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## HB 452 - Domestic Terrorism


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## CRIMES AND OFFENSES

***Offenses Against Public Order and Safety: Amend Title 16 of the Official Code of Georgia Annotated, Relating to Crimes and Offenses, so as to Repeal Certain Provisions Relating to Domestic Terrorism and Penalty; Provide for the Crime of Domestic Terrorism; Provide for Definitions; to Provide for Penalties; Provide for Venue and Jurisdiction for Prosecutions; Change Provisions Relating to Possessing, Transporting, or Receiving Explosives or Destructive Devices with Intent to Kill, Injure, or Intimidate Individuals or Destroy Public Buildings; Change Provisions Relating to Disclosures by Service Providers Pursuant to Investigations; Amend Code Section 30 of Article 2 Chapter 10 of Title 17 of the Official Code of Georgia Annotated, Relating to the Procedure for Imposition of the Death Penalty generally, so as to Provide for Domestic Terrorism to be a Statutory Aggravating Circumstance; Amend Title 35 of the Official Code of Georgia Annotated, Relating to Law Enforcement Officers and Agencies, so as to Provide for Training in Identifying Domestic Terrorism and Reporting Information to the Georgia Information Sharing and Analysis Center; Require the Bureau to Publicly Post and Share Certain Information from the Law Enforcement Notification System of the Enforcement Integrated Database of the United States Department of Homeland Security to the Extent Permitted by Federal Law; Provide for a Short Title; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 16-4-10 (amended); 16-7-80, -88 (amended); 16-9-109 (amended); 16-11-220, -221, -222, -223, -224 (new); 17-10-30 (amended); 35-1-21 (new); 35-3-14 (new)
BILL NUMBER:	HB 452
ACT NUMBER:	208
GEORGIA LAWS:	2017 Ga. Laws 536

SUMMARY:

The Act creates and defines the offense of domestic terrorism in Georgia. It establishes that a person must have the intent to intimidate the public or coerce the government while causing significant harm in order to be liable for domestic terrorism. The Act also provides for training law enforcement to identify and combat domestic terrorism, to share the information with the Georgia Information Sharing and Analysis Center, and for the Georgia Information Sharing and Analysis Center to share that information with the United States Department of Homeland Security.

EFFECTIVE DATE:

July 1, 2017

*History*

On September 11, 2001, the United States of America witnessed one of the most devastating days in the history of the country, and the terrorist attacks that day reshaped America's understanding of national security. Eleven days later, President George W. Bush appointed the first Director of the Office of Homeland Security, and the Department of Homeland Security (DHS) was established the following year.<sup>1</sup> The federal government was not alone in its response to these attacks; the reverberations could be felt in states across the nation, including in Georgia.<sup>2</sup>

Efforts to protect against domestic terrorism in Georgia have developed in the years following the 9/11 attacks. In October 2001, the Georgia Legislature created the Georgia Information Sharing and Analysis Center (GISAC) and the Georgia Homeland Security Task Force.<sup>3</sup> GISAC was created "to enhance information and intelligence

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1. *Creation of the Department of Homeland Security*, DEP'T OF HOMELAND SEC. (Sept. 24, 2015), <https://www.dhs.gov/creation-department-homeland-security>.

2. Barbara S. Murphy, *Crime and Offense: Criminal Attempt, Conspiracy, and Solicitation*, 19 GA. ST. U. L. REV. 95, 95-96 (2002).

3. *Georgia Information Sharing & Analysis Center*, GA. EMERGENCY MGMT. & HOMELAND SEC. AGENCY, <http://www.gema.ga.gov/PlanPrepare/Pages/Georgia-Information-Sharing-Analysis->

sharing between local, state, and federal agencies.”<sup>4</sup> It is a DHS-recognized fusion center, meaning it acts as the primary center responsible for counterterrorism in Georgia.<sup>5</sup> In 2002, Georgia enacted its first domestic terrorism bill to define the crime and the associated penalties.<sup>6</sup> In March 2003, the Georgia Office of Homeland Security (GOHS) was created, and GISAC began reporting to the GOHS director.<sup>7</sup> Finally in 2010, the Georgia Bureau of Investigation (GBI) Criminal Intelligence unit merged into GISAC, making GISAC a fusion center focused on all crimes, rather than strictly on counterterrorism.<sup>8</sup>

On December 2, 2015, married couple Syed Rizwan Farook and Tashfeen Malik committed a terrorist attack in San Bernardino, California.<sup>9</sup> This attack killed fourteen people and seriously injured twenty-two others.<sup>10</sup> In Georgia, this triggered another look into the state’s domestic terrorism policies and procedures. Following the San Bernardino attack, Senator Bill Cowser (R-46th) toured GISAC and met with GBI director Vernon King.<sup>11</sup> Up to that point, the GBI relied on an executive order renewal each year to keep GISAC functioning, so Director King asked the Georgia General Assembly to codify GISAC to ensure its perpetual existence.<sup>12</sup> During the 2016 Legislative Session, the Georgia General Assembly responded to this request by passing SB 416, which codified GISAC within the GBI and GOHS within the Georgia Emergency Management Agency (GEMA), creating the Georgia Emergency Management and Homeland Security Agency (GEMHSA).<sup>13</sup>

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Center.aspx (last visited Sept. 8, 2017).

4. *Id.*

5. *Id.*

6. Murphy, *supra* note 2, at 96.

7. GA. EMERGENCY MGMT. & HOMELAND SECURITY AGENCY, *supra* note 3.

8. *Id.*

9. *Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES (Dec. 14, 2015, 4:03 PM), <http://www.latimes.com/local/california/la-me-san-bernardino-shooting-terror-investigation-htmlstory.html>.

10. *Id.*

11. Telephone Interview with Tom Krause, Chief of Staff to Senate Majority Leader Bill Cowser (R-46th) and Donavon Eason, General Counsel to Senate Majority Leader Bill Cowser (R-46th), at 1 min., 15 sec. (April 18, 2017) (on file with Georgia State University Law Review) [hereinafter Krause and Eason Interview].

12. *Id.* at 1 min., 26 sec.

13. O.C.G.A. § 35-3-201 (2017); 2016 Ga. Laws 91.

Leading into the 2017 legislative session, Senator Cowsert had several policy meetings to determine how to further bolster the state's anti-terrorism efforts.<sup>14</sup> After several meetings with various policy committees, Senator Cowsert developed Senate Bill (SB) 1.<sup>15</sup> Prior to the enactment of SB 1, the Georgia Code defined domestic terrorism as:

[A]ny violation of, or attempt to violate, the laws of this state or of the United States which: [i]s intended or reasonably likely to injure or kill not less than ten individuals as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics; and [i]s intended to intimidate the civilian population of this state, any of its political subdivisions, or of the United States; [i]s intended to alter, change, or coerce the policy of the government of this state or any of its political subdivisions by intimidation or coercion; or [i]s intended to affect the conduct of the government of this state or any of its political subdivisions by use of destructive devices, assassination, or kidnapping.<sup>16</sup>

Proponents of SB 1 wanted the Act to capture incidents of domestic terrorism, such as the Charleston Massacre.<sup>17</sup> They did not want to require an arbitrary number of people be injured or killed for an act to qualify as domestic terrorism.<sup>18</sup> To capture these types of incidents, the authors created SB 1,<sup>19</sup> and for formatting purposes they modeled the bill after federal laws defining domestic terrorism and penalties.<sup>20</sup> However, opponents of SB 1 are concerned the new definition is too broad and might also capture incidents of peaceful

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14. Krause and Eason Interview, *supra* note 11, at 1 min., 47 sec.

15. *Id.* at 1 min., 55 sec.

16. O.C.G.A. § 16-4-10 (2002) (repealed 2017).

17. Video Recording of House Proceedings at 2 hr., 43 min., 40 sec. (Mar. 28, 2017) (remarks by Sen. Bert Reeves (R-34th)), <https://www.youtube.com/watch?v=58LNGOXyEiw> [hereinafter House Proceedings Video 1].

18. *Id.*

19. Krause and Eason Interview, *supra* note 11, at 13 min., 52 sec.

20. *Id.* at 23 min., 46 sec.

protesting, resulting in violations of free speech and charges against individuals not actually engaged in terroristic acts.<sup>21</sup>

### *Bill Tracking of SB 1*

#### *Consideration and Passage by the Senate*

Senator Bill Cowsert (R-46th) sponsored SB 1 in the Senate.<sup>22</sup> Senators David Shafer (R-48th), Steve Gooch (R-51st), Tyler Harper (R-7th), Mike Dugan (R-30th), and Hunter Hill (R-6th) co-sponsored the bill.<sup>23</sup> The Senate read the bill for the first time on January 11, 2017, and committed it to the Senate Public Safety Committee.<sup>24</sup> On February 24, 2017, the Senate Public Safety Committee amended the bill and favorably reported the bill by substitute.<sup>25</sup>

The Committee substitute included some of the introduced bill's text as well as two additional components.<sup>26</sup> The substitute slightly changed the introduced bill's definition of domestic terrorism.<sup>27</sup> The introduced bill's definition included violations of the law intended or reasonably likely to injure or kill the following:

Any individual or group of individuals as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics; [a]ny individual by virtue of such individual's presence within or as part of a congregated, assembled, or gathered group of individuals, including, but not limited to, individuals congregated, assembled, or gathered for purposes of buying or previewing goods and services, effectuating commerce,

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21. Michelle Baruchman, *Civil Rights Groups Oppose State Bills Affecting Ability to Protest*, ATLANTA J.-CONST. (Mar. 15, 2017), <http://www.ajc.com/news/state—regional-govt—politics/civil-rights-groups-oppose-state-bills-affecting-ability-protest/PeHReptUOIcaqLC1SOi39O/>.

22. Georgia General Assembly, SB 1, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/1>.

23. *Id.*

24. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017.

25. *Id.*

26. *Compare* SB 1, as introduced, 2017 Ga. Gen. Assemb., with SB 1 (SCS), 2017 Ga. Gen. Assemb.

27. *Compare* SB 1 (SCS), § 2-1, p. 2, ll. 35–50, 2017 Ga. Gen. Assemb., with SB 1, as introduced, § 2, pp. 1–2, ll. 20–34, 2017 Ga. Gen. Assemb.

conducting or performing business, instruction, religious worship, medical treatment, political speech, or sports or entertainment; or [a]ny individual by virtue of such individual's presence at or in a public or private facility for use by the public or presence in or on public transit, commercial transportation, or a public road or public right of way, including, but not limited to, structures, sidewalks, facilities, and appurtenances incidental thereto . . . .<sup>28</sup>

The Committee substitute removed the above language and replaced it with language that included violations of the law “intended or reasonably likely to injure or kill any individual or group of individuals or to damage, disrupt, or destroy critical infrastructure as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics.”<sup>29</sup> The Committee substitute also inserted additional language further defining critical infrastructure.<sup>30</sup>

The Committee's first major change gave the Attorney General or district attorney subpoena power to investigate domestic terrorism.<sup>31</sup> The Committee's second major change removed GOHS from within GEMHSA, creating a separate Georgia Department of Homeland Security (GDHS) that would operate independently of the Georgia Emergency Management Agency (GEMA).<sup>32</sup> This addition to the bill also included modifications to various sections of the Georgia Code involving GEMHSA, removing the words “Homeland Security,” and replacing GEMHSA with GEMA.<sup>33</sup>

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28. SB 1, as introduced, § 2, pp. 1–2, ll. 22–34, 2017 Ga. Gen. Assemb.

29. Compare SB 1, as introduced, § 2, pp. 1–2, ll. 22–34, 2017 Ga. Gen. Assemb., with SB 1 (SCS), § 2-1, p. 2, ll. 37–40, 2017 Ga. Gen. Assemb.

30. Compare SB 1, as introduced, 2017 Ga. Gen. Assemb., with SB 1 (SCS), § 2-1, p. 2-3, ll. 51–68, 2017, Ga. Gen. Assemb. (defining critical infrastructure as “public or private systems” that are “vital” to the State of Georgia or the United States).

31. Compare SB 1, as introduced, 2017 Ga. Gen. Assemb., with SB 1 (SCS), § 2-1, pp. 3–5, ll. 82–136, 2017 Ga. Gen. Assemb. This power would allow these individuals to “compel the production of books, records or papers or electronic communication service or remote computing service records or other information pertaining to a subscriber or customer of such service, exclusive of the contents of communications.” SB 1 (SCS), § 2-1, p. 3, ll. 83–86, 2017 Ga. Gen. Assemb.

32. Compare SB 1, as introduced, 2017 Ga. Gen. Assemb., with SB 1 (SCS), § 3-3, p. 7, l. 230, 2017 Ga. Gen. Assemb.; see also SB 1 (SCS), § 4-3, p. 20 ll. 642–43, Ga. Gen. Assemb.;

33. See, e.g., SB 1 (SCS), § 4, p. 19, ll. 614, 628, 641–43, 662–63, 2017 Ga. Gen. Assemb.

The Senate read the bill for the second time on February 27, 2017, and for the third time on March 1, 2017.<sup>34</sup> After the third reading, two floor amendments were offered. Senators Cowsert, Lester Jackson (D-2nd), and Harold V. Jones II (D-22nd) offered the first floor amendment, and Senators Cowsert and Jones offered the second floor amendment.<sup>35</sup> The first floor amendment made several changes. It changed the definition of domestic terrorism from acts “intended or reasonably likely to injure or kill” to acts “intended or reasonably likely to cause serious bodily harm or kill.”<sup>36</sup> The amendment also provided a definition of serious bodily harm and included a line clarifying the Act “shall not apply to constitutionally protected speech or lawful assemblies.”<sup>37</sup> The second floor amendment replaced language authorizing the Attorney General to call on the district attorney to assist in or conduct prosecutions.<sup>38</sup> The Senate adopted both floor amendments and passed the Committee substitute as amended on March 1, 2017, by a vote of 42 to 12.<sup>39</sup>

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34. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017.

35. Senate Floor Amendment to SB 1 (AM 41 0252), introduced by Sens. Lester Jackson (D-2nd), Bill Cowsert (R-46th), Harold Jones II (D-22nd); Senate Floor Amendment to SB 1 (AM 41 0249), introduced by Sens. Harold Jones II (D-22nd), Bill Cowsert (R-46th); *see also* SB 1 (SCSFA), § , p. 1–2, ll. 1–32 , 2017 Ga. Gen. Assemb. (incorporating the floor amendment introduced by Sen. Jackson (D-2nd), Sen. Cowsert (R-46th), and Sen. Jones II (D-22nd)); SB 1 (SCSFA), § , p. 1, ll. 1–6, 2017 Ga. Gen. Assemb. (incorporating the floor amendment introduced by Sen. Cowsert (R-46th) and Sen. Jones II (D-22nd)).

36. Senate Floor Amendment to SB 1 (AM 41 0252), introduced by Sens. Lester Jackson (D-2nd), Bill Cowsert (R-46th), Harold Jones II (D-22nd), Mar. 1, 2017. *Compare* SB 1 (SCS), § 2-1, p. 2, ll. 37–38, 2017 Ga. Gen. Assemb., *with* SB 1 (SCSFA), § 2-1, p. 2, ll. 37–39, 2017 Ga. Gen. Assemb.

37. Senate Floor Amendment to SB 1 (AM 41 0252), introduced by Sens. Lester Jackson (D-2nd), Bill Cowsert (R-46th), Harold Jones II (D-22nd), Mar. 1, 2017; SB 1 (SCSFA), § 2-1, p. 3, ll. 68–70, 2017 Ga. Gen. Assemb. (“‘Serious bodily harm’ means harm to the body of another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.”); *id.* § 2-1, p. 5, ll. 137–38.

38. Senate Floor Amendment to SB 1 (AM 41 0249), introduced by Sens. Harold Jones II (D-22nd), Bill Cowsert (R-46th), Mar. 1, 2017. *Compare* SB 1 (SCS), § 2-1, pp. 4–5, ll. 129–33, 2017 Ga. Gen. Assemb., *with* SB 1 (SCSFA), § 2-1, pp. 4–5, ll. 131–34, 2017 Ga. Gen. Assemb.

39. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017; Georgia Senate Voting Record, SB 1, Vote #121 (Mar. 30, 2017); Video Recording of Senate Proceedings at 2 hr., 18 min., 17 sec. (Mar. 24, 2017) (remarks by Lieutenant Governor Casey Cagle (R)), <http://www.gpb.org/lawmakers/2017/day-27> [hereinafter Senate Proceedings Video 1].



*Consideration and Failure in the House*

Representative Bert Reeves (R-34th) sponsored SB 1 in the House.<sup>40</sup> The House read the bill for the first time on March 3, 2017, and committed it to the House Judiciary Non-Civil Committee.<sup>41</sup> The House read the bill for a second time on March 6, 2017.<sup>42</sup> On March 24, 2017, the Judiciary Non-Civil Committee amended the bill in part and favorably reported the bill by substitute.<sup>43</sup>

The Committee's revised definition of "domestic terrorism" required the underlying act be a felony and meet other elements of the crime.<sup>44</sup> The Committee also took out an element of "domestic terrorism" from the Senate's version. They removed the language requiring the offense to be "intended to advance, further, or effectuate any ideology or belief whether committed alone or as part of a command structure involving an identifiable set of other individuals."<sup>45</sup>

The Committee also eliminated the portion of the bill which gave the Attorney General subpoena power in investigating crimes.<sup>46</sup> Finally, the Committee took out the portion of the bill that established a GDHS separate from GEMA, keeping GEMHSA in place.<sup>47</sup>

The House read the bill for the third time on March 28, 2017.<sup>48</sup> The Committee substitute did not pass out of the House, losing by a vote of 85 yeas to 83 nays.<sup>49</sup> The House voted on a motion to

40. Georgia General Assembly, SB 1, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/1>.

41. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017.

42. *Id.*

43. *Id.*

44. Compare SB 1, as passed Senate, § 2-1, p. 2, ll. 35–36, 2017 Ga. Gen. Assemb., with SB 1 (HCS), § 2-2, p. 2, ll. 35–36, 2017 Ga. Gen. Assemb. (replacing "any violation or attempt to violate, the laws this state or the United States" with "any felony violation of, or attempt to commit a felony violation of the laws of this state" in the definition of domestic terrorism).

45. Compare SB 1, as passed Senate, § 2-1, p. 2, ll. 47–49, 2017 Ga. Gen. Assemb., with SB 1 (HCS), § 2-2, p. 2, ll. 35–45, 2017 Ga. Gen. Assemb.

46. Compare SB 1, as passed Senate, § 2, p. 3, ll. 84–93, 2017 Ga. Gen. Assemb., with SB 1 (HCS), § 2-1, p. 1, ll. 22–23, 2017 Ga. Gen. Assemb.

47. Compare SB 1, as passed Senate, § 3, p. 10, ll. 321–23, 2017 Ga. Gen. Assemb., with SB 1 (HCS), 2017 Ga. Gen. Assemb.

48. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017.

49. Georgia House of Representatives Voting Record, SB 1, Vote #360 (Mar. 28, 2017).

reconsider, which passed by a vote of 94 yeas to 73 nays.<sup>50</sup> The House reconsidered SB 1 and again the bill failed, losing by a vote of 84 yeas to 83 nays.<sup>51</sup> The House Rules only allow for a bill to be reconsidered once, so SB 1, *by that name*, was dead.<sup>52</sup>

*Senate Consideration and Passage of HB 452 as a Vehicle for SB 1*

After the House failed to pass SB 1, the Senate used House Bill (HB) 452 as a vehicle by incorporating language from SB 1 into HB 452 before passing HB 452. On March 24, 2017, in preparation for a failed House vote on SB 1, Senator Cowsert offered a floor amendment to HB 452.<sup>53</sup> This amendment was the entirety of the SB 1 language from the Senate substitute to SB 1 as passed out of the Senate.<sup>54</sup> Since the amendment was so long, per the rules, the Senate sent HB 452 back to the Senate Rules Committee to reschedule a floor vote.<sup>55</sup> On March 28, 2017, after the House failed to pass SB 1, the Senate passed the Senate substitute to HB 452 by a vote of 36 to 18.<sup>56</sup>

*House Consideration and Passage of HB 452 as a Vehicle for SB 1*

On March 30, 2017, the House received the Senate substitute of HB 452 and amended the bill on the floor<sup>57</sup> because the substitute

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50. Georgia House of Representatives Voting Record, SB 1, Vote #361 (Mar. 28, 2017).

51. Georgia House of Representatives Voting Record, SB 1, Vote #362 (Mar. 28, 2017).

52. GA. HOUSE OF REPRESENTATIVES, RULES, ETHICS AND DECORUM 40 r. 144 (2017), <http://www.house.ga.gov/Documents/Information/HouseRules2017.pdf>.

53. Senate Floor Amendment to HB 452 (AM 29 267ER), introduced by Sens. Bill Cowsert (R-46th), Tyler Harper (R-7th), Mike Dugan (R-30th), Bruce Thompson (R-14th), Mar. 28, 2017; Video Recording of Senate Proceedings at 47 min. (Mar. 24, 2017) (remarks by Sen. Bill Cowsert (R-46th)), <http://www.gpb.org/lawmakers/2017/day-38> [hereinafter Senate Proceedings Video 2].

54. Compare HB 452 (SCSFA), 2017 Ga. Gen. Assemb. with SB 1, as passed Senate, 2017 Ga. Gen. Assemb.

55. See Senate Proceedings Video 2, *supra* note 53, at 1 hr., 9 min.; GA. STATE SENATE, RULES § 7-1.6(b), (2017) (setting forth special procedures for amendments of over three and one-half pages in length).

56. State of Georgia Final Composite Status Sheet, HB 452, May 11, 2017; Georgia Senate Voting Record, HB 452, Vote #269 (Mar. 28, 2017).

57. House Floor Amendment to HB 452 (AM 29 2655), introduced by Rep. Jesse Petrea (R-166th), Mar. 30, 2017; House Floor Amendment to HB 452 (AM 41 0311), introduced by Rep. Jesse Petrea (R-166th), Mar. 30, 2017; State of Georgia Final Composite Status Sheet, HB 452, May 11, 2017; Video

was essentially the same as the original SB 1 passed out of the Senate.<sup>58</sup> The amendment included the same changes the House Judiciary Non-Civil Committee originally made to SB 1 in Committee, described above.<sup>59</sup> The House passed the Senate substitute to HB 452 as amended by the House, by a vote of 96 to 77, and sent it back to the Senate for approval.<sup>60</sup>

The Senate agreed to HB 452, as amended by the House, by a vote of 35 to 16.<sup>61</sup> The House sent the bill to Governor Nathan Deal (R) on April 7, 2017.<sup>62</sup> The Governor signed the bill into law on May 8, 2017, and the bill became effective on July 1, 2017.<sup>63</sup>

### *The Act*

The Act amends the following portions of the Official Code of Georgia Annotated: Title 16, relating to crime and offenses; Section 30 of Article 2 of Chapter 10 of Title 17, relating to the death penalty imposition generally; and Title 35, relating to law enforcement officers and agencies generally.<sup>64</sup> The overall purpose of the Act is to provide a definition for domestic terrorism in the State of Georgia and to establish the criminal offense and punishment for domestic terrorism.<sup>65</sup>

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Recording of House Proceedings at 1 hr., 6 min., 30 sec. (Mar. 30, 2017) (remarks by Rep. Christian Coomer (R-14th)), <http://www.gpb.org/lawmakers/2017/day-40> [hereinafter House Proceedings Video 2].

58. House Proceedings Video 2, *supra* note 57, at 43 min., 40 sec. (remarks by Rep. Christian Coomer (R-14th)).

59. House Floor Amendment to HB 452 (AM 29 2655), introduced by Rep. Jesse Petrea (R-166th); House Proceedings Video 2, *supra* note 57, at 1 hr., 5 min., 30 sec. (remarks by Rep. Robert Trammell (D-132nd)).

60. Georgia House of Representatives Voting Record, HB 452, Vote #404 (Mar. 30, 2017).

61. Georgia Senate Voting Record, HB 452, Vote #362 (Mar. 30, 2017).

62. State of Georgia Final Composite Status Sheet, SB 1, May 11, 2017.

63. See O.C.G.A. § 1-3-4 (2017).

64. 2017 Ga. Laws 536, at 536–37.

65. House Proceedings Video 1 at 2 hr., 43 min., 40 sec. (Mar. 28, 2017) (remarks by Sen. Bert Reeves (R-34th)), <https://www.youtube.com/watch?v=58LNGOxyEiw>.

### *Section 1*

Section 1 establishes the name of the act as the “Protect Georgia Act.”<sup>66</sup>

### *Section 2*

Section 2-1 of the Act repeals Code Section 16-4-10, which defined and criminalized domestic terrorism and set the penalty.<sup>67</sup>

Section 2-2 creates Code sections 16-11-220, 16-11-221, 16-11-222, 16-11-223, and 16-11-224.<sup>68</sup> Code section 16-11-220 defines five key terms—critical infrastructure, domestic terrorism, public transportation system, serious bodily harm, and state or government facility.<sup>69</sup>

A person commits domestic terrorism when they commit or attempt to commit a felonious act while possessing two types of intent.<sup>70</sup> First, the person must intend to either kill or cause serious bodily harm to an individual or group of individuals or to “disable or destroy critical infrastructure, a state or government facility, or a public transportation system.”<sup>71</sup> However, a person intending to disable or destroy critical infrastructure is only guilty of domestic terrorism when the “disability or destruction” caused by the person’s felonious act “results in major economic loss[.]”<sup>72</sup> Secondly, the person must commit or attempt to commit the act with the intent to intimidate the population, alter governmental policy through intimidation or coercion, or affect government conduct via kidnapping, destructive devices, or assassination.<sup>73</sup>

“Critical infrastructure” is broadly defined.<sup>74</sup> It encompasses all “publicly or privately owned facilities, systems, functions, or assets, whether physical or virtual, providing or distributing services for the

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66. 2017 Ga. Laws 536, § 1-1, at 537.

67. 2017 Ga. Laws 536, § 2-1, at 537.

68. 2017 Ga. Laws 536, § 2-2, at 537–39.

69. O.C.G.A § 16-11-220 (Supp. 2017).

70. O.C.G.A § 16-11-220(2) (Supp. 2017).

71. *Id.*

72. *Id.*

73. O.C.G.A § 16-11-220(2)(A)–(C) (Supp. 2017).

74. *See* O.C.G.A § 16-11-220(1) (Supp. 2017).

benefit of the public, including, but not limited to, energy, fuel, water, agriculture, health care, finance, or communication.”<sup>75</sup>

Code section 16-11-221 sets the penalty for domestic terrorism.<sup>76</sup> A person convicted of domestic terrorism faces a mandatory minimum sentence, ranging from five years imprisonment to death, depending on the type of harm involved.<sup>77</sup> If domestic terrorism results in the death of a person, the offender can be punished by death, life without parole, or life in prison.<sup>78</sup> If the act involves kidnapping or serious bodily harm, the penalty is imprisonment of fifteen to thirty-five years.<sup>79</sup> Offenses involving critical infrastructure are punishable by imprisonment of five to thirty-five years.<sup>80</sup> The sole exception to the mandatory minimum sentences applies if the court, in its discretion, adopts a sentencing agreement made between the prosecutor and the defendant.<sup>81</sup>

Code section 16-11-222 establishes jurisdiction over all domestic terrorism committed within or outside of the State of Georgia if the violation involves an individual residing in Georgia, or critical infrastructure located in Georgia.<sup>82</sup> Georgia courts also have jurisdiction over violations committed within Georgia which involve individuals residing within or outside of the State of Georgia, or which involve critical infrastructure located in Georgia.<sup>83</sup> Thus, the Code section covers both people who commit an act out of state that involves a person in Georgia or affects “critical infrastructure” in Georgia, and people who commit an act that causes harm within the state.<sup>84</sup>

Code section 16-11-223 gives the Attorney General concurrent jurisdiction with district attorneys to prosecute acts of domestic terrorism.<sup>85</sup>

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75. *Id.*

76. O.C.G.A. § 16-11-221 (Supp. 2017).

77. O.C.G.A. § 16-11-221(a) (Supp. 2017).

78. O.C.G.A. § 16-11-221(a)(1) (Supp. 2017).

79. O.C.G.A. § 16-11-221(a)(2)–(3) (Supp. 2017).

80. O.C.G.A. § 16-11-221(a)(4) (Supp. 2017).

81. O.C.G.A. § 16-11-221(b) (Supp. 2017).

82. O.C.G.A. § 16-11-222(1) (Supp. 2017).

83. O.C.G.A. § 16-11-222(2) (Supp. 2017).

84. O.C.G.A. § 16-11-222 (Supp. 2017).

85. O.C.G.A. § 16-11-223 (Supp. 2017).

Finally, Code section 16-11-224 clarifies that “[t]his article shall not be construed to infringe upon constitutionally protected speech or assembly.”<sup>86</sup> This addresses concerns that the Act could be used to prosecute lawful protests.<sup>87</sup>

### *Section 3*

Section 3-1 amends Code section 16-7-80.<sup>88</sup> First, the Act adds new definitions for “[b]acteriological weapon” or “biological weapon[,] . . . biological agent[,]” and other chemical weapons relating to domestic terrorism.<sup>89</sup>

Section 3-2 inserts the phrase “bacteriological weapon, or biological weapon” into Code section 16-7-88(a).<sup>90</sup> This change assigns criminal penalties for the possession or transport of any bacteriological or biological weapon, as defined in Code section 16-7-80.<sup>91</sup>

Section 3-3 revises subsection (a) of Code section 16-9-109.<sup>92</sup> Code section 16-9-109 defines when electronic communication service providers must disclose information to law enforcement.<sup>93</sup> In domestic terrorism cases, courts may now require disclosure of “the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days” pursuant to a search warrant issued under Article 2 of Chapter 5 of Title 17, or for more than 180 days under the procedures outlined in Code section 16-9-109(b).<sup>94</sup>

### *Section 4*

Section 4-1 amends Code section 17-10-30, relating to the imposition of the death penalty.<sup>95</sup> Prosecutors may now seek the

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86. O.C.G.A. § 16-11-224 (Supp. 2017).

87. Krause and Eason Interview, *supra* note 11, at 26 min.

88. 2017 Ga. Laws 536, § 3-1, at 539–41.

89. O.C.G.A. § 16-7-80(1) (Supp. 2017).

90. 2017 Ga. Laws 536, § 3-2, at 541.

91. O.C.G.A. § 16-7-88(a) (Supp. 2017).

92. 2017 Ga. Laws 536, § 3-3, at 541.

93. O.C.G.A. § 16-9-109 (Supp. 2017).

94. O.C.G.A. § 16-9-109(a) (Supp. 2017).

95. 2017 Ga. Laws 536, § 4-1, at 541–42.

death penalty for murders “committed during an act of domestic terrorism.”<sup>96</sup>

### *Section 5*

Section 5 adds two new Code sections to Title 35, relating to law enforcement officers and agencies.<sup>97</sup> Section 5-1 adds Code section 35-1-21, and Section 5-2 adds Code section 35-3-14.<sup>98</sup> Code section 35-1-21 provides training for law enforcement to spot, combat, and report activity that may lead to domestic terrorism.<sup>99</sup> Code section 35-3-14 requires the bureau post “the information of persons who are aliens and who have been released from federal custody within the boundaries of this state” on the bureau’s public website within twelve hours of receiving such information.<sup>100</sup>

### *Analysis*

#### *Redefining Domestic Terrorism*

In response to recent domestic terrorist attacks around the nation, Senator Bill Cowsert (R-46th) introduced SB 1 to update Georgia’s policies regarding domestic terrorism.<sup>101</sup> The Act attempts to accomplish this goal by redefining domestic terrorism to encompass additional acts and by instituting strict penalties for those acts.<sup>102</sup>

Prior to the Act, Code section 16-4-10 limited domestic terrorism to acts that injure or kill at least ten individuals.<sup>103</sup> Limiting domestic terrorism to an arbitrary number of victims could result in acts that would otherwise qualify as domestic terrorism not satisfying the definition simply because the requisite number of people were not injured.<sup>104</sup> The Charleston church shooting exemplifies this

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96. O.C.G.A. § 17-10-30(12) (Supp. 2017).

97. 2017 Ga. Laws 536, §§ 5-1 to 5-2, at 542.

98. *Id.* at 542.

99. O.C.G.A. § 35-1-21 (Supp. 2017).

100. O.C.G.A. § 35-3-14 (Supp. 2017).

101. Krause and Eason Interview, *supra* note 11, at 1 min., 45 sec.

102. *See id.* at 2 min., 13 sec.

103. O.C.G.A. § 16-4-10 (2016).

104. *See* Telephone Interview with Rep. Robert Trammell (D-132nd) at 26 min., 25 sec. (Apr. 13, 2017) (on file with Georgia State University Law Review) [hereinafter Trammell Interview]. The

predicament.<sup>105</sup> In 2015, Dylann Roof, a white supremacist, shot and killed nine people in the Emanuel African Methodist Episcopal Church in Charleston, South Carolina.<sup>106</sup> If the Charleston church shootings happened in Georgia in 2015, under the old Code section, the incident would have been treated differently than today, under the new Code section. Since Dylann Roof killed nine individuals, his actions would not have qualified as domestic terrorism under the old definition because ten people were not injured. Under the new definition, the crime does not have to involve a minimum number of people, so Dylann Roof's actions could meet the domestic terrorism requirements.

### *Unintended Consequences*

While people on both sides of the Act agree domestic terrorism should not be limited to an arbitrary number of victims, opponents are concerned about two aspects of the Act that could lead to unintended consequences.<sup>107</sup> First, critics have concerns regarding the definition of critical infrastructure.<sup>108</sup> In the Act, domestic terrorism includes “any felony violation of, or attempt to commit a felony violation” that is “intended to . . . disable or destroy critical infrastructure.”<sup>109</sup> Critical infrastructure is broadly defined as “publicly or privately owned facilities, systems, functions, or assets, whether physical or virtual, providing or distributing services for the benefit of the public . . . .”<sup>110</sup> Opponents are concerned such a broad definition of critical infrastructure might encompass individuals who are not trying to harm people or commit terroristic acts.<sup>111</sup>

Two recent examples of this include protestors marching onto the I-75/I-85 downtown connector and the I-85 bridge collapse. In early July 2016, a group protesting police brutality in Atlanta marched

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Charleston Massacre would not qualify as domestic terrorism under Georgia's original domestic terrorism definition. *Id.*

105. *Id.* at 26 min., 25 sec.

106. Nick Corasaniti et al., *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (June 18, 2015), <https://mobile.nytimes.com/2015/06/19/us/charleston-church-shooting.html>.

107. See Trammell Interview, *supra* note 104, at 9 min., 44 sec.

108. *Id.* at 9 min., 58 sec.

109. O.C.G.A. § 16-11-220(2) (Supp. 2017).

110. O.C.G.A. § 16-11-220(1) (Supp. 2017).

111. See Trammell Interview, *supra* note 104, at 10 min., 9 sec.



onto the I-75/I-85 downtown connector, briefly shutting down a portion of the highway.<sup>112</sup> This action could plausibly fall within domestic terrorism because a highway, which provides a function for the public benefit, falls within the definition of critical infrastructure, and protestors entered the highway after officers told them not to.

Additionally, on March 30, 2017, a bridge collapsed on I-85 after a homeless man, Basil Eleby, was alleged to have started a fire that ignited flammable construction material, that state transportation officials had stored under the bridge.<sup>113</sup> Once again, since the bridge fits within the definition of critical infrastructure as providing a public benefit, and Mr. Eleby was charged with arson, this action could also fall within the meaning of domestic terrorism.

The Act's supporters stressed they did not intend to create a definition that encompassed situations like peaceful protests.<sup>114</sup> After Senator Cowsert consulted with Senator Jackson about this concern, they attempted to address it by amending the bill to include Code section 16-11-224, which clarifies the Act "shall not be construed to infringe upon constitutionally protected speech or assembly."<sup>115</sup> However, opponents of the bill are still concerned about who decides what is constitutionally protected speech and assembly.<sup>116</sup>

Opponents argue protestors that block the road or damage property could fall within the definition of domestic terrorism, and Code section 16-11-224 would not protect them if their actions are not deemed constitutionally protected.<sup>117</sup> Depending on who is responsible for interpreting this language, the Act could be used as a tool to prosecute these individuals as terrorists.<sup>118</sup> Additionally,

112. Jennifer Brett, *Protesters Shut Down Atlanta Streets After Police Shootings, Hanging Death*, ATLANTA J.-CONST. (July 8, 2016), <http://buzz.blog.ajc.com/2016/07/07/protesters-shut-down-atlanta-streets-after-police-shootings-hanging-death/>.

113. Dan Klepal, *GDOT Defends Storage of Material That Ignited in Bridge Collapse*, ATLANTA J.-CONST. (Apr. 4, 2017, 6:34 PM), <http://www.myajc.com/news/local/gdot-defends-storage-material-that-ignited-bridge-collapse/OBLoCUdXQ8w889tiblkmGK/>; Jennifer Belamy and Catherine Park, *Attorneys: witness could prove I-85 bridge collapse innocence*, ATLANTA J.-CONST., <http://www.11alive.com/news/local/i-85-bridge-collapse-suspect-to-be-indicted-again/449620604>.

114. See Krause and Eason Interview, *supra* note 11, at 7 min., 34 sec; *id.* at 8 min., 56 sec.

115. *Id.* at 26 min.; O.C.G.A. § 16-11-224 (Supp. 2017).

116. Max Moran, *ACLU Says New Georgia Terrorism Law Is Broader Than the Patriot Act*, GA. PUB. BROADCASTING (July 11, 2017), <http://gpbnews.org/post/aclu-says-new-georgia-terrorism-law-broader-patriot-act>.

117. *Id.*

118. *Id.*

creating a definition of domestic terrorism that includes actions which cause harm to critical infrastructure, even when no person is harmed, goes beyond the federal definition of domestic terrorism.<sup>119</sup> Opponents are concerned a law this broad can easily encompass individuals who are not involved in acts of terrorism.<sup>120</sup>

It is also important to note that individuals must meet the other elements of the crime to be charged with domestic terrorism. This may provide another level of protection against unintended consequences.

Importantly, the third element requires intent.<sup>121</sup> The I-85 bridge collapse presents an example of a situation that only satisfies the first two elements. While arson is a felony and the collapse of the bridge caused an interstate shut down that likely resulted in major economic loss, the facts currently known to the public indicate Mr. Eleby did not intend to intimidate citizens or coerce policy.<sup>122</sup> Without the requisite intent, Mr. Eleby's actions do not qualify as domestic terrorism.

The I-75/I-85 protestors provide another example of a situation that does not satisfy all three elements. While marching onto the highway may qualify as impacting critical infrastructure, the protestors did not cause major economic loss or attempt to commit a felony. Whether they are trying to alter or coerce policy is debatable, but without satisfaction of the other elements, this action would not meet the requirements for domestic terrorism. However, this does not prevent a prosecutor from charging an individual with domestic terrorism and fighting to prove the elements in court.

The second issue opponents are concerned with is the mandatory minimum sentencing.<sup>123</sup> In Code section 16-11-221, the Act includes punishments for individuals found guilty of domestic terrorism.<sup>124</sup>

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119. *Id.* The federal definition of terrorism includes only infrastructure damage resulting in harm to human life. *Id.*

120. *Id.*

121. The other required elements of the crime include the following: (1) the actor must commit or attempt to commit a felony; (2) the "disability or destruction" of the critical infrastructure must "result[] in [a] major economic loss;" and (3) the actor must "intend[] to[] [i]ntimidate [] civilian[s] . . . [.] alter [] or coerce [] policy . . . [.] or affect the conduct of the government . . . by use of destructive devices, assassination, or kidnapping." O.C.G.A. § 16-11-220(2) (Supp. 2017).

122. Krause and Eason Interview, *supra* note 11, at 4 min., 55 sec.; Belamy, *supra* note 113.

123. Trammell Interview, *supra* note 104, at 10 min., 40 sec.

124. O.C.G.A. § 16-11-221(a) (Supp.2017).

All of these punishments include jail time ranging from five years in jail to life without parole or the death penalty, depending on the severity of the crime.<sup>125</sup> This section also prevents the sentencing court from altering these sentences in any capacity.<sup>126</sup> The only exception to this rule is when the prosecutor and the defendant agree to an altered sentence, and the judge permits the agreement to go forward.<sup>127</sup> Therefore, the judge cannot use his or her discretion absent the prosecutor first providing the court with an agreement for an altered sentence. Normally a judge's sentencing discretion allows the judge to suspend a sentence or order a lesser sentence if, after taking into account all of the factors surrounding the crime, the judge believes a lesser or suspended sentence is appropriate.<sup>128</sup> The ability to apply this normal judicial discretion might compensate for unintended consequences because a judge could give a lower sentence in the event that an individual is found guilty for actions the judge believes the Act was not intended to capture.

For example, if a peaceful protestor was convicted of domestic terrorism for walking onto I-75 during a protest, normal judicial discretion would allow the judge to order a sentence of less than the minimum five years in prison. Here, however, the judge cannot give a lesser sentence unless the prosecutor first presents an altered sentence that he or she has negotiated with the defendant. Using the same example as above, in this case the judge would be required to order a sentence of at least five years in prison for the peaceful protestor, unless the prosecutor presents the court with an altered sentence of less than five years. Requiring minimum prison time and eliminating the judge's normal sentencing discretion removes a layer of protection against these unintended consequences. Although there is an exception that allows for an altered punishment, this exception gives the power to the prosecuting attorney because the judge can only accept an altered sentence that the prosecutor has negotiated with the defendant. However, a prosecutor negotiating a sentence with a defendant may not be as impartial as a judge applying his or her own objective sentencing discretion.

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125. *Id.*

126. O.C.G.A. § 16-11-221(b) (Supp. 2017).

127. *Id.*

128. O.C.G.A. § 17-10-1 (Supp. 2017).

*Procedural Constitutionality*

Some opponents have also expressed concerns about whether the bill's passage was constitutional.<sup>129</sup> Under the Georgia Constitution,

No bill or resolution intended to have the effect of law which shall have been rejected by either house shall again be proposed during the same regular or special session under the same or any other title without the consent of two-thirds of the house by which the same was rejected.<sup>130</sup>

The Act could be subject to a legal suit challenging the Act for violating this provision of the constitution because the final vote on HB 452 did not constitute two-thirds of the House.<sup>131</sup> When the Georgia House of Representatives first voted on the bill as SB 1, the bill failed on the initial vote, and the House moved to reconsider.<sup>132</sup> On the motion to reconsider, the bill failed again, at which point it became a rejected bill by the House.<sup>133</sup> When the House voted on the bill a third time as HB 452, one could argue it was reconsidering a rejected bill which would require consent of two-thirds of the House, per the constitutional provision.<sup>134</sup> However, it could also be argued that the House was not reconsidering a rejected bill because it was not reconsidering SB 1; it was considering an amendment to HB 452.<sup>135</sup> Even still, it is unclear whether a court would consider such a challenge.

*Completing the Goal*

Georgia's domestic terrorism policy still has a few loose ends. Some proponents of the original bill were interested in separating

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129. Trammell Interview, *supra* note 104, at 13 min., 47 sec.

130. GA. CONST. art. III, § 5, para. 12.

131. See Georgia House of Representatives Voting Record, HB 452, Vote #404 (Mar. 30, 2017).

132. Georgia House of Representatives Voting Record, SB 1, Vote #360 (Mar. 28, 2017); Georgia House of Representatives Voting Record, SB 1, Vote #361 (Mar. 28, 2017).

133. Georgia House of Representatives Voting Record, SB 1, Vote #362 (Mar. 28, 2017).

134. Trammell Interview, *supra* note 104, at 14 min., 30 sec.

135. See *id.* at 15 min., 20 sec.

Georgia's Office of Homeland Security from GEMA.<sup>136</sup> The goal was to create a new agency that would be composed of the employees currently dedicated to the homeland security portion of GEMA, but the agency would be run by its own homeland security director rather than the GEMA director.<sup>137</sup> This would create an agency mechanism focused specifically on domestic terrorism.<sup>138</sup> This section of the bill was removed during the House Committee process because House members were uncomfortable with creating a new agency without taking more time to flesh out the details.<sup>139</sup>

House members were concerned about the practical impacts of simply transferring GISAC personnel, equipment, and appropriations to the newly created department.<sup>140</sup> Over half of GISAC's responsibilities pertain to "ordinary criminal intelligence not related to domestic terrorism."<sup>141</sup> Thus, devoting all GISAC resources to an agency dedicated strictly to domestic terrorism may result in a gap in Georgia's gathering of criminal intelligence. Georgia's legislature will likely propose another bill in the foreseeable future to address this component of the original SB 1.<sup>142</sup> The passage of such a bill will likely depend on a mechanism for creating this agency that ensures Georgia's general criminal intelligence is not negatively impacted.

The Protect Georgia Act proposes to strengthen Georgia against domestic terrorism threats by removing arbitrary limitations and broadening the scope of actionable domestic terrorism under Georgia law, while also implementing mandatory minimum sentences and the death penalty. To mollify concerns with the Act's breadth, it also includes considerations for constitutionally protected speech. However, it remains to be seen whether these concerns were adequately addressed.

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136. Krause and Eason Interview, *supra* note 11, at 24 min., 46 sec.

137. *Id.* at 25 min., 37 sec.

138. Trammell Interview, *supra* note 104, at 3 min., 8 sec.

139. *See id.* at 7 min., 43 sec.; Krause and Eason Interview, *supra* note 11, at 23 min., 13 sec.

140. *See, e.g.*, Trammell Interview, *supra* note 104, at 3 min., 21 sec.

141. *Id.* at 3 min., 33 sec.

142. Krause and Eason Interview, *supra* note 11, at 22 min., 50 sec.