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**Bill Analysis 2020 Regular Session****SPONSOR:** Representatives Hochman-Vigil, Rehm, and Figueroa**SHORT TITLE:** Domestic Terrorism Changes

**SYNOPSIS OF BILL:** Establishes a “New Mexico all source intelligence center” to support “the development of plans, policies and procedures” to protect from crime and “terrorist threats.” Expands the definitions in the Antiterrorism Act found in NMSA 30-20A-2 and adds a “community center, daycare centers, and other similar physical locations” to those covered by the acts. HB269 also adds an expansive definition of “public accommodation” which means “any establishment that provides or offers its services, facilities, accommodations or goods to the public.” The bill also makes additions to NMSA 30-20A-3 by adding a definition of “terrorism” that is very broad and is based on “the intent” of the offender. It adds, “possessing a terrorist weapon,” as a crime, including “manufacturing, fabricating, or possessing, in any manner, **whether real or imitation**, a weapon...”(emphasis added) related to toxic chemicals, biological agents, or the release of radiation. The bill makes possessing a terroristic weapon a second degree felony with a minimum prison term of three years, which shall not be suspended or deferred.

**First Amendment Concerns:** The bill also defines terrorism as “an act dangerous to human life that is also a criminal violation of state law with the intent to...influence the policy of a state entity or political subdivision of the state.” By defining “terrorism” so broadly, this crime could include protected first amendment activities such as protests and rallies. The bill also defines “Cyberterrorism” broadly to include anything prohibited by the Computer Crimes Act with “the intent” to “... **influence the policy of a state entity or a political subdivision of the state...**” as well as a denial of service attack under certain circumstances. A denial of service attack includes “inundating or otherwise overloading a computer network, or attempting to inundate or otherwise overload a computer service.” Such broadly written language could include a legitimate campaign to oppose or support a state agency with public comments on a proposed policy. The bill makes Cyberterrorism a third degree felony. The chilling effect of such potential prosecutions is potentially significant, particularly in the realm of ‘on-line’ communications.

**Overly Broad and Redundant:** HB269 also adds a new crime for making a terroristic threat to a school, community center, or public accommodation that would make this crime a second degree felony. The bill would give local district attorneys and the attorney general “concurrent jurisdiction” to enforce this section. This is another example in the legislation where existing law, both federal and state, already criminalizes these activities and carries significant penalties. The bill would also make some existing crimes (bomb threats to schools, for example) into potential terrorism cases and would also outlaw certain statements made “unequivocally, unconditionally, and specifically.” Prosecution allows for separate charges for each calendar day on which an act constituting terrorism, possessing a terroristic weapon or making a terroristic threat involving a school or community center is committed. This means an online threat posted to Facebook could be charged as a separate second degree felony for each day the post is online.

**Lack of Deterrence:** Portions of the bill are effectively a sentencing enhancement for certain crimes committed with “terrorist intent.” Increasing sentences is within the purview of the legislature, but there is a dearth of evidence that increased sentences will have deterrent effect on typical “terrorists.”

<b><u>S</u>afer</b>	<b><u>A</u>political</b>	<b><u>F</u>iscally-Responsible</b>	<b><u>E</u>vidence Based</b>	<b>Grade</b>
The bill would provide some incapacitation of terrorists by providing for longer sentences in some circumstances, but there is no evidence that the bill would have any deterrent effect. Existing federal and state law already carries significant penalties for the conduct criminalized by this bill.	The bill was a result of a task force on domestic terrorism convened by the Governor after the mass shooting at a Wal-Mart in El Paso last year. The bills expansive language invites a great deal of prosecutorial discretion, which in turn leads to unequal enforcement, often based on the political whims and interests of the enforcers. <sup>1,2</sup> Enforcement could raise a number of free speech issues. <sup>3</sup>	The bills fiscal impact is unknown. The bill does not mention a cost or funding source for the “all source intelligence center.” Presumably, longer sentences for some crimes and the addition of new crimes will lead to some increase in costs to the judicial and prison systems, but it is difficult to quantify.	The bill seems intended to deter terrorism by increasing sentences for crimes that have a “terrorism” component. However, there does not appear to be any empirical evidence that terrorism is deterred by longer sentences. To the contrary, anecdotal evidence suggests that many terrorists commit acts even in the face of death. In addition, the statute would label and punish as a “terrorist” a child phoning in a bomb threat in a tragically misguided attempt to get a day off school.	<b>D</b>

1. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 Vand. L. Rev. 651, 653 (March, 2017) (“...avoid repeating grave errors of an era in the early- to mid-twentieth century, when the Supreme Court countenanced the suppression of subversive but nonviolent speech.”)

2. *Watts v. U.S.* 394 U.S. 705, fn. 2 (1969) (J. Douglas, concurring) “Likewise, judges and juries, in their willingness to presume evil intent on the part of Republican writers, largely nullified the safeguards erected by the Sedition Act itself.”

3. *Id.* 707, (“Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”)