2 Worthy Goals For The DOJ's New Domestic Terrorism Unit

By **Emil Bove and Brittany Manna** (January 23, 2022, 8:02 PM EST)

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Domestic terrorism is driven by a variety of ideologies and motives that blend conventional terrorist methodologies, hate crimes and other criminal violations. An effective response to this national security issue requires collaboration between numerous federal, state and local prosecutors and law enforcement agencies.

The response could be improved by creating a component at the U.S. Department of Justice that includes both counterterrorism and civil rights prosecutors, and the passage of a criminal statute consistent with President Joe Biden's campaign pledge to work toward a broader criminal prohibition of domestic terrorism modeled on the well-established framework of international terrorism laws.

Recent developments illustrate the priority on these issues.

On Jan. 11, Assistant Attorney General Matthew G. Olsen, of the DOJ's National Security Division, told the Senate Judiciary Committee that he is forming a Domestic Terrorism Unit.

Two days later, in a press release that does not appear to reference the new unit, the DOJ announced seditious conspiracy charges against 11 so-called Oath Keepers based on their alleged roles in the Jan. 6, 2021, attack on the U.S. Capitol. According to the press release, the case is being prosecuted by the U.S. Attorney's Office for the District of Columbia and the DOJ's Counterterrorism Section, which is part of the National Security Division overseen by Olsen.

Extremist violence in the homeland remained at the forefront the following weekend when, on Jan. 15, British national Malik Faisal Akram took several hostages at the Congregation Beth Israel synagogue in Colleyville, Texas, and was killed after law enforcement interceded.

Chain-of-command questions may arise at the DOJ when, as in Colleyville, incidents present aspects of terrorism and hate crime.

As another example, at the Jan. 11 hearing, Olsen — responsible for the National Security Division — described the October 2018 murders at Pittsburg's Tree of Life synagogue as an example of domestic terrorism. But the prosecution arising from that attack includes hate-crime charges under the purview of the DOJ's Civil Rights Division.

These distinctions matter because, pursuant to the Justice Manual, prosecutors at U.S. attorney's offices around the country must seek approval from the National Security Division before bringing terrorism charges. Hate crimes, on the other hand, require approval from the Civil Rights Division.

Any investigation relating to the Colleyville incident would present questions about which part of the DOJ Texas prosecutors should call first, and which statutes should be the focus of the inquiry. While details are yet to emerge about the new Domestic Terrorism Unit, establishing the unit within the National Security Division could add to the overlapping lines

of supervision at the DOJ instead of streamlining the responses to these incidents.

Joint participation in the DOJ's new Domestic Terrorism Unit by the National Security Division and the Civil Rights Division would also help to ensure that investigations and prosecutions overseen by the unit are conducted in a manner consistent with the First Amendment and other civil liberties.

One of the important roles played by both divisions, when operating separately, is to facilitate careful and uniform decision making as cases arise and legal authorities are invoked around the country by U.S. attorney's offices and law enforcement personnel.

In this regard, the portion of the Justice Manual relating to the Civil Rights Division provides that, "[b]ecause of the sensitive nature of the constitutional and statutory issues involved and the desirability of uniform application of federal law in this field, close consultation between United States Attorney's Offices and the Civil Rights Division on civil rights matters is essential."

Similarly, with respect to the National Security Division, the Justice Manual states that effective coordination in domestic terrorism matters is critical because "this threat arises in connection with movements and groups whose existence spans multiple jurisdictions or even the entire nation."

Consistent with this guidance, a Domestic Terrorism Unit comprised of prosecutors and supervisors from both the National Security Division and the Civil Rights Division would help to ensure consistency across the country on issues such as how and when to deploy investigative techniques and which charges to bring in a particular case.

Regardless of how the unit is composed, prosecutors and law enforcement seeking to proactively protect the public from domestic terrorism face a second, related challenge.

While the U.S. Code defines the term "domestic terrorism," no statute broadly penalizes the varying forms of violent extremism in the United States. The appropriateness of such a prohibition has been debated in Congress for years, bills were proposed in 2019, and Biden's campaign website pledged to "[w]ork for a domestic terrorism law that respects free speech and civil liberties, while making the same commitment to root out domestic terrorism as we have to stopping international terrorism."

Yet, as threats and violence escalate, no law along these lines has been enacted.

Recent examples illustrate the asymmetry between the coverage of modern international terrorism statutes and the patchwork of narrower laws that can be used to address domestic terrorism when particular facts or acts of violence are presented.

Late last year, mirroring an innovative theory from a private suit relating to the violence at the August 2017 "Unite the Right" white supremacist rally in Virginia, District of Columbia Attorney General Karl Racine invoked the Ku Klux Klan Act of 1871 in a civil action, in the U.S. District Court for the District of Columbia, against members of the Proud Boys and the Oath Keepers relating to the Jan. 6 attack, including six of the Oath Keeper defendants later charged in the criminal seditious conspiracy case filed this month.

In the sedition case, prosecutors dusted off the statute after more than two decades of repose to charge 11 defendants who appear to be some of the most culpable participants in the attack at the Capitol. Of the 725 individuals who have reportedly been arrested in

connection with the attack, however, prosecutors charged others with a form of obstruction and, in some cases, misdemeanors.

National security prosecutors are not required to look back to the Reconstruction era, or a seditious conspiracy statute with archaic origins, when seeking an appropriate charge to disrupt an international terrorism plot or react to a completed attack.

Title 18 of the U.S. Code, Section 2339B, referred to as the material support statute, prohibits providing almost any conceivable form of support to foreign terrorist organizations designated by the U.S. Department of State, such as the Islamic State group.

Section 2339B is within the province of the National Security Division, alone, and it carries the same 20-year statutory maximum sentence as the seditious conspiracy statute but applies to many more forms of terrorist activity. This and other laws establish a comprehensive statutory framework prohibiting support of international terrorism that is essential to thwarting plots of violence against American interests.

The absence of such a framework for domestic terrorism threatens to leave officials in a more reactive posture when seeking to disrupt developing threats.

The issue arises in cases involving lone-wolf actors. According to the Biden administration's June 21 National Strategy for Countering Domestic Terrorism, acts of domestic terrorism have often been perpetrated by "lone actors or small groups."

For years, foreign terrorist groups like the Islamic State group and al-Qaida have sought to cultivate extremist violence by radicalizing would-be terrorists via propaganda disseminated over the internet. To disrupt these types of lone-wolf plots in international terrorism cases, prosecutors frequently rely on attempt theories under the material support statute to prevent U.S. nationals from supporting these organizations by joining them and contributing to their violent objectives.

As one example, in 2018 the FBI arrested U.S. citizen Naser Almadaoji at an international airport in Ohio when he tried to travel abroad to obtain terrorist training from the Islamic State group's Afghanistan affiliate.

There, the FBI arrested Almadaoji thousands of miles away from his intended destination in Afghanistan because his trip to the airport and related communications were sufficient proof, under Section 2339B, of an attempt to provide material support to ISIS-K by joining the group. Almadaoji pled guilty in November 2021 to attempting to violate Section 2339B and faces up to 20 years in prison.

The material support statute does not require proof of a specific plot, another predicate felony, or an overt act in conspiracy cases. Prosecutors frequently admit terrorist propaganda possessed by defendants in those cases as proof of their intent, based in part on the U.S. Supreme Court's 1993 ruling in Wisconsin v. Mitchell that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

While domestic terrorism investigations can raise difficult civil liberties questions about whether and how to examine U.S. groups and individuals engaged in a mix of potentially violent and lawful conduct, such as nonviolent protests, one of the ways in which the material support statute addresses that issue in the international context is to require proof of a defendant's knowledge of the terrorism nexus in the case.

Which is all to say, crafting a prohibition on domestic terrorism similar to Section 2339B appears to be an objective that could be achieved by striking an appropriate balance between protecting the public and constitutional rights.

The goal is worthy.

In the domestic terrorism context, statutes penalizing specific types of violence can limit options for disrupting dangerous extremism at a nascent stage because officials may need to develop evidence of a more detailed plot in order to establish the elements of a narrower statute.

Consider in this regard the difficult choices faced by law enforcement in 2020 as evidence emerged of a militia group's plot to kidnap Michigan Gov. Gretchen Whitmer.

For almost four months, law enforcement relied on undercover agents and informants to monitor the militia members' plans to abduct Whitmer, which included field training exercises and attempts to detonate improvised explosive devices.

Whereas Almadaoji was arrested at the airport before he got anywhere near an Islamic State group training camp, several of the defendants in the plot against Whitmer got close enough to conduct surveillance of one of her homes. They were not arrested until weeks later.

While law enforcement may have been able to take protective measures to reduce obvious safety risks as those defendants advanced their scheme against the governor, a broader domestic terrorism statute, crafted in a manner consistent with the First Amendment and civil liberties, may have allowed them to disrupt the plot sooner and without the risks of such an operation.

The Michigan case is one public example of many in which officials disrupted a domestic terrorism threat by using traditional law enforcement tools and arresting the participants before they could execute their plans. We do not know how many nonpublic disruptions have occurred, and prosecutions are only one of several components necessary to an effective response to domestic terrorism.

That said, as the new Domestic Terrorism Unit is implemented, officials should consider a more centralized chain of command for overseeing domestic terrorism investigations and prosecutions that also involve hate crimes, and a broader statutory prohibition on support for domestic terrorism that is similar to Section 2339B.

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