



**INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER**

September 13, 2018

The Honorable Jefferson Beauregard Sessions III
Attorney General, U.S. Department of Justice
Attn: Office of Legislative Affairs
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Kirstjen M. Nielsen
Secretary, U.S. Department of Homeland Security
Attn: Office of the Chief Information Officer/Information Quality Officer
245 Murray Lane SW
Mail Stop 0136
Washington, DC 20528

Dear Attorney General Sessions and Secretary Nielsen,

We, the undersigned, are former officials with extensive experience in designing and implementing policies to counter terrorism at the White House, Department of Justice, Department of Homeland Security, Department of State, Department of Defense, and the Intelligence Community:

- Rand Beers, Former Acting Secretary of Homeland Security
- James Clapper, Former Director of National Intelligence
- Richard A. Clarke, Former National Coordinator for Counterterrorism, National Security Council
- Jonathan Finer, Former Chief of Staff and Director of Policy Planning, Department of State
- Joshua A. Geltzer, Former Senior Director for Counterterrorism, National Security Council
- Luke Hartig, Former Senior Director for Counterterrorism, National Security Council
- Brett Holmgren, Former Senior Policy Advisor to the Assistant to the President for Homeland Security and Counterterrorism, National Security Council
- Gil Kerlikowske, Former Commissioner of U.S. Customs and Border Protection, Department of Homeland Security
- Robert Malley, Former Special Assistant to the President and Senior Adviser to the President for the Counter-ISIL Campaign, National Security Council
- Amy Marshak, Former Counsel to the Assistant Attorney General for National Security, Department of Justice

- Mary B. McCord, Former Acting Assistant Attorney General for National Security, Department of Justice
- Brian McKeon, Former Acting Under Secretary for Policy, Department of Defense
- Matthew G. Olsen, Former Director, National Counterterrorism Center
- Nicholas Rasmussen, Former Director, National Counterterrorism Center
- Daniel Rosenthal, Former Director for Counterterrorism, National Security Council
- Suzanne Spaulding, Former Under Secretary for the National Protection and Programs Directorate, Department of Homeland Security
- Jake Sullivan, Former National Security Adviser to the Vice President
- Francis X. Taylor, BGen, USAF (Ret.), Former Under Secretary for Intelligence and Analysis, Department of Homeland Security

Based on our experience, we believe strongly that accurate public characterizations by the U.S. Government of the terrorist threat faced in this country are important to countering terrorism effectively. Accurate information helps to thwart terrorists' immediate goals of distorting public understandings and sowing discord and enables the public to make informed evaluations of government decision-making. We therefore write in support of the requests for reconsideration filed today by concerned groups and individuals regarding the misleading report issued by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) in January 2018 and the letters subsequently sent by DOJ and DHS that attempt to defend the misleading impressions yielded by the report.

Introduction

Terrorism as a strategy uses acts of violence to sow confusion, trigger outsized fear-based reactions, and stoke societal conflict in furtherance of terrorists' political goals. Terrorists rely on public overreaction and misunderstanding to skew political dialogue and create dangerous societal fissures in ways that inflame public sentiment against whole subsets of society. To counter this strategy effectively, counterterrorism policy-makers must help the public understand the actual nature of the threat posed by terrorism, thereby building societal resilience and ensuring that terrorists' attempts to divide society are met with efforts to unite people.

In January 2018, DOJ and DHS issued a public report that purported to satisfy a reporting obligation imposed by Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*. See Dep't of Homeland Sec. & Dep't of Justice, Executive Order 13780: *Protecting the Nation from Foreign Terrorist Entry into the United States* Initial Section 11 Report, Jan. 2018, <https://www.justice.gov/opa/press-release/file/1026436/download> ("Report"). Concerned groups and individuals identified a number of mischaracterizations in the Report and sought the rescission of the Report and other remedies under the Information Quality Act (IQA), 44 U.S.C. § 3516 note, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* Having received DOJ's response of July 31 and DHS's response of August 1, those groups and individuals now request reconsideration of that response as inadequate.

Under the IQA, certain public reports issued by federal departments and agencies must meet standards of "utility, objectivity, and integrity." Office of Mgmt. & Budget (OMB), Exec. Office

of the President, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8451, 8458 (Feb. 22, 2002). Moreover, “[i]n assessing the usefulness of information that the agency disseminates to the public,” an agency must “consider the uses of the information not only from the perspective of the agency but also from the perspective of the public.” *Id.* at 8459. The IQA therefore evinces a recognition that information shared publicly by the government must be not just technically accurate but also informative—and not misleading—to the public.

We write to emphasize the damage that DOJ’s and DHS’s continued dissemination of misleading information can inflict on vital counterterrorism efforts. Allowing misunderstandings to continue to circulate would undermine the objectives of effective counterterrorism policy and exacerbate the fear and division that terrorists seek to create.

I. Terrorists Seek to Confuse and Divide the Societies They Target, So Effective Counterterrorism Demands Accurate Public Understandings of the Terrorist Threat.

Because terrorists and terrorist groups tend to have far less political power than their adversaries, they use violent attacks to achieve their political objectives. As part of this strategy, terrorists seek “to provoke governments to react emotionally and precipitously to threats rather than respond in a sober and rational manner.” Brian Michael Jenkins, Bruce Hoffman & Martha Crenshaw, *How Much Really Changed About Terrorism on 9/11*, *The Atlantic*, Sept. 11, 2016, <https://www.theatlantic.com/international/archive/2016/09/jenkins-hoffman-crenshaw-september-11-al-qaeda/499334/>. In other words, “[t]errorism works not simply because it instills fear in target populations, but because it causes governments and individuals to respond in ways that aid the terrorists’ cause.” Andrew H. Kydd & Barbara F. Walter, *The Strategies of Terrorism*, *Int’l Security*, Summer 2006, at 49, 50; *see also* Brian Michael Jenkins, RAND Corp., *Unconquerable Nation* 153 (2006), <https://www.rand.org/pubs/monographs/MG454.html> (“Fear can erode confidence in our institutions, provoke us to overreact, tempt us to abandon our values.”). Indeed, it is because of their desire to stoke public fear and misunderstanding that terrorist groups like ISIS take credit not only for attacks actually associated with the group but also, at times, for attacks in which they had no hand—such as the horrific October 2017 shooting in Las Vegas. *See* Graeme Wood, *Why Did the Islamic State Claim the Las Vegas Shooting?*, *The Atlantic*, Oct. 2, 2017, <https://www.theatlantic.com/international/archive/2017/10/isis-amaq-las-vegas/541746/>.

One particularly common way that terrorists attempt to weaken their stronger adversaries is to sow discord and prod them into turning on themselves. The fear caused by terrorism “can eventually divide and poison societies, hardening people against perceived outsiders, even causing them to abandon key values.” Amanda Taub, *As Vehicle Attacks Rise, an Ordinary Object Becomes an Instrument of Fear*, *N.Y. Times*, Aug. 17, 2017, <https://www.nytimes.com/2017/08/17/world/europe/barcelona-van-terrorist-weapon-fear.html>. In particular, terrorists may seek to provoke government crackdowns against vulnerable populations associated in the public’s mind—however inaccurately—with the identities of terrorists themselves.

Because terrorists seek to create and exploit misunderstandings and societal divisions, accurately informing the public about the nature and scope of the terrorism threat it faces is a

critical component of effective counterterrorism policy. Cultivating resilience against terrorism relies in part on ensuring that the public accurately understands the real nature of the terrorist threat—such as whether that threat stems primarily from those believed to be foreigners. Instilling resilience also hinges on maintaining unity, even as terrorists seek to create and exacerbate divisions by goading the majority into turning on vulnerable minorities. In this way, building resilience on the public’s part can actually assist in thwarting terrorism. *See* Michael Leiter, Director, Nat’l Counterterrorism Ctr., Address at the Ctr. for Strategic & Int’l Studies: The Changing Terrorist Threat and NCTC’s Response (Dec. 1, 2010), https://csis-prod.s3.amazonaws.com/s3fs-public/event/101202_leiter_transcript.pdf (“We help define the success of an attack by our reaction to that attack. And one of the ways that we illustrate to terrorists that their methods are fruitless and that their goals will not be achieved through terrorism is to respond with resilience . . .”).

In sum, in order to prevent terrorists from distorting public understanding and sowing divisions, counterterrorism policy-makers have an obligation to characterize the terrorist threat accurately, both in its degree and in its nature, in its public communications. Moreover, dissemination of accurate terrorism-related information allows the public to effectively evaluate the government’s counterterrorism policies, thereby preserving critical credibility for the government in justifying its counterterrorism measures to the public.

II. The January 2018 Report Contains Mischaracterizations That Distort the Public’s Understanding of Terrorism.

We are concerned that misleading statements and omissions in the January 2018 Report may undermine effective counterterrorism policies. Overall, the Report appears designed to give the misleading impression that immigrants—and even their citizen family members—are responsible for the vast majority of terrorist attacks that have occurred in the United States, whereas statistical studies and our experience have shown no identifiable correlation between “foreignness” and terrorist activity in the past 15 years. The Report’s mischaracterizations fall into four categories of particular concern.

A. The Report Misleadingly Includes U.S. Citizens in Response to a Call for Information on “Foreign Nationals.”

The Report responds to Executive Order 13780’s call for semi-annual reports concerning certain categories of information. *See* Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The first of those categories is “information regarding the number of *foreign nationals* in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons.” *Id.* (emphasis added).

While the Executive Order sought information about “foreign nationals,” the Report responded by concluding that, among individuals “convicted of international terrorism-related charges in U.S. federal courts between September 11, 2001, and December 31, 2016 . . . approximately 73 percent (402 of these 549 individuals) were *foreign-born*.” Report at 2 (emphasis

added). Included among these were 148 individual naturalized U.S. citizens. These U.S. citizens are not “foreign nationals.” See 52 U.S.C. § 30121(b)(2) (defining “foreign national” to exclude citizens of the United States). Although the Report includes the raw number of actual foreign nationals, the only percentage included in the Report is the misleading 73 percent figure—which was the primary data point from the Report cited in tweets by both DOJ and President Trump. See Donald J. Trump (@realDonaldTrump), Twitter (Jan. 16, 2018, 3:19 pm), <https://twitter.com/realDonaldTrump/status/953406423177859073> (“New report from DOJ & DHS shows that nearly 3 in 4 individuals convicted of terrorism-related charges are foreign-born.”); Dep’t of Justice (@TheJusticeDepartment), Twitter (Jan. 16, 2018, 6:40 am), <https://twitter.com/TheJusticeDept/status/953275839361187840> (“DOJ, DHS Report: Three out of four individuals convicted of international terrorism and terrorism-related offenses were foreign-born” (capitalization modified)).

Removing U.S. citizens from the calculation yields a finding that fewer than half of those charged or convicted of international terrorism-related offenses in the specific time period were, in fact, foreign nationals (some of whom it was *still* inappropriate to include, as they were foreigners who committed their offenses overseas and were brought to the United States for trial, as will be discussed below). Yet, as President Trump’s tweet reflects, the Report’s mischaracterization of these figures gives the public the inaccurate sense that acts of terrorism on U.S. soil are overwhelmingly associated with foreign nationals, the category about which the Executive Order asked in the first place. Misleadingly correlating the terrorist threat with immigrants—a distortion which is exacerbated by a footnote in the Report suggesting that even the birthplace of terrorists’ *parents* might be relevant to explaining terrorist activity, see Report at 2 n.1—is precisely the opposite of what effective counterterrorism strategy demands. And it is inaccurate: concrete data debunk the notion that foreign nationals are the dominant sources of terrorist threats to Americans. See Peter Bergen et al., *Terrorism in America After 9/11: Who Are the Terrorists?*, New America, <https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/> (“[E]very jihadist who conducted a lethal attack inside the United States since 9/11 was a citizen or legal resident.”).

Rather than informing and reassuring the public, the Report’s misleading focus on place of birth serves to spread false impressions of the nature of the actual terrorist threat. Moreover, the Report’s implicit suggestion that naturalized U.S. citizens are somehow not legitimate or full citizens of this country exacerbates divisions within American society and disturbingly aggravates hostility toward its most vulnerable populations in ways that are counterproductive to effective counterterrorism policy.

B. The Misleading Inclusion of Foreign-Born U.S. Citizens Compounds the Report’s Failure To Address Radicalization That Occurs on U.S. Soil.

The Report’s inclusion of foreign-born U.S. citizens in its data on foreign nationals suggests that an individual’s foreign origin is a meaningful predictor of whether he or she—even decades later—will engage in a terrorism-related crime. Our experience in counterterrorism suggests quite the opposite. In understanding what drives individuals to terrorism, the most important question is not, as the Report implies, “where were they born.” Instead, the better question concerns where—and more importantly why—they radicalized. Answering that question can yield better

policy responses aimed at preventing such radicalization from occurring and potentially taking more lives through violence.

The decision to focus exclusively on where individuals were born and to ignore where and why they radicalized is not only misleading; it also defies the very Executive Order that spawned the Report. That order asked for “information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts.” Exec. Order 13780. Whatever the intent behind the framing of this question, it at least offered DOJ and DHS an opportunity to provide a more accurate rendering of potential drivers of terrorism by showing the extent to which radicalization occurs on U.S. soil, thereby shifting the focus to what causes that radicalization, rather than suggesting it is simply a product of being foreign-born. Yet DOJ and DHS decided to ignore this question *entirely*, briefly indicating that they lacked relevant information and would try to provide a better answer in future reporting. Report at 7. This was a deliberate choice *not* to help the public understand better the nature of radicalization and its role in terrorist activities on U.S. soil.

Instead, the Report indulges the misplaced notion that where someone is born is more determinative of their later turn to terrorism than the radicalization process that occurs wherever they might be—including on U.S. soil. When the United States has suffered from even specifically *jihadist* terrorism since 9/11, it has generally been at the hands of individuals who are on U.S. soil legally and who radicalized *here*: “[O]f the 13 perpetrators of lethal jihadist terrorist attacks in the [United] States since 9/11 (which killed a total of 94 people), all were American citizens or legal permanent residents. Of the 406 cases of jihadist terrorism (nonlethal and otherwise) in this country since Sept. 11, 2001, . . . more than 80 percent involved U.S. citizens or legal permanent residents. . . . [T]he most pressing terrorist threat we see today . . . is the phenomenon of Western citizens and legal residents becoming radicalized by what they are watching and reading online.” Peter Bergen, *Trump’s Travel Ban Is Useless. Terrorists Mostly Come from Our Own Back Yard.*, Wash. Post, June 5, 2017, <https://www.washingtonpost.com/posteverything/wp/2017/06/05/trumps-travel-ban-is-useless-terrorists-mostly-come-from-our-own-back-yard/> (citing the study by New America); *see also* Brian Michael Jenkins, RAND Corp., *The Origins of America’s Jihadists* 25 (2017), <https://www.rand.org/pubs/perspectives/PE251.html> (noting that “foreign-born jihadists . . . spent an average of 12 years in the United States before planning or participating in their attacks,” thus suggesting that immigration vetting is not the stage at which such attacks can be prevented).

These statistics are consistent with our work in counterterrorism. A number of drivers lead individuals toward violent extremism: disaffection, a lack of belonging, a grandiose desire to be part of something seen as “bigger,” and a gradual numbing to the humanness of potential victims. These drivers are not unique to immigrants or those in immigrant communities, nor are they specific to any particular ideology. Violent extremism itself can take many forms—from jihadist terrorism to white supremacy to anarchism to violent environmentalism—and the same drivers can affect individuals drawn to these ideologies. Sharing *that* sort of accurate understanding of the nature of terrorist threats—an understanding that does not focus on “foreignness” as a key driver of terrorism—not only accurately reflects the available information but also advances the goals of counterterrorism and frustrates those of terrorists. The misleading Report, however, does just the opposite.

C. The Report Misleadingly Inflates the Percentage of Foreign Nationals Who Committed Terrorism Crimes by Including Individuals Who Committed Terrorism Overseas and Were Extradited to the United States for Prosecution.

The Report makes an astonishing inclusion in its response to the call for the number of individuals “who have been charged with” or “convicted of terrorism-related offenses while in the United States.” Exec. Order 13780. The Report includes in that category individuals “who committed offenses while located abroad, including defendants who were transported to the United States for prosecution.” Report at 2. In the most technical way, it is true that someone extradited or otherwise brought to the United States for prosecution has, in the end, been charged or convicted “while in the United States.” But including those individuals who have committed a terrorism-related offense *overseas* and whose only connection to U.S. soil is getting forcibly brought to the United States for prosecution and subsequent imprisonment distorts the public’s understanding of the actual terrorist threat by inflating the apparent number of terrorist acts committed in the United States by foreign nationals.

Indeed, including those who commit terrorist acts overseas does not just overstate the threat of terrorism in ways contrary to the key counterterrorism goal of building resilience; it also inflates the number of foreign nationals (or even foreign-born individuals), in particular, who appear responsible for terrorism in the United States. And it implies failures on the part of an immigration system that those extradited to the United States for prosecution never, in fact, encounter. See Lisa Daniels, Nora Ellingsen & Benjamin Wittes, *Trump Repeats His Lies About Terrorism, Immigration and Justice Department Data*, Lawfare, Jan. 16, 2018, <https://www.lawfareblog.com/trump-repeats-his-lies-about-terrorism-immigration-and-justice-department-data> (“[The Report] included almost 100 foreign-born defendants who were extradited into the United States and therefore never would have been affected by U.S. immigration policy.”). This is precisely the type of scapegoating of a vulnerable portion of the population that terrorists hope to induce through their attacks and through the overreaction that those attacks can generate—if the targeted government responds to the provocation. DOJ and DHS take the bait with their Report. They do so by artificially swelling the numbers of terrorist defendants mischaracterized as connected to acts of terrorism on U.S. soil and by inflating the proportion of terrorism defendants who are foreign nationals or even, in the Report’s preferred formulation, foreign-born.

D. The Report Misleadingly Excludes Any Statistics on Domestic Terrorism or Even Any Examples of It.

As noted, Executive Order 13780 sought information on “terrorism-related offenses.” But the Report evades this instruction and instead provides information regarding only individuals “convicted of *international* terrorism-related charges.” Report at 2 (emphasis added). By selectively answering a different question from the one posed to them, DOJ and DHS excluded from their calculations all terrorism-related offenses perpetrated in the United States by individuals without connections to international terrorist groups.

Such offenses generally are referred to as “domestic terrorism.” That term is defined by federal law as “activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or

coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.” 18 U.S.C. § 2331(5). There is, however, no federal crime called “domestic terrorism.” That means that acts of terrorism associated with wholly domestic entities such as white supremacist groups are often prosecuted in state court or, if at the federal level, on the basis of non-terrorism-specific charges. Widely reported acts of apparent domestic terrorism include the April 1995 Oklahoma City bombing; the June 2015 Charleston church shooting; and the August 2017 killing of Heather Heyer on the streets of Charlottesville, Virginia.

This mischaracterization of the responsive data set dramatically skews the results. An April 2017 Government Accountability Office report showed that, of the 85 violent extremist incidents that resulted in deaths in almost exactly the same time period surveyed in the Report, “far right wing violent extremist groups were responsible for 62 (73 percent) while radical Islamist violent extremists were responsible for 23 (27 percent).” U.S. Gov’t Accountability Office, *Countering Violent Extremism: Actions Needed To Define Strategy and Assess Progress of Federal Efforts* 4 (Apr. 2017), <http://gao.gov/assets/690/683984.pdf>; see also Nora Ellingsen & Lisa Daniels, *What the Data Really Show About Terrorists Who “Came Here,” Part III: What If You Included Domestic Terrorism Cases*, Lawfare, Apr. 11, 2017, <https://www.lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-iii-what-if-you-included-domestic> (“Domestic terrorism convictions account for the majority of terrorism convictions in the U.S. since Sept. 11, 2001 . . .”). Although the Report notes in a single sentence that its calculations do “not include individuals convicted of offenses relating to domestic terrorism,” Report at 2, DOJ and DHS appear to have made no effort to include such figures (by, for example, reviewing relevant convictions in state courts or at least offering examples of domestic terrorism, much as the Report offers examples of international terrorism) so as actually to respond to the Executive Order’s full mandate. Moreover, the inflammatory touting of the Report’s conclusion by the President and others neglected to include this critical caveat, which ensured that it did not penetrate the public consciousness.

The decision to ignore the question posed and instead answer a different one contributes to the misleading nature of their Report. In particular, DOJ’s and DHS’s approach artificially inflates the apparent involvement of foreign-born individuals in terrorism-related offenses on U.S. soil by defining those offenses as solely those perpetrated by those persons with links to international (i.e., *foreign*) terrorist groups, who are—of course—more likely to be foreign-born. See Ellingsen & Daniels, *supra* (“[T]hose convicted of domestic terrorism charges are less likely to be foreign-born than their international terrorism counterparts”). Redefining the scope of the Report misleads the public as to the nature of the terrorist threat that it faces and, in particular, construes that threat as intertwined with foreigners generally and immigrants specifically in ways belied by the full facts. It also wrongly suggests that international terrorism is the only real terrorism to worry about and that domestic terrorism does not pose a serious threat—at least not one worthy of the U.S. Government collecting information on it. To mislead the public into viewing foreigners overwhelmingly as the perpetrators of terrorism offenses in this country serves to confuse and divide the public in ways contrary to effective counterterrorism and all too welcome to those terrorists who seek to inflame and polarize our country.

Conclusion

By specifying that, “[i]n assessing the usefulness of the information that the agency disseminates to the public, the agency needs to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public,” OMB’s guidelines for implementing the IQA emphasize that information disseminated to the public must not be just technically accurate but also informative—and not misleading. Whatever technical accuracy of particular statements DOJ and DHS attempt to defend in their recent letters, it is the Report’s broader, misleading character that is of serious concern to us as former counterterrorism officials. In particular, the inclusion in the Report without sufficient explanation of foreigners who commit terrorist acts abroad and are brought to the United States solely for the purposes of prosecution and incarceration is egregiously deceptive. Terrorists’ success or failure in spreading fear and provoking self-inflicted overreactions hinges, in significant part, on how the public understands the actual threat that terrorists pose. DOJ’s and DHS’s Report distorts that threat in ways that run contrary not only to the IQA but also to sound, responsible approaches to counterterrorism.

We urge DOJ and DHS to reconsider their responses to the concerns articulated with respect to the Report.

Respectfully submitted,



Joshua A. Geltzer

Mary B. McCord

Amy L. Marshak

Institute for Constitutional Advocacy and
Protection

Georgetown University Law Center

600 New Jersey Ave NW

Washington, DC 20001

(202) 662-9042

jg1861@georgetown.edu

mbm7@georgetown.edu

as3397@georgetown.edu