A View from the CT Foxhole: Mary McCord, Executive Director, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center

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Mary McCord serves as Executive Director at the Institute for Constitutional Advocacy and Protection (ICAP) and Visiting Professor of Law at Georgetown University Law Center. McCord was the Acting Assistant Attorney General for National Security at the U.S. Department of Justice from 2016 to 2017 and Principal Deputy Assistant Attorney General for the National Security Division from 2014 to 2016.

Previously, McCord was an Assistant U.S. Attorney for nearly 20 years at the U.S. Attorney's Office for the District of Columbia. Among other positions, she served as a Deputy Chief in the Appellate Division, overseeing and arguing hundreds of cases in the U.S. and District of Columbia Courts of Appeals, and Chief of the Criminal Division, where she oversaw all criminal prosecutions in federal district court.

CTC: In the wake of the storming of the U.S. Capitol on January 6, 2021, what is your assessment of the threat posed by the extreme far-right in the United States?

McCord: If anyone were ever inclined to discount the threat of far-right extremist violence in the United States, the insurrection at the U.S. Capitol certainly should have changed their views. We witnessed our fellow Americans violently assaulting U.S. Capitol Police, forcibly entering and overrunning the Capitol Building, and attempting to kidnap elected officials and prevent the certification of the electoral college vote. They succeeded in delaying the counting for several hours. Although it was shocking to witness because of the sheer number of people willing to use violence to overthrow the government, it was not surprising that extremists led the charge. This is something that has been building up for some time now.

The former president sowed the seeds for this even before the election as he claimed that mail-in ballots were particularly susceptible to fraud and that the only way he could lose were if the election were rigged.[1] He doubled down after the election, refusing to concede and actively spreading disinformation about election fraud, for which there was no credible evidence produced in court after court in states around the country.[2] He bought into the "Stop the Steal" rhetoric and propagated it, adding a veneer of credibility because of his position of power and influence. The false narrative gave the extremists a "cause" that he urged them to fight for, explicitly calling on them to "never concede" and "fight like hell."[3] We worried before January 6 that Trump's most extreme supporters would take him literally, and they did.[4]

The lies and rhetoric that spurred extremists to commit the assault on the Capitol—and our democracy—is the kind of rhetoric that often spurs individuals and groups to commit some sort of act of terrorism. We've seen disinformation used this way before.

For example, the El Paso shooter, he's never been traced back to a particular group, but that doesn't mean he wasn't radicalized by consuming toxic disinformation and violent rhetoric on social media, which came through in his manifesto.[5] The Michigan plot [to kidnap the state's governor] was a terrorist plot—a plot to influence a policy of government through intimidation or coercion, specifically because of Governor Gretchen Whitmer's pandemic-related policies.[6] That's terrorism. And that wasn't done by an individual; that was a group that plotted together over a course of months, acquired weapons, built weapons, created strategies, cased out various places for this crime to take place—all the type of plotting that I've seen by terrorists in my career, oftentimes connected to a foreign terrorist organization.

And what is particularly worrisome is that the extremist tent seems to be getting bigger. On January 6, there was a whole spectrum of people participating. There were conspiracy theorists who were promoting utterly baseless conspiracies, including the QAnon conspiracy, conspiracies that have to do with the Democrats being child sex traffickers, and other conspiracy theories about the election, and about ballots appearing in the middle of the night, etc. There were unlawful private militia groups, including the Oath Keepers—several of whom were the first to be charged with conspiracy related to the insurrection—and violent paramilitary street gangs like the Proud Boys, many of whom are also charged with conspiracy and other crimes arising from the insurrection.

Now happily, Washington does not allow open carrying of weapons, and you can only conceal carry if you have a registration in Washington, D.C., which most people do not. Although some still smuggled in weapons, imagine what it would have been like if many of those who stormed the Capitol had been armed with semi-automatic assault rifles? So you had unlawful militias, unlawful violent street gang groups, extremist conspiracy theorists, but then I think you also had a fair number of people who honestly and legitimately believe that there might have been election fraud because they'd been consuming the disinformation that even some cable networks were promoting, and they were there to exercise their First Amendment rights. They might have had no intention to be violent, but they were at the same event with extremists who *did* have such plans. And the way that looks to me as somebody who has dealt in counterterrorism for years involving foreign terrorist organizations, those are opportunities for the extremists to try to radicalize the more mainstream over to the more extremist views. That's partly where the danger comes from, because the rhetoric and disinformation is promoted not just in the deep, darkest places on the web, but also in some cases by elected officials—by people on Capitol Hill, by state legislators in some cases, by Marjorie Taylor Greene who is a QAnon conspiracy believer and just won election to the Congress. That impact on people and potential for radicalizing people who then might find alignment with more extremist individuals and groups who think that using violence is an acceptable means to an end, that's where the danger comes from,

and we saw it on January 6.

CTC: Since leaving the Department of Justice in 2017 where you served as Acting Assistant Attorney General for National Security, you and your colleagues at the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law have focused on a range of efforts, including using litigation and public education to address the threat of violence posed by unlawful private paramilitary activities at rallies and protests. What reflections do you have on the transition from the Department of Justice to ICAP, and specifically, what was it like to shift focus from Islamic State cases and other well-recognized national security threats to more localized threat types?

McCord: I think the experience at the Department of Justice in the National Security Division really transferred very well into moving into the private sector in a time when we started seeing a real rise of far-right, extremist violence and a far-right extremist threat here in the U.S. And when I say "transferred very well," it is because this extremist threat in the U.S. is a national security issue in many ways not that dissimilar from the national security issue posed by a foreign terrorist group like ISIS. That might sound dramatic, but when you really look at the data and statistics, it's not. Because the lethality from [the] far right—and really, we're talking about white supremacist extremist violence in the U.S.—the lethality of that type of violence and terrorist acts is greater than it is from what we commonly think of as international terrorism or terrorism that is promoted by and carried out by adherents to Islamist extremism. In looking at what's happening in the U.S., I—and some of my colleagues who also came from a national security community—have been able to draw upon a rich base of knowledge in counterterrorism to try to apply some of those same principles and ways of thinking about an approach to the threat here in the U.S. from domestic actors.

CTC: Can you walk us through how ICAP arrived at the approach you used for the lawsuit you filed after the Unite the Right Rally in Charlottesville and how it motivated or informed your subsequent anti-militia work?

McCord: Charlottesville is a good example of really drawing on the previous experience. Even in the National Security Division, we weren't focused solely on ISIS or al-Qa`ida or foreign terrorist organizations. We also certainly were very aware of the increase in the threat of domestic terrorism and had directed resources toward that, including the hiring of a domestic terrorism counsel within the National Security Division to provide regular briefings and accumulate data and statistics toward understanding that threat better and understanding what gaps there are in our laws.

But when the "Unite the Right" rally happened in Charlottesville in August of 2017, and I saw footage of James Fields[7] using his car to ram into a crowd of counter-protesters, we had just come off of several years of vehicles being used as a weapon of terrorism by foreign terrorist groups and those who were committing terrorist crimes in their names. We'd seen that across Western Europe and elsewhere, including some car-rammings in the U.S. on behalf of ISIS. And so, my first reaction was that this was a crime of domestic terrorism, and I went onto Lawfare to write a piece about that[8]—to say "this is domestic terrorism, we ought to be treating this as the moral equivalent of international terrorism, it's done with the intent to intimidate or coerce, it's a crime of violence." When I went on to Lawfare to see if anyone had already written about it, I saw a post by Philip Zelikow,[9] who is a history professor at UVA [the University of Virginia] but he was also on the 9/11 Commission, and he wrote about the unlawful paramilitary groups that were there in Charlottesville. He explained how that type of activity is illegal under state law—both state constitutions and state statutes—and that when he had been a constitutional lawyer back in the 70s and 80s, he had partnered with the Southern Poverty Law Center to bring a couple of different cases in different areas—one was in Texas, one was in North Carolina against the militia wing of the KKK—using state anti-militia law.

So that is where the idea for our Charlottesville case and our anti-militia work first came from. Even though I had a pretty good understanding of the threat of right-wing wing extremist violence in the U.S., I didn't know very much about unlawful militias. I knew about Ruby Ridge,[10] and I knew about Waco and the famed standoffs with the federal government, including the much more recent standoffs at Bunkerville[11] and in Oregon at the Malheur Wildlife Refuge.[12] But this notion of these armed individuals looking like members of the military, dressed in full military kits, interacting and projecting authority over the public in a public environment while heavily armed with semi-automatic assault rifles seemed extremely dangerous, and I had no idea that it was utterly unprotected by the Second Amendment and unlawful under state law.

And so, what we did is we used Virginia's own constitutional provision that makes clear that in all cases the military must be strictly subordinate to the civilian government, which means the governor. The governor is the commander-in-chief of the state militia in Virginia, and in *all* states, only the governor has the authority to call forth the militia. So the only lawful militia is the National Guard or other state militia that answers to the governor. And in some states, the governor also has the authority to call forth the "unorganized militia," meaning all able-bodied residents between certain ages, when needed, but that is really a vestige of history that isn't used anymore. The constitutional structure and the statutory structure in Virginia and elsewhere make clear that only the governor can do that. We also used criminal anti-paramilitary activity laws in Virginia plus criminal laws that make it unlawful to assume the functions of law enforcement.

We represented the city of Charlottesville, local businesses, and local residential associations to bring a lawsuit [that was] forward-looking only. We weren't looking for damages for injuries sustained during the event; other people were bringing lawsuits about that. We solely wanted to get injunctive relief to prevent a repeat of Charlottesville—to prevent those groups, the self-professed militia groups as well as the white nationalist groups who also organized themselves and engaged in paramilitary activity—even though for them it was with shields and batons and pointed flagpoles used as offensive weapons against counter-protesters—to prevent them all from doing it again. We used those theories to bring our lawsuit seeking injunctive relief against 23 different individuals and organizations, including the organizers of the rally, and we were successful in obtaining that court-ordered relief.

We ended up not going to trial, as just a few weeks before trial, we prevailed on all of our legal theories against a motion to dismiss

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the case. After that, all the defendants, except for a couple who had defaulted, entered into consent decrees.[13] These were then entered as orders by the court and are binding on these organizations and their successors, preventing them from returning in groups of two or more people acting in concert while armed with anything designed to be used as a weapon during any rally, protest, demonstration, or march.

CTC: In preparation for the 2020 election, ICAP rolled out factsheets on unlawful militias for all 50 states.[14] Recently, your team launched a new toolkit to prevent violence at protests and rallies.[15] How has this work affected the capabilities of relevant stakeholders?

McCord: The pre-election effort, I think, was very important because we saw during 2020 an increase—even over the previous three years where we had already seen an increase—in the public engagement of unlawful militias, and we saw it in a couple of ways. We saw it dramatically early in the year when private militias engaged in armed opposition to state government pandemic-related policies—so stay-at-home orders and that type of thing, most notably, of course, with the armed storming of the statehouse in Lansing, Michigan.[16] We saw similar armed activity by unlawful militias in Ohio, Kentucky, Idaho, and elsewhere. Then after George Floyd was killed and the racial justice demonstrations spread across the country, we saw more and more of these armed unlawful militia groups "self-activating," if you will, and deploying to where racial justice demonstrations were occurring. They would purport to be protecting property or protecting statues in some cases, but again, projecting this authority while heavily armed over other people that they had absolutely no authority under federal or state law to project, and it's very dangerous as we saw in places like Kenosha where two people were killed and one another tragically injured.[17] We saw the same thing happen in Albuquerque, where a person was shot during a racial justice protest.[18] When these armed groups that are not publicly accountable get involved in a demonstration, it can have really tragic consequences.

Coming into the election, disinformation about mail-in ballots being more susceptible to voter fraud and claims about election rigging were already circulating on social media and other platforms. We were also seeing those kinds of conversations within unlawful militia groups. The concern that we had and that many others had was that these groups were going to use these claims of fraud as a reason to deploy to polling places, ostensibly to protect against fraud, but, of course, their armed presence had the potential to be hugely intimidating. So we—ICAP at Georgetown—put out a series of fact sheets explaining what is a militia, why they're unlawful and not protected by the Second Amendment, not authorized by federal law or state law, how to know if a group of individuals is an unlawful militia and what to do about it. We put out guidance for law enforcement as well, and we put out guidance explaining that armed groups of individuals at polling places could also violate voter intimidation statutes. By putting these out, we got a lot of press coverage by not only major nationwide media like *New York Times*, *Washington Post*, CNN, NPR, but also localized press: for example, *The Idaho Statesman* and various other smaller media at the local level. And this also generated a number of meetings with state attorneys general, district attorneys, police chiefs, sheriffs, mayors who then went out on their own and, after learning more about unlawful militias and after learning that they're not protected by the Second Amendment, made strong statements that this type of activity at polling places could be very intimidating and they were going to enforce the law against that type of intimidation. It wouldn't be tolerated.

What we saw was that these efforts were quite successful. On Election Day, my team was getting a feed of voter intimidation calls, and we did not see any indications of armed unlawful militia activity. There were a few occasions of individuals with firearms at polling places who caused people to feel intimidated. There were maybe one or two instances of two individuals, but they weren't in military gear and they weren't purporting to be policing the area. By and large, even though there were other types of intimidation happening at some polling places, it wasn't [being done by] armed groups. We also learned that right before Election Day, one of the nationwide militia groups put out their own guidance, telling their members not to go to the polling places, quoting from our fact sheets. They actually linked to the Georgetown fact sheets in their own guidance, so we think that [our initiative] really did help to prevent that type of unlawful militia intimidation on Election Day.

CTC: Does it make sense to call these entities militias? Or do you think that there is a more appropriate label for these actors?

McCord: I try to always use the adjective "unlawful" in front of the word militia unless I'm talking about a lawful militia. And as I indicated, the only lawful militia is the National Guard or other state-sanctioned militia that reports to the government. Oftentimes,

"vigilantes" or "unlawful paramilitary organizations" are better terms to use, although I recognize that some researchers have just used the term "militia" for years because their job is not necessarily to be making the legal distinctions.

I think it's important to understand that these groups will often point to the words "a well-regulated militia" in the Constitution as their authority for existence. Historically, "well-regulated" has always meant regulated by the government, not self-regulated. Even before the founding of the country when we had the colonies, they had their own militia acts, which defined militias [as] all able-bodied residents capable of being called forth in service of the colony, but the only way they could be called forth was by the governor. And when they were called forth, they were armed and trained and commanded by the governor or the governor's designee, in defense of the colony. It was never what you sometimes hear claimed today--that militias exist to oppose the tyranny of the government. No, that was not a thing. We had just come from England, and there was a desire not to have standing armies because of the threat they posed to liberty. The idea of the militia was that it was the way the state would defend itself, not that the militia had to exist in order to oppose the state. [The latter conception] is just not supported by history, the text of the Constitution, or subsequent Supreme Court interpretation. But the concept of "well-regulated" by the government was, of course, included in the Second Amendment and the constitutions of most states.

Unlawful militias will also point to the Second Amendment right of an individual to bear arms for self-defense, and they will say, 'where you have that individual right under the Second Amendment and you're in an open-carry state, that means we can form our own militia.' But that also has no support in Supreme Court precedent because the Supreme Court has been clear as far back as 1886 that the Second Amendment does not protect private paramilitary organizations.[19] In 1886, the Supreme Court upheld a state statute that exists still to this day on the books of 29 states that bans bodies of men from associating together as military units or parading or drilling in public with firearms. And [in] that case upholding that statute, the Supreme Court said it was without question that states have to be able to prohibit paramilitary organizations in order to protect public safety, peace, and good order. The Supreme Court in 2008, when it determined for the first time that the Second Amendment protects an individual right to bear arms for self-defense,[20] pointedly contrasted that with paramilitary organizations, and Justice Scalia, writing for the court in 2008, said, essentially, 'we stated in 1886, and no one has even argued otherwise, that the states certainly are allowed to prohibit private paramilitary organizations.'[a] And all states do, either through their constitutional schemes or their state statutes.

CTC: How do you evaluate the threat posed by left-wing extremism? And are the legal measures used to address extreme far-right and extreme far-left groups ideologically neutral?

McCord: All of the concepts we've been talking about when it comes to the U.S. Constitution not providing any protection for paramilitary groups, the state anti-militia statutes, these are all ideologically neutral. These are all based on conduct. In fact, in our Charlottesville litigation, most of the defendants were right-wing militia organizations or white supremacist organizations, but there also were two left-wing self-described militias that were defendants in that case because they were doing that same thing. They were arming themselves with semi-automatic assault rifles; they were staking out a perimeter around a park and asserting their authority over others with no actual authority whatsoever, completely outside of public accountability, and arrogating unto themselves when and under what circumstances they would deploy lethal force. What we're talking about here is conduct. The biggest threat comes from the right-wing militias; those are the ones who are agitating for bombastic things like civil war, etc., and some of them were involved in the insurrection at the U.S. Capitol on January 6. But we do have leftist militias. There are many fewer of them, but they do exist. And we also have straight-up anarchist militias that would claim they don't really fall on any ideological side. Any of these are a danger if they're actually engaging with the public, projecting authority over the public. But there's a greater threat of injury and violence from the right-wing militias just based on their rhetoric.

CTC: In addition to your work with ICAP, you also regularly speak on the topic of domestic terrorism, and you've identified gaps in U.S. terrorism statutes and proposed ways to fill these gaps. First, could you help our readers understand the legal difference between international terrorism and domestic terrorism?

McCord: There's not a huge difference. Terrorism is defined the same way. It's a crime of violence that's illegal under any federal or state law—so we're talking about things like murder, kidnapping, armed assault, that type of thing—a crime of violence when done with the intent to intimidate or coerce a civilian population or to influence the policy of government through intimidation or coercion. It also covers things like assassinations, but the heart of it is violence to intimidate or coerce. Under U.S. law, the only difference between international terrorism and domestic is that international terrorism means there's some sort of tie to international activities, and usually, what that means is a tie to a foreign terrorist organization. It doesn't mean that the crime has to occur overseas. The crime can still occur in the U.S. and be considered international terrorism if it's done on behalf of a foreign terrorist organization. If you think about the Pulse nightclub shooting in Orlando, for example, where the shooter pledged *bay `a* to the leader of ISIS before that shooting,[21] that is considered international terrorism, even though it occurred right here in the domestic U.S. Under U.S. law, domestic terrorism is defined, again the same way—crime of violence to intimidate or coerce—but that occurs domestically and doesn't have that connection to some international element like a foreign terrorist organization.

Today, I think these are no longer meaningful distinctions and probably should be eliminated from our discussions of terrorism

a Editor's note: Writing for the court in 2008, Justice Scalia stated, "*Presser v. Illinois*, 116 U. S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade 'bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.' *Id*., at 264–265. This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups." Justice Scalia added, "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *District of Columbia v. Heller*, 554 U.S. 570 (2008).

because the ideologies that tend to motivate terrorists here to commit crimes in the United States might run across a spectrum, but they don't necessarily end at the U.S. border. So even though most international terrorism is terrorism associated [with a] foreign terrorist organization, and the vast majority of the 67 or so designated foreign terrorist organizations are Islamist extremist organizations, and so far none are white supremacist organizations, that doesn't mean that white supremacy doesn't exist overseas. And we've seen that in the connections already in the networking of white supremacist extremists. So, for example, the El Paso shooter cited in his screed[22] the Christchurch, New Zealand, shooter, who [in turn] referenced other international or other white supremacist extremists from other countries, including Norway,[23] and so we see a network of inspiration.[24] We also know that there have been various camps in Ukraine[25] and elsewhere, training camps for white supremacist extremists and white nationalist extremists. So they're using many of the tactics and strategies and networking, not to mention the recruiting tactics, the propagandizing tactics, etc. that we see with foreign terrorist organizations. So this notion that one is domestic and one [is] international, I think it's time to abolish those distinctions. I think what's more meaningful is in its ordinary meaning: if it's domestic, that means it happened in the U.S., regardless of the ideology that motivated it.

CTC: As you've discussed and written about in recent years, the United States lacks a domestic terrorism statute. While defined at the federal level, domestic terrorism is not a prosecutable offense presently in the United States. Can you walk us through why this is and how it affects law enforcement's ability to detect and disrupt different actors?

McCord: We have a whole suite of terrorism statutes in the United States Code, and although many of them technically could apply to what we're still referring to as domestic terrorism—meaning things that are not associated with a foreign terrorist organization—these are very, very specific things like the use of a weapon of mass destruction or biological device or radiological or nuclear device, or shooting down an airplane. Right now, no terrorism offense would apply to a mass shooting or a car-ramming here in the U.S. unless it is connected to a foreign terrorist organization or is targeted at a U.S. government official or U.S. government property. That means crimes like the El Paso shooting, the Poway shooting,[26] the Tree of Life synagogue shooting,[27] and the car-ramming by James Fields in Charlottesville can be prosecuted because they're violations of law, but they can't be prosecuted as terrorism offenses under U.S. terrorism laws because none of those attackers had connections to a designated foreign terrorist organization. For example, if the El Paso shooter had pledged *bay`a* to Abu Bakr al-Baghdadi right before his shooting, that would have been prosecuted [differently] as a number of terrorism offenses would have applied to that crime. The same crime done for purposes of creating a white ethnostate and preventing [in the shooter's mind] a Latino invasion across our southwest border ends up being prosecuted as murder under state law, and maybe as a hate crime under federal law. These are significant crimes with significant penalties, but they don't carry the terrorism label.

One of the reasons I think we should at least consider filling this gap pertains to investigations. Our counterterrorism program and our counterterrorism agents at the FBI and in other law enforcement are used to focusing their investigatory tools and techniques on *preventing* acts of terrorism. The idea of *counter*terrorism is not to let it get to the point of prosecuting after 50 people have been killed; it's to prevent those attacks from happening in the first place. And so [law enforcement] aggressively use tools like online undercover personas, sting operations, measures that sometimes can be controversial, but that is how we prevent things from happening. They're the same tools that are used, for example, to prevent child sexual exploitation. You have an FBI agent who engages in conversations in pedophilia chatrooms, sets up a sting operation, then prevents a real child from being sexually exploited by disrupting the process with a sting operation.

Without a statute that applies to the most common acts of domestic terrorism—mass shootings or car-rammings that are not connected to a foreign terrorist organization—the FBI must rely on other criminal predicates to open its investigations, such as hate crimes or other federal crimes. Historically, hate crimes have been investigated outside of the counterterrorism section of the FBI. They have typically been after-the-fact investigations to bring justice to the victims, and there hasn't been the daily drumbeat of approaching the domestic threat the way we approach the international threat when it comes to opening investigations and using the prevention strategy. If Congress were to pass a terrorism statute that applies to all acts of terrorism in the territorial U.S., whether motivated by Islamist extremism, white supremacist extremism, animal rights extremism, anarchist extremism, whatever the ideology, if it applied to violent acts done to intimidate or coerce, it'd put all these actors on the same moral plane, which is important.

I also think it would help with data collection because the government doesn't have great data on domestic terrorism right now. The government has complete data on international terrorism cases because all those cases must be coordinated through the National Security Division of the Department of Justice. We don't have good measures to counter the domestic threat because you need data and research, etc. to come up with good ideas for countering the threat. We don't really have that body of knowledge because it's been treated so differently historically from international terrorism. If Congress in the future signs into law a statute to fill this gap, it would also be a mandate to direct resources toward it. I will say, it does seem like the FBI under Director [Christopher] Wray is putting resources toward these issues. He's been very open and public that the greatest domestic terrorism threat is from racially motivated extremism, and within that category, the greatest threat is from white supremacist extremism.[28]

Another gap that would be filled by a statute that applies to all acts of terrorism in the U.S. relates to those preparing for a terrorist attack. Right now, if a person is amassing a stockpile of weapons, etc. intending to use those to conduct a series of mass shootings in order to create a white ethnostate, law enforcement might be able to find some kind of criminal charge to thwart that plot, as the FBI did in the case of the Coast Guard Lieutenant Christopher Paul Hasson, but not with a terrorism crime. Lieutenant Hasson was doing exactly what I just described; he was amassing an arsenal of semi-automatic assault rifles and other equipment for what he was planning to be a series of mass shootings in order to create a white ethnostate.[29] The FBI thwarted that plot by charging Lieutenant Hasson with unlawful possession of a silencer, unlawful possession of drugs because he had some amphetamines in his apartment with his other materials, and unlawful possession of a firearm by a

drug addict because of the quantity of drugs that had been found. None of these crimes are even considered to be crimes of violence, much less terrorism crimes. They have relatively short penalties, and they're not things that typically you can even get preventive detention on—by that, I mean a detention prior to trial, even when clearly the lieutenant was very dangerous.

If the U.S. were to create a crime that applies to all terrorism in the territorial U.S., that would also trigger liability for providing material support to that terrorism—not material support to a foreign terrorist organization, which is a separate material support charge. Material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B, is the most commonly used charge for international terrorism, but here, I'm talking about 18 U.S.C. 2339A, which prohibits providing material support or resources or disguising the nature of resources knowing or attending that they will be used in committing a listed crime of terrorism.[b] So if terrorism in the territorial U.S. was one of those listed crimes of terrorism, then if you are stockpiling firearms (resources) thereby disguising those resources (because you're hiding them), knowing and intending to use them in mass shootings to intimidate or coerce, then you could be liable for material support to terrorism under 18 U.S.C. 2339A. This would apply *before* committing any crime of violence, even without a conspiracy or before the person has actually attempted to commit the crime. Without a charge like this, a gap exists that we've seen in a number of cases. We saw it recently in the charges against three members of an accelerationist[c] militia group, The Base,[30] here in the U.S., which has been acquiring weapons and training, etc. in order to trigger a civil war.[31] And yet, the charges against some of the individuals who've been arrested don't include any type of terrorism offense.

CTC: The Russian Imperial Movement was designated an SDGT [Specially Designated Global Terrorist] in April 2020.[32] You have called for the group to be declared a Foreign Terrorist Organization [FTO] as well.[33] How do you view that course of action as it pertains to The Base or Atomwaffen[34]? Would that be appropriate for those entities as well?

McCord: First, just to start to make sure people understand the difference between SDGT, which is Specially Designated Global Terrorist, and foreign terrorist organization: the criteria for designation is pretty much the same, and both are important, but the foreign terrorist organization designation triggers that material support statute under 18 U.S.C. 2339B. SDGT does not. SDGT was devised as a way to go after the money and use finances, asset forfeitures, and asset seizures as a leverage mechanism against those who would engage in or support terrorist activity. So if you're talking about individuals with large amounts of financial resources or organizations with large amounts of financial resources, that designation automatically freezes any assets they have in U.S. banks. It prohibits U.S. financial transactions, and it prohibits doing business with U.S. companies. That's important, but it doesn't trigger material support, criminal liability, and that's been a critical tool in our counterterrorism program for years. More than half of the U.S. terrorism prosecutions post-9/11 have been for material support to an FTO.

If the Russian Imperial Movement were a designated FTO, then if anybody [in the U.S.] went to go seek to train with them, that would trigger liability for training with a foreign terrorist organization. If anybody here sought to provide any material resources, or support, including themselves, to the organization—money, services, anything—that would trigger liability. So it's a more effective, more substantial tool, and it also drives more investigations. I think the foreign terrorist designation could be used against groups like these. The reason I say "I think" is because I don't have access to all the information about foreign white supremacist organizations such as the Russian Imperial Movement, but if they meet the criteria, and I think that there are several that would, those designations could be made by the State Department in consultation with the Department of Justice and Treasury. That again could be a very, very useful tool. If the organization is foreign, engages in acts of terrorism, or has the capability and intent to do so, and is a threat to U.S. nationals or U.S. national security, that's the criteria for designation.

For U.S.-based organizations, there is no lawful structure for designating a domestic terrorist organization. Congress would have to create a new authority to do that. That bumps up against First Amendment rights because people and organizations in the U.S. have the right to express views, peacefully assemble with each other, and petition the government with their grievances. The Supreme Court has never had to rule on whether it would be lawful to designate a domestic organization as a terrorist organization since there has never been such an attempt, and we don't have the legal authorities to do it. I think it's not an impossible thing to do, but it would be subject to immediate challenge, First Amendment challenge, and I think it would be extremely controversial in Congress to consider authorities for designating domestic terrorist organizations. There is a lot of distrust of law enforcement in the U.S. and a lot of concern that [the government] would use that tool to designate organizations based on ideology rather than grounds such as advocating the use of violence. I think people would be concerned that it would be used to designate movements like Black Lives Matter or maybe Antifa (which has no real organizational structure), even if there's actually no history of those movements engaging in acts of terrorism or having the capability and intent to engage in acts of terrorism.

There are a number of people in the civil rights and civil liberties community who oppose a new terrorism statute like the kind we've been discussing, even though it does not include

b Editor's note: In an August 2019 policy paper about addressing gaps in terrorism statutes in the United States, McCord explained 18 U.S.C. 2339A, noting, "Section 2339A makes it illegal to 'provide material support or resources or conceal[s] or disguise[s] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of' any one of a list of enumerated federal crimes of terrorism." Mary McCord, "Filling the Gap in our Terrorism Statutes," GW Program on Extremism, August 2019, p. 4. For more context, see also "Terrorist Material Support: An Overview of 18 U.S.C. §2339A and §2339B," Congressional Research Service, December 8, 2016.

c Editor's note: For reference, the Anti-Defamation League (ADL) offers a primer on the concept of "accelerationism" on its blog. In short, ADL explains that "accelerationism is a term white supremacists have assigned to their desire to hasten the collapse of society as we know it … The concept of acceleration has existed for years as a fringe philosophy … However, some white supremacists have adopted the terminology and determined that a societal collapse is both imminent and necessary." See "White Supremacists Embrace 'Accelerationism,'" Anti-Defamation League (ADL), April 16, 2019.

designations of domestic groups. These people worry that even a statute focused on crimes of violence would be misused by law enforcement to open investigations into individuals who associate with organizations, including progressive organizations, that are not really responsible for the current threat picture in the U.S. And that distrust is well-founded historically. So because of all of this, I think the designation of domestic organizations would be very controversial and ultimately face a lot of court challenges. SDGT is a little bit different and can be applied to domestic actors who then can challenge it in court, but it also raises tricky First Amendment issues. With the First Amendment protections that we have in the U.S., designation tools like the FTO and SDGT tools become much more difficult. CTC

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