Federal Bureau of Investigation (FBI) and the Departments of Justice (DOJ) and Homeland Security (DHS); (2) provide for coordination with joint terrorism task forces and fusion centers; (3) instruct the FBI, DOJ and DHS to assess the anti-terrorism training they provide to other federal, state, local, and tribal law enforcement entities; (4) in conjunction with the Secretary of Defense, create an interagency task force to combat White supremacist and non-Nazi infiltration of the armed forces; and (5) authorize the necessary appropriations. [H.R. 3106](#) (Rep. Thompson) would create a National Center for the Study of Domestic Terrorism within DHS. In addition, some Members of Congress have proposed designating particular groups “domestic terrorist organizations,” [S. Res. 279](#) (Sen. Cassidy); [H. Res. 525](#) (Rep. Fitzpatrick); [H. Res. 536](#) (Rep. Mark Green).

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