

Prosecuting Terror in the Homeland

An Assessment of Sentencing Disparities in United States Federal Terrorism Cases

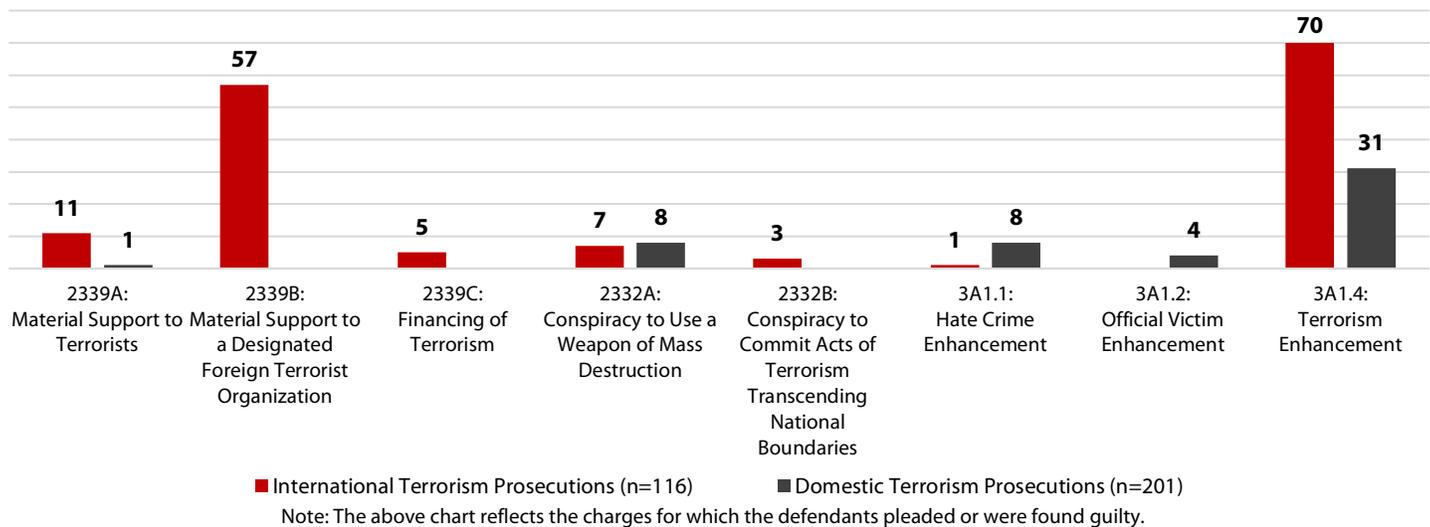
OVERVIEW

The most significant terrorist threat to the United States originates from domestic extremist movements, which have steadily increased their violent activities in recent years.¹ While a host of legal statutes were passed after the September 11, 2001, terrorist attacks to aid in the prosecution international terrorism suspects, the rapid rise in domestic extremism has not led to a similar process of revising the U.S. legal code. Many international terrorism defendants are prosecuted under specific terrorism statutes that are far less often used in cases involving individuals suspected of committing domestic extremist crimes. The application of different laws in international and domestic terrorism cases has led to intense debate over the need for new domestic terrorism legislation.² Proponents argue that legal revisions are necessary to promote judicial fairness, address sentencing disparities, and deter individuals from engaging in domestic extremism.³ Opponents argue that international and domestic terrorism cases can already be prosecuted to a similar extent under the current legal regime, and they suggest that new domestic terrorism laws could be used to infringe on civil rights and liberties.⁴

This research brief contributes to this debate by providing an assessment of the current legal regime as it applies to the prosecution of terrorism in the United States. Using data from the Profiles of Individual Radicalization in the United States (PIRUS) project, this brief looks at sentencing disparities in 344 federal terrorism prosecutions that were initiated between 2014-2019. The brief includes sections on the “in/out” decision, case disposition, incarceration length, post-incarceration supervision, and special conditions of probation.

TERRORISM STATUTES AND SENTENCING ENHANCEMENTS

Figure 1: The Use of Federal Terrorism and Terrorism-Related Charges and Sentencing Enhancements, 2014-2019



¹ Government Accountability Office, *Domestic Terrorism: Further Actions Needed to Strengthen FBI and DHS Collaboration to Counter Threats*. Washington, DC, 2023. <https://www.gao.gov/products/gao-23-104720>

² See, for example, Jason Blazakis, “The Intangible Benefits of a Domestic Terrorism Statute,” *Georgetown Journal of International Affairs*, June 24, 2021, <https://gjia.georgetown.edu/2021/06/24/the-intangible-benefits-of-a-domestic-terrorism-statute/>; Amy C. Collins, *The Need for a Specific Law Against Domestic Terrorism*, Washington, D.C.: Program on Extremism, (2020), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf>; Michael German, “Why New Laws Aren’t Needed to Take Domestic Terrorism More Seriously,” Brennan Center for Justice, (December 14, 2018). <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-to-domestic-terrorism-more-seriously>; Brian Michael Jenkins, “Five Reasons to Be Wary of a New Domestic Terrorism Law,” *RAND Blog*, (February 24, 2021), <https://www.rand.org/blog/2021/02/five-reasons-to-be-wary-of-a-new-domestic-terrorism.html>; Francesca Laguardia, “Considering a Domestic Terrorism Statute and Its Alternatives,” *114 Nw. U. L. Rev.*, 1061 (2020); Mary B. McCord, “It’s Time for Congress to Make Domestic Terrorism a Federal Crime,” *Lawfare*, (December 5, 2018), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>.

³ Shirin Sinnar, “Separate and Unequal: The Law of ‘Domestic’ and ‘International’ Terrorism,” *Michigan Law Review* 117, no. 7 (2019).

⁴ “157 Civil Rights Organizations Oppose a New Domestic Terrorism Charge.” The Leadership Council on Civil and Human Rights. January 19, 2021. <https://civilrights.org/resource/135-civil-rights-organizations-oppose-a-new-domestic-terrorism-charge/#:~:text=We%20are%20concerned%20that%20a,used%20to%20expand%20racial%20profiling>



For prosecutions initiated between 2014-2019, terrorism charges and sentencing enhancements were disproportionately applied to cases of international terrorism.⁵

Not surprisingly, international terrorism defendants were the only subjects during this period who pleaded guilty to, or were convicted of, 18 U.S.C. § 2339B-- Providing Material Support to Terrorists, which can only be applied to cases where the accused acted in support of a designated foreign terrorist organization. Approximately 50% of international terrorism defendants prosecuted during this period pleaded guilty to, or were convicted of, this charge.

Somewhat more surprising, 18 U.S.C. § 2339A-- Providing Material Support to Terrorists, which does not require that the crime have an international nexus, was rarely used in federal terrorism prosecutions during this period. The statute was only used in 11 (9.5%) international terrorism prosecutions and one (0.05%) domestic terrorism prosecution from 2014-2019.

During this period, domestic terrorism defendants were prosecuted on a wide array of charges that are not specific to crimes of terrorism. This includes 18 U.S.C. § 922 and 18 U.S.C. § 924 (22% of cases), which

are commonly used in prosecutions involving the illegal use or possession of firearms, and 18 U.S.C. § 875 (14.4%), which makes it a crime to transmit threats across state lines.

The most common sentencing enhancement used in terrorism prosecutions is §3A1.4, which is known as the "terrorism enhancement." This enhancement can be applied to cases involving a federal crime of terrorism, which is defined in 18 U.S.C. § 2332b(g)(5) as an act that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."

While §3A1.4 does not require a transnational element to the crime, the enhancement was used far more commonly in international terrorism prosecutions. From 2014-2019, prosecutors sought a sentencing enhancement under §3A1.4 in approximately 60% of international terrorism cases, while they only requested similar penalties in 15.4% of domestic terrorism cases.

Other sentencing enhancements, such as §3A1.1—hate crime enhancement—and §3A1.2—official victim enhancement—were seldomly used during this period in either international or domestic terrorism prosecutions.

THE IN/OUT DECISION

For both types of defendants, non-custodial sentences (i.e., sentences that resulted in probation without periods of incarceration in federal prison) were only issued in cases involving guilty pleas. Approximately 12% of the domestic terrorism defendants and 5% of the international terrorism defendants who pleaded guilty to one or more of their charges received non-custodial sentences.

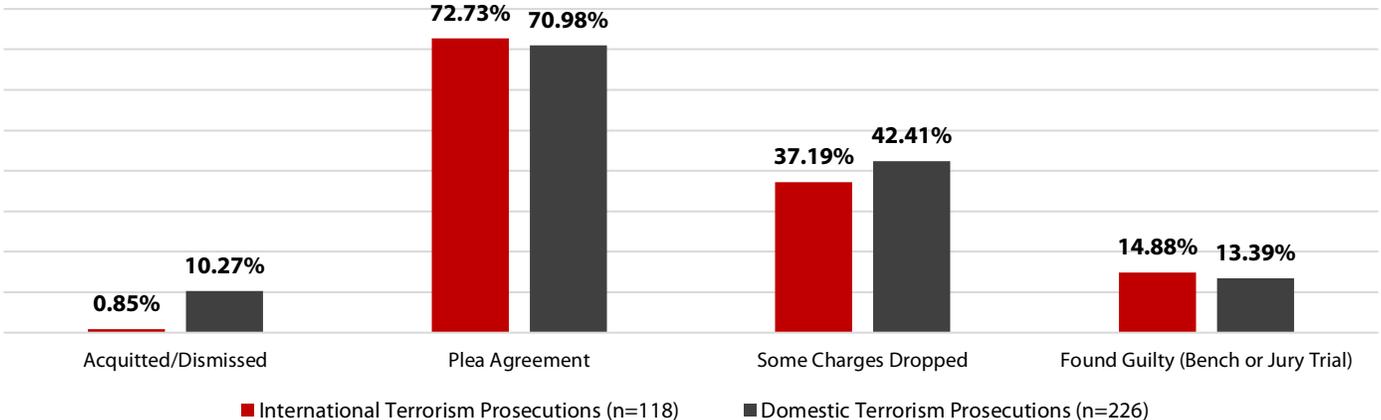
All of the international terrorism defendants who received non-custodial sentences during this period pleaded guilty to committing

non-violent crimes, such as making false statements to law enforcement about their support for, or contacts with, foreign terrorist groups (e.g., 18 U.S.C. § 1001(a)(2)).

By comparison, 42.9% of the 21 domestic terrorism defendants who were given non-custodial sentences during this period threatened to commit, or committed, violent crimes, including threatening to assault or kill a United States official (18 U.S.C. § 115(a)(1)(B)) or law enforcement officer (18 U.S.C. § 115(a)(1)(B)).

CASE DISPOSITION

Figure 2: Dispositions of Federal Terrorism Cases, 2014-2019



⁵ Given the lack of a comparable domestic terrorism behavior, international terrorism defendants who were accused of traveling abroad to fight with foreign terrorist groups, and who did not plan to or commit terrorist attacks within the territorial borders of the United States, were not included in this study.

Case dispositions were similar across international and domestic terrorism prosecutions; although, domestic terrorism defendants were far more likely to be acquitted of their charges or have some of their charges dropped.

None of the international or domestic terrorism defendants who were acquitted of their charges during this period were accused of committing successful violent attacks.

Twenty-four cases (7%) during this period resulted in acquittals or charges being dismissed.

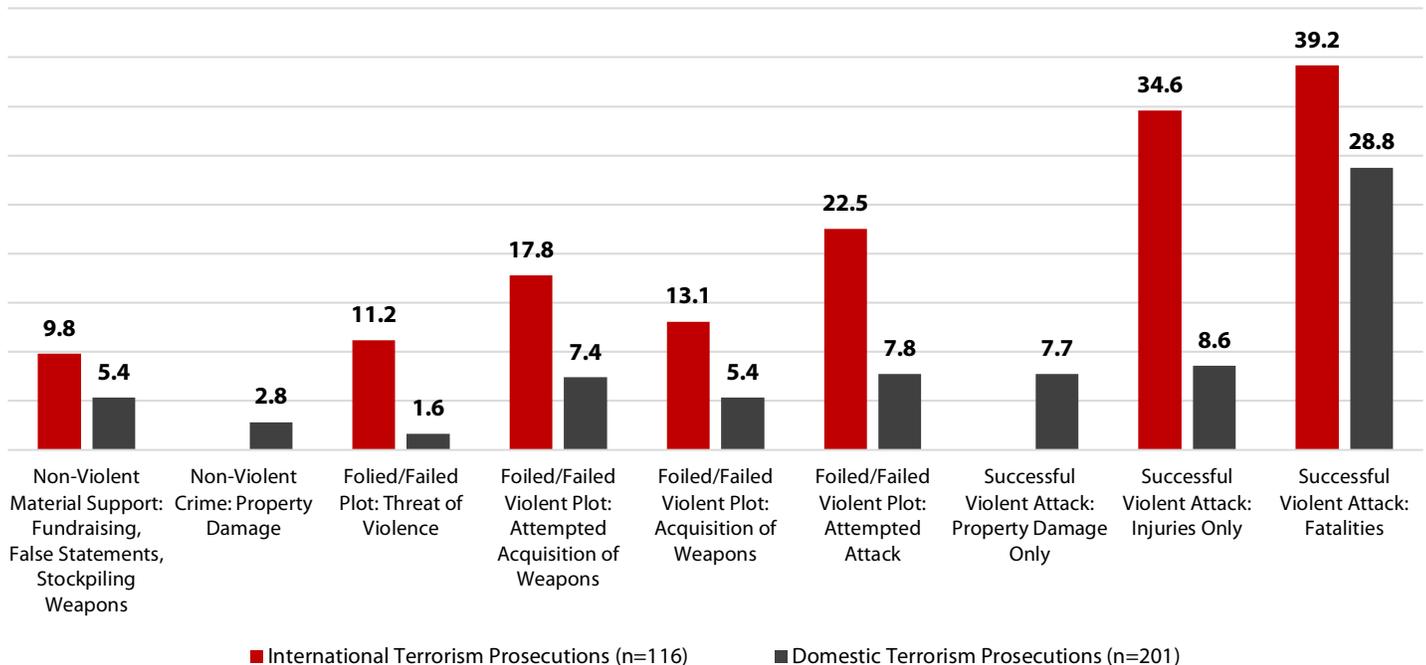
Only one (0.85%) international terrorism defendant was acquitted of their charges during this period.

The remaining 23 defendants who were acquitted or had their charges dismissed were accused of committing domestic extremist crimes. All but four were defendants who participated in the 2014 armed standoff in Bunkerville, Nevada, and the 2016 occupation of the Malheur National Wildlife Refuge in Oregon.

During this period, three additional terrorism defendants—one international and two domestic—were deemed mentally unfit to stand trial.

INCARCERATION LENGTH

Figure 3: Average Incarceration Length (Years) by Criminal Behavior Type, 2014-2019



From 2014-2019, international terrorism defendants received average prison sentences that were more than double those given to domestic extremists.⁶

International terrorism defendants were sentenced to 166.2 months (13.85 years) of incarceration in federal prison on average. By comparison, domestic terrorism defendants prosecuted during this period received average federal prison terms of 75.8 months (6.32 years).

Disparities in incarceration length were observed across all criminal behavior types but were especially large in cases involving subjects

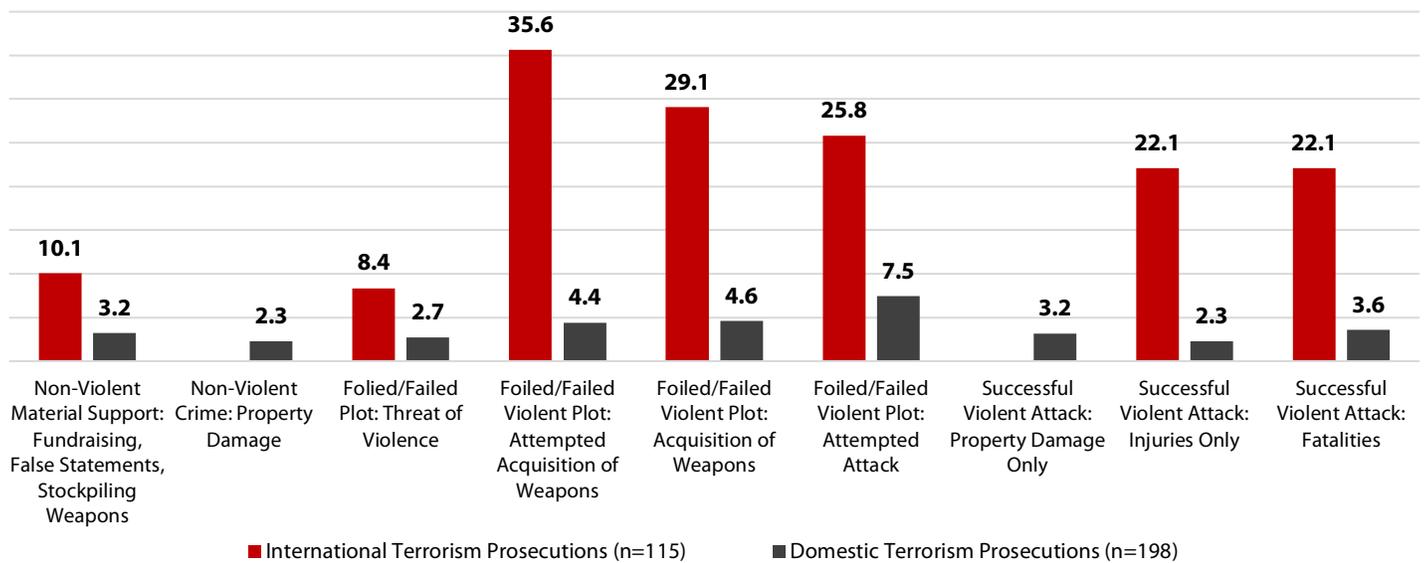
who plotted, but failed, to commit violent attacks. International terrorism defendants who were involved in failed or foiled violent plots received average prison terms of 11.2 years, while domestic extremists who engaged in similar plots were, on average, sentenced to 1.6 years in prison.

A drastic disparity in length of incarceration was also observed in cases involving defendants who committed attacks that resulted in at least one victim injury. In these cases, international terrorism defendants were sentenced on average to 34.6 years in federal prison—a more than fourfold increase over their domestic extremist counterparts, who received average prison terms of 8.6 years.

⁶ Following the practice established by the United States Sentencing Commission, life sentences were coded as 470 months in prison. United States Sentencing Commission. *Life Sentences in the Federal System*. Washington, DC, 2015. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf

POST-INCARCERATION SUPERVISION LENGTH

Figure 4: Average Post-Incarceration Supervision Length (Years) by Criminal Behavior Type, 2014-2019



Note: Four subjects were sentenced to life in prison without the possibility of release and are not included in the charts above or below.

International terrorism defendants received post-incarceration supervisory terms that were on average 500% longer than those given to domestic terrorism defendants.

Individuals who committed domestic extremist crimes were given average post-incarceration probationary terms of 41.73 months (3.48 years). International terrorism defendants, on the other hand, were given average supervisory terms of 231.7 months (19.3 years).

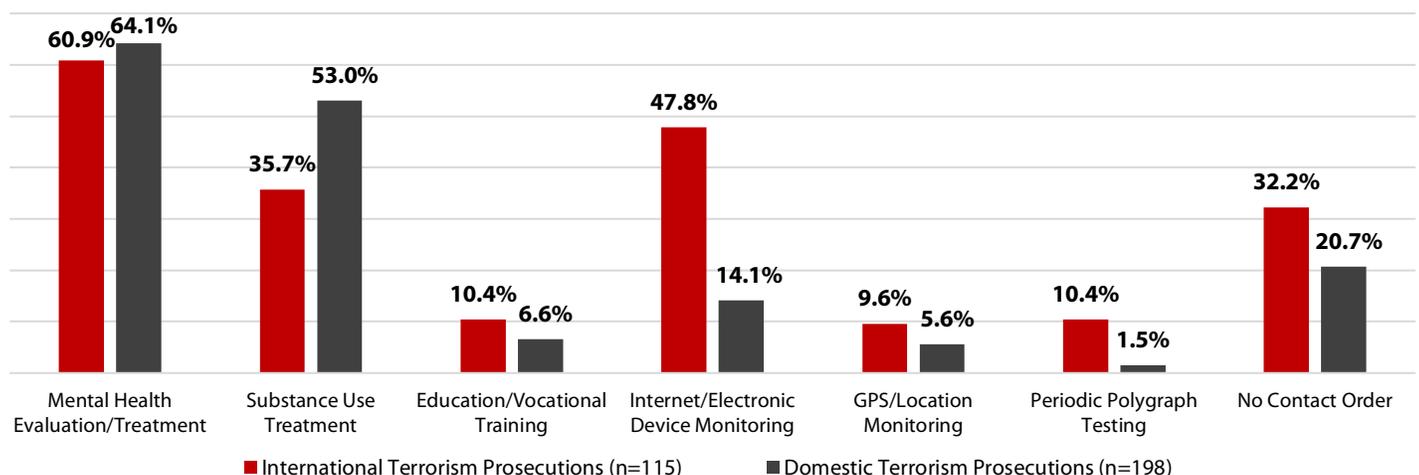
Significant disparities in post-incarceration supervisory terms were observed across all crime types but were especially large in cases involving defendants who committed successful terrorist attacks.

For instance, domestic terrorism defendants who committed attacks that resulted in casualties (fatalities or injuries) were given average post-incarceration supervisory terms of 35.3 months (2.94 years). International terrorism defendants who committed similar crimes received average post-incarceration supervisory terms that were 7.5 times longer (265 months or 22.1 years).

During this period, 27 (23.5%) international terrorism defendants were ordered to spend the rest of their lives on supervision after leaving prison. Only two (1.01%) domestic terrorism defendants during this period received the same penalty.

CONDITIONS OF POST-INCARCERATION SUPERVISION

Figure 5: Conditions of Post-Incarceration Supervision, 2014-2019



During this period, the special conditions applied to post-incarceration supervisory terms often included rehabilitation services, as well as a variety of more restrictive requirements, including physical location monitoring via GPS, internet monitoring and electronic surveillance, and no-contact orders barring defendants from maintaining relationships with known extremists or extremist co-defendants.

Both cohorts received rehabilitative services, such as mental health treatment or vocational training, at similar rates. However, due to higher rates of substance use concerns, domestic extremist defendants were more often ordered to attend drug and/or alcohol treatment programs.

During this period, international terrorism defendants were considerably more likely to be ordered to comply with restrictive monitoring conditions. For example, while nearly half of all international terrorism defendants were subject to the monitoring of their internet activity, only 14.1% of domestic extremists were subject to the same condition.

International terrorism defendants were also far more likely than their domestic terrorist counterparts to have their physical location monitored via GPS, to be required to sit for periodic polygraph examinations, and to receive orders to disassociate themselves from extremist peers or co-defendants.

ABOUT THE DATA

The data used in this brief were collected as an addendum to the Profiles of Individual Radicalization in the United States (PIRUS) project. The data were compiled from public sources, including news reports and court records, and include federal terrorism prosecutions that were initiated from January 1, 2014, to December 31, 2019. Due to the extended time that it often takes for federal terrorism prosecutions to reach final judicial outcomes, 2019 was chosen as the end date for inclusion in the study to increase the odds of identifying a comprehensive set of cases for which final sentencing and probation decisions have been made.

Cases were classified as terrorism prosecutions if they resulted in federal criminal charges and meet the PIRUS inclusion criteria, which require that the defendants radicalized in the United States and that there is clear evidence that their criminal activities were the result of ideological motives, including the pursuit of political, economic, social, or religious goals. Cases were classified as international terrorism if the defendants had links to, or were acting in support of, terrorist groups and movements whose bases of operation and primary activities are located outside of the territorial boundaries of the United States. Subjects who had links to narco-terrorist groups do not satisfy the PIRUS inclusion criteria and were not included in this study. Cases were classified as domestic terrorism if the defendants had links to, or were acting on behalf of, groups or movements that operate primarily within the territorial jurisdiction of the United States.

The resulting data include 344 federal terrorism prosecutions—118 international terrorism cases and 226 domestic terrorism cases—that were initiated between 2014-2019. Of these, 317 resulted in guilty pleas or convictions. The remaining 31 cases include 28 prosecutions that resulted in acquittals or charges being dismissed and three cases where the defendants were deemed mentally unfit to stand trial.

This research is a part of *Tackling Terror in the Homeland: An Empirical and Legal Analysis of the Debate Over a New Domestic Terrorism Law*, which was supported by the University of Maryland's MPowering the State (MPower) Strategic Partnership program.

To learn more about the project, please visit: https://twitter.com/RaD_UMD

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START

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