Hearing before the House Committee on Financial Services
Subcommittee on National Security, International Development, and Monetary Policy

"A Persistent and Evolving Threat:
An Examination of the Financing of Domestic Terrorism and Extremism"

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There are marked differences in the tools available to investigate the financing of domestic and international terrorism. This is because the First Amendment protects the freedom of speech and peaceful assembly of individuals and organizations in the United States, while providing no such protections for foreign individuals and organizations. Thus, U.S. law provides for the designation of foreign terrorist organizations (FTOs) like ISIS and al Qaeda that engage in terrorist activity, even if those same organizations might engage in other activity that would be protected by the First Amendment if they were based in the U.S. An FTO designation allows the United States to enforce criminal statutes that prohibit providing material support or resources to designated FTOs. It also allows for other State Department and Treasury Department sanctions.

Focusing on criminal enforcement tools, the statute that criminalizes providing material support to a designated FTO, 18 U.S.C. § 2339B, provides the basis for law enforcement and the intelligence community to open investigations on suspicion that an individual or entity may be financing a foreign terrorist organization, regardless of the purpose of the financing. In other words, even if a person wants to fund only the "humanitarian" operations of an FTO, it is prohibited. The material support statute drives U.S. financial services providers to implement sophisticated risk-management protocols for detecting potential misuse of their services for foreign terrorist financing.

Because of the rights protected by the First Amendment, there is no comparable designation scheme for domestic extremist organizations. Hateful speech, even if abhorrent to the majority of the population, is protected by the First Amendment, as is assembling with others who share the same hateful views. Unless an organization engages *solely* in *un*protected activity, such as committing crimes of violence, any designation of the organization as a terrorist organization likely would run afoul of the First Amendment. Thus, law enforcement cannot open an investigation merely based on suspicion that someone is providing financing to an extremist group in the U.S.

Moreover, the FBI is prohibited by its own internal rules from opening investigations based purely on protected First Amendment activity. To use investigative tools like undercover and sting operations—sometimes criticized as overly aggressive, but important in any crime prevention program—the FBI must have reason to believe that a crime is being or may be committed. For the reasons just discussed, providing material support for a designated terrorist organization is not an available option for opening an investigation into the financing of domestic extremist organizations. But there's another gap in our criminal laws that impacts terrorism investigations. Currently, there is no federal law prohibiting what is commonly thought of as "domestic" terrorism when committed with a firearm, knife, or vehicle—all of which have been used to commit acts of domestic terrorism in the U.S. in recent years—when the crime is not in support of a designated foreign terrorist organization or against a U.S. official or U.S. property. Likewise, there is no current federal prohibition on stockpiling firearms with intent to commit a mass attack in furtherance of domestic ideologies like white supremacy that are unconnected to a foreign terrorist organization.

This gap has several important implications. First, it fails to accord moral equivalency to terrorist acts regardless of the ideology motivating them. This leads to a double standard that perpetuates the misconception that all terrorism is Islamist extremist terrorism even when the lethality of domestic terrorism in the U.S. exceeds that of international terrorism. Second, it results in inaccurate and inadequate data about incidents of domestic terrorism that could be used to develop measures to counter the threat. Third, and most salient for today's hearing, it fails to integrate domestic terrorism into the U.S. counterterrorism program, which is based on *prevention* of terrorism rather than prosecutions after the fact. Filling the gap in our terrorism statutes, as explained more fully in the attached paper, when coupled with appropriate oversight, would provide more flexibility for law enforcement to open investigations into those who may be acquiring or providing resources—financial or otherwise—for potential terrorist attacks.

Attachment:
Mary B. McCord, *Filling the Gaps in Our Terrorism Statutes*, Program on Extremism, George Washington University (August 2019)