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POLITICAL MURDER, DEMYSTIFIED

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INTRODUCTION

Definitions of terrorism proliferate. Articles¹ and entire books² are written questioning whether terrorism can ever be adequately defined. Meanwhile, plenty of counterterrorism professionals go about their business, often settling on a very simple definition which suffices for their immediate purposes: Terrorism is political violence. It does not matter whether the deaths and casualties from an attack number in the thousands or a single individual, political violence is- at the very least- the *sine qua non* of terrorism.

If this is the case, how well does the U.S. redress the basic unit of terrorism – political murders? This Article

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¹ See e.g., Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249 (2004).

² Lisa Stampnitzky, *DISCIPLINING TERROR: HOW EXPERTS INVESTED "TERRORISM,"* (Cambridge University Press, 2013)(this book concludes that terrorism and counterterrorism studies is not really a true discipline or grounds for expertise – and that there are no real counterterrorism experts - all because of the thorny problem of defining terrorism).

argues that American law enforcement does an effective job at punishing political murders in federal court when these cases arise. These efforts cannot please everyone, since not all political murders inherit the terrorism label. Many political murders matters are prosecuted as civil rights violations.³ However, these cases frequently result in sentences that are every bit as harsh as in terrorism matters. The real question is whether any political murders are being missed or not punished satisfactorily. And the follow up question, whether there is any difference in post-attack government resources thrown at the questions of why and how it happened? In the end, there might indeed be one small difference, which could be the basis for some modest reform.

Part I of this Article looks at the various federal terrorism statutes, to show that a subset of these cases involve political murders. When a case like this arises, there is a whole myriad of tools to prosecute the culprits. The main tool is 18 U.S.C. § 2332, allowing for the prosecution of murderers of U.S. citizens overseas, and requiring the Department of Justice to make a specific finding of political motivation prior to charging.⁴ There are, however, other useful terrorism tools, some of which are frequently used in non-terrorism cases. Want to know how to determine, based on the legal proceedings, whether a particular murder is terrorism-related? The U.S. Sentencing Guidelines provide a necessary backstop to assure political motive is present in

³ See Jenna McLaughlin, *Charging Crimes as Terrorism*, 6 NAT'L SEC. & ARMED CONFLICT L. REV. 101 (2015-2016).

⁴ 18 U.S.C. § 2332 (see notes, comment on subsection d, describing the need for the attorney general to only prosecute crimes that demonstrate intent to "coerce, intimidate, or retaliate" against the United States government).

every case that is alleged to involve terrorism,⁵ and they are a great argument settler.

Part II responds to the criticism that some political murders escape terrorism-treatment. I refer to this as the “terrorism vs. civil rights dilemma.” As I address in this Article, there is a reason for this choice- which is a function both of existing law and law enforcement structure and culture. Still, it should be comforting to know that, as case law shows, this is really a distinction without a practical difference. Those who commit political murders that are charged as civil rights crimes generally get their due under the U.S. sentencing law, irrespective of the terrorism label.

I conclude with the question of whether the statutes and case law described in this Article demystify the legal question of what exactly happens to political murderers investigated by the U.S. law enforcement, and whether there is a need for any reform to address the terrorism vs. civil rights distinction. There is one significant difference: murderous civil rights attacks rarely get the post-attack analysis of the defendant’s motivation that terrorism does-- especially after the attacker is dead. This could be the basis of some modest reform not requiring any legislation.

I. POLITICAL MURDERS AS TERRORISM CRIMES

Most American murders are prosecuted in state court. Every major city has a homicide division capable of handling such matters, and small or rural towns may only occasionally need to call in the assistance of the State

⁵ See *Amendment 676*, UNITED STATES SENTENCING COMM’N, (Oct. 24, 2005), <https://www.ussc.gov/guidelines/amendment/676>. (referencing 18 U.S.C. § 2331(1) and (5), requiring that the intent to coerce, intimidate, or retaliate against the United States government be present to be prosecuted as an act of terror).

Attorney General's office. When a murder case lands in federal court, it is a signal that there is a specific federal interest. These include such acts as murder on federal land,⁶ murder of a federal witness,⁷ murder by Native Americans,⁸ murder in further of a drug offense,⁹ and killing during a carjacking.¹⁰ When it comes to terrorism, one federal murder statute stands out: 18 U.S.C. § 2332.

A. 18 U.S.C. § 2332: The Perfect Correlation

Section 2332 criminalizes anyone who murders a national of the United States overseas. This statute has a unique requirement, set out in subsection (d) of the statute, which provides:

(d) Limitation on prosecution. No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

According to one case involving § 2332, which got into the legislative history, the goal of this requirement was to weed out non-political overseas murders of Americans:

⁶ 18 U.S.C. § 1111(b) (2012).

⁷ 18 U.S.C. § 1512(a)(1)(C) (2012).

⁸ 18 U.S.C. § 1153(a) (2012).

⁹ 21 U.S.C. § 841(b)(1)(A) (2012); 21 U.S.C. § 848(e)(1)(A) (2012).

¹⁰ 18 U.S.C. § 2119 (2012).

The committee of conference does not intend that Chapter 113 A [§ 2332] reach non-terrorist violence inflicted upon American victims. *Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision.* To ensure that this statute is used only for its intended purpose, the conference substitute requires that the Attorney General certify that in his judgment such offense was intended to coerce, intimidate, or retaliate against a government or civilian population.¹¹

To be sure, since its enactment, the case law of § 2332 shows that it is applied to cases most would agree constitute terrorism.¹² It is rarely applied in non-terrorism cases where the motive does not appear to be political.¹³

What assures that § 2332 captures mostly political murder, thereby not federalizing potentially any murder involving a U.S. citizen overseas? The Attorney General

¹¹ United States v. Alwan, 822 F. Supp.2d 672, 676 (W.D. Ky. 2011). (Emphasis added).

¹² United States v. Trabelsi, 845 F.3d 1181, 1184 (D.C. Cir. 2017); United States v. Bout, 731 F.3d 233, 236 (2d Cir. 2013); United States v. Hamidullin, 114 F. Supp.3d 365, 369 (E.D. Va. 2015); United States v. El-Hage, 589 F. App'x 29, 30 (2d Cir. 2015); Moreno-Godoy v. United States, Nos. 13 Civ. 2383(JSR)(GWG), 07 Cr. 354, 2014 WL 1088300, at *1 (S.D.N.Y. Mar. 20, 2014); United States v. Abu Ghayth, 945 F. Supp.2d 511 (S.D.N.Y. 2013); United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013); United States v. Siddiqui, 699 F.3d 690, 695 (2d Cir. 2012); United States v. Bary, 57 F. Supp.3d 300, 302 (S.D.N.Y. 2014); United States v. Alwan, 822 F. Supp.2d 672, 673 (W.D. Ky., 2011); United States v. Al Kassar, 660 F.3d 108, 116 (2d Cir. 2011); United States v. Jabarah, 292 F. App'x 140, 141 (2d Cir. 2008); In re Terrorist Bombings of United States Embassies in East Africa, 552 F.3d 93, 107 (2d Cir. 2008); United States v. Al Delaema, 583 F. Supp.2d 104, 105 (D.D.C. 2008); United States v. Karake, 443 F. Supp.2d 8, 12 (D.D.C. 2006); United States v. Parr, No. 04-CR-235, 2006 WL 314413, at *1 (E.D. Wis. Feb. 8, 2006); United States v. Reid, 369 F.3d 619, 620, 627 n.1 (1st Cir. 2004); United States v. Yousef, 327 F.3d 56, 83 (2d Cir. 2003); United States v. Lindh, 227 F. Supp.2d 565, 566, 574 n.2 (E.D. Va. 2003); United States v. Bin Laden, 160 F. Supp.2d 670, 672, 681 n.1 (S.D.N.Y. 2001); United States v. Munoz-Mosquera, 101 F.3d 683 (2d Cir. 1996).

¹³ *But see* United States v. Morin, 80 F.3d 124, 126–27 (4th Cir. 1996)(it is unclear how this case was certified under § 2332(d), though perhaps it was because this case reflects an early use of §2332).

certification requirement. While not an element of the offense, the certification requirement is a procedural constraint that assures that the case – and the question of the likely political motive of the defendant – necessarily gets sufficient attention among the prosecutors prior to charging. The certification requirement of § 2332 makes § 2332 unique.¹⁴ Other “Federal crimes of terrorism” have no such requirement within their terms.¹⁵

It works like this: the U.S. Code provides that certain federal crimes are “Federal crime[s] of terrorism.”¹⁶ The significance of this designation comes at sentencing,¹⁷ and at the stage of determining pretrial detention status.¹⁸ Since it is not an element of the offense, they do not require a political motive be proven prior to conviction. Those convicted of “Federal crimes of terrorism”- or cases involving them – are to be sentenced in light of the tough terrorism enhancement if, and only if, the court finds at the sentencing stage that the criminal conduct “was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹⁹

Thus, for § 2332 terrorism prosecutions, the required political motivation is two-fold: (1) a defendant cannot be prosecuted for murder under § 2332 unless the Attorney General determines, in writing, that the offense “was intended to coerce, intimidate, or retaliate against a government or a civilian population,” and (2) at sentencing for a § 2332

¹⁴ See 18 U.S.C. § 2332(d) (2012).

¹⁵ See 18 U.S.C. §2332b(g)(5) (2012).

¹⁶ See *id.*

¹⁷ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2018).

¹⁸ 18 U.S.C. § 3142 (2012).

¹⁹ U.S. SENTENCING GUIDELINES MANUAL, § 3A1.4 (U.S. SENTENCING COMM’N 2018).

conviction, one will not be punished under the terrorism enhancement unless the court finds that the crime “was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”²⁰

What crimes involving murder are on the list of statutes that are “federal crimes of terrorism”? For the most part, the attention of the terrorism crimes is on the activity, irrespective of inherent motive and whether death results. For example, it is a crime to bomb airliners,²¹ airports,²² federal facilities,²³ communication lines,²⁴ energy facilities,²⁵ and public places.²⁶ Still, some of these crimes redress murder, even they do not require a political motive to be asserted at the time of charging, as required by the § 2332 certification requirement.²⁷

B. 18 U.S.C. § 956: The Neutrality Act Strikes Back

²⁰ 18 U.S.C. § 2332(d) (2012); U.S. SENTENCING GUIDELINES MANUAL, § 3A1.4 (U.S. SENTENCING COMM’N 2018). The terrorism enhancement provision was impacted by *United States v. Booker*, 543 U.S. 220 (2005) where the Supreme Court found the Sixth Amendment prohibited imposition of an enhanced sentence under the Guidelines on the basis of facts not admitted by the defendant or found by the jury beyond a reasonable doubt. The net effect of this ruling was to make the Sentencing Guidelines advisory in nature. In this respect, *Booker* also held that, while the Sentencing Guidelines were no longer mandatory, they must still be taken into account by the court pursuant to 18 U.S.C. § 3553(a) in fashioning an appropriate sentence. Consequently, at least with respect to the terrorism enhancement provision set forth in USSG §3A1.4, sentencing opinions today look very much like those that predated *Booker*.

²¹ 18 U.S.C. § 32 (2012).

²² 18 U.S.C. § 37 (2012).

²³ 18 U.S.C. § 930 (2012).

²⁴ 18 U.S.C. § 1362 (2012).

²⁵ 18 U.S.C. § 1366 (2012).

²⁶ 18 U.S.C. § 2332f (2012).

²⁷ 18 U.S.C. § 2332a(a)(4), (b) (2012); 18 U.S.C. § 2332b(c)(1)(A) (2012). (The way in which these crimes include murder comes from the language in which the sentence typically is described for circumstances where death results).

Section 956 of Title 18 is part of the Neutrality Act, the 1930s-era legislation that was designed to prevent the United States from being embroiled in a foreign war by clearly stating the terms of U.S. neutrality.²⁸ Prior to 9/11, it did not get much use.²⁹ It caught on, however, when federal prosecutors started using it along with the first “material support” crime (18 U.S.C. § 2339A) when it was unclear whether the defendants were acting in tandem with a Foreign Terrorist Organization (FTO), as required by § 2339B.³⁰ Eventually, as § 956 began to be used as a § 2339A predicate, terrorism prosecutors began charging § 956 itself, either in addition to or in lieu of a § 2332A charges.³¹

²⁸ See *Overview of the Neutrality Act*, OP. ATT’Y GEN, 209, 210–211 (Sept. 20, 1984).

²⁹ See generally *Fact sheet: Justice Department Counter-Terrorism Efforts Since 9/11*, DEP’T JUST. (Sept. 11, 2008), <https://www.justice.gov/archive/opa/pr/2008/September/08-nsd-807.html>.

³⁰ *Amawi v. Walton*, No. 3:13-cv-00866-JPG-RJD, 2016 WL 7364768, at *1 (S.D. Ill. Nov. 17, 2016); *United States v. Awan*, No. CR-06-0154(CPS), 2007 WL 749739, at *1 (E.D.N.Y. Mar. 7, 2007); *United States v. Robertson*, No. 6:12-cr-63-Orl-31GJK, 2015 WL 3915568, at *4 (M.D. Fla. June 25, 2015); *United States v. Omar*, 786 F.3d 1104, 1105 (8th Cir. 2015); *United States v. Kabir*, No. ED CR 12-00092-(B)-VAP, 2015 WL 631951, at *1 (C.D. Cal. Feb. 13, 2015); *United States v. Bell*, 81 F. Supp.3d 1301, 1305 (M.D. Fla. Jan. 14, 2015); *United States v. Brown*, No. 5:14-CR-58-FL, 2014 WL 1572553, at *1 (E.D.N.C. Apr. 18, 2014); *United States v. Wilson*, No. 12-00293-KD-N, 2013 WL 1296694, at *1 (S.D. Ala. Mar. 26, 2013); *United States v. Mohamed*, Crim. No. 09-352(MJD), 2012 WL 5279184, at *1 (D. Minn. Oct. 25, 2012); *United States v. Chandia*, 675 F.3d 329, 331 (4th Cir. 2012); *United States v. Jayyousi*, 657 F.3d 1085, 1091 (11th Cir. 2011); *United States v. Boyd*, No. 5:09-CR-216-FL-5, 2011 WL 2550753, at *1 (E.D.N.C. June 26, 2011); *United States v. Stewart*, 590 F.3d 93, 99 (2d Cir. 2009); *United States v. Hassoun*, No. 04-60001-CR, 2007 WL 4180844, at *1 (S.D. Fla. Nov. 20, 2007); *United States v. Abdi*, 498 F. Supp.2d 1048, 1051 (S.D. Ohio 2007); *United States v. Padilla*, No. 04-CR-60001, 2006 WL 2415946, at *1 (S.D. Fla. Aug. 18, 2006); *United States v. Khan*, 461 F.3d 477, 486 (4th Cir. 2006); *United States v. Sattar*, 395 F. Supp.2d 79, 82 (S.D.N.Y. 2005); *United States v. Arnaout*, No. 02 CR 892,2003 WL 255226, at *1 (N.D. Ill. Feb. 4, 2003).

³¹ *United States v. Singh*, No. 3:13-cr-0117-LRH-VPC, 2016 WL 6542829, at *1 (D. Nev. Nov. 2, 2016); *United States v. Kaziu*, 559 F. App’x 32, 34–35 (2d Cir. 2014); *United States v. Hassan*, 742 F.3d 104, 110–111 (4th Cir. 2014); *United States v. Almonte*, 587 F. App’x 746, 747 (3d Cir. 2014); *United States v. Subasic*, 568 F. App’x 234, 235 (4th Cir. 2014); *United States v. Mehanna*, 735 F.3d 32, 41 (1st Cir. 2013); *United States v. Mostafa*, 965 F. Supp.2d 451, 455 (S.D.N.Y. 2013); *United States v. Amawi*, 695 F.3d 457, 465 (6th Cir. 2012); *United States v. Yaghi*, No. 5:09-CR-216-FL-8, 2012 WL 147955, at *1 (E.D.N.C. Jan. 18, 2012); *United States v. Sherifi*, 793 F. Supp.2d 751, 752–53 (E.D.N.C. 2011);

Section 956 is a “Federal crime of terrorism.”³² It does not require political intent as an element of the offense. The relevant part provides:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).³³

Let’s look at an example.

I have a business rival who is so efficient in his work habits that he is stealing my customers. I learn that this person is taking his family on vacation in Italy. I hire an Italian hit-man to kill him while he is abroad.

In this scenario, I have committed a § 956 violation. I will likely avoid the terrorism enhancement at sentencing, after conviction in federal court. That is probably appropriate. I was acting out of pure avarice, really without any political motivation at all. I certainly would not consider

United States v. Zazi, Nos. 09-CR-663 (RJD), 10-CR-0019 (RJD), 2010 WL 2710605, at *1 (E.D.N.Y. June 30, 2010); United States v. Kassir, No. 04 Cr. 365(JFK), 2009 WL 2913651, at *1 (S.D.N.Y. Sept. 11, 2009); United States v. Mazloum, No. 3:06CR719, 2007 WL 2778731, at *1 (N.D. Ohio Sept. 4, 2007).

³² 18 U.S.C. § 2332 (5)(B)(i) (2012).

³³ 18 U.S.C. § 956(a)(1) (2012).

myself to be a terrorist, despite how I was charged. In legal terms, I will not earn the terrorism enhancement because my particular § 956 crime was not “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”³⁴

True to its roots, § 956 has been used to punish U.S.-based conduct in fomenting coups in foreign countries.³⁵ It has also been used in a wide variety of non-terrorism cases, where the motive is not political, as in my hypothetical.³⁶ Because § 956 also prohibits plots to destroy property in foreign countries, it has been used in some political, non-murder contexts.³⁷

C. 18 U.S.C. § 1114: Killing Federal Employees

³⁴ 18 U.S.C. §2332b(g)(5)(A) (2012); U.S. SENTENCING GUIDELINES MANUAL, § 3A1.4 (U.S. SENTENCING COMM’N 2018).

³⁵ *United States v. Chhun*, 744 F.3d 1110, 1114, 1116–1117 (9th Cir. 2014); *United States v. Jack*, No. 2:07-cr-00266 FCD DAD, 2010 WL 4718613 at *1, *18 (E.D. Cal. Nov. 12, 2010).

³⁶ *United States v. Samia*, No. (S9) 13 CR 521-LTS, 2016 WL 7223410, at *1 (S.D.N.Y. Dec. 13, 2016); *Vega v. United States*, EP-14-CV-369-DB, 2016 WL 7107903, at *1 (W.D. Tex. Nov. 22, 2016); *United States v. Bibbs*, No. 15 CR 578, 2016 WL 6804573, at *1 (N.D. Ill. Nov. 16, 2016); *United States v. Choudhry*, 649 F. App’x 60 (2d Cir. 2016); *United States v. Leija-Sanchez*, 820 F.3d 899, 900 (7th Cir. 2016); *Obregon-Reyes v. United States*, EP-14-CV-180-DB, 2016 WL 7107901 at *2 (W.D. Tex. Apr. 22, 2016); *United States v. Castellon*, 636 F. App’x 204 (5th Cir. 2016); *United States v. Martinez-Herrera*, 539 F. App’x 598, 600 (5th Cir. 2013); *United States v. Long Van Nguyen*, No. CR12-212RSL, 2013 WL 2403307, at *1 (W.D. Wash. May 31, 2013); *Krueger v. Martinez*, 665 F. Supp.2d 477, 479 (M.D. Pa. 2009); *United States v. Carman*, 341 F. App’x 345, 346 (9th Cir. 2009); *United States v. Lane*, No. 07-CR-00835, 2009 WL 2366431 at *1 (S.D. Cal. July 27, 2009); *United States v. Iribe*, 564 F.3d 1155, 1157 (9th Cir. 2009); *United States v. Fernandez*, 559 F.3d 303, 325 (5th Cir. 2009); *United States v. Acosto-Vargas*, No. EP-05-CR-755 DB(2), 2006 WL 4511940 at *2 (W.D. Tex. Oct. 3, 2006); *United States v. Marquez-Ramos*, No. EP-05-CR-755 DB1, 2006 WL 2459436 at *3 (W.D. Tex. Aug. 23, 2006); *United States v. Wharton*, 320 F.3d 526, 529 (5th Cir. 2003).

³⁷ *United States v. McKinley*, 995 F.2d 1020, 1022 (11th Cir. 1993) (IRA plot to destroy British aircraft); *United States v. Johnson*, 952 F.2d 565, 571 (1st Cir. 1991) (IRA plot to destroy British helicopters); *United States v. Elliott*, 266 F. Supp. 318, 321 (S.D.N.Y. 1967) (Plot to destroy railroad bridge in Zambia).

Another example of a tool to redress political murders is 18 U.S.C., § 1114, which qualifies as a “Federal crime of terrorism” and provides:

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be [guilty of a felony].³⁸ Sure, § 1114 is used in plenty of terrorism cases.³⁹ It is also charged in cases involving personal grievances unrelated to terroristic motives.⁴⁰

³⁸ 18 U.S.C. § 1114 (2012).

³⁹ *Shnewer v. United States*, Civ. No. 13-3769 (RBK), 2016 WL 867461, at *3 (D.N.J. Mar. 2, 2016); *United States v. Abu Khatallah*, 151 F. Supp.3d 116, 122 (D.D.C. 2015); *United States v. Georgescu*, 148 F. Supp.3d 319, 320 (S.D.N.Y. 2015); *United States v. Hamidullin*, No. 3:14CR140-HEH, 2015 WL 7283119, at *1, 3 (E.D. Va. Nov. 16, 2015); *Duka v. United States*, Civ. Nos. 13-3664 (RBK), 13-3665 (RBK), 13-3666 (RBK), 2015 WL 5768786, at *3 (D.N.J. Sept. 9, 2015); *United States v. Qazi*, No. 12-60298-CR, 2015 WL 728386, at *1 (S.D. Fla. Feb. 19, 2015); *Moreno-Godoy v. United States*, Nos. 13 Civ. 2383(JSR)(GWG), 07 Cr. 354, 2014 WL 1088300, at *1 (S.D.N.Y. Mar. 20, 2014); *United States v. Hassan*, 742 F.3d 104, 113 n.5 (4th Cir. 2014); *United States v. Bout*, 731 F.3d 233, 236 (2d Cir. 2014); *United States v. Cromitie*, 727 F.3d 194, 199 (2d Cir. 2013); *Tatar v. United States*, Civil Action No. 13-3317 (RBK), 2013 WL 2452680, at *1 (D.N.J. June 5, 2013); *United States v. Thomas*, 521 F. App'x 741, 742 (11th Cir. 2013); *United States v. Siddiqui*, 699 F.3d 690, 696 (2d Cir. 2012); *United States v. Amawi*, 695 F.3d 457, 499 (6th Cir. 2012); *Mohammed v. Holder*, Civil Action No. 07-cv-02697-MSK-BNB, 2011 WL 4501959, at *3 n.5 (D. Colo. Sept. 29, 2011); *United States v. Al Kassar*, 660 F.3d 108, 115–116 (2d Cir. 2011); *United States v. Al Ghazi*, No. S3 07 CR 354(JSR), 2009 WL 1605741, at *1 (S.D.N.Y. June 9, 2009); *In re Terrorist Bombings of United States Embassies in East Africa*, 552 F.3d 93, 102, 107 (2d Cir. 2008); *United States v. Hale*, 448 F.3d 971, 988 n.1 (7th Cir. 2006); *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699, at *1 (E.D. Va. Mar. 10, 2003); *United States v. Graham*, 275 F.3d 490, 499–500 (6th Cir. 2001); *United States v. Bin Laden*, 126 F. Supp.2d 290, 293 (S.D.N.Y. 2001); *United States v. McVeigh*, 153 F.3d 1166, 1176, 1221 (10th Cir. 1998); *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995); *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997); *United States v. Swapp*, 719 F.Supp. 1015, 1021 (D. Utah 1989).

⁴⁰ *Sublett v. United States*, CIVIL ACTION NO. 1:16-CV-00111-TBR, 2017 WL 1324133, at *1 (W.D. Ky. Apr. 6, 2017).

Between those two extremes we get plots to kill federal law enforcement officials. Agents from the FBI,⁴¹ DEA,⁴² IRS,⁴³ DHS,⁴⁴ ATF,⁴⁵ Bureau of Indian Affairs,⁴⁶ Park

⁴¹ *Ervin v. United States* Nos. 1:08 CV 936, 1:04 CR 013, 2011 WL 2312564 at *1 (N.D. Ohio June 8, 2011); *Waller v. United States*, No. 1:08-CV-936, 1:04-CR-13, 2010 WL 750219, at *2 (N.D. Ohio Feb. 26, 2010); *United States v. Bell*, 584 F.3d 478, 480 (2d Cir. 2009); *Carringer v. United States*, Civil Nos. 2:08CV-15-T-02, (2:00CR18-02-T), 2008 WL 2568153, at *1 (W.D.N.C. June 24, 2008); *United States v. Boone*, 437 F.3d 829, 835 (8th Cir. 2006); *United States v. Naovasaisri*, 150 F. App'x 170, 172 (3d Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 857 (6th Cir. 2005); *United States v. Reed*, 375 F.3d 340, 341 (5th Cir. 2004); *United States v. Granville*, 222 F.3d 1214, 1216–1217 (9th Cir. 2000); *United States v. Dick*, Nos. 97-6085/97-6086, 1999 U.S. App. LEXIS 25184, at *1 (6th Cir. Oct. 6, 1999); *United States v. Williams*, No. CRIM.A. 94-196, 1996 WL 741886, at *1 (E.D. Pa. Dec. 10, 1996). Two other FBI cases might have been political. *See United States v. Peltier*, 446 F.3d 911, 913 (8th Cir. 2006); *United States v. Banks*, 383 F. Supp. 368, 377 (D.S.D. 1974).

⁴² *Rodriguez-Pena v. Werlich*, No. 14-CV-994, 2014 WL 4273631, at *1 (W.D. La. Aug. 29, 2014); *Molina-Uribe v. United States*, Civil Action No. B:87-1, 2011 WL 13124273, at *1 (S.D. Tex. May, 31 2011); *United States v. Smith*, No. CV.02-.2799-B, CR.96-20176, 2005 WL 2491550, at *1 (W.D. Tenn. Oct. 6, 2005); *Benitez v. Booker*, No. Civ.A. 15CV081KSF, 2005 WL 2403726, at *1 (E.D. Ky. Sept. 29, 2005); *United States v. Taylor*, 59 F. App'x 960, 962 (9th Cir. 2003); *United States v. Duarte-Acero*, 208 F.3d 1282, 1283, n.3 (11th Cir. 2000); *United States v. Clemons*, 32 F.3d 1504, 1506 (11th Cir. 1994); *United States v. Padilla*, 771 F. Supp. 35, 36 (E.D.N.Y. 1991); *United States v. Rodriguez*, 689 F.2d 516, 517 (5th Cir. 1982); *United States v. Rivera*, 513 F.2d 519, 521–22 (2d Cir. 1975); *United States v. Hull*, 441 F.2d 308, 309 (7th Cir. 1971). When DEA agents are murdered overseas, the culprits are occasionally charged under the “International Protected Person” murder statute. *See United States v. Murillo*, 826 F.3d 152, 155 (4th Cir. 2016); *United States v. Sepulveda* 57 F. Supp.3d 610, 612 (E.D. Va. 2014).

⁴³ *United States v. Nowak*, No. 09-11329, 2010 WL 892850, at *1, *5 (11th Cir. Mar. 15, 2010); *United States v. Treff*, 924 F.2d 975, 977, 983 (10th Cir. 1991); *United States v. Tidmore*, 893 F.2d 1209, 1210, 1212 (11th Cir. 1990).

⁴⁴ *United States v. Vela*, 624 F.3d 1148, 1150 (9th Cir. 2010); *United States v. Wilk*, No. 04-60216-CR, 2005 WL 7863525, at *1 (S.D. Fla. Mar. 14, 2005); *United States v. Rodriguez-Pena*, 54 F.3d 764 (1st Cir. 1995).

⁴⁵ *United States v. Gatling*, 687 F.3d 382 (D.C. Cir. 2012); *United States v. Amos*, 423 F. App'x 541, 544 (6th Cir. May 1, 2011); *United States v. Penney*, 576, F.3d 297, 303, 315 (6th Cir. 2009); *United States v. Branch*, 91 F.3d 699, 710 (5th Cir. 1996); *United States v. Mason*, 70 F.3d 1281 (9th Cir. 1995); *United States v. Alvarez*, 755 F.2d 830, 836 (11th Cir. 1985).

⁴⁶ *United States v. Montoya*, No. 95-8052, 1996 U.S. App. LEXIS 10691, at *1 (10th Cir. May 7, 1996)(this case may have been political, though I did not include it in the list of terrorism-related § 1114 cases in note 37).

Service,⁴⁷ U.S. Marshals,⁴⁸ Forest Service,⁴⁹ Border Patrol,⁵⁰ U.S. Attorney's Office,⁵¹ the U.S. Department of Agriculture,⁵² and local police departments working on federal task forces⁵³ have all been targets of § 1114 murder plots. These cases – plots to kill cops – are terrible, but the motive in some of these cases could be personal pique rather than political ideology. Which is to say, the motive is not always terrorism.⁵⁴ We also get § 1114 cases, involving plots to murder federal judges⁵⁵ and Congressional aides.⁵⁶ Necessarily political? Probably not. This is true for § 1114 prosecutions arising from drug deals,⁵⁷ bank robberies,⁵⁸ and street gang

⁴⁷ *United States v. Locust*, 95 Fed. App'x 507, 510 (4th Cir. 2004); *United States v. Wollard*, 981 F.2d 756 (5th Cir. 1993); *United States v. Bowers*, 534 F.2d 186, 187 (9th Cir. 1976).

⁴⁸ *Braxton v. United States*, 500 U.S. 344, 345 (1991); *United States v. Greene*, 834 F.2d 1067, 1068-69 (D.C. Cir. 1987); *United States v. Kahl*, No. A3-96-55, 2003 WL 21715352, at *1-2 (N.D. Se. Div. 2003); *United States v. Diamond*, CR No. 93-241-FR, 1994 WL 86462, at *1 (D. Or. 1994).

⁴⁹ *United States v. Ballesteros*, No. 2:04-CR-0144 GEB, 2006 WL 224437, at *1 (E.D. Cal. 2006).

⁵⁰ *United States v. Navarro-Montez*, No. 09cr577-MMA-1, 2016 WL 7335837, at *1 (S.D. Cal. 2016); *United States v. Benitez-Torres*, No. CR.C-01-249(1), C.A. C-05-181, 2006 WL 335616, at *3 (S.D. Tex. 2006).

⁵¹ *United States v. Kwong*, 69 F.3d 663, 664 (2d Cir. 1995); *United States v. Hamrick*, 43 F.3d 877, 880 (4th Cir. 1995); *United States v. Wilson*, 565 F. Supp. 1416, 1427-28 (S.D.N.Y. 1983).

⁵² *United States v. Mays*, No. 4:10CR00055 JLH, 2011 WL 4434528, at *1, *3 (E.D. Ark. 2011); *United States v. Holder*, 256 F.3d 959 (10th Cir. 2001).

⁵³ *United States v. Smith*, 296 F.3d 344, 345-46, 349 (5th Cir. 2002).

⁵⁴ *United States v. Akers*, 499 F. Supp. 46, 47 (D. Or. 1974). The political violence of the 1960s and '70s did occasionally involve politically-motivated plots to kidnap law enforcement. *See United States v. Ahmad*, 53 F.R.D. 194, 196 (M.D. Pa. 1971). This type of activity continued into more modern times, including plots to bomb Selective Service draft centers. *See United States v. Jordan*, 223 F.3d 676, 680-82 (7th Cir. 2000).

⁵⁵ *United States v. Saunders*, 166 F.3d 907, 911 (7th Cir. 1999); *United States v. Thompson*, 130 F.3d 676, 682 (5th Cir. 1997); *United States v. Chagra*, 638, F. Supp. 1389, 1396, 1408 (W.D. Tex. 1986).

⁵⁶ *United States v. Fenton*, 10 F. Supp. 2d 501, 503 (W.D. Pa. 1998).

⁵⁷ *United States v. Wilson*, 653 Fed. App'x 433, 437 (6th Cir. 2016).

⁵⁸ *Polk v. United States*, Nos. 3:23-CV-1793-K, 3:00-CR-0236-K, 2012 WL 2864477, at *1 (N.D. Tex. 2012); *United States v. Muhammad*, 948 F.2d 1449, 1456-57 (6th Cir. 1991).

activity as well.⁵⁹ These murder cases are awful and are handled by federal prosecutors, but they do not qualify as terrorism.

The best example of the thorny motivation question in § 1114 cases comes from the case of Mamdouh Mahmud Salim, who was charged for his involvement in the Al Qaeda attack on the U.S. Embassies in Kenya and Tanzania.⁶⁰ While in jail in New York awaiting trial, he stabbed a prison guard in the eye.⁶¹ He eventually pled guilty to the prison attack, but the district court refused to sentence him under the terrorism enhancement.⁶² Though the Second Circuit ultimately reversed, concluding Salim met the standard for the enhancement, the case shows the tricky proposition of determining whether a § 1114 crime was politically motivated.⁶³ Here, while awaiting trial in a terrorism case, the individual arguably committed a murderous attack out of anger not connected with his terrorism charge.

In capturing the universe of politically motivated murders, § 1114 is clearly not as good of a correlation-to-terrorism as § 2332. However, some § 1114 murder plots will be treated as terrorism at sentencing, if the court finds that the conduct “was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”⁶⁴

⁵⁹ United States v. States, 652 F.3d 734, 736-38 (7th Cir. 2011).

⁶⁰ United States v. Salim, 549 F.3d 67, 70 (2d Cir. 2008).

⁶¹ *Id.*

⁶² *Id.* at 70, 72.

⁶³ *Id.* at 77, 79.

⁶⁴ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 3A1.4, at 349.

D. Assassination Statutes

To many, assassination would seem the essence of political murder. In the Twentieth Century, we saw one world war started by an assassination, and three U.S. Presidents felled by assassins' bullets.⁶⁵ If the would-be victim of the murder plot in the President, Vice President, or member of Congress, or some prominent foreign leader, is the plot inherently political? On first instinct, most would say yes.

When we get into the U.S.-based assassination plots and the judicial opinions that result from them, however, we see that plenty of assassins are motivated by private thoughts and objectives (and even demons). Even the act of murdering a prominent leader is not always political.

“Assassination” is not criminalized in the U.S. code, nor is it a term defined by criminal law. Instead, we have several federal criminal laws specifically designed to protect certain political leaders. We have threat crimes that are used to redress expressions of intent to assassinate Presidents, Vice Presidents, and other successors to the presidency,⁶⁶ former Presidents and their families,⁶⁷ Presidential candidates⁶⁸, and high-level foreign guests.⁶⁹ We also have murder statutes to punish plots and actual killings.

⁶⁵ Jesse Greenspan, *The Assassination of Archduke Franz Ferdinand*, HISTORY (Feb. 12, 2020), <https://www.history.com/news/the-assassination-of-archduke-franz-ferdinand>; *U.S. presidential assassinations and attempts*, LOS ANGELES TIMES, (Jan. 22, 2012), <https://timelines.latimes.com/us-presidential-assassinations-and-attempts/>.

⁶⁶ 18 U.S.C. § 871 (2012).

⁶⁷ 18 U.S.C. § 879(a)(1) (2012).

⁶⁸ *Id.* § 879(3).

⁶⁹ 18 U.S.C. § 878 (2012).

Our Presidential murder statute, 18 U.S.C. 1751, for example, provides:

§ 1751. Presidential and Presidential staff assassination, kidnapping, and assault; penalties

(a) Whoever kills (1) any individual who is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the Office of the President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States, or (2) any person appointed under section 105(a)(2)(A) of title 3 employed in the Executive Office of the President or appointed under section 106(a)(1)(A) of title 3 employed in the Office of the Vice President, shall be punished as provided by sections 1111 and 1112 of this title.⁷⁰

The case law from this statute shows that it is sometimes, but not always, used in cases of political-inspired murders.⁷¹

The Nationalist Party of Puerto Rico, once a political party, abandoned hope of achieving Puerto Rican independence through legitimate political processes, and in the late 1940s began an effort to overthrow American authority on the island by violence. In October 1950 the party launched an unsuccessful revolution in Puerto Rico

⁷⁰ 18 U.S.C. § 1751(a) (2012).

⁷¹ See The Associated Press, *Court Sentences Man to 40 Years for Trying to Kill the President*, N.Y. TIMES (June 30, 1995), <https://www.nytimes.com/1995/06/30/us/court-sentences-man-to-40-years-for-trying-to-kill-the-president.html>; *United States v. Duran*, 884 F. Supp. 566, 567 (D.D.C. 1995); *United States v. Hinckley*, 672 F.2d 115, 117 n.1 (D.D.C. 1982).

with simultaneous armed uprisings in two cities. The insurrection was quelled by native forces after at least nine persons lost their lives.⁷²

Two days later, attempting to promote their cause, two members tried to kill President Harry S. Truman. On November 1, 1950, Girselio Torresola and Oscar Collazo reached the steps of Blair House, where President Truman was staying during a remodeling of the White House.⁷³ As they attempted to climb the stairs, they were spotted by a private security guard, Donald Birdzell, and gunfire erupted. Torreselo and one guard (Leslie Coffelt) were killed, while Collazo was wounded and placed under arrest.⁷⁴ He was convicted and sentenced to death, although President Truman—who was unhurt and tried to play down the incident—ultimately commuted his sentence to life imprisonment.⁷⁵ Collazo was pardoned by President Carter in 1979.⁷⁶ Two letters from Harvard-educated Pedro Albizu Campos were found on Torresola's body. Campos, leader of the Puerto Rican Nationalist Party, called for armed action against “American oppressors.”⁷⁷ Paradoxically, the intended victim, President Truman, favored Puerto Rican independence.⁷⁸

⁷² United States v. Lebron, 222 F.2d 531, 533 (2nd Cir. 1955).

⁷³ *Id.*

⁷⁴ Andrew Glass, *Puerto Rican militants try to assassinate Truman, Nov. 1, 1950*, POLITICO (Nov. 1, 2017), <https://www.politico.com/story/2017/11/01/puerto-rican-militants-try-to-assassinate-truman-nov-1-1950-244323>.

⁷⁵ *Id.*

⁷⁶ Jeffrey D. Simon, *THE TERRORIST TRAP: AMERICA'S EXPERIENCE WITH TERRORISM* 53 (Ind. Univ. Press, 2nd ed. 2001).

⁷⁷ Louis R. Mizell, Jr., *TARGET USA: THE INSIDE STORY OF THE NEW TERRORIST WAR* 85 (John Wiley & Sons, Inc. 1998).

⁷⁸ *Id.*

President John F. Kennedy was killed in November 1963 by Lee Harvey Oswald.⁷⁹ Although Oswald was killed shortly thereafter and was thus never prosecuted, it is now common knowledge that he was motivated in part by the U.S.' relationship with Cuba.

On the morning of September 5, 1975, President Gerald R. Ford departed the Senator Hotel in downtown Sacramento and began a short walk across Capitol Park to the State Capitol for a scheduled meeting with California Governor Jerry Brown.⁸⁰ As he walked through the park, the President was greeted by numerous citizens and paused occasionally to shake hands. During one stop, a woman in a red dress, who the President had previously seen standing beside a tree and who was still visible to the President, suddenly moved her right hand forward toward the President. The President saw that she was holding a handgun about two feet from him. The gun, a .45 caliber pistol, did not fire. Agents of the Secret Service and local law enforcement officers immediately wrested the woman to the ground while other agents quickly moved the President from the scene of the incident. The would-be assassin turned out to be Lynette Alice "Squeaky" Fromme, a follower of convicted murderer Charlie Manson.⁸¹ She had obtained the weapon from a partially blind septuagenarian.

Fromme was ultimately convicted under § 1751 and sentenced to life in prison. The only published opinion in her case involved her right to subpoena President Ford as a witness, and the form his testimony would take.⁸² In 1987

⁷⁹ *Assassination of John F. Kennedy*, HISTORY (June 14, 2019), <https://www.history.com/topics/us-presidents/jfk-assassination>.

⁸⁰ Mizell, *supra* note 77, at 69.

⁸¹ *Id.*

⁸² *United States v. Fromme*, 405 F.Supp. 578, 580, 583 (E.D. Cal. 1975).

she escaped from prison, reportedly because she wanted to be closer to Manson. She was recaptured and transferred to a more secure facility.⁸³

The person who tried to kill President Reagan in 1981, John Hinckley, was apparently motivated not by politics but by a desire to impress a girl.⁸⁴

On September 12, 1994, when Bill Clinton was President, a pilot was killed when he crashed a small plane on the South Lawn of the White House.⁸⁵ Steering a stolen Cessna from a Maryland airport, Frank Eugene Corder, an unemployed truck driver and an unlicensed pilot, flew into the prohibited airspace over the White House. Corder was killed when he dove the Cessna toward the mansion, crashing it on the South Lawn. His plane hit a tree on the steps of the South Portico, as well as a first-floor corner of the White House. President Clinton and his family were not in the mansion at the time.⁸⁶

Andrew Jopling, carrying an unloaded gun, scaled a White House fence on May 26, 1995 in what law enforcement authorities called an apparent "cry for attention."⁸⁷ He was shot and wounded while scuffling with the Secret Service about thirty yards from the East Wing. At the time, one official said Jopling had asked to see President

⁸³ *Squeaky Fromme Transferred to Lexington*, LEXINGTON HERALD-LEADER, (June 5, 1988) at A16.

⁸⁴ Christopher Klein, *John Hinckley, Jr. Tried to Assassinate Ronald Reagan Because He Was Obsessed with Jodie Foster*, HISTORY (MAR. 27, 2019), [HTTPS://WWW.HISTORY.COM/NEWS/RONALD-REAGAN-ATTEMPTED-ASSASSINATION-JOHN-HINCKLEY-JODIE-FOSTER](https://www.history.com/news/ronald-reagan-attempted-assassination-john-hinckley-jodie-foster).

⁸⁵ Maureen Dowd, *Crash at the White House: The Overview; Unimpeded, Intruder Crashes Plane into White House*, N.Y. TIMES, (Sept. 13, 1994), <https://www.nytimes.com/1994/09/13/us/crash-white-house-overview-unimpeded-intruder-crashes-plane-into-white-house.html>.

⁸⁶ *Id.*

⁸⁷ Mike Sims, *White House Intruders*, CBS (Feb. 7, 2001), <https://www.cbsnews.com/news/white-house-intruders/>.

Clinton.⁸⁸ “Three days earlier, Leland Mojeski climbed a White House fence and got within twenty yards of the East Wing before he was stopped. Authorities said Mojeski may have wanted to be killed, citing his history of mental illness.”⁸⁹

The most serious attack on the White House occurred in October, 1994.⁹⁰ During the months leading up to this attack, Francisco Duran, a twenty-six-year-old upholsterer from a Colorado Springs suburb, began purchasing assault weapons. He purchased another thirty-round clip in Charlottesville, Virginia on October 10, and bought a large overcoat the next day in Richmond, Virginia. Later that day, Duran arrived in Washington, D.C. and checked into a hotel. He stayed at a variety of hotels in the D.C. area between October 10 and October 29. At that point, he checked out of the Embassy Suites Hotel in Tysons Corner, drove to downtown D.C., and parked his truck on 17th Street, between D and E Streets.⁹¹

Early that afternoon, Duran was standing in front of the north side of the White House, wearing the large overcoat he had recently purchased on the trip. As he stood by the White House fence, two eighth-grade students on a field trip, Robert DeCamp and Brent Owens, ran to a point along the fence thirteen feet away.⁹² DeCamp pointed toward a small group of men in dark suits standing near the White House. One of these men, civilian Dennis Basso, strongly resembled Clinton.⁹³ DeCamp commented that the

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *United States v. Duran*, 96 F.3d 1495, 1498 (D.C. Cir. 1996).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

man “looked like Bill Clinton,” and Owens said “Yeah, it does.”⁹⁴ Almost immediately after this exchange, Duran began firing the rifle at Basso.

Four Secret Service officers stationed on the north side of the White House reacted to the sound of shots by taking cover and trying to move toward the source of the gunfire.⁹⁵ After firing about twenty rounds from his original spot, Duran began running east along the fence, still firing at the White House.⁹⁶ Then he stopped, apparently trying to reload a second thirty-round clip.⁹⁷ At this point, Harry Rakowsky, a civilian, tackled him, and several Secret Service agents arrived to help subdue Duran and confiscate his rifle.

As they searched his truck after arresting him, agents found one of the rifles Duran had purchased on his way to Washington, several boxes of ammunition, nerve gas antidote, a letter in which Duran had written “Can you imagine a higher moral calling than to destroy someone's dreams with one bullet?,” a road atlas on which Duran had written “Kill the Pres!;” a cover torn from a telephone book bearing a picture of President Clinton, which Duran had defaced by drawing a circle around Clinton's head and an “X” on his face; a handwritten document with the heading “Last will and words;” an order form for the book “Hit Man,” and several books about out-of-body experiences.⁹⁸

Duran was convicted under 18 U.S.C. § 1751, and for his assault on the federal agents, and on April 5,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

1995, he received a forty-year sentence.⁹⁹

The other main assassination statute, 18 U.S.C. § 351, was used against Puerto Rican nationalists in the 1950s,¹⁰⁰ and more recently in the attempt on Congresswoman Gabriele Giffords.¹⁰¹

Significantly, neither § 351 nor § 1751 require a political motivation as an element.

II. POLITICAL MURDERS NOT CHARGED AS TERRORISM

This brings us to what I call the “Dylann Roof problem.” Roof in June 2015 gunned down nine African American parishioners at a church in Charleston, South Carolina.¹⁰² He was charged with a battery of civil rights-related murders, even though he seemed to be motivated by his membership in a white supremacist organization and apparently wanted to start a race war in America.¹⁰³

According to the court:

At trial, the Government presented evidence that Defendant attacked parishioners at Mother Emanuel during a Wednesday-night Bible study. Defendant used the internet to conduct

⁹⁹ The Associated Press, *Court Sentences Man to 40 Years For Trying to Kill the President*, N.Y. TIMES (June 30, 1995), <https://www.nytimes.com/1995/06/30/us/court-sentences-man-to-40-years-for-trying-to-kill-the-president.html>.

¹⁰⁰ U.S. v. Lebron, 229 F.2d 16 (D.D.C. 1955).

¹⁰¹ United States v. Loughner, 807 F. Supp.2d 828, 833 (D. Ariz. 2011).

¹⁰² Emily Shapiro, *Key Key Moments in Charleston Church Shooting Case as Dylann Roof Pleads Guilty to State Charges*, ABC NEWS (Apr. 10, 2017), <https://abcnews.go.com/US/key-moments-charleston-church-shooting-case-dylann-roof/story?id=46701033>.

¹⁰³ Feliks Garcia, *Dylann Roof: The Vile White Supremacy That Killed 9 Black Churchgoers*, INDEPENDENT (Jan. 11, 2017), <https://www.independent.co.uk/news/world/americas/dylann-roof-death-sentence-had-to-do-it-white-supremacist-manifesto-who-is-he-a7520656.html>.

research and identify Mother Emanuel as his target, a telephone to contact the church directly, and GPS navigation satellites to navigate interstate highways on his multiple trips to and from the vicinity of the church. He used a Russia-based service to host the online manifesto he posted shortly before the attack at Mother Emanuel, which explained his motives. In preparation for the attack, Defendant purchased hollow-point bullets, magazines, and a firearm that had all travelled in interstate commerce. Defendant entered Mother Emanuel carrying the firearm and loaded magazines in a tactical pouch that had travelled in interstate commerce. Inside the church, Defendant used the items he procured to kill nine parishioners.¹⁰⁴

Roof was not charged with any terrorism offenses.

The Dylann Roof dilemma was the focus of an article by Jenna McLaughlin, who was critical of the charging decision.¹⁰⁵ Her article cites multiple cases that appeared to be domestic terrorism but were charged under civil rights criminal statutes, and it compiles the criticism leveled by a number of experts that terrorism was not included in the official narrative.¹⁰⁶ In the Roof case, DOJ officials and the FBI Director assured the public that the treatment was regular, justified by the law and would not impact the

¹⁰⁴ United States v. Roof, 252 F. Supp. 3d 469, 472 (D.S.C. 2017).

¹⁰⁵ See Jenna McLaughlin, *Charging Crimes as Terrorism*, 6 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 101, 101–02, 108 (2015–2016).(2015–2016).

¹⁰⁶ See *id.*

energy devoted to the case.¹⁰⁷ Were these reassurances convincing? Consider that Dylann Roof was ultimately sentenced to death,¹⁰⁸ not something that occurs very much even in the most heinous of terrorism cases.¹⁰⁹ Other critics go further. For example, one article attributes the “terrorism vs. civil rights dilemma” to racism and suggests that implicit bias in prosecutors needs to be redressed.¹¹⁰

Under American civil rights laws, if two or more people conspire to “injure, oppress, threaten, or intimidate any person” to prevent, or because, the person exercised their Constitutional rights and death results, it is a federal offense under 18 U.S.C. §241.¹¹¹ Similarly, it is a federal offense (§ 245) if a person is killed because he or she is engaged in a federally-protected or federally-sponsored activity.¹¹² Causing the death of another while damaging any “religious real property” for racial motives can also give rise to federal jurisdiction (§ 247).¹¹³ The federal hate crimes statute (§ 249), which was enacted in 2002, extends the special protection to gay individuals, and it too contains an “if death results” provision.¹¹⁴

Like many of the terrorism-crime cases, not all murders charged as civil rights crimes qualify as political murders. For example, there are plenty of these cases involving brutal cops and jailers acting

¹⁰⁷ *See id.*

¹⁰⁸ *See Roof*, 252 F. Supp. 3d at 471.

¹⁰⁹ *But see United States v. Tsarneav*, 157 F. Supp. 3d 57, 58 (D. Mass. 2016).

¹¹⁰ Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33, 35, 69–70 (2013).

¹¹¹ 18 U.S.C. § 241 (2012).

¹¹² 18 U.S.C. § 245 (2012).

¹¹³ 18 U.S.C. § 247 (2012).

¹¹⁴ 18 U.S.C. § 249 (2012).

“under color of law.”¹¹⁵ In addition, civil rights crimes are often used to punish people who plot to murder federal witnesses, on the theory that the act of testifying in federal court is a civil right.¹¹⁶ Rather than being true political murder cases, these latter matters seem motivated by the desire to get rid of an inconvenient person- not politics. This makes the civil rights crimes similar to § 1114, § 351, and § 1751

¹¹⁵ *United States v. Teel*, No. 07-60897, 2008 WL 4888513, at *1 (5th Cir. 2008); *United States v. Serrata*, 425 F.3d 886, 893 (10th Cir. 2005); *United States v. McDougle*, 2003 WL 22734840, at *1 (6th Cir. 2003); *United States v. Causey*, 185 F.3d 407, 411 (5th Cir. 1999); *United States v. Patterson*, 809 F.2d 244, 245–246 (5th Cir. 1987); *United States v. Robinson*, 503 F.2d 208, 210 (7th Cir. 1974); *Marlowe v. United States*, 2010 WL 582193, at *13 (M.D. Tenn. 2010); *United States v. Taylor*, 1997 WL 208430, at *1 (N.D. Ill. 1997); *United States v. Flanagan*, 527 F. Supp. 902, 902 (E.D. Pa. 1981); *United States v. McMahon*, 339 F. Supp. 1092, 1092 (S.D. Texas 1971). See *United States v. Garcia*, 340 F.3d 1013, 1014 (9th Cir. 2003); *United States v. Smith*, 294 F.3d 473, 475 (3rd Cir. 2002); *United States v. Guillette*, 547 F.2d 743, 746 (2nd Cir. 1976); *United States v. Brown*, 2007 WL 1655873, at *1 (D.D.C. 2007); *Joost v. United States Parole Comm’n*, 647 F. Supp. 644, 647 n.1 (D. Kan. 1986).

¹¹⁶ *United States v. Hardy*, No. 12-30036, 2012 WL 6052023, at *1 (5th Cir. 2012); *United States v. Coleman*, No. 10-2928, 2011 WL 791332, at *1 (3rd Cir. 2011); *United States v. Davis*, 609 F.3d 663, 671 (5th Cir. 2010); *United States v. Grandison*, No. 03-6465, 2003 WL 23095932, at *1 (4th Cir. 2003); *Summ. Order, United States v. Dinome*, 104 F.3d 350 (2d Cir. 1996) (No. 96-1173); *United States v. Walton*, 86 F.3d 1154, 1154 (4th Cir. 1996); *United States v. D’Antoni*, 874 F.2d 1214, 1216 (7th Cir. 1989); *United States v. Coleman*, 811 F.2d 804, 805–06 (3rd Cir. 1987); *United States v. Guzzino*, 810 F.2d 687, 689 (7th Cir. 1987); *United States v. Lebron-Gonzalez*, 816 F.2d 823, 825–26 (1st Cir. 1987); *United States v. Rovetuso*, 840 F.2d 363, 364 (7th Cir. 1987); *United States v. Wallace*, No. 86-5633, slip op. 1061, 1061 (4th Cir. Aug. 12, 1987); *United States v. Ebens*, 800 F.2d 1422, 1425 (6th Cir. 1986); *United States v. Kimble*, 719 F.2d 1253, 1254, 1256 (5th Cir. 1983); *United States v. Bagaric*, 706 F.2d 42, 69 n.1 (2d Cir. 1983); *United States v. Bufalino*, 683 F.2d 639, 640 (2nd Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 621 (5th Cir. 1982); *United States v. Smith*, 623 F.2d 627, 628–29 (9th Cir. 1980); *United States v. Ellis*, 595 F.2d 154, 156–57 (3rd Cir. 1979); *United States v. Harvey*, 526 F.2d 529, 531 (2nd Cir. 1975); *United States v. Merritts*, 527 F.2d 713, 716 n.1 (7th Cir. 1975); *United States v. Pacelli*, 521 F.2d 135, 136 (2nd Cir. 1975); *Morton v. Zych*, No. 09-12855, 2010 WL 743042, at *1 (E.D. Mich. 2010); *Fisher v. United States*, 6 F. Supp. 2d 254, 256–57 (S.D.N.Y. 1998); *Proctor v. United States*, 729 F. Supp. 473, 474 (D. Md. 1990); *United States v. Panzardi-Alvarez*, No. 85–4931987, WL 19900, at *1 (D.P.R. 1987); *United States v. Catala Fonfrias*, 612 F. Supp. 999, 1001, 1003 (D.P.R. 1985); *United States v. Dawson*, 556 F. Supp. 418, 421 (E.D. Pa. 1982).

described above; they reach some political murders, but other non-political plots as well.¹¹⁷

Are civil rights crimes another tool for the federal government to redress politically-inspired murders? Can we check the government's claim that cases like Dylann Roof's are not investigated and punished any less rigorously when they are label hate crimes, as opposed to terrorism? Consider these terrorism-like facts in civil rights prosecutions:

- Joseph Paul Franklin, on August 20, 1980, shot two black men who were jogging with two white women at Liberty Park in Salt Lake City. In the preceding days, Franklin told anyone who would listen about how much he hated black people.¹¹⁸
- An organized group of white supremacists sought to attack American institutions where Jewish power was thought to exist. On the night of June 18, 1984, the group shot and killed radio host Alan Berg in front of his Denver, Colorado home. Berg was outspoken in his criticism of the white supremacist movement.¹¹⁹ The group maintained that it was trying to make a "statement" by killing a prominent Jewish person.¹²⁰
- A Latino street gang in a Los Angeles suburb in the 1990s decided to systematically use racial slurs, threats, assaults, harassment, and murder against

¹¹⁷ Many civil rights "death results" prosecutions resulting in judicial opinions law seem to be racially-motivated assaults that went too far, rather than organized murder plots. See *United States v. Sandstrom*, 594 F.3d 634, 638–39 (8th Cir. 2010); *United States v. Sowa*, 34 F.3d 447, 449 (7th Cir. 1994); *United States v. Piche*, 981 F.2d 706, 709, 711 (4th Cir. 1992); *United States v. Ebens*, 800 F.2d 1422, 1427, 1431 (6th Cir. 1986).

¹¹⁸ *United States v. Franklin*, 704 F.2d 1183, 1185–86 (10th Cir. 1983).

¹¹⁹ *United States v. Lane*, 883 F.2d 1484, 1487, 1497 (10th Cir. 1989).

¹²⁰ *United States v. Yarbrough*, 852 F.2d 1522, 1527 (9th Cir. 1998).

African Americans in an effort to rid the area of them.¹²¹

- In Texas, Eli Mungia and Roy Martin shot three black men attempting to start a race war.¹²²
- Buford O'Neal Furrow, Jr. was charged in 1999 for shooting five individuals at the North Valley Jewish Community Center in Southern California.¹²³
- Robert Doggart recruited people to attack a Muslim enclave in Hancock, New York.¹²⁴

These cases were pursued aggressively, as shown by the results.¹²⁵

I have no problem concluding that many of the cases charged under these civil rights statutes qualify as political murders, making the civil rights statutes a good adjunct to terrorism enforcement. This terrorism-civil rights link is not necessarily a novel idea. In passing § 245 in 1968, for example, Congress referred to “[a]cts of racial terrorism”

¹²¹ United States v. Cazares, 788 F.3d 956, 962 (9th Cir. 2015).

¹²² See United States v. Mungia, No. 96-10391, 1997 U.S. App. LEXIS 43001, at *1 (5th Cir. Apr. 7, 1997).

¹²³ United States v. Furrow, 125 F. Supp. 2d 1178, 1179 (C.D. Cal. 2000).

¹²⁴ United States v. Doggart, No. 1:15-cr-39, 2016 U.S. Dist. LEXIS 146750, at *3 (E.D. Tenn. Oct. 24, 2016).

¹²⁵ Franklin was ultimately sentenced to death. Kyung Lah, *Serial Killer Joseph Paul Franklin Prepares to Die*, CNN.COM (Nov. 19, 2013), <http://www.cnn.com/2013/11/18/justice/death-row-interview-joseph-paul-franklin/>. The gunman who killed Alan Berg got 150 years. Howard Pankratz, *Neo-Nazi Gunman in Alan Berg's Murder Dies in Prison*, DENV. POST. (Aug. 17, 2010), <http://www.denverpost.com/2010/08/17/neo-nazi-gunman-in-alan-bergs-murder-dies-in-prison/>. The court sentenced three of the leaders of the Latino gang to two consecutive sentences of life imprisonment. *Cazares*, 788 F.3d at 962. Furrow, got two consecutive life terms, plus 110 years. Dree DeClamecy, *Jewish Center Gunman Gets 2 Life Sentences*, CNN.COM, (Mar. 26, 2001), <https://edition.cnn.com/2001/LAW/03/26/buford.furrow/index.html>. Mungia and Martin received life sentences. *Life Sentences For 3 Men in Racial Attacks*, N.Y. TIMES (Apr. 8, 1996), <http://www.nytimes.com/1996/04/08/us/life-sentences-for-3-men-in-racial-attacks.html>.

that had “deterred the free exercise of constitutional and statutory rights.”¹²⁶

Moreover, there is nothing to prevent terrorism charges to be included alongside civil rights charges in the same indictment. For example, Kevin Harpham was charged with placing an explosive device in a backpack along the route of the January, 2011 Martin Luther King, Jr. Day parade in Spokane, Washington.¹²⁷ He was charged with civil rights and terrorism crimes, and ultimately pled guilty to a terrorism charge – attempting to use a weapon of mass destruction.¹²⁸ Similarly, Jarred Loughner was charged both with civil rights violations and with the Congressional assassination statute for his attempt on the life of Representative Gabrielle Gifford.¹²⁹

CONCLUSION

Does this Article demystify how political murder cases are handled by U.S. law enforcement? What does it say to McLaughlin’s criticism? It is true that the assignment of cases within the DOJ and FBI depend on whether the case is labeled a civil right (or hate) crime, as opposed to terrorism. These are separate types of crimes, with different law enforcement units and different tools. It is important to note that whether a case falls in either category, it is aggressively pursued. The DOJ people employed by the Criminal Section of the Civil Rights Division are every bit as elite as their counterterrorism counterparts in the National Security Division. Both types of cases are overseen by strong and

¹²⁶ S. REP. NO. 90-721, at 4 (1967).

¹²⁷ *United States v. Harpham*, No. 2:15-cv-125-JLQ, 2015 U.S. Dist. LEXIS 101326, at *2 (E.D. Wash. Aug. 3, 2015).

¹²⁸ *Id.* at *1–2.

¹²⁹ *United States v. Loughner*, 672 F.3d 731, 736 (9th Cir. 2012).

well-resourced units at FBI Headquarters.

There might, however, be one difference, which is illustrated by some recent attacks. On December 2, 2015, fourteen people were killed and twenty-two others were seriously injured in a mass shooting and an attempted bombing at the Inland Regional Center in San Bernardino, California.¹³⁰ Syed Rizwan Farook and Tashfeen Malik, a married couple living in Raglands, targeted a Christmas party held by the San Bernardino County Department of Public Health, where around eighty guests were gathered in a rented banquet hall.¹³¹ Farook was a U.S.-born citizen of Pakistani descent, and also worked as an employee of the health department. Malik was born in Pakistan but was a lawful permanent citizen of the United States. They were both subsequently killed in a shoot-out with law enforcement.¹³² Just six months later, 49 people were killed, and 53 other wounded, when 29-year-old Omar Matten attacked a gay nightclub called Pulse in Orlando, Florida.¹³³ He was subsequently shot and killed by Orlando police after a three-hour standoff.¹³⁴

In each of these cases, the culprits died, but that does not stop the FBI's ongoing investigation. It still looks for evidence of the assailants' motives, and whether there was anyone else involved. Recall that in San Bernardino, the FBI

¹³⁰ Richard Pérez-Peña & Adam Goldman, *New Report Chronicles Chilling Details of San Bernardino Shooting*, N.Y. TIMES (Sept. 10, 2016), LEXIS, <https://advance.lexis.com/api/permalink/2da6dd06-8614-4d39-b4fe-a328f5b8d4ba/?context=1000516>.

¹³¹ *Id.*

¹³² Saeed Ahmed, *Who Were Syed Rizwan Farook and Tashfeen Malik?*, CNN.COM, (Dec. 4, 2015), <https://www.cnn.com/2015/12/03/us/syed-farook-tashfeen-malik-mass-shooting-profile/index.html>.

¹³³ Ralph Ellis, Ashley Fantz, Faith Karimi & Elliott C. McLaughlin, *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN.COM, June 13, 2016, <https://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html>.

¹³⁴ *Id.*

went to a lot of time and expense to unlock the Farook's Apple iPhone.¹³⁵ This was well after Farook's death.

If the assailant is deceased, why does the FBI work so assiduously to determine his/her motivation, post-mortem? The answer is that terrorism attacks tend to kick the collective oversight bodies into action. In these cases, as with the 9/11 attacks and Benghazi, there is the possibility that Congress will want to analyze "what went wrong" that allowed the terrorist plans to continue in certain cases. Sometimes, the result is an Independent Commission.¹³⁶ At the very least, the relevant Inspectors General get into the act. The question for these inquiries is why the FBI did not connect the dots to prevent the attack. FBI counterterrorism personnel know that they must be prepared to answer these questions.

Does the same dynamic occur in domestic terrorism cases that are charged as civil rights crime? I have my doubts. While Farook and Mateen's motivation was pursued after their deaths, it is not clear that there was much attention paid to how Dylann Roof and other white supremacists become radicalized. That distinction could be one that makes a real difference.

One idea for reform is to add some of the civil rights crimes to the definition of "Federal crimes of terrorism." Of course, this is not technically necessary to assure that some civil rights convictions receive the terrorism enhancement, since the count of conviction need not be to a statute on the

¹³⁵ See Arash Khamooshi, *Breaking Down Apple's iPhone Fight with the U.S. Government*, N.Y. TIMES (Mar. 21, 2016), https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html?_r=0.

¹³⁶ About the Commission, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. (2004), <https://govinfo.library.unt.edu/911/about/index.htm>.

list for a defendant to earn the enhancement.¹³⁷ However, it might prompt prosecutors to seek the terrorism enhancement more often after civil rights convictions are achieved in cases involving politically motivated murder, and it would not require any legislation. Beyond this idea, we could simply seek to extend the curiosity of the oversight bodies to make them as focused on intelligence gaps in civil rights cases as they are in terrorism.

¹³⁷ Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. JUST. (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously>.