

Addressing Tomorrow's Terrorists

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American anti-terrorism laws are insufficient to address the next wave of global terrorism. When President Bush declared that the United States had begun a “war on terror,”¹ the entire government began to reorient itself to tackle America’s newest “generational challenge.”² The Department of Justice (DOJ) joined this massive effort, declaring in a new Strategic Plan that its focus was not simply to prosecute terrorists for crimes, but to “[p]revent, disrupt, and defeat terrorist operations before they occur.”³ Despite its constant talk of reorientation, however, DOJ has been limited in its ability to creatively address the war on terror for one simple reason: many of the relevant federal criminal statutes are poorly constructed. Prior to September 1994, there were no federal criminal prohibitions that specifically punished material support for terrorism. Prosecutors had to rely instead on generic federal crimes, such as murder and money laundering, or on a variety of statutes condemning specific acts of terrorism, such as air piracy or hostage taking. After the 1993 terrorist bombing of the World Trade Center, this situation rapidly changed. Legislators hastily drafted a number of statutes and amendments that sought to address the domestic terrorist threat. Acting in response to public demand for quick, decisive action, Congress generally maximized the scope of anti-terror prohibitions while overriding any legal obstacles to quick prosecution that were presented by the judiciary.

Although it is difficult to fault Congress for acting decisively, the bedrock of counterterrorism enforcement laid down by these statutes is deeply flawed. Two of these statutes, in particular, are invoked more often than any others in criminal prosecutions of suspected terrorists: 18 U.S.C. §§2339A and 2339B. These measures prohibit aid to terrorists and to terrorist organizations. They rely on two legal concepts. First, both criminalize the provision of “material support,” which is distinct from traditional common law concepts of aiding and abetting. Second, §2339B, the broader and more frequently used of the two statutes, relies on a “list-based” approach to criminalize support to

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1. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (September 20, 2001).

2. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 361 (2004).

3. U.S. DEP’T OF JUSTICE, FISCAL YEARS 2003-2008 STRATEGIC PLAN, at 2.10 (n.d.), available at <http://www.usdoj.gov/archive/mps/strategic2003-2008/pdf.html> [hereinafter DOJ 2003-2008 STRATEGIC PLAN]. Goal I stated in the plan is to “Prevent Terrorism and Promote the Nation’s Security.” *Id.* at 2.9.

terrorists, prohibiting material support only when it is given to an organization that is on the State Department's list of Foreign Terrorist Organizations (FTOs). This approach is a direct result of Congress's difficulties in defining "material support."

A list-based approach to criminalizing support for terrorism cannot effectively address modern terrorism. Terrorist groups are evolving. Today, fewer terrorists are still affiliated with structured organizations; instead, the greatest terrorist threat to the United States comes from a diffuse global network of terrorists. These individuals, inspired by figures like Osama bin Laden and linked together by global communications networks, move between and among terrorist groups and causes without necessarily ever becoming "members" of any particular organization. By focusing primarily on organizations, rather than on the global jihadi movement, the criminal prohibition in §2339B is too narrow.

DOJ has had difficulty in obtaining large numbers of criminal convictions of terrorists using these statutes, forcing it to cede ground to more decisive actors in the war on terror, such as the Department of Defense (DOD) and the intelligence agencies. Although a number of major terrorism cases have been brought since 9/11 in this system, it has not been used against any senior members of the terrorist group that most threatens the United States – al Qaeda. While many domestic terrorism trials have been successful,⁴ policymakers have shown little appetite for facilitating the prosecution of major terrorists in civilian courts by enacting major legislative change.⁵ Instead, Congress has taken incremental steps, and built on the material support-based system that it put in place in the mid-1990s. As a result, other government agencies filled the gap, most notably DOD, with its system of military detention and military commissions, thereby shifting more and more anti-terrorist action outside the traditional legal system.⁶

It does not have to be this way. The criminal laws can be more effective weapons in the war on terrorism. Section I discusses DOJ's "preventive" strategy for the war on terror and discusses the primary implements in DOJ's anti-terrorism toolbox, notably 18 U.S.C. §2339B, the criminal prohibition on material support to Foreign Terrorist Organizations. Section II examines the history and development of the "material support" concept and how that concept became the centerpiece of the legal war on terrorism. Section III discusses the problems, both practical and theoretical, with the current

4. See, e.g., RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

5. For example, while commentators have urged creation of a national security court, see, e.g., Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19, no action has been taken.

6. See Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 21-26 (2005).

statutes. Finally, Section IV outlines alternative approaches, in an attempt to begin a dialogue on how to advance the legal war on terrorism.

I. PREVENTING TERRORIST ATTACKS BEFORE THEY OCCUR:
CURRENT CRIMINAL PROHIBITIONS ON MATERIAL SUPPORT

A. *The Law*

The statutes most often invoked by federal prosecutors in anticipation of a terrorist attack are 18 U.S.C. §§2339A and 2339B, which criminalize the provision of “material support or resources” to terrorists and to FTOs.⁷ No other federal statute criminalizes “material support” for any other person or group; these prohibitions are unique to terrorism. “Material support or resources” is defined in 18 U.S.C. §2339A(b):

(1) the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.⁸

The definition includes all tangible and intangible property, as well as any service; it is difficult to think of what it does not include.

This broad definition of material support forms the basis for what this article will describe as the “list-based approach” to federal anti-terrorism prosecutions. “List-based” refers to the primary requirement for criminality under 18 U.S.C. §2339B – that the organization to which material support was provided must be an FTO. FTOs are designated by the Secretary of State, under a process described in the Immigration and Nationality Act (INA).⁹ The State Department annually releases an updated list of FTOs. At the time of

7. See ZABEL & BENJAMIN, *supra* note 4, at 31-32.

8. 18 U.S.C. §2339A (Supp. V 2005). In this article, “material support” is often used as a shorthand expression for the statutory phrase “material support or resources.”

9. 8 U.S.C. §1189 (2000 & Supp. V 2005).

this writing there were 44 designated foreign terrorist organizations.¹⁰ Because the definition of “material support” is so incredibly broad, once an organization is listed, almost all interaction with it is criminal. If an organization is not listed, however, a person may provide any otherwise lawful type of assistance, for any purpose.

Although the concept of material support is used only in statutes pertaining to terrorism, it is not found only in *criminal* statutes. Notably, its first appearance was in U.S. immigration law, in an attempt by Congress to craft a legal term of art to define conduct that fell somewhere between mere membership in a terrorist organization and direct involvement that would amount to aiding and abetting terrorism.¹¹ Drawing the line between mere association, which is protected under the First Amendment, and criminal support of terrorism, has been the abiding question in “material support” jurisprudence. Material support is now a primary component of three distinct statutes:

- 8 U.S.C. §1182(a)(3)(B), which makes immigrants excludable and deportable if they have materially supported terrorist activity.
- 18 U.S.C. §2339A, which makes it a crime to provide material support to those an individual knows or reasonably should know intend to commit certain terrorist crimes.
- 18 U.S.C. §2339B, a criminal prohibition on material support to foreign terrorist organizations.

These statutes, according to the Department of Justice, provide the “key” to “one of the most important law enforcement responses to 9/11.”¹²

B. *The Strategy*

The material support statutes are the centerpiece of the DOJ’s anti-terrorism strategy. Senator Patrick Leahy described them as the “weapon of

10. Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, *Fact Sheet, Foreign Terrorist Organizations*, Apr. 8, 2008, available at <http://www.state.gov/s/ct/rls/fs/08/103392.htm>.

11. Although “material support” first appeared as a statutory term in 1990, the expression was used colloquially much earlier. For instance, in a news conference on January 7, 1986, when asked about economic sanctions against Libya, President Ronald Reagan responded, “By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he had used its own armed forces. We’ve urged repeatedly that the world community act decisively and in concert to exact from Qadhafi a high price for his support and encouragement of terrorism.” President’s News Conference: January 7, 1986, 1 PUB. PAPERS 17.

12. JEFFREY A. BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER’S GUIDE 264 (U.S. Dep’t of Justice Office of Legal Educ. 2004).

choice for domestic anti-terrorism prosecution efforts.”¹³ The DOJ manual for counterterrorism enforcement states that §2339B has been used to “roll up post-9/11 terrorist cells in Seattle, Detroit, Buffalo, Portland, San Diego, Houston, Miami, Tampa, Brooklyn and Virginia.”¹⁴ Among those charged with terrorism related offenses since 9/11, a vast majority have been charged with “material support,” rather than with the commission of any specific terrorist act.¹⁵

The reason the material support statutes have been so widely used is simple: material support prohibitions function as inchoate terrorist crimes.¹⁶ Section 2339B does not require that a terrorist act actually occur or that a defendant know that his support is going to be used for terrorism. It more closely resembles state facilitation or criminal “aiding” statutes than the traditional federal inchoate crimes.¹⁷ Its ability to reach beyond traditional criminal acts means that the statute authorizes prosecution of two groups of persons not covered by other criminal laws – those who raise money and supplies for terrorist networks through seemingly legitimate business activities, and potential terrorists who have not yet committed acts sufficient to bring them within the scope of more traditional federal inchoate crimes, such as conspiracy or aiding and abetting. The DOJ counterterrorism enforcement manual describes §2339B as “the closest thing American prosecutors have to the crime of being a terrorist.”¹⁸ Thus, the criminalization of material support aids the effort to prevent terrorist attacks.

After 9/11, DOJ’s priorities fundamentally changed. In the past, DOJ attorneys primarily investigated and prosecuted crimes that had already taken place rather than actively attempting to anticipate and prevent criminal activity. To be sure, criminal prosecutions deter crime by enforcing the law and locking up criminals, but preventing crimes through direct intervention

13. *Oversight Hearing: Aiding Terrorists – An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (written statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary), available at http://judiciary.senate.gov/print_member_statement.cfm?id=1172&wit_id=103.

14. BREINHOLT, *supra* note 12, at 264.

15. NYU CENTER ON LAW AND SECURITY, *TERRORIST TRIALS: A REPORT CARD 7* (2005); see also ZABEL & BENJAMIN, *supra* note 4, at 31-32.

16. Traditional federal inchoate crimes, such as “aiding and abetting” and conspiracy still apply to acts of terrorism, including material support. Thus, aiding and abetting the provision of material support is a crime under 18 U.S.C. §2 (2000). A conspiracy to provide material support is a crime under 18 U.S.C. § 371 (2000). Challenges to convictions based on the argument that conspiring to provide material support is functionally the same as providing material support have been unsuccessful. See *United States v. Chandia*, 514 F.3d 365, 372 (4th Cir. 2008); *United States v. Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2007).

17. See, e.g., N.Y. PENAL LAW art.115 (McKinney 2004) (criminal facilitation); CAL. PENAL CODE §27 (West 1999) (“cause or aid” a crime).

18. BREINHOLT, *supra* note 12, at 264.

was a lesser priority.¹⁹ After 9/11, the government realized that it could not wait for other terrorist attacks to occur. Accordingly, DOJ shifted its focus from the prosecution of crimes already committed to the prevention of future terrorist acts. The very first goal DOJ articulated in its Fiscal Year 2003-2008 Strategic Plan was to “Prevent Terrorism and Promote the Nation’s Security.”²⁰ Its first strategic objective in achieving this goal was to “[p]revent, disrupt, and defeat terrorist attacks before they occur.” To that end,

DOJ is committed to stopping terrorism at any stage of development, from the positioning of those who would conduct an act to the financiers of the operations. A terrorist attack, such as a bombing, is the culmination of extensive planning and resource gathering. The DOJ’s fusion of national intelligence and law enforcement creates an inhospitable terrorist environment that exposes terrorist activity and prevents terrorist attacks.²¹

Although the material support statutes predate this effort, they are perfectly suited in principle for the government’s preventive strategy.

The broad scope of “material support” in the criminal code is part of a legal strategy the DOJ counterterrorism manual recognizes as one of strategic overinclusiveness.²² This strategy requires DOJ to find and prosecute “non-bomb throwers” with more attenuated links to terrorist activity, specifically donors and financiers of terrorism.²³ The government is increasingly focused on the earliest stages of terrorist planning.²⁴

19. Prosecutors in U.S. Attorneys’ offices who investigated, prosecuted, and disrupted terrorist attacks in the mid-1990s would likely dispute this statement. However, it is clear that after 9/11 the leadership of DOJ emphasized that the Department had shifted its priorities from post-act prosecution to preemption. For some U.S. Attorneys’ offices, this transition may have occurred after terrorist attacks within their respective jurisdictions, such as the 1993 attempt to bomb the World Trade Center in the Southern District of New York.

20. DOJ 2003-2008 STRATEGIC PLAN, *supra* note 3, at 2.9.

21. *Id.* at 2.10; see also *Oversight Hearing: Aiding Terrorists – An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (written statement of Christopher A. Wray, Asst. Att’y Gen.) (“the Justice Department’s top priority is to prevent terrorist attacks before they occur”), available at http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391.

22. BREINHOLT, *supra* note 12, at 264, 270-272.

23. *Id.* at 264.

24. *Oversight Hearing*, *supra* note 21 (written statement of Christopher A. Wray, Asst. Att’y Gen.) (“The chronology of a terrorist plot is a continuum from idea, to planning, to preparation, to execution and attack. The material support statutes help us strike earlier on that continuum – we would much rather catch terrorists with their hands on a check than on a bomb.”).

In the words of Gary Bald, the FBI's Assistant Director of the Counterterrorism Division,

The terrorists who pose the most imminent danger to the United States today are those that facilitate financial transactions through clean bank accounts and other monetary systems, such as [hawala], those that provide weapons and tactical training, those that recruit new members for terrorist organizations, those that set up safe and secure Internet accounts for facilitation of communication, those that provide safe havens to other terrorists, those that provide expert advice on U.S. targets, and how to attack those targets, those that manufacture and procure identity documents, those that facilitate and provide transportation and other logistical duties, and finally, those individuals who have actually traveled overseas to attend Al Qaida and other terrorist training camps, and provide instruction on how to make bombs, surveil a target, and other terrorist trade craft, and have returned now to the United States to await further operational direction.²⁵

Choking off support networks is a critical part of preventing future terrorist attacks, both at home and abroad.²⁶ The government's interest in disrupting terrorist networks has been described by the courts as "substantial,"²⁷ even "paramount."²⁸ Section 2339B is an integral part of this effort.²⁹ FBI Assistant Director Bald told the Senate Judiciary Committee that "[i]t would be difficult to overstate the importance of the material support statutes to our ongoing counterterrorism efforts."³⁰

This dramatic redirection of DOJ activities has not been without controversy. Because the United States was subjected to increasingly violent terrorist attacks throughout the 1990s and into the new millennium, the

25. *U.S. Senator Orrin G. Hatch (R-UT) Holds Hearing on Aiding Terrorists*, FDCH POLITICAL TRANSCRIPTS (Lexis, News Library) (May 5, 2004); see also *Oversight Hearing: Aiding Terrorists – An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (written statement of Gary Bald, FBI Asst. Dir.), available at http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3393. The focus on preventing terrorism is an important innovation in counterterrorism policy. It is not one that has been adopted worldwide. For a criticism of European and other "Western" countries' counterterrorism efforts, specifically for their failure to proactively target financiers and support networks of terrorism, see Rohan Gunaratna, *The Post-Madrid Face of Al Qaeda*, WASH. Q., Summer 2004, at 91.

26. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 2 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf.

27. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000).

28. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002).

29. BREINHOLT, *supra* note 12, at 264. ("Section 2339B has proven to be a powerful tool in achieving this goal.")

30. *Oversight Hearing*, *supra* note 25 (written statement of Gary Bald, FBI Asst. Dir.).

executive branch has constantly sought to expand the material support statutes. These efforts have been challenged, however, by civil libertarians who charge that the government is trying to criminalize constitutionally protected political advocacy and associational rights. The collision of these competing forces has resulted in a patchwork of amendments that have displeased both civil libertarians and federal prosecutors.

II. THE DEVELOPMENT OF THE MATERIAL SUPPORT STATUTES

The two basic elements of 18 U.S.C. §2339B are (1) “material support” that is (2) provided to a designated FTO. The second element, which depends upon the maintenance of a list of FTOs, arose directly out of problems Congress encountered when it expanded the definition of material support.

Material support, as a concept, is relatively new to American law. In most areas of federal criminal law, those who participate in crime but do not actually commit specific criminal acts are punished as co-conspirators or accomplices. One who “aids, abets, counsels, commands, induces, or procures” the commission of an offense against the United States can be tried as a principal.³¹ One who comforts or assists a criminal offender in order to obstruct apprehension, trial, or punishment is considered an accessory after the fact.³² Such definitions are present, in some form or another, in the criminal codes of many states.³³ For punishing participants in terrorism, however, Congress deemed this structure inadequate.³⁴ It therefore adopted criminal laws that reach beyond traditional inchoate crimes to ensure that anyone involved in terrorism, not just the bomb-throwers and their immediate accomplices, may be punished.³⁵ The legal concept that Congress chose for this expansion was “material support.”

Just how far “material support” reaches and should reach, however, has been a source of heated conflict and debate. The development of the “material support” statutes shows that Congress has struggled to describe a level of involvement with terrorists or terrorist organizations that should be condemned.

Congress has taken three distinct approaches to defining the term. The first, which I will label the “nexus” approach, was the narrowest. This approach required that, in order to establish criminal liability, the support given must advance the preparation for or the carrying out of a terrorist act in some way. Thus, to determine whether someone’s assistance to a person who

31. 18 U.S.C. §2 (2000).

32. 18 U.S.C. §3 (2000).

33. See, e.g., IOWA CODE ANN. §703.1 (West 2003).

34. For a doctrinal discussion of how these statutes differ from traditional federal criminal law concepts, see Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5 (2005).

35. BREINHOLT, *supra* note 12, at 264.

later committed a terrorist act was material, courts and juries were required to determine whether there was a nexus between the support provided and the terrorist activity.

At the other extreme, Congress has used an exclusive statutory list to define material support. If a type of support was listed, it was material. If something was not listed, it was not "material support" and, therefore, could be provided to anyone or any group, even a known terrorist. No nexus analysis was used, and there was no need to show any link between the support provided and terrorism.

The final approach Congress has used is an "inclusive" listing approach. If a person provided something on the list to terrorists, it was "material support." If what was provided was not on the list, then courts, or juries, would have to engage in the nexus analysis described above to determine whether or not something was in fact "material support." This approach was developed in the mid-1990s as a response to the difficulties prosecutors experienced in proving a nexus.

Congress has also repeatedly broadened the definition of "material support."³⁶ The term is no longer used to distinguish political activity from terrorism. Under current law, any support, even the tiniest financial donation, is considered "material." Rather than try to articulate a qualitative distinction between "material" support and political activity, Congress has established a process for generating a list of proscribed recipients. Any support to these designated FTOs is material and thus criminal. Aid to groups not listed, however, is legal, unless given with the specific intent to further violence.³⁷

36. This is representative of a trend away from the nexus approach, where the materiality of support is determined on a case by case basis, and toward the listing approach, where the materiality of support is determined by Congress.

37. The case of Abu Musa'ab Al-Zarqawi is illustrative here. Zarqawi was active in international terrorism long before he became a central terrorist figure in Iraq. Zarqawi was involved with, but not necessarily a member of, numerous FTOs prior to the U.S. invasion of Iraq. See Press Statement, U.S. Department of State, *Treasury Department Designates Six People as Al-Qaeda Terrorists*, Sept. 29, 2003 (announcing Zarqawi as a member of al Qaeda). His own organization, Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (QJBR) (also known as al-Qaida in Iraq and formerly known as Jama'at al-Tawhid wa'al-Jihad), was not designated as an FTO until more than a year later. Press Statement, U.S. Dep't of State, *Foreign Terrorist Organization: Designation of Jama'at al-Tawhid wa'al-Jihad and Aliases*, Oct. 15, 2004, available at <http://www.state.gov/r/pa/prs/ps/2004/37130.htm>; see also Press Statement, U.S. Dep't of State, *Addition of Al-Manar to the Terrorist Exclusion List, New Designation of the Libyan Islamic Fighting Group as a Foreign Terrorist Organization and Amended Designation of the Zarqawi-led Foreign Terrorist Organization Jam'at al Tawhid wa'al-Jihad to Reflect New Aliases*, Dec. 28, 2004, available at <http://www.state.gov/r/pa/prs/ps/2004/40081.htm>. Technically, aid to Zarqawi's organization, if not covered by §2339A, would have been legal until the group's designation in October 2004. Although the government could have made an argument at that time that Zarqawi himself was a member of al Qaeda, aid to others in his organization might not have been illegal. In any event, U.S. prosecution of a known terrorist and his associates should not have to rely on something as tenuous as their affiliation with a particular terrorist group. In another interesting development, soon after his organization was designated a FTO, Zarqawi changed its name.

Under the current version of 18 U.S.C. §2339B, the type of aid given matters much less than the identity of the recipient.

Legislative debates on terrorism statutes are lengthy, and they provide insight into the evolution of the current approach to “material support.” Three primary themes are visible. First, in the criminal context Congress has emphatically rejected any qualitative distinction between different types of support. What I deem the nexus approach, which would require a showing by the government that support was “material” (in the sense that lawyers normally think of that word) to the terrorist acts of an individual or group, has been completely rejected. “Material support” has instead become a term of art defined exclusively by Congress. There is almost no room for courts or juries to evaluate the effect of the support provided in a given instance. Second, Congress has repeatedly amended the definition of “material support” in an effort to make it more inclusive. Finally, and most importantly, Congress has developed a list-based approach to “material support.” As it has increasingly read the “material” out of “material support,” Congress has nevertheless found ways to limit the potentially unlimited reach of the statute. There was no flexibility in what was “material.” Therefore, Congress has chosen to proscribe support only when given to specified groups.

As the history of 18 U.S.C. §2339B shows, the legislative process was not based on a broad assessment of current or potential future terrorist threats or on the relationship between different types of aid to terrorism. Rather, it was stimulated by reactions to recent terrorist acts and by a desire to ensure that DOJ could prosecute those involved. The result is not a statute tailored to attack terrorist networks. It is a blunderbuss approach to terrorist prosecution, and its overreach threatens to undermine the government’s ability to keep us safe.

*A. The Immigration Act of 1990 – The Prohibition of “Abetting”
Terrorist Activity Evolves To Become a Ban on “Material
Support” of Terrorist Organizations*

From the earliest use of the term “material support,” an effort was made to balance associational and free speech rights with the government’s interest in preventing terrorist activity. The term first appeared in legislative debates over immigration reform that culminated in the Immigration Act of 1990. Starting in the mid-1980s, numerous members of Congress advanced proposals for rewriting the longstanding exclusionary provisions of U.S. immigration law regulating entry into this country. Central to this redrafting was a new exclusionary provision specifically targeting those who engage or had engaged in terrorist activity.

In the Immigration Act debates, Congress considered wording that would have required the government to show, prior to any exclusion or deportation action against an alien, clear ties between the alien and a specific terrorist act. Congress also debated wording that would have excluded any member or affiliate of an organization that had engaged in terrorism, regardless of

whether that person was involved in terrorist activity. It then sought a compromise. The compromise was “material support.”

*1. From “Organizing, Abetting, and Participating”
to “Material Support”*

In the late 1980s, Congress debated redrafting decades-old immigration laws. The Immigration and Nationality Act of 1952 (INA), also known as the McCarran-Walter Act,³⁸ had established broad categories of grounds for excluding certain aliens from the United States.³⁹ Reformers attacked some of these categories as violating First Amendment rights to free speech and association, as well as other basic American principles. One of the most controversial provisions was §212(a)(28)(F), which barred entry to

Aliens who advocate or teach or who are members affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his [sic] or their official character; or (iii) the unlawful damage of [sic] injury, or destruction of property; or (iv) sabotage.⁴⁰

This provision had primarily, but not exclusively, targeted Communists.⁴¹ Significantly, the Department of State had relied on §212(a)(28)(F) to prevent known terrorists, such as members of the Palestine Liberation Organization (PLO), from entering the United States.⁴²

Section 212(a)(28)'s broad language and its application to Communists led to some creative judicial attempts to limit its scope. Courts were hard-pressed to justify excluding immigrants for membership in the Communist Party when the only reason for that exclusion was belief in a political theory. Additionally, in many countries, membership in the Communist Party was a necessary fact of life for almost all citizens, and the membership exclusion

38. Pub. L. No. 82-414, 66 Stat. 163.

39. See *Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis Before the H. Comm. on the Judiciary*, 100th Cong. 26-27 (1988) [hereinafter *Grounds for Exclusion*]. The practice of prohibiting members of certain groups from entering the United States goes back at least as far as 1918. *Id.* at 48.

40. *Id.* at 49.

41. *Id.*

42. *Exclusion and Deportation of Aliens: Hearing on H.R. 1119 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 100th Cong. 35 (1987) [hereinafter *Exclusion and Deportation*] (statement of Abraham D. Sofaer, Legal Adviser to the State Department).

would have prevented average citizens or, more importantly, defectors from those countries from being admitted to the United States. As a result, courts began to interpret the prohibition on membership as a prohibition on “meaningful association.”⁴³ Membership alone in an organization such as the Communist Party was not sufficient to justify excluding an alien.⁴⁴ Generally, voluntary political affiliation and active participation constituted “membership” that warranted exclusion, but service in the armed forces of a Communist country did not.⁴⁵

Beginning in the late 1970s, and increasingly during the 1980s, this provision came under fire for punishing the mere advocacy of ideas and for inhibiting the freedom of association.⁴⁶ Courts generally dismissed these criticisms, holding that the power of the Executive to exclude aliens need not be balanced against citizens’ First Amendment rights.⁴⁷ Failure in the courts, however, did not end the attacks. Legislative support for these criticisms manifested itself in the passage of what was then known as the Moynihan-Frank Amendment to the INA. This amendment precluded the exclusion or deportation of an individual “because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.”⁴⁸ The Moynihan-Frank Amendment did not, however, apply to suspected terrorists.⁴⁹

The First Amendment-based criticisms culminated in a 1987 effort to completely rewrite the 1952 Immigration and Nationality Act. This effort was not opposed by the executive branch. While testifying before Congress, Abraham Sofaer, the State Department Legal Adviser, admitted that the exclusion provisions in §212(a)(28) were “vague, arguably offensive, and

43. *Grounds for Exclusion*, *supra* note 39, at 56.

44. *Id.* at 35.

45. *Id.* at 57.

46. *Id.* at 50.

47. *Id.* at 58. *See generally* *Kleindienst v. Mandel*, 408 U.S.753 (1972); NGO Committee on Disarmament v. Haig, 1982 U.S. Dist. LEXIS 13583 (S.D.N.Y.), *aff’d*, 697 F.2d 294 (2d Cir. 1982). First Amendment challenges were usually based on the asserted rights of citizens to associate with foreigners espousing prohibited political beliefs. Excluded aliens themselves have no standing to assert a First Amendment challenge to exclusionary immigration laws.

48. *Grounds for Exclusion*, *supra* note 39, at 53. Prior to the enactment of the Moynihan-Frank Amendment, a different amendment to the 1952 INA, known as the McGovern Amendment, was passed to try to limit the use of §212(a)(28) for exclusions based solely on the advocacy of ideas. This amendment provided that within 30 days of receiving the application of an alien who was excludable on the basis of an affiliation with a proscribed organization, the Secretary of State had to recommend to the Attorney General that the alien be admitted unless he or she determined that admission would be contrary to the security interests of the United States and so certified to the Congress. *Id.* at 51. This amendment quickly came under fire, primarily because it “facilitated the entry of espionage agents and terrorists such as members of the [PLO].” *Id.* It was later amended twice to try to allay concerns that it was facilitating the entry of terrorists into the country. *Id.* at 51-52.

49. *Id.* at 53.

anachronistic,” and that they needed to be replaced, but not entirely.⁵⁰ While supporting the repeal of every other subsection of §212(a)(28), he argued that an exclusion for terrorists *and their accomplices* be maintained. He argued:

[§212(a)(28)(F)] should be retained, or should be replaced with an equally effective exclusion against terrorists To be considered equally effective, any such provision would have to exclude not only those who pull the triggers and plant the bombs, but all of their accomplices in the international terror network. Those who raise the money, make the plans, forge the passports, and provide the training and transportation are just as culpable, and should at the very least forfeit the privilege of entering the United States.⁵¹

The scope of “accomplice” was not made clear. Sofaer’s list of accomplices might have encompassed only traditional co-conspirators or it might have included any member of a recognized terrorist group. Regardless, early congressional attempts to draft the new terrorist exclusion did not use the language “material support.” During the first session of the 100th Congress, Representative Barney Frank introduced H.R. 1119, the Immigration Exclusion and Deportation Amendments of 1987, which would have made excludable or deportable any alien “who has engaged in terrorist activity.”⁵² “Terrorist activity” was, in theory, broader than the traditional definition of terrorism as an act of politically motivated violence. H.R. 1119 defined it as “organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to individuals not taking part in armed hostilities.”⁵³ The Administration supported this language, stating that it would encompass fundraisers and accomplices in addition to those who actually committed violent terrorist acts.⁵⁴

Opponents felt this language did not go far enough to exclude potential terrorists and those more remotely connected to terrorist acts. There were two primary concerns. First, a question remained whether the “organizing, abetting, or participating in terrorist activity” language covered those who could not be directly linked to a specific act of terrorism. An analyst from the

50. *Exclusion and Deportation*, *supra* note 42, at 34-37.

51. *Id.* at 37; *see also* Grounds for Exclusion, *supra* note 39, at 60.

52. *Exclusion and Deportation*, *supra* note 42, at 5 (full text of bill).

53. *Id.*

54. *Id.* at 37. Supporters of the new language testified to the bill’s numerous benefits, including: (1) establishing procedures for judicial review of exclusions based on group membership or ideology, and forcing the government to justify exclusions on the basis of “terrorism” or other proscribed associations, *id.* at 97-98 (statement of John Scanlan on behalf of the American Association of University Professors); and (2) sharpening the vague language in §212(a)(28)(F), so the government would have to provide a reasonable basis for excluding someone, rather than relying on the arbitrary, unreviewable determinations permitted under the previous law. *Id.* at 81-84 (statement of John Buchanan of People for the American Way).

Heritage Foundation criticized the language, saying that it would not prevent Yasser Arafat from entering the country to speak at the United Nations.⁵⁵ The American Legion took the position that any known member of a terrorist organization should be excludable, and complained that the proposed language did not reach members of terrorist organizations not linked to specific acts of terror. The group argued that “the burden of proof should not be on the Attorney General to reconstruct the details of past individual involvement in specific acts of terrorism.”⁵⁶ Second, it was argued that if the bill did not exclude persons on the basis of mere membership in an organization engaging in terrorist activity, it ought to cover those who were entering the country to engage in lawful activity that indirectly supported violence, such as fundraising. William A. Rusher, a prominent conservative,⁵⁷ testified that H.R. 1119 would not cover those who wished to enter the United States to raise money for the PLO or the Irish Republican Army (IRA).⁵⁸

These criticisms stemmed primarily from the fact that the proposed statute’s definition of “terrorist activity” did not include membership in a terrorist organization.⁵⁹ Representative Frank, the sponsor of the bill, felt the proposed definition was adequate. He argued that simple membership in a terrorist organization such as the PLO was sufficient legal proof that a person organized or abetted terrorism.⁶⁰ In response to critics, Representative Frank defended the breadth of the proposed statutory language:

[W]e did not want to have a narrow thing where you had to prove that they were going to do this – and we do not have the criminal standard here, we have much more flexibility in keeping people out – we picked up some legal definitions of terrorism, including organizing, abetting, or participating [I]t was clearly our intention . . . to cover fund raisers as people who abet. I would say that if you raise money to buy the sustenance – whether it is guns or food – for people who are engaged in terrorist activity, you are abetting . . . that is both prospective and retroactive I would think that, for most

55. *Id.* at 158-159 (statement of Julian Geran Pilon).

56. *Id.* at 175 (statement of David Daniels, assistant director, National Legislative Comm’n, The American Legion).

57. *Id.* at 188 (statement of William A. Rusher). Although Rusher’s qualifications are not discussed at the hearing, he was at the time the publisher of *National Review*.

58. *Id.* at 190. Around that time, both the IRA and the PLO were considered to be actively engaged in acts of political terrorism. There was continuing violence in Northern Ireland, *see* BBC, *Northern Ireland: The Troubles*, available at <http://www.bbc.co.uk/history/recent/troubles/>, and although the PLO had renounced terrorism in 1988, as the testimony quoted *infra* shows, Congress was skeptical. *See also Talking with the P.L.O.; The P.L.O.: From Birth Through Terrorism to Dialogue with the U.S.*, N.Y. TIMES, Dec. 16, 1988, at A15. Whether the IRA or PLO and their members should, in fact, be considered terrorists and terrorist organizations is beyond the scope of this article.

59. *Exclusion and Deportation*, *supra* note 42, at 181 (statement of Rep. Mazzoli).

60. *Id.* at 190.

members of the IRA, you would be able to show that they had abetted terrorists in the past by their membership and activity.⁶¹

Although critics of the bill were uncertain about the scope of the statutory language,⁶² others took Representative Frank at his word. Many individuals testified that the language was too broad. David Cole, then an attorney for the Center for Constitutional Rights, testified that using the terms “organizing and abetting” would lead to exclusion of all members or supporters of any group that had used violent means.⁶³ This was precisely the result desired by those who felt the language did not go far enough. Cole advocated a narrow definition of terrorist activity, which included only “participation” in acts of violence. In the end, H.R. 1119 did not pass, but the contentious debate surrounding the wording of the terrorist exclusion provisions continued.⁶⁴

2. *The First Appearance of “Material Support”*

These formative legislative debates finally culminated in a new legal standard for prohibited aid to terrorists. In 1988, another bill, H.R. 4427, was introduced to reform the McCarran-Walter Act. The Immigration Exclusion and Deportation Amendments of 1988 would have excluded anyone from the United States who had “engaged in terrorist activity” or whom a consular officer had “reasonable ground[s] to believe is likely to engage after entry in any terrorist activity.”⁶⁵ H.R. 4427 did not define terrorist activity using what Representative Frank had termed the “criminal standard.”⁶⁶

It did not use “organizing, abetting, or participating”; instead, it used “material support.” It provided:

ENGAGE IN TERRORIST ACTIVITY DEFINED. – As used in this Act, the term “engage in terrorist activity” means to commit, in an individual capacity or as a member of an organization, an act of

61. *Id.* at 191. The Supreme Court had already rejected a First Amendment challenge to an exclusionary immigration policy. *See supra* note 47.

62. *See Exclusion and Deportation, supra* note 42, at 190-191 (comments by Rep. Mazzoli and William A. Rusher).

63. *Id.* at 295 (statement of David Cole, Center for Constitutional Rights). In his testimony on the Anti-terrorism and Effective Death Penalty Act in 1995, Cole used the African National Congress, the anti-apartheid group that had been labeled a terrorist organization by the United States, as an example of an organization that would be adversely affected by such broad language. *See Counterterrorism Legislation: Hearing Before the Subcomm. on Terrorism, Technology, and Government of the S. Comm. on the Judiciary, 104th Cong.* 63-64 (1995) (testimony of Prof. David Cole, Georgetown University Law Center).

64. At the end of the hearing, Representative Frank agreed with Representative Mazzoli to revisit the definition of terrorist activity. *Exclusion and Deportation, supra* note 42, at 190-193.

65. H.R. REP. NO. 100-882, at 3 (1988). Note that these changes closely track the questions and attacks on the language in the prior hearings.

66. *Exclusion and Deportation, supra* note 42, at 190.

terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

- (I) The preparation or planning of a terrorist activity.
- (II) The gathering of information on potential targets for terrorist activity.
- (III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.
- (IV) The soliciting of funds or other things of value for terrorist activity.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.⁶⁷

This was the first use in federal legislation of the phrase “material support” to provide sanctions for activities related to terrorism.

This definition was not a picture of clarity, and it provided little insight into exactly what Congress might have intended had it finally approved the “material support” language. The confusion stems primarily from the self-referential use of this new term. The definition used “material support” twice, once in its opening sentence and again in Subsection III.

In the most natural reading of the definition, the reference to material support in the first sentence does not appear to be a term of art. The word “material” is simply an adjective that describes the type of “support” that is prohibited – that which actually matters to a given “act of terrorist activity.” Just as only certain facts are “material” to a given case or on a particular issue, not every type of support was grounds for exclusion; only support “material” to a terrorist act would have been so sanctioned. Such a reading follows common dictionary definitions of “material,” such as “having real importance or great consequences.”⁶⁸

The problem with this interpretation of “material support” is that it would not work for the second use of “material support” in Subsection III. Subsections I-IV are a list of the acts that meet the “materiality” requirement laid out in the first sentence. The third type of act listed is “providing any type of material support.” Thus, one of the four categories of acts constituting “material support” is “providing material support.” If the first use of “material

67. H.R. 4427, §2(a).

68. MERRIAM-WEBSTER ONLINE DICTIONARY, www.m-w.com/dictionary/material.com; see BLACK'S LAW DICTIONARY 998 (8th ed. 2004) (“Having some logical connection with the consequential facts”).

support” means “consequential support,” the second use of the term is redundant.

It is possible to read the bill to avoid this redundancy. Doing so would require that the list of types of “material support” in Subsection III be distinct in some way from the list of acts described in Subsections I, II, and IV. For example, one could look at the subsection III as a list of objects, as opposed to actions, considered “material.” Upon close examination, however, that reading breaks down. Both Subsections II and IV include the transfer of physical objects (information⁶⁹ and funds), so there is no need to highlight the fact that Subsection III contains physical objects. Provision of any of the items in Subsection III would seemingly also be covered by subsection I, as the provision of goods such as safehouses and passports is integral to the planning of terrorist acts. There is simply no justification for treating the items in Subsection III differently from those in the other subsections.

This definition was incomprehensible. Either the second use of “material support” was redundant, or one had to bend over backwards to create phantom distinctions between the overlapping subsections. In addition, it was difficult to determine which approach to “materiality” was intended. Although there was no specific nexus requirement, no definition of materiality was provided. Moreover, the lists of what constitutes “material support” in §2(a) and Subsection III were inclusive, not exclusive, and there was no guidance as to what else they might have included.

The legislative history of the bill provides little information on how to resolve these questions. The House Judiciary Committee report on H.R. 4427 states that the changes in the definition of terrorist activity were important, primarily to “make it clear that mere membership in an organization, some members of which have engaged in terrorist activity, does not constitute an appropriate ground for exclusion.”⁷⁰ This was in direct contrast to Representative Frank’s comments the previous year that membership in the IRA would be sufficient proof to meet the more stringent definition of “engage in terrorist activity” included in his bill.⁷¹ In a later, confusing paragraph, the Committee went on to explain that this definition would cover

not only those who pull the trigger . . . but also those who provided logistical and other forms of specific support for these attacks. However, an alien would not be deportable under this legislation on

69. Information, obviously, is not necessarily a physical object, but intelligence reports on terrorist targets may also be stored and transmitted in a tangible form.

70. H.R. REP. NO 100-882, *supra* note 65, at 19. This statement was potentially inconsistent with the report’s specific references to the PLO, and to the report’s later statement that the fact that a member of the PLO is not an officer does not mean the individual is not a terrorist. *Id.* at 29-30.

71. *Exclusion and Deportation*, *supra* note 42, at 190-191. The Committee on the Judiciary seemed to reject Representative Frank’s reasoning, since it stated that “simple membership in any organization, including the PLO, is not *per se* an absolute bar to admission to the United States.” H.R. REP. NO. 100-882, *supra* note 65, at 30.

the basis of mere membership in an organization, some members of which have committed terrorist acts, if the alien has not committed or helped to commit such acts. Nor would an alien be deportable for having merely advocated terrorism. On the other hand, if the alien went beyond advocacy to incitement, conspiracy, or direct training, then he or she could be deported, provided the activity was unlawful.⁷²

The Committee claimed, however, that the definition would include “activities terrorists often find necessary for the accomplishment of their mission,”⁷³ with “necessary” activities including things as basic as the provision of food.⁷⁴ It is difficult to think of a membership activity more benign than providing food at a group meeting. If providing food at a meeting is covered by the exclusion, what aspects of “mere membership” are left outside it?⁷⁵

Rather than provide a workable definition of a new inchoate act related to terrorism, the report showed just how difficult and confusing it is to draw a line between protected associational activity and illegal terrorism. The self-referential definition of “engage in terrorist activity,” coupled with the Committee’s explanation, was the origin of one approach to this problem. While the sponsors did a poor drafting job, they sought to distinguish protected activity from prohibited support by analyzing the connection between the support provided and the terrorist act itself. In this nexus approach, if the support given advanced the terrorist activity in some way – if there was some link between the aid and terrorism – then that support was “material.” Some types of support, those enumerated in the four subsections, were considered “material.” Others types could be evaluated by immigration authorities, and, if necessary, the courts.⁷⁶ If, however, no link could be found between the support and terrorism, then that support was lawful no matter to whom it was given. It was the nexus to terrorist acts that made the provider of support subject to exclusion, rather than membership in a group that had engaged in terror.

Much of the confusion is understandable. Congress faced a fundamental problem. There clearly were some organizations whose goals were considered terrorist, whether they included political aims or not. H.R. 4427 would have excluded from the United States all members of these organizations, while not excluding members of other organizations, such as the African National Congress in South Africa, that had used violence on some earlier occasions.

72. H.R. REP. NO. 100-882, *supra* note 65, at 45.

73. *Id.* at 29-30.

74. *Id.* at 30.

75. *See, e.g., Singh-Kaur v. Ashcroft*, 385 F.3d 293, 300 (3d Cir. 2004) (alien ordered deported upon proof that he “furnished food and shelter” to those involved in terrorism).

76. The new law established judicial review of immigration exclusions for the first time. *Exclusion and Deportation*, *supra* note 42, at 97 (statement of John Scanlan on behalf of the American Association of University Professors).

Congress did not want to repeat the failures of the McCarran-Walter Act by replacing the old ideological exclusion provision with a new one, but it *did* want to exclude any member of the IRA or the PLO from the United States. Even Representative Frank, an ardent critic of the ideological exclusions of members of the Communist Party, argued that membership in these organizations was sufficient proof that one had abetted or, later, provided material support to terrorist activity.⁷⁷ Although Congress had not yet decided how to determine what was or was not a terrorist organization, it was trying to draft an exclusion that would catch all supporters of these organizations without relying on membership or ideology. As terrorist attacks on the United States increased, however, its reluctance to base exclusion or even criminal sanctions on membership and affiliation would dissipate.

3. *The Beginnings of a Shift Toward Targeting Specific Organizations*

Despite all the attention on crafting a working terrorist exclusion, H.R. 4427 did not pass. However, its formulation of “material support” survived. In 1990, Congress finally passed legislation rewriting the McCarran-Walter Act. The Immigration Act of 1990 did away with §212(a)(28)(F) and replaced it with a slightly modified version of H.R. 4427’s definition of “engage in terrorist activity.”⁷⁸ Subsection IV was amended to include the “soliciting of funds” for “terrorist organizations” as well as for “terrorist activity,” and Subsection V was added to include solicitation of individuals for “membership in a terrorist organization.”⁷⁹ Proposals by DOJ that simple membership in a terrorist organization be excluded from the bill’s reach were not incorporated.⁸⁰

The Conference Report on the Immigration Act made no reference to the bill’s use of “material support,” and it did not engage in convoluted explanations of who was meant to be included or excluded by the provision. It simply defined terrorism in relation to international treaties and 22 U.S.C. §2656(f)(d), and it provided this definition of a “terrorist organization”:

[O]ne whose leadership, or whose members, with the knowledge, approval, or acquiescence of the leadership, have taken part in terrorist activities A group may be considered a terrorist organization even if it has not conducted terrorist operations in the

77. *Id.* at 190-191 (questioning of Representative Barney Frank).

78. Immigration Act of 1990, Pub. L. No. 101-649, §601(a), 104 Stat. 4978, 5070.

79. *Id.*; see H.R. REP. NO. 101-955, at 99 (1990).

80. See H.R. REP. NO. 100-882, *supra* note 65, at 53, 58 (U.S. Dep’t of Justice Office of Legislative Affairs proposed language for the Immigration Act of 1990, including language similar to the old §212(a)(28)(F)); H.R. REP. NO. 101-955, *supra* note 79, at 98-99 (the final language of the bill does not include this provision).

past several years, but there is reason to believe it still has the capability and inclination to conduct such operations.⁸¹

The statute did not include a procedure for designating an organization as a terrorist organization. With only that brief explanation, the first sanction against “material support” to terrorist organizations became law.

It may seem unnecessary to recount in such detail the numerous battles surrounding the “material support” language in the 1990 immigration statute, rather than focusing on its primary current use in 18 U.S.C. §2339B, but these earlier disputes anticipate the current controversies surrounding §2339B. The tension between the rights of individuals and the necessities of terrorism prosecutions, and that between freedom of association and criminalizing contributions to dangerous organizations, existed long before the current war on terror. The “material support” language developed in the late 1980s and 1990s was an attempt to balance these competing interests and find a middle ground that accommodated both the government’s need to distinguish terrorist supporters from nonviolent political activists and citizens’ constitutional rights. The later development of criminal prohibitions on “material support” would lead to changes in the definition of “material support” and in the balance Congress struck between these values.

B. Migration: The Criminalization of Material Support in the Violent Crime Control and Law Enforcement Act of 1994

By the mid-1990s, the United States still did not have any substantive criminal statutes proscribing domestic terrorist acts generally. The FBI and other domestic law enforcement agencies relied on familiar criminal statutes to prosecute terrorists.⁸² The World Trade Center bombings in 1993 created a stir in Congress, however, and the next year Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which included what is now 18 U.S.C. §2339A, a prohibition on “material support to terrorists.” That provision criminalized material support to an individual when the provider

81. H.R. REP. NO. 101-955, *supra* note 79, at 131.

82. *Prepared Statement of Louis J. Freeh*, FEDERAL NEWS SERVICE (Lexis, News Library), Feb. 14, 1995 (“Since there presently is no statute specifically addressing terrorism, the FBI uses a number of criminal statutes which are applicable to such investigations, including conspiracy, money laundering, bombing, and kidnapping.”). Director Freeh was describing criminal trends over the past year. It was only in September 1994 that Congress imposed enhancements on sentencing for terrorist acts and created the specific criminal terrorism offense that is now codified at 18 U.S.C. §2339A.

knows or intends that the individual will commit certain crimes.⁸³ Material support was defined as:

currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not *directly involved* in such violations.⁸⁴

This definition reflected two important changes from the definition in the Immigration Act. First, it included financial transactions. Congress was beginning to focus on criminalizing terrorist fundraising. Additionally, Congress abandoned the nexus approach. The list in §2339A was exclusive, as Congress had eliminated the “including” language from the Immigration Act definition. Instead of an inclusive list that would allow judges to determine when support was “material” in relation to a terrorist act, Congress defined “material support” as a term of art. Items listed were “material,” even if they had little effect on terrorism; items not listed were not “material,” even if their potential aid to terrorists would be great.⁸⁵

A list-based approach to material support is not necessarily broader or narrower than the nexus approach used in Immigration Act. The breadth is determined by what is on the list. Given the number and variety of the items listed in §2339A, however, it is clear that Congress sought to make this a broad list.

This shift to a very broad definition of material support is not so drastic when seen in light of the other limitations included in §2339A. Although Congress eliminated the nexus requirement from the definition of material support, the statute’s strong scienter requirement created a de facto one. A person could violate §2339A only if she provided material support “knowing or intending that [the support is] to be used in preparation for, or in carrying

83. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §120005(a), 108 Stat. 1796, 2002 (1994) (codified at 18 U.S.C. §2339A) [hereinafter VCCA]. The offense was defined as follows:

(b) Offense. – A person who, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 36, 351, 844 (f) or (i), 1114, 1116, 1203, 1361, 1363, 1751, 2280, 2281, 2331, or 2339 of this title or section 46502 of title 49, or in preparation for or carrying out the concealment of an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

84. *Id.* (emphasis added).

85. Courts rejected attempts to make the list broader by reviving the nexus approach for items not listed. When the Seventh Circuit ruled on the issue, it stated that the list of items that constituted material support was both exclusive and conclusive in determining what constituted “material support.” *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002).

out” a specific violent crime or terrorist act. If the aid itself could not be linked to a specific criminal or terrorist act, then there was no violation of §2339A. Thus, there was no need for a nexus requirement in the definition of “material support” itself.

These changes represented the beginning of a paradigm shift in the U.S. approach to prosecuting those involved in terrorism. Advocates of a broad prohibition on the entry of potential terrorists had answered challenges to the appropriateness of such a provision by pointing out that it created no criminal liability. Congress’s reaction to the World Trade Center bombing was to enact a criminal prohibition that was even broader than the immigration exclusion. Terrorism was no longer something that was “over there” and that could be dealt with by using immigration laws to keep terrorists out of the country; it was a threat to the United States that required a strong response. Congress was now less interested than it had been in the mid-1980s in trying to determine what types of support should be banned or in tailoring a law to reach only those types of support. Rather, it attempted to criminalize all aid that could possibly support any terrorist activity.

Such a broad expansion of the criminal law made civil liberties groups nervous. Critics, worried about the potential abuse of the new law, moved to limit its scope. Their concerns were manifested in a statutory exception for humanitarian assistance to those not directly implicated in terrorist activity⁸⁶ and in severe statutory restrictions on investigations directed at possible violations of §2339A.⁸⁷ These restrictions prohibited any investigation within the United States unless there were facts reasonably indicating that the statute or some other federal law was or would soon be knowingly or intentionally violated.⁸⁸ Additionally, no investigations could be initiated based on activities protected by the First Amendment, including humanitarian and political donations to the nonviolent activities of any persons or groups.⁸⁹

86. *See supra* text accompanying note 84. There was no discussion of what constituted “direct” involvement, or of whether this was another variation upon the nexus requirement of the Immigration Act.

87. Pub. L. No. 103-322, §120005(a), 108 Stat. 2002.

88. *Id.* To ensure compliance with these regulations, the Department of Justice required the Director of the FBI to sign off on the initiation of any investigation concerning a violation of §2339A. *See* Attorney General’s Guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations, Mar. 2, 1994, *available at* <http://www.justice.gov/ag/readingroom/generalcrime.htm> and <http://www.justice.gov/ag/readingroom/generalcrimea.htm>.

89. Pub. L. No. 103-322, §120005, 108 Stat. 2002-2023; *see also* 140 CONG. REC. H8957, H8962 (Aug. 21, 1994) (statement of Rep. Edwards) (discussing identical language in the 1993 version of the bill: “The intent of the conferees is to provide a very narrow criminal statute for a very specifically defined category of acts in support of terrorism. This provision is not intended to authorize wide-ranging investigations of groups of activists in this country.”) [hereinafter Edwards Statement]. Representative Edwards was a conferee on both bills.

The 1994 measure provided:

(c) Investigations. –

(1) In General. – Within the United States, an investigation may be initiated or

Members of Congress also voiced concerns. Representative Edwards of California stated that the definition of material support contained a nexus requirement that limited the scope of the statute, saying that the intent of the conferees was to provide a “very narrow criminal statute for a very specifically defined category of acts in support of terrorism.”⁹⁰ He specifically distinguished the immigration definition of “material support,” saying there was no intent to criminalize lawful donations to charitable organizations. He cited overzealous FBI investigations of Muslims during the Gulf War, and said that “[t]his provision is not intended to authorize wide-ranging investigations of activists in this country.”⁹¹ These reservations did not prevail for long, however.

C. AEDPA and the Criminalization of Support to Foreign Terrorist Organizations

Although the terrorist bombing of the World Trade Center in 1993 generated some impetus for reform of U.S. anti-terrorism statutes, its impact paled in comparison to that of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. At the time of the latter bombing, President Clinton had already submitted to Congress the Omnibus Counterterrorism Act of 1995, a bill that was supposed to be a comprehensive response to the bombing of the World Trade Center.⁹² Senators Dole and Hatch, however, unsatisfied with the Clinton plan, soon introduced a bill of their own, the Terrorism Prevention Act.⁹³ The Dole/Hatch bill’s “short title” became the Antiterrorism and Effective Death Penalty Act of 1996

continued under this section only when facts reasonably indicate that –

(A) in the case of an individual, the individual knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law; and

(B) in the case of a group of individuals, the group knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law.

(2) Activities Protected by the First Amendment. – An investigation may not be initiated or continued under this section based on activities protected by the First Amendment to the Constitution, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.

90. Edwards Statement, *supra* note 89, at H8962.

91. *Id.* Representative Edwards specifically cited the *L.A. Eight* case, a well publicized controversy that concerned an effort to deport the members of a suspected terrorist cell in Los Angeles. In late 2007, the government finally abandoned its efforts to deport the last two defendants remaining in the case. Neil MacFarquhar, *U.S., Stymied 21 Years, Drops Bid To Deport 2 Palestinians*, N.Y. TIMES, Nov. 1, 2007, at 18; Henry Weinstein, *After 20 Years, U.S. Drops Efforts To Deport Men Accused of Ties to Palestinian Terrorists*, L.A. TIMES, Nov. 1, 2007, at B1.

92. Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 210-213 (1996).

93. H.R. REP. NO. 104-518, at 1 (1996) (Conf. Rep.).

(AEDPA).⁹⁴ As the first major anti-terrorism legislation after a large-scale domestic terrorist attack in the United States, it represented an unprecedented broadening of U.S. anti-terror laws. Congress's response included a broad definition of criminality in the context of terrorism and severe punishments for those convicted. "Material support" was a key element of the new policy.

1. Expansion of the "Material Support" Definition

The final version of AEDPA changed the definition of "material support" in 18 U.S.C. §2339A. Section 323 of the bill, entitled "Prohibition on Assistance to Terrorist States," read:

the term "material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.⁹⁵

This definition broadened the prohibitions on support to terrorism.⁹⁶ It also narrowed the exception for humanitarian assistance, so that it applied only to medicine and religious materials, and it eliminated the exception for support to those not directly involved in terrorism. In addition, AEDPA created an entirely new material support offense in 18 U.S.C. §2339B, the prohibition on material support to foreign terrorist organizations.

Even without the new §2339B provision, the changes in the definition of material support were significant. Dissenters to the House Judiciary Committee Report on the House version of the legislation,⁹⁷ noted, under the heading "Inclusion of Provisions Which Threaten Our Civil Liberties and Other Constitutional Rights," that

Current law already criminalizes the provision of material support for criminal terrorist activities (18 U.S.C. Sec. 2339A); so the legislation would criminalize support for humanitarian activities. Although H.R. 1710 includes a specific carve-out for the provision of medicine and

94. Pub. L. No. 104-132, 110 Stat. 1214. Since the relevant sections of AEDPA were later amended, as discussed *infra*, this section will use the numbers of the original sections of AEDPA, rather than the corresponding sections of the U.S. Code.

95. AEDPA §323.

96. The definition also added the word "resources" to the phrase "material support." This implied some distinction between support and resources. But it was functionally irrelevant, as it was followed by an exclusive list of items that constituted "material support or resources." *Id.*

97. The new definition of material support originated in the House version. The Conference report on AEDPA states that the Senate acceded to the wording of the House version (§103 of H.R. 1710). H.R. REP. NO. 104-518, *supra* note 93, at 114.

religious materials, it would still criminalize support for a variety of humanitarian services, such as school supplies.⁹⁸

In the context of 18 U.S.C. §2339A, this may not seem so significant, as the provision's nexus and *mens rea* elements required that the support be given to knowingly further a specific criminal terrorist act.⁹⁹ A larger issue arose when this same definition was used in 18 U.S.C. §2339B.

2. *The Adoption of 18 U.S.C. §2339B*

AEDPA criminalized any contribution of material support to a Foreign Terrorist Organization.¹⁰⁰ Title III, Subtitle A of AEDPA was entitled "Prohibition on Terrorist Fundraising." This subtitle included three sections. Section 301 stated Congress's purpose and findings. The purpose of the subtitle was simple and, compared to the uses of the statute today, relatively narrow: to prevent persons subject to U.S. jurisdiction from donating to organizations that engage in terrorist activity.¹⁰¹ Congress found no distinction between the lawful activities of terrorist groups and their terrorist acts. It stated that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct."¹⁰² Because of this, Sections 302 and 303 established a procedure for designating an organization as an FTO.¹⁰³ This procedure, now found in 8 U.S.C. §1189, requires the Secretary of State make a series of findings prior to designation, including (1) that the organization is foreign, (2) that it engages in terrorist activity (as defined confusingly in the Immigration Act discussed above), and (3) that its terrorist activity "threatens the security of United States' nationals or the national security of the United States."¹⁰⁴

None of the designation requirements addresses the Secretary's power to make these findings. There are no specific levels of proof or evidentiary requirements. The ramifications for the organizations, and those who support

98. H.R. REP. NO. 104-383, at 50 n.3 (1995). Notably, these "dissenting views" did not find their way into the conference report on the final bill, despite the fact that the bill included all of the same changes to the criminal material support statutes that were in the House version.

99. The Conference Committee Report noted as much in the explanation of section 323, where it explained that this was not a substantial broadening of §2339A. H.R. REP. NO. 104-518, *supra* note 93, at 114. Whether they were correct as a matter of law is, however, pure conjecture on my part. There are no cases prior to AEDPA discussing the *mens rea* requirement of 18 U.S.C. §2339A.

100. Professor Robert Chesney identifies the origin of these provisions as the International Emergency Economic Powers Act. Chesney, *supra* note 6, at 13-14. While he focuses broadly on the concept of criminalizing "support" for terrorist groups, my lodestar is the term "material support."

101. AEDPA §301.

102. *Id.* (emphasis added).

103. There are currently 44 organizations designated by the U.S. Government as Foreign Terrorist Organizations. See *supra* note 7 & accompanying text.

104. AEDPA §302.

them, are severe.¹⁰⁵ Once an organization is designated as an FTO, §303 of AEDPA criminalizes any and all material support knowingly given to that organization, with punishments of up to ten years in prison. AEDPA did not state whether the individual simply had to know that they were giving assistance, or whether they had to know they were giving it to a “terrorist” organization.¹⁰⁶ AEDPA also required financial institutions to freeze all of the organization’s assets in the United States.¹⁰⁷ In addition, the restrictions that cabined the FBI’s authority to investigate potential violations of 18 U.S.C. §2339A were not applied to §2339B. In any case, AEDPA eliminated those restrictions for §2339A.¹⁰⁸

This list-based approach was one solution to the dilemmas first identified during the debates on the Immigration Act of 1990. That act had excluded immigrants who had provided material support to terrorist organizations, but it did not contain any process for determining when an organization became a terrorist organization. AEDPA remedied this defect by establishing a specific procedure, reviewable in court, and requiring that the status of each organization be reviewed every two years.¹⁰⁹ In 1990, when the Immigration Act was passed and the prominent terrorist groups were the IRA and the PLO, determining whether an organization would be treated as a political organization or a terrorist organization was difficult. The PLO, despite its prominence in the mid-1980s congressional debates about terrorist exclusions, was never determined to be a terrorist organization for Immigration Act purposes.¹¹⁰ Both the PLO and IRA were sophisticated organizations with large political components. As terrorism became less related to specific political struggles and more dominated by a worldwide movement of violent jihadists, this line became clearer.¹¹¹ Al Qaeda rejects the entire international

105. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1132 (9th Cir. 2000) (“The provision has teeth.”); Eric Broxmeyer, Note, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT’L L. 439 (2004); James P. Fantetti, Comment, *John Walker Lindh, Terrorist? Or Merely a Citizen Exercising His Constitutional Freedom: The Limits of the Freedom of Association in the Aftermath of September Eleventh*, 71 U. CIN. L. REV. 1373 (2003).

106. This has been extensively litigated. It is now generally settled that an individual must knowingly give the aid and know that the organization is a designated FTO or has engaged in terrorist activity. See *Humanitarian Law Project v. United States Dep’t of Justice*, 352 F.3d 382, 399-401 (9th Cir. 2003). The Intelligence Reform and Terrorism Prevention Act of 2004 amended the statute to include and define a specific knowledge requirement. That statute is discussed below.

107. AEDPA §303(a)(2).

108. AEDPA §323.

109. AEDPA §302.

110. This could be because there was no specific process created for this designation under the Immigration Act.

111. For a description of modern terrorist networks, see MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS (2004). I do not deny that current terrorist networks have political goals, but these goals are different in scale and kind from those of mid-1970s Palestinian and Irish terrorists. The PLO and IRA sought specific political solutions to their

political system, and it has no interest in compromise with current political powers, in the West or the Middle East.¹¹² As critics of AEDPA were quick to illustrate, however, the fact that the line between potentially legitimate political organizations and FTOs was clearer than in the 1990s did not necessarily mean that the government was more capable of drawing it.

AEDPA implicated civil liberties concerns to a much greater extent than previous material support legislation. Section 2339B eliminated any nexus requirement because it criminalized all aid knowingly given to a designated organization, regardless of how the donor intended it to be used or how it was used in fact. The two things that limited §2339A, a high scienter requirement and a specific nexus requirement, were not present in §2339B. The ACLU testified to Congress that this provision

could have a dramatic, negative effect on organizations that would conduct relief activities in many troubled parts of the world. By barring individuals and organizations from providing even in-kind support to organizations the President has designated as “terrorist” organizations, the legislation could disrupt relief efforts encouraged by the U.S. government.¹¹³

Other commentators argued that the bill would unconstitutionally infringe on citizens’ First Amendment right to freedom of association, and increase the risk of FBI intrusion into persons’ lives.

disputes, and they worked within the international political system through actions such as Yasser Arafat’s speech at the United Nations. Osama bin Laden’s terrorist network largely eschews the international political system in favor of radical jihad against nearly all governments. (After the fall of the Taliban in Afghanistan, Osama bin Laden and al Qaeda may not support any existing government.) As some terrorist groups like Hamas diversify their activities and move back into politics, however, the difficulty in distinguishing between political groups and terrorist ones will increase. See Steven Simon & Jeff Martini, *Terrorism: Denying Al Qaeda Its Popular Support*, WASH. Q., Winter 2004-2005, at 136-137.

112. See OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* 56-57 (2004); ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 84-94 (2002) (discussing al Qaeda’s radical ideology); DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR: RADICAL ISLAM’S WAR AGAINST AMERICA* 412-413 (2003) (discussing the differences between the terrorism used by Palestinian terrorist groups and that pursued by al Qaeda).

113. *International Terrorism Threats and Responses: Hearings Before the H. Comm. on the Judiciary*, 104th Cong. 322 (1995) (statement of Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union). The election that brought Hamas to power in the Palestinian Authority made this problem acute. Both the European Union and the United States struggled with whether and how to continue their aid to the Palestinian Authority now that it is controlled by a designated terrorist organization. Steven Erlanger, *Lacking Mandate on Hamas Policy, Mideast Envoy May Quit*, N.Y. TIMES, Mar. 12, 2006, §1, at 10.

David Cole, who made similar arguments against the terrorist exclusion provisions of the Immigration Act of 1990, stated that

In fact, these bills would have wide-spread domestic impact on the civil and political rights of all persons living here, citizens and immigrants alike. By criminalizing constitutionally protected political activity, these bills would have the effect of authorizing – indeed, obligating – the FBI to investigate, infiltrate, and conduct surveillance on a myriad of domestic charitable, religious and political organizations that provide humanitarian aid and political support for organizations engaged in struggle abroad.¹¹⁴

Both the ACLU and Professor Cole were uncomfortable with giving the executive branch such broad authority to designate groups as “terrorist organizations,” analogizing the situation both to McCarthyism and the government’s prosecution of the NAACP during the Civil Rights movement.¹¹⁵

Congress was not persuaded. The House Committee on the Judiciary, in its report on H.R. 1710¹¹⁶ did not, as some courts later did,¹¹⁷ shy away from these risks. Rather, it stated: “The rights guaranteed by the First Amendment are also not absolute. Under our constitutional scheme of ordered liberties, no one can be absolutely free from reasonable governmental restrictions that protect the public in a broader sense.”¹¹⁸ The Committee found that terrorists were, under the “cloak of a humanitarian or charitable exercise,” engaged in substantial fundraising activities in the United States.¹¹⁹ Dismissing the idea

114. *The Constitutionality of Antiterrorism Legislation: Hearing Before the Subcomm. on Terrorism, Technology, and Government of the S. Comm. on the Judiciary*, 105th Cong. (1995), available at FEDERAL NEWS SERVICE (Lexis, News Library) (prepared testimony of Prof. David Cole, Georgetown University Law Center). Professor Cole’s predictions of action against purportedly religious and charitable organizations was correct, although I express no opinion about whether the organizations in question in these trials are in fact charitable organizations or terrorist fronts. *See, e.g.*, *Boim v. Quranic Literary Inst.*, 291 F.3d 1000 (7th Cir. 2002).

115. *International Terrorism Threats and Responses*, *supra* note 113.

116. *See* H.R. REP. NO. 104-383 (1995). This report was the source of the material support language later included in AEDPA.

117. *See, e.g.*, *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000).

118. H.R. REP. NO. 104-383, *supra* note 116, at 44. The Committee also cited the Supreme Court’s decision in *City of Houston v. Hill*, 482 U.S. 451, 471 (1987), for the proposition that, to some extent, public order was a prerequisite to the exercise of First Amendment rights. H.R. REP. NO. 104-383, *supra* note 116, at 43.

119. H.R. REP. NO. 104-383, *supra* note 116, at 43. The Committee’s discussion of how §2339B interacts with the First Amendment is worth quoting:

The First Amendment protects one’s right to associate with groups that are involved in both legal and illegal activities. The Supreme Court held in *Elfbrandt v. Russell*, 384 U.S. 11 (1966), that an individual cannot be restricted from joining such a group. The Court noted that, “[a] blanket prohibition of association with a group having both legal and illegal aims would pose a ‘real danger’ that legitimate political

that the law might infringe on rights of association, the Committee Report argued that §2339B did not criminalize membership, only donations, stating that §2339B:

recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.¹²⁰

The broad criminalization of "material support" was necessary, the report stated, to eliminate any possibility that FTOs might gain some financial benefit from operations in the United States.

In addition to Congress's attempts to reach terrorist financiers, it also sought to remedy a number of problems created by the language of §2339A. The old nexus requirement had created a great burden for prosecutors. Most terrorists do not prioritize accounting. There is often no "paper trail" by which a prosecutor can link money or a specific gift to a particular terrorist act.¹²¹ If there were such a trail, the records might be in places like Afghanistan or Lebanon, beyond the reach of U.S. courts. Did a donation pay for the most recent terrorist attack, or has it been dedicated to a future one? Did an individual provide bomb-making material that was already used or is simply stored somewhere? These types of evidentiary problems severely restricted the ability of prosecutors to secure convictions of those who were believed to be making donations to terrorist organizations.

The designation of FTOs provided a shortcut solution to both problems. By finding that FTOs are so tainted by their terrorist conduct that any

expression or association would be impaired." *Id.* at 15 (citing *Scales v. United States*, 367 U.S. 203, 229 (1961)).

It is important to recognize that *Elfbrandt*, and its progeny, however, are not implicated by Section 102 of H.R. 1710. This provision does not attempt to restrict a person's right to join an organization. Rather, the restriction only affects one's contribution of financial or material resources to a foreign organization that has been designated as a threat to the national security of the United States. The prohibition is on the act of donation. There is no proscription on one's right to think, speak, or opine in concert with, or on behalf of, such an organization. The basic protection of free association afforded individuals under the First Amendment remains in place. The First Amendment's protection of the right of association does not carry with it the "right" to finance terrorist, criminal activities.

Id. at 43-44. The Committee did not explain how this was consistent with the statute's prohibition on the provision of "personnel," a subject later clarified by the Intelligence Reform and Terrorism Prevention Act of 2004, discussed *infra*.

120. *Id.* at 81.

121. Cherie Krigsman, Address at the New York University Public Interest Law Center Monday Night Speaker Series (Oct. 25, 2004).

contribution made to them aided terrorism, there was no need to determine whether the specific aid was of a type that supported specific terrorist activity or that it did in fact support terrorist activity. Functionally, any interaction with a terrorist group was now “material support,” although the Committee repeatedly stressed that membership and advocacy had not been criminalized.¹²² Additionally, as long as something was material support, all the government had to prove was that it was knowingly given to a designated organization, not where the funds went after the donation. This greatly simplified prosecutors’ tasks.

On the other hand, using aid to an organization as a proxy for aiding an actual terrorist act necessarily confused the concept of “material support.” Material support became “financial support,” or, in reality, simply anything that provided financial assistance of any kind. Originally, “material support” could be understood by its relation to the terrorist act itself. To be material, it had to advance the terrorist act. Now, however, the support simply had to reach a designated organization. Section 2339B allowed criminalization of any support, no matter what it was, depending on the recipient. This begs a larger question: if all aid is fungible and any support of any kind aids terrorism, why retain the phrase “material support?”¹²³

122. The exclusion of advocacy shows that constitutional arguments, although relatively unsuccessful in the court system, may still influence Congress. Excluding advocacy does not make sense in light of Congress’s fungibility argument. Congress stated, and courts have later held, that pure advocacy, such as giving a speech in support of an organization, is not “material support.” Even this type of activity, however, generates benefits for terrorist organizations, either by defraying the cost of sending out its own advocates, providing free advertising and media coverage, or increasing membership (although openly soliciting membership is considered material support). Both Congress and the courts are likely interpreting the phrase to preserve a small carveout for pure advocacy and thereby avoid making the statute unconstitutional. This also highlights, however, that Congress’s rationale for the material support statutes is much broader than the types of activity it actually chooses to punish.

123. The role of the material support statutes as a way to attack financiers of terrorism was further confused after the United States ratified the International Convention of the Suppression of Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270. In its implementing legislation, the Terrorist Bombing Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721, 724-728, Congress created an additional crime aimed specifically at criminalizing terrorist financing. The new provision, 18 U.S.C. §2339C (Supp. V 2005), makes it unlawful to directly or indirectly raise funds with the intention or knowledge that they be used for terrorism. The overlap between §2339B and §2339C seems considerable, but discussion of that issue is beyond the scope of this article. The author is unaware of any prosecution yet brought under §2339C. However, courts have contrasted the presence of a specific intent requirement in §2339C with the absence of such a requirement in §2339B, and rejected defendants’ claims for a heightened intent requirement in §2339B. *See, e.g.,* United States v. Assi, No. 98 Cr. 80695, 2008 WL 906815 (E.D. Mich. Apr. 3, 2008) (rejecting claim that enactment of §2339C incorporated into §2339B the element of intent to affect government conduct); Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1132-1133 (9th Cir. 2008) (noting that Congress specifically declined to make intent to further the terrorist activity of an FTO part of the intent requirement in §2339B). For more information on U.S. implementation of the treaty, see H.R. REP. NO. 107-307 (2002). The full text of the convention is available at <http://untreaty.un.org/English/Terrorism/Conv12.pdf>. For a list of the parties and the status of their implementing legislation,

*D. Band-Aids: The Patriot Act and the Intelligence Reform
and Terrorism Prevention Act of 2004*

1. Reacting to September 11: The USA Patriot Act

Surprisingly, the largest terrorist attack on the United States did not prompt major revisions to the U.S. material support statutes. It is possible that AEDPA had already sufficiently broadened the statutes to meet the Justice Department's needs. In any event, September 11 provoked relatively small changes in §§2339A and 2339B. Its most important effect was to bring the definition of material support in the Immigration Act into line with the new criminal definition in AEDPA.

The USA Patriot Act,¹²⁴ passed soon after September 11, contained two primary revisions to U.S. material support statutes. Section 411 revised the definition of terrorist activity in 8 U.S.C. §1182, eliminating the confusing, redundant definition from the Immigration Act of 1990. Section 805 added one additional category to the list of prohibited acts of "material support" in the criminal statutes, that of expert advice or assistance.

Section 411 of the Patriot Act replaced the definition of "engage in terrorist activity" in 8 U.S.C. §1182. Two aspects of the original definition had been problematic. First, it contained redundant usages of the term "material support." Second, because it enumerated an inclusive, rather than a conclusive, list of what constitutes material support, it implied that there must be some nexus between the support itself and the terrorist activity. In the Patriot Act, Congress addressed the first of these problems, but not the second. Congress clarified "material support" in the immigration context by eliminating the redundant use of the phrase. "Material support" is now only a subset of "engag[ing] in terrorist activity." Thus, for Immigration Act purposes, preparation, planning, and fundraising for terrorist activities are now distinct from the provision of "material support." Such acts independently justify exclusion of an immigrant from the United States.¹²⁵

see <http://untreaty.un.org/English/TreatyEvent2003/index.htm>.

124. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

125. *Id.* at §411(a)(1)(F), 115 Stat. 346-347. The new language reads:
ENGAGE IN TERRORIST ACTIVITY DEFINED.—

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization —

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for —

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can

This change eliminated some of the incongruities in the Immigration Act definition, but it raised further questions about material support as a legal concept. The immigration provisions now distinguish fund raising, information gathering, and other activities from material support, but they create problems for a uniform interpretation of the concept in Title 8 and Title 18. When the criminal prohibition of “material support” to terrorists in 18 U.S.C. §2339A was originally drafted, it encompassed all these activities under a broad conception of material support derived from the Immigration Act. In the criminal law, fundraising for and providing information to terrorists are considered “material support” of terrorist activity. After the Patriot Act, the Immigration Act distinguishes these activities from material support for terrorism. Thus, the same activity can constitute “material support” in the criminal context but not in the immigration context. In addition, Congress added the concept of “material financial support” alongside “material support” in the immigration context. This addition, by choosing “material financial support” over simple “financial support,” reinforces the idea of a nexus; it implies that there has to be a relationship to a terrorist act or group that shows the support was material. That idea was specifically rejected in the criminal context by AEDPA. Although §411 substantially clarified Title 8’s material support provisions, it did little to clarify what “material support” should mean as a legal concept.

-
- demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization’s terrorist activity;
- (V) to solicit any individual –
- (aa) to engage in conduct otherwise described in this clause;
 - (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
 - (cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization’s terrorist activity; or
- (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training –
- (aa) for the commission of a terrorist activity;
 - (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
 - (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or
 - (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity.
- This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.

This confusion has manifested itself in the courts. In 2004, the Third Circuit decided *Singh-Kaur v. Ashcroft*.¹²⁶ Singh-Kaur is an immigrant who had lived in the United States for nearly a decade. He is a Sikh who, upon arrival, had applied for political asylum. After living in the United States for many years, he applied for a change of status to become a lawful permanent resident. His change of status was denied on the basis that he had “engaged in terrorist activity” as a member of Babbar Khalsa, an organization of militant Sikhs.¹²⁷ Singh-Kaur’s alleged terrorist activity was providing food and tents for a religious meeting of Babbar Khalsa.¹²⁸

The majority held that Singh-Kaur was excludable because the enumerated list of prohibited types of “material support” could include such things as food and tents. The court did not discuss whether the statute required a showing of materiality in relation to the acts of terrorism, or how to determine whether a non-listed type of support should be a basis for exclusion.¹²⁹ The court said, “Use of the term ‘including’ suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories.”¹³⁰

The dissent found the statutory language to be ambiguous. Using a strong version of the nexus approach, Judge Fisher argued that the court should

126. 385 F.3d 293 (3d Cir. 2004).

127. Singh-Kaur was not excludable on the basis of being a member of these organizations, because at the time he applied for a change of status Babbar Khalsa was not designated as a Foreign Terrorist Organization. *Id.* at 297; *see also* In re Changareet Singh-Kaur, File A29 932 930 – Philadelphia, 2004 WL 1167312 (Board of Immigration Appeals 2004) (unpublished opinion). As of this writing, Babbar Khalsa is not designated as a FTO.

128. *Singh-Kaur*, 385 F.3d at 295-296.

129. The court in *Singh-Kaur* was reviewing a judgment of the Board of Immigration Appeals (BIA), so it was not directly interpreting the statute, but instead evaluating whether or not the BIA’s determination that Singh-Kaur’s actions amounted to material support of terrorist activity was “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 299. The main findings of the BIA were as follows:

We find that the respondent’s actions, including providing food and the organization and setting up of tents (shelter), constitute material support. The material support itself can be, but does not have to be, part of a violent act. As the statute indicates, it can be as minor as providing money, shelter, or transportation. *See* section 212(a)(3)(B)(iv)(VI) of the Act. The statute does not require that the support be given at the moment that a violent act is in process, but indicates that such support can be given to an individual who is known to have committed or plans to commit a terrorist activity. *See* section 212(a)(3)(B)(iv)(VI)(bb) of the Act. Although the respondent here testified that he did not keep the weapons that the militants were transporting, he did enable their activities by providing the Babbar Khalsa militants with sustenance and lodging. The respondent knew, at the time that he offered assistance, that the Babbar Khalsa militants, whom he assisted, were transporting weapons and that they were “involved in terrorist activities.”

In re Changareet Singh-Kaur, File A29 932 930 – Philadelphia, 2004 WL 1167312 (Board of Immigration Appeals 2004).

130. *Singh-Kaur*, 385 F.3d at 298. This is exactly the opposite of the way the courts had been interpreting the list of items constituting “material support” in the criminal context. *See* Boim v. Quranic Literary Inst., 291 F.3d 1000, 1027 (7th Cir. 2002).

interpret the statute to give meaning to each word used by Congress, and that it should find some meaning for “material” in the phrase “material support.”¹³¹ He argued that the enumerated prohibited acts were ones Congress had found to be material, but that for non-enumerated ones the courts must determine whether they provided the requisite level of materiality.¹³² To add to the confusion, both sides looked to the differences between the definitions in the Immigration Act and the criminal material support provisions to strengthen their arguments. The majority argued that interpreting the immigration provision to require some sort of nexus would make it narrower than the criminal statute, an absurd result.¹³³ The dissent argued that, as the definition in §2339A includes numerous issues not in the Immigration Act definition, Congress purposefully excluded those items from the immigration definition.¹³⁴

The *Singh-Kaur* decision exemplifies the legal problems that may result when Congress does not take a uniform approach to what has become a legal term of art. Both the majority and the dissent attempted to compare the definition in front of them, which was ambiguous, to the definition of material support in the criminal code. Both were left with little guidance, as the differences between the definitions raised more questions than answers. Although the USA Patriot Act sought to modify the immigration provisions for clarity, the failure to create a uniform interpretation of what “material support” is continues to create confusion.¹³⁵

Section 805 of the Patriot Act made one additional change to the material support statutes. It expanded the prohibitions in §§2339A and 2339B once again. Section 805 added another category – “expert advice and assistance” – to the list of prohibited items in the statutory definition of “material support.” Although there was practically no debate on this item, it would

131. *Singh-Kaur*, 385 F.3d at 303-304 (Fisher, J., dissenting).

132. *Id.* at 305-306 (Fisher, J., dissenting). The materiality determination is an objective one, not an evaluation of the donor’s intent. On this point, Congress was clear. The Patriot Act “broadens the definition of a terrorist ‘engaging in a terrorist activity’ to include anyone who affords material support to an organization that the individual knows or should know is a terrorist organization, regardless of whether or not the purported purpose for the support is related to terrorism.” 147 Cong. Rec. H7198 (Oct. 23, 2001) (House Committee on the Judiciary section-by-section analysis of H.R. 3162).

133. *Singh-Kaur*, 385 F.3d at 299 (majority opinion) (“Second, it would be incongruous to conclude that a person who provides food and sets up tents for terrorists could be jailed for up to life under 18 U.S.C. §2339A, but the same conduct could not prohibit admission to the United States under INA §212.”).

134. *Id.* at 305 (Fisher, J., dissenting). The legislative history shows that Congress’s approach to “material support” has been anything but purposeful.

135. Prior to the Intelligence Reform and Terrorism Prevention Act (IRTPA), this specific dispute was unlikely to arise in the criminal context, since courts had interpreted §2339A to be a complete enumeration of everything constituting “material support or resources.” See *Boim*, 291 F.3d at 1015. After IRTPA, however, the list in §2339A is an inclusive list, so the probability that a dispute will arise similar to that in *Singh-Kaur* is much greater.

become important to post-Patriot Act challenges to the material support provisions.¹³⁶

2. *Legal Challenges to the Material Support Statutes:
Fallout from the Legal War on Terror*

September 11 brought about not just the Patriot Act, but also a new counterterrorism strategy from DOJ. DOJ's new mission focused on preventing, rather than punishing, terrorism, and thus required prosecution of persons before terrorist acts were committed.¹³⁷ The material support statutes became the primary tool to accomplish that mission.¹³⁸ The increased focus on civil liberties after the Patriot Act and the increase in prosecutions under anti-terrorism laws sparked a number of legal challenges to the criminal material support statutes.

Many of these challenges began prior to September 11, but they became increasingly important after passage of the Patriot Act. The major prohibitions on material support were included in AEDPA in 1996. In 2000, the Ninth Circuit heard a challenge to those provisions. In *Humanitarian Law Project v. Reno*, the Ninth Circuit struck down the prohibitions on "training" and "personnel" in the definition of "material support" as unconstitutionally vague.¹³⁹ In *Humanitarian Law Project*, the plaintiffs were members of a humanitarian organization that provided legal assistance to the Kurdistan Worker's Party ("PKK"), a designated FTO, and doctors who wished to provide medical training to the Tamil Tigers, another FTO. They sought to enjoin the enforcement of 18 U.S.C. §2339B. The plaintiffs argued that the broad prohibitions on fundraising, personnel, and training in AEDPA prevented them from associating with the PKK and the Tigers, violating their First Amendment rights.¹⁴⁰ The government argued that because all donations were fungible, the purpose of the training provided was irrelevant. The court accepted the government's fungibility argument and found no First Amendment right to make contributions to organizations,¹⁴¹ but it also held that the terms "training" and "personnel" were too nebulous to provide

136. See H.R. REP. NO. 107-236, pt. 1 (2001).

137. See *supra* Part I.B.

138. *Id.*

139. 205 F.3d 1130 (9th Cir. 2000), *vacated in part*, 393 F.3d 902 (9th Cir. 2004) (remanding for consideration in light of IRTPA). The district court, on remand, held that IRTPA's definition of "personnel" was constitutionally permissible, but that the new definitions of "training," "service," and portions of the definition of "expert advice and assistance," were unconstitutional. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1148-1153 (C.D. Cal. 2005). The Ninth Circuit affirmed. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (2007).

140. *Humanitarian Law Project*, 205 F.3d at 1133 ("Plaintiffs try hard to characterize the statute as imposing guilt by association.").

141. *Id.* at 1136 ("More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.").

sufficient notice as to the activities proscribed by the statute.¹⁴² As the use of the statute by the government expanded, *Humanitarian Law Project v. Reno* became the foundation for most post-September 11 challenges to the material support statutes.¹⁴³

Most of these challenges failed, but the courts conclusively agreed that Congress had abandoned the nexus approach in the criminal material support statutes. In *Boim v. Quranic Literary Institute*, the Seventh Circuit dismissed an attempt by the district court to define “material” in “material support.” It stated:

The statute itself defines “material support or resources” Thus, the term relates to the type of aid provided rather than whether it is substantial or considerable. . . . Congress’ goal of cutting off funding for terrorism would be seriously compromised if terrorist organizations could avoid liability by simply pooling together small donations to fund a terrorist act.¹⁴⁴

Prior to the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), §2339B did not use the word “including.” From the statute’s creation through the amendments included in the Patriot Act, §2339B was written as an exclusive list. In practice, however, this distinction was not that important. The list includes nearly every conceivable type of support, regardless of its actual effect on terrorism. It is hard to imagine a defense based on the fact that what was provided was not tangible property, intangible property, or a service.

The Ninth Circuit also continued to hold that the training and expert advice and assistance phrases were too vague. The same organization that had challenged AEDPA in the Ninth Circuit challenged the “expert advice and assistance” language of the Patriot Act.¹⁴⁵ Again, a federal court found that these prohibitions were unconstitutionally vague, and that this vagueness potentially chilled protected First Amendment activities.¹⁴⁶ The Ninth Circuit was also joined by a court in the Southern District of New York which held that the statutory prohibitions on provision of “personnel” and

142. *Id.* at 1137-1138.

143. *See, e.g.*, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002); *see also* *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (holding that 18 U.S.C. §2339A does not violate the First Amendment); *Humanitarian Law Project v. United States Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003) (finding that 18 U.S.C. §2339B does not violate the Fifth Amendment if the government proves a specific intent to aid a designated foreign terrorist organization).

144. *Boim*, 291 F.3d at 1015.

145. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). This decision was vacated and remanded for consideration in light of IRTPA. *Humanitarian Law Project v. U.S. Dep’t of Justice*, 393 F.3d 902 (9th Cir. 2004).

146. *Humanitarian Law Project*, 309 F. Supp. at 1201, *aff’d*, *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

“communications equipment” were unconstitutionally vague as applied to the defendants.¹⁴⁷

3. *The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)*¹⁴⁸

The material support provisions of IRTPA sought to address the problems that had been highlighted by the courts. On May 5, 2004, Congress held a hearing on these provisions. Senator Leahy, quoting former Assistant Attorney General Viet Dinh, a drafter of the USA Patriot Act, described Congress's mission in redrafting the material support provisions. It was the same mission that Congress had struggled with since the Immigration Act:

I think we can all agree that there are certain core activities that constitute material support for terrorists, which should be prohibited, and others which would not be prohibited. Congress needs to take a hard look and draw the lines very clearly to make sure that we do not throw out the baby with the bath water.¹⁴⁹

Despite the opportunity to redraft the statute, Congress chose to fill holes rather than to address the fundamental problems.

IRTPA made three changes to the criminal material support provisions. First, it reworded the entire definition, sharpening its focus on the two broad categories of property and services.¹⁵⁰ At hearings, the government had

147. *United States v. Sattar*, 272 F. Supp. 2d 348, 360-361 (S.D.N.Y. 2003). *But see* *United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002) (rejecting *Humanitarian Law Project*). In a later opinion, the *Sattar* court rejected numerous additional challenges to 18 U.S.C. §2339B based on vagueness and the First Amendment right of association. *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004).

148. Pub. L. No. 108-458, 118 Stat. 3638. The full impact of IRTPA on the material support statutes is yet to be determined. The prophylactic changes to the definition of material support that are discussed in this section were originally scheduled to expire on December 31, 2006, but the deadline was later extended to December 31, 2009. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §103, 120 Stat. 192, 195 (2006). Moreover, IRTPA extended the jurisdiction of the material support statutes to persons who are “brought into or found in” the United States after the conduct necessary for the offense occurs, even if the conduct occurred outside of the United States. IRTPA §6603(d)(1)(C). That potentially would allow the government to charge individuals, such as those held in Guantánamo, with material support crimes that occurred outside the United States. It is clear from IRTPA that the government would like to be able to use §2339B against anyone even remotely linked to terrorism.

149. *Oversight Hearing*, *supra* note 13 (written statement of Sen. Leahy).

150. IRTPA §6603(b) (“the term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”).

warned that there was a risk that some types of support for terrorism were not covered by the prior definition of material support. Assistant Attorney General Daniel J. Bryant suggested a solution:

Consequently, the department would support clarifying the scope of the statute in this regard to ensure that all terrorist acts are covered, and we'd be happy to work with Congress toward that end. In addition, Congress may wish to consider revising the definition of material support or resources. The types of property and services specifically enumerated in this definition potentially may not include all of the possible types and forms of support that could be given to terrorists, or to foreign terrorist organizations.¹⁵¹

This was a direct response to the listing approach the Congress had taken in AEDPA and the USA Patriot Act. There was a risk that a person could specifically aid terror but avoid the statute because the type of aid had not been contemplated by Congress. Congress acquiesced, and the present scheme criminalizes support neither because it is of a specific type (as everything conceivable is listed) nor because of its relationship to terrorism (as the nexus approach has been abandoned), but because of the identity of the recipient of that support.

IRTPA also added specific definitions of “expert advice and assistance” and “training” to the definition of “material support” in §2339A – a response to the decision in *Humanitarian Law Project v. Reno*.¹⁵² Finally, the statute added an explicit intent requirement to 18 U.S.C. §2339B.¹⁵³ To violate §2339B, a person must “must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section

151. *U.S. Senator Orrin G. Hatch (R-UT) Holds Hearing on Aiding Terrorists*, FDCH POLITICAL TRANSCRIPTS (Lexis, News Library) (May 5, 2004); see also *Oversight Hearing: Aiding Terrorists – An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (written statement of Daniel J. Bryant, Asst. Att’y Gen.), available at http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3392.

152. Courts are divided on whether these provisions are unconstitutional even after IRTPA. Compare *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005) (holding the statute unconstitutional), with *United States v. Assi*, 414 F. Supp. 2d 707, 717-719 (E.D. Mich. 2006), and *United States v. Marzook*, 383 F. Supp. 2d 1056, 1065-1066 (N.D. Ill. 2005) (holding that the material support statutes are not overbroad or impermissibly vague).

153. Much of the post-IRTPA litigation concerning the material support statutes has concerned whether this intent requirement is sufficient to satisfy the Fifth Amendment. See *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d at 1148-1149; *United States v. Assi*, 414 F. Supp. 2d at 717. A district court in Ohio noted that the definition of “terrorist organization” in the intent section of §2339B is significantly different from, and broader than, that of the substantive offense. See *United States v. Abdi*, 498 F. Supp. 2d 1048, 1064-1065 (S.D. Ohio 2007).

212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).”¹⁵⁴ This codified the intent requirement that a majority of courts had read into the statute, and highlighted the differences between §2339A and §2339B. To violate §2339A, one must intend or know that the provided support will further a specific terrorist act. To violate §2339B, one only has to know that a group is listed or has engaged in any terrorist activity in the past. These changes addressed some of the difficulties that courts had seen regarding the potentially broad sweep of §2339B, but they did little to clarify the meaning of the term “material support.” Early decisions show that the dispute over the constitutionality of the material support statutes in the courts will continue.

E. Where We Are Now

The short history of the material support statutes documents numerous changes to the wording of the statutes, and in the justifications given for their structure, but two major themes are clear. First, the material support statutes are an attempt to create a specific inchoate crime for terrorism, aimed especially at financiers.¹⁵⁵ The goal of the statutes is to criminalize the earliest stages of terrorist activity, in other words, to create a crime of “being a terrorist.”¹⁵⁶ Second, the focus of the current statutory scheme is on the recipient, as represented by the FTO. What is not clear is whether this approach is the best way to use the criminal law to combat terrorism.

The fundamental policy problem for Congress in creating the “material support” prohibitions has not changed – how to create an acceptable legal line between criminal support for terrorism and the legitimate exercise of protected First Amendment speech and association rights.¹⁵⁷ Initially, it was thought

154. IRTPA §6603(c). This section was a response to court decisions that required specific intent to further the organizations illegal activities, not simply to aid the organization. *See United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1296 (M.D. Fla. 2004). It is notable that the *Al-Arian* court was concerned about the constitutional problems that would arise if a minimal mens rea requirement was applied. In IRTPA, Congress adopted a mens rea requirement of the type that the *Al-Arian* had rejected because of the constitutional questions it raised. *Id.* at 1299. Numerous other courts have considered the same challenge to the statute and rejected it. *See United States v. Paracha*, No. 03 Cr. 1197, 2006 U.S. Dist. LEXIS 1, at 24-30 (S.D.N.Y. 2006) (citing numerous decisions rejecting constitutional challenges to Section 2339B). *Al-Arian* was decided prior to IRTPA; *Paracha* came after it so the only issue was whether the mens rea requirement adopted by Congress met constitutional standards.

155. The counterterrorism manual for government prosecutors specifically contemplates using inchoate crimes to prosecute persons who attempt to provide aid to a domestic front organization for an FTO even when none of the domestic front's money is ever provided to the FTO. BREINHOLT, *supra* note 12, at 279-280.

156. *Id.* at 264.

157. I am speaking of this balance primarily as a political, not a legal problem. The history of the material support statutes in the courts makes it clear that what has been dubbed the “associational rights” critique has been unsuccessful. That legal challenges to the material

that “material support” might strike this balance by requiring some sort of linkage between the support and the terrorist activity of an individual or organization. As terrorism has increasingly hit home, however, Congress has repeatedly broadened the statute, moving to an approach that lists specific types of prohibited support. The current approach, exemplified by IRTPA, is to categorize almost everything as material support, but to criminalize it only when given to listed recipients. As of today, Congress has listed nearly every conceivable type of support as prohibited. It is only prohibited, however, when given to someone known to be or likely to become a terrorist.

An individually-focused nexus approach such as that utilized in §2339A creates practical problems that help explain the increasing reliance on §2339B. First, and most importantly, §2339A could not adequately address the fact that donations to sophisticated terrorist organizations may be fungible to a large extent. Many terrorist organizations engage in humanitarian efforts, and they have developed sophisticated ways to move money and assets to hide their ultimate purpose. Donations of food or supplies, for example, allow these organizations to allocate more money to their terrorist activities by offsetting the cost of other activities. Additionally, the nexus approach is not as preventive as the organization-based approach. For there to be a nexus, the support must be linked to a specific terrorist attack. Thus, under the nexus approach, in order to prosecute the financiers of a terrorist plot (rather than its direct participants), the government must wait until the plot develops sufficiently that various types of support can be linked to the plan. The government will not and should not have to wait until terrorist attacks are imminent in order to prosecute supporters of terrorism, yet it will often be difficult to use §2339A successfully at an early stage of the terrorist planning. Finally, the nexus approach raises difficult issues of proof. Prosecutors must prove that support was given by a defendant who knew or intended that it would be used for a specified type of terrorist attack – a difficult, if not impossible, prospect.

Although the reasons for the government’s move away from the nexus approach to an approach focused on the recipient of the aid are clear, what is not clear is whether this alternative effectively targets terrorists. While analysis of how past terrorists attacks occurred is crucial to designing laws that will prohibit similar attacks in the future, laws, especially those as important as the material support laws, cannot be purely reactionary. By focusing only on past attacks and repeatedly emphasizing breadth, there are significant holes in the criminal prohibitions on terrorism. “Material” has been read out of the material support statute. A list-based approach is only

support statutes have failed, however, does not mean that the civil rights issues raised are irrelevant. Congress clearly has considered civil liberties in legislating about support to terrorist organizations. Going forward, it would be imprudent to ignore the civil liberties concerns of both Congress and the courts when seeking to revise the statute. If the statute unnecessarily implicates civil liberties concerns, this may not infringe constitutional rights but still may be disadvantageous as a matter of policy.

effective if a particular threat is reflected in the list. Under the current approach, the government uses two lists, a list of prohibited support and a list of prohibited recipients. Congress has repeatedly broadened the former list, but done little to address the problems with the latter. Individuals supporting new or unrecognized groups are not covered by §2339B. The ability to prosecute new offshoots of the global jihad is predicated on prosecutors' ability to link those new or unrecognized groups to official, listed organizations.

In addition, Congress's broadening of the definition of material support has significant costs. The very scope of the material support laws leaves them open to constitutional challenges in almost every case. These challenges raise the costs of prosecuting terrorist suspects, ensure that most convictions will not be final for years, and introduce difficult legal issues for juries that can detract from crucial fact finding.

III. THE PROBLEMS OF AN ORGANIZATION-FOCUSED SYSTEM

The main legal argument leveled against the material support statutes is that they are overbroad and criminalize association with political groups based on their views. David Cole strenuously made this argument to Congress prior to the revisions of the Immigration Act and in hearings on the Patriot Act.¹⁵⁸ This controversy has become particularly acute as some organizations labeled FTOs have diversified their operations into the humanitarian and political spheres.¹⁵⁹ Both Congress, as a matter of policy, and the courts, as a matter of law, have clearly rejected this argument. The House Judiciary Committee rejected it explicitly prior to adoption of AEDPA,¹⁶⁰ and the courts rejected it later when they considered constitutional challenges to AEDPA.

The Ninth Circuit, which has been more skeptical than other courts in its review of the material support statutes, took a pass when it was asked to decide whether AEDPA restricted freedoms protected by the First Amendment, stating:

Congress explicitly incorporated a finding into the statute that "foreign organizations are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." It follows that all material support given to such organizations aids their unlawful goals. Indeed, as the government points out, terrorist

158. See *supra* note 63 and accompanying text & note 114 and accompanying text; see also David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203 (1999).

159. See generally INTERNATIONAL CRISIS GROUP, ISLAMIC SOCIAL WELFARE ACTIVISM IN THE OCCUPIED TERRITORIES: A LEGITIMATE TARGET?, ICG MIDDLE EAST REPORT NO. 13 (April 2, 2003), available at <http://www.crisisgroup.org/library/documents/reportarchive/A40093302042003.pdf>.

160. See *supra* note 119.

organizations do not maintain open books . . . even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. . . . We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that the AEDPA is not sufficiently tailored.¹⁶¹

This case was decided prior to September 11, and it is unlikely that the statutes will face stiffer resistance today.¹⁶²

The more fundamental problem with the FTO approach embodied in §2339B is that it misdiagnoses the terrorist threat to the United States. A statutory scheme that criminalizes “material support” based on the identity of the recipient must be certain that it defines the category of forbidden recipients accurately. The greatest terrorist threat to the United States does not come from structured, hierarchical terrorist *organizations*; rather, it comes from a global *movement* of fundamentalist Islamic militants. Many of these militants are not affiliated with designated FTOs, while others provide support to a number of groups in an ever-shifting web of terrorist financing. Even if the statute’s focus on organizations is constitutional, it may not be the most effective way to address the terrorist threat to the United States.

A. *Defining the Evolving Terrorist Threat*

A common misconception about terrorist groups is that they are highly organized groups with members and representatives. Matthew Levitt, a Senior Fellow in Terrorism Studies at the Washington Institute for Near East Policy and a former FBI Counterterrorism analyst put it this way: “Too often people insist on pigeonholing terrorists as members of one group or another, as if such operatives carry membership cards in their wallets. In reality, much of the ‘network of networks’ that characterizes today’s terrorist threat is informal and unstructured.”¹⁶³ Congress was laboring under the type of misperception described by Levitt when it crafted §2339B as part of AEDPA. Although the text of §2339B speaks only of contributions to FTOs, the new immigration provisions in AEDPA excluded “members” and “representatives” of FTOs.¹⁶⁴ A representative was defined as “an officer, official, or spokesman of an organization, and any person who directs, counsels,

161. Humanitarian Law Project v. Reno, 205 F.3d at 1136 (citations omitted).

162. So far, the successful challenges to the material support statutes have been on vagueness, not First Amendment grounds. See *supra* note 153.

163. Matthew Levitt, *Untangling the Terror Web: Identifying and Counteracting the Phenomenon of Crossover Between Terrorist Groups*, SAIS REVIEW, Winter-Spring 2004, at 34; see also Scott Atran, *A Leaner, Meaner Jihad*, N.Y. TIMES, March 16, 2004, at A27.

164. AEDPA §411.

commands, or induces an organization or its members to engage in terrorist activity.”¹⁶⁵

This approach was rooted in history. In the early 1960s and 70s, when international terrorism was becoming prominent on the international scene, most terrorist groups were relatively bureaucratic. They had a clearly delineated structure, and were organized around a specific hierarchical command.¹⁶⁶ Newer organizations, however, lack these characteristics. In groups such as al Qaeda terrorist operatives “are part of a network that relies less on bureaucratic fiat and more on shared values and horizontal coordination mechanisms.”¹⁶⁷ These groups lack formal structures, instead consisting of “cells” that appear and disappear over time.

Networked organizations differ from traditional organizations in three basic ways. First, communication and coordination are not specified by structured relationships, but vary according to the task at hand.¹⁶⁸ Second, internal group networks are complemented by relationships outside of the group. In other words, small networks communicate with larger networks.¹⁶⁹ Finally, internal and external ties are not created by bureaucratic fiat, but by shared values and reciprocal trust.¹⁷⁰ These distinctive organizational characteristics give networks properties that differ from traditional organizations. Networks are incredibly dynamic. As personal relationships evolve, so does the composition of the network.¹⁷¹ Most importantly, large parts of the network may expand spontaneously, through linkages with willing individuals anywhere, rather than by active solicitation on the part of the existing network.¹⁷²

Over the past twenty years, terrorist groups have been trending toward network forms of organization.¹⁷³ The most recent wave of terrorism has sprung out of a worldwide terrorist movement, not at the direction of one individual or organization.¹⁷⁴ Newer terrorist groups, such as The Islamic

165. *Id.*

166. NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY 32 (John Arquilla & David Ronfeldt eds., 2001) available at <http://www.rand.org/publications/MR/MR1382/>; see also Gil Arieli, *Knowledge: The Thermonuclear Weapon for Terrorists in the Information Age*, available at <http://www.ict.org.il/articles/articleDet.cfm?articleid=465>; JOHN ARQUILLA & DAVID RONFELDT, THE ADVENT OF NETWAR 68 (1996), available at <http://www.rand.org/publications/MR/MR789/>.

167. NETWORKS AND NETWARS, *supra* note 166, at 33; see also GUNARATNA, *supra* note 112, at 54, 76.

168. NETWORKS AND NETWARS, *supra* note 166, at 31.

169. *Id.*

170. *Id.* at 31-32

171. SAGEMAN, *supra* note 111, at 139.

172. *Id.* at 142.

173. ARQUILLA & RONFELDT, *supra* note 166, at 24.

174. See generally SAGEMAN, *supra* note 111 (Chapter Four argues that the global jihad is comprised of several small, loosely linked terrorist networks); see also David C. Rapoport, *The Four Waves of Modern Terrorism*, in ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 46-73 (Audrey Kurth Cronin & James M. Ludes eds., 2004). There continues to be

Group in Egypt, Hamas in Palestine, and al Qaeda, are networked groups.¹⁷⁵ They function less as coherent organizations than as coordinating structures for the actions of independent cells of militants.¹⁷⁶ Indeed, part of Osama bin Laden's success in leading al Qaeda has been his ability to link together disparate groups of militant Muslims. Militants around the world linked their causes together without sacrificing their local goals.¹⁷⁷ Al Qaeda is not a close-knit, hierarchical terrorist organization; it is a brand that represents the products of many different terrorists. Sometimes, these individuals and groups coordinate their actions and resources, but often they do not.

This trend away from bureaucratic organizations and toward networks is accelerating. Because the jihad has become a global movement, a strict hierarchy has become unnecessary. As J. Bowyer Bell, president of the International Analysis Center has observed:

The great organizational strength of the global jihad has been the potential of the force field Those who would direct the jihad do not need to maintain an organization or undertake lasting campaigns. They do not need a secret army or conspirators who meet regularly. Instead, there are organizations mutating, people appearing and disappearing, and changing action constellations. No one leader has to unify all these efforts. Any of the dedicated with assets can find uses for them, volunteers, support, and prospects.¹⁷⁸

Increasingly, terrorist operations center on key individuals, such as Al Musab Al Zarqawi in Iraq, rather than groups.¹⁷⁹ The spread of the internet has catalyzed this trend. Terrorist networks are increasingly using the internet as a tool for recruitment, coordination, and finance.¹⁸⁰ This allows dynamic

a lively debate over these issues, including a dispute over whether al Qaeda is part of a terrorism "network" or a unique threat. See Bruce Hoffman, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, FOREIGN AFF., May/June 2008, available at <http://www.foreignaffairs.org/20080501fareviewessay87310/bruce-hoffman/the-myth-of-grass-roots-terrorism.html>.

175. The discussion of Hamas as a networked terrorist group predates its entry into Palestinian electoral politics. As Hamas attempts to establish a working government, it remains to be seen if it can continue as a networked group or whether it will establish more hierarchical forms of organization.

176. NETWORKS AND NETWARS, *supra* note 166, at 33-34.

177. GUNARATNA, *supra* note 112, at 56-57.

178. J. Bowyer Bell, *The Organization of Islamic Terror: The Global Jihad*, J. MGMT. INQUIRY, September 2002, at 261.

179. Gunaratna, *supra* note 25, at 98.

180. See SAGEMAN, *supra* note 111, at 160-163; Gabriel Weimann, *Special Report # 116: www.terror.net: How Modern Terrorism Uses the Internet* (2004), available at <http://www.usip.org/pubs/specialreports/sr116.html>; see also David Talbot, *Terror's Server*, TECH. REV., February 2005, at 48; Craig Whitlock, *Briton Used Internet As His Bully Pulpit*, WASH. POST, Aug. 8, 2005, at A1; Roula Khalaf & Maija Pesola, *Spies and Jihadis Share the Net's Corridors of Conspiracy*, FIN. TIMES, July 18, 2005, at 14; Farhan Bokhari, *Militant Islamic Groups Not Short of Men To Volunteer for Jihad*, FIN. TIMES, Nov. 9, 2001, at 6.

individuals to link up with and encourage “home grown” terrorists, such as those that committed the July 7, 2005 subway and bus bombings in London.¹⁸¹ As global jihad becomes more and more a “cyber-jihad,” this decentralization will continue.

To say that these groups are unstructured is not to say they are ineffective. In fact, the lack of dependence on formal structures has made them more dangerous. Rohan Gunaratna, an expert on terrorism at the Institute of Defence and Strategic Studies in Singapore, argues that since September 11, the “terrorist threat has escalated several-fold The drastic increase in [this threat] has been a result of Al Qaeda’s transformation from a group into a movement.”¹⁸² This structure has made groups harder to penetrate, more adept at recruiting, and more global in reach.¹⁸³ The networked structure of Islamic terrorist groups has also given them a unique ability to resist attempts to target and disrupt their operations. Traditional, hierarchical organizations are extremely vulnerable to decapitation – kill the leadership, and the organization ceases to function. Networked organizations are resilient. If an important individual dies, the network compensates. The “force field” of potential terrorists still exists. The “leaders” of these networks provide coordination, experience, money, and spiritual support, but they have little control over the day-to-day operations of individual groups of militants.¹⁸⁴ Analysis of the effects of removal of important individuals from terrorist networks suggests that these networks are able to “fill in” leadership positions, because the leaders’ primary contributions to such networks are their social connections to other jihadists.¹⁸⁵ When leaders fall, others rise in their place.

181. *July 7 Bombers Tied to al Qaeda*, CBS EVENING NEWS, August 18, 2005, available at <http://www.cbsnews.com/stories/2005/08/18/eveningnews/main787072.shtml>; J.F.O McAllister, et al, *Hate Around the Corner: In a Stunning Twist, Investigators Blame the London Attacks on Four Homegrown Suicide Bombers*, TIME ATLANTIC, July 25, 2005, at 20. The official government report on the July 7 attacks finds no conclusive evidence linking the bombers to al Qaeda, but says “the target and mode of attack of the 7 July bombings are typical of Al Qaida and those inspired by its ideologies.” REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, at 21 (2006), available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/11_05_06_narrative.pdf.

182. Gunaratna, *supra* note 25, at 93.

183. See Bell, *supra* note 178 at 262; SAGEMAN, *supra* note 111, at 180.

184. Michael Kenney, *From Pablo to Osama: Counter-terrorism Lessons from the War on Drugs*, SURVIVAL, Autumn 2003, at 192. (“[Al] Qaeda must now rely more on local groups that may have only loose affiliations with – or merely be inspired by – the al-Qaeda leadership. Consequently, bin Laden and his lieutenants are often compelled to relinquish substantial operational initiative and responsibility to local talent.”); see also Charles Hanley, *Experts: Decapitation Can Fuel Insurgency; Killing a Leader Might Not Shut Down a Terror Network*, TELEGRAPH HERALD, January 22, 2006, at A8 (quoting Richard Clarke, former counterterrorism coordinator in the White House).

185. See, e.g., Kathleen M. Carley, et al., *Destabilizing Terror Networks*, at 2 (2003), available at http://www.casos.cs.cmu.edu/publications/protected/2000-2004/2003-2004/carley_2003_destabilizingterrorist.pdf (registration required); Kathleen M. Carley, et al., *Destabilizing Dynamic Covert Networks*, in PROCEEDINGS OF THE 8TH INTERNATIONAL COMMAND AND CONTROL RESEARCH AND TECHNOLOGY SYMPOSIUM 10-11(2003), available at <http://>

Individuals that organize and carry out specific terrorist attacks, however, are much more difficult to replace. In short, according to network theory, the capture of Mohammad Atta might have done more to prevent September 11 than the death of Osama bin Laden.¹⁸⁶ Although the global terrorist movement has produced many willing terrorists, it has not produced a massive swell of capable managers.¹⁸⁷

There is a growing recognition that disrupting these mid-level nodes in the terrorist network is necessary to protect the United States against the threat of terrorism. Obviously, attacks on the leadership of al Qaeda and other notorious international terrorists are a necessary component of any strategic approach to disrupting terrorism. However, simply focusing on the leadership is not sufficient. FBI Assistant Director Bald has testified that individuals outside the leadership who fund and support terror cells pose the “most imminent danger” to the United States.¹⁸⁸ Matthew Levitt argues that:

It should be clear to investigators, intelligence officers, and decision makers alike that the logistical and financial supporters of terrorism warrant increased attention, not only because they facilitate acts of terror and radicalize and recruit future terrorists, but because distinguishing between “supporters” and “operatives” assures that the plotters of the next terrorist attack – today’s “supporters” – will only be identified after they conduct whatever attack they are now planning – and are thus transformed into “operatives.” In particular, any serious effort to crack down on terrorist financing, so critical to

www.casos.cs.cmu.edu/publications/protected/2000-2004/2003-2004/CarleyKIMASV6.pdf (registration required). Professor Carley’s work compares the effect on terrorist networks of removing individuals with high degrees of “centrality” – those who are closest to the central nodes of the terrorist network (traditionally thought of as the leaders of an organization) – with the effect of removing those with a high degree of “cognitive load” (managers). Cognitive load is a term of art used in network theory that takes into account the number of people, resources, and tasks the agent needs to manage and the communication needed to engage in, for this article’s purposes, terrorism. Professor Carley’s work indicates that the removal of individuals with a high cognitive load would be more disruptive to terrorist networks than the removal of leaders. It does not conclude that removal of leaders would be counterproductive. Rather, in a world of limited resources, targeting managers would be more effective at disrupting terrorist attacks than targeting leaders. A real world example of this theory was shown by U.S. attempts to disrupt Columbian drug networks by eliminating the heads of the major cartels. New leaders sprang into place. According to at least one former official involved, this actually hampered drug enforcement efforts, because the new drug organizations adapted in a way that neutralized most of the previous methods used to catch the cartel kingpins. Kenney, *supra* note 184, at 194.

186. Mohammad Atta was one of the lead coordinators of the September 11 attack on the United States. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 2, at 241-250.

187. The point is not that we should focus on an individual like Atta instead of pursuing an individual like bin Laden. Rather, criminal prohibitions on terrorism must adequately address all parts of the network, not just the leadership.

188. See *supra* text accompanying note 25.

disrupt terrorist activity, demands paying special attention to these support networks.¹⁸⁹

A failure to address support networks increases the size, strength, and capability of terrorist cells around the world.¹⁹⁰ Most critically, however, the government must prioritize those cells that are potentially operating within the United States.¹⁹¹

These diffuse, nebulous terrorist structures provide a unique opportunity and a substantial challenge for the criminal law in the war on terror. After September 11, there has been much debate about whether terrorism should be viewed through the paradigm of crime or that of war.¹⁹² Unfortunately, the war paradigm has difficulty addressing many of the mid-level and low-level operatives who are the most critical nodes in the global terror network. These individuals are not well known, rarely have direct involvement in prior terrorist acts, and, in many cases, may not yet have been identified. It is not easy to effectively wage war when one does not have a target. In addition, the most dangerous terrorists are those that are already within the United States, and it is even more difficult to implement the war model domestically. Criminal prohibitions on terrorist activity, if properly structured, could fill this gap. Unfortunately, as written, §2339B is not up to the task.

B. The FTO Framework for the Material Support Statutes Cannot Effectively Disrupt Terrorist Networks

Congress has recognized that prosecuting mid- and low-level terrorists is crucial to disrupting terrorist financing. The passage of §2339B was an attempt to criminalize terrorist financing; the statute's continued expansion is based in part on Congress's recognition that current laws do not do enough to address these crucial aspects of terrorist networks. Unfortunately, Congress is trying to hammer a square peg into a round hole. The problem is not that the list of prohibited recipients is too narrow. Rather, it is that no approach based on a list of proscribed recipients can ever be complete. Many dangerous terrorist threats to the United States will fall outside any list of FTOs. In addition, maintaining the list of terrorist organizations is a relatively static bureaucratic process, making it almost certain that the listing of FTOs will not be able to keep up with the dynamic, interwoven texture of current terrorist networks.

189. Levitt, *supra* note 163, at 33-34.

190. See Gunaratna, *supra* note 25, at 95.

191. RICHARD A. CLARKE, ET AL., *DEFEATING THE JIHADISTS: A BLUEPRINT FOR ACTION* 18 (Century Foundation Press 2004). Richard Clarke, the chair of this task force, was former counterterrorism coordinator in the White House.

192. For a discussion of the implications of both models, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002).

Many terrorists and terrorist financiers are not members of formal organizations. Some experts estimate that al Qaeda has trained over 10,000 potential terrorists at its camps in Afghanistan, yet al Qaeda only offered “membership,” which was shown by taking a sworn oath of allegiance called *baya*, to between 10 and 30 percent of the trainees.¹⁹³ Recent estimates of al Qaeda’s actual “membership” place the number at a few hundred.¹⁹⁴ Al Qaeda also exploits the member/non-member distinction by ensuring that funds are kept with trusted non-members and only distributed when necessary.¹⁹⁵ Other dangerous individuals are not part of any particular terrorist organization, but instead patronize and support many different terrorist groups. Beneath the surface of distinct “terrorist organizations,” there are substrata, described by one commentator as “an international matrix of logistical, financial, and sometimes operational terrorist activity.”¹⁹⁶ The financial and logistical networks behind terror cells are interconnected, sophisticated, and increasingly distinct from the “terrorist organizations” that carry out actual operations.¹⁹⁷

The existing §2339B is a crude tool, because the organization-based list cannot address those potential terrorists that spring out of the “force field” of the network. Many terrorist cells form spontaneously, not as the result of recruitment into a preexisting “terrorist organization.”¹⁹⁸ These motivated individuals then seek out jihadists to further their individual purposes. Terror cells form primarily by self-selection – individuals decide they want to be terrorists, and seek out other militants to achieve those aims – and there is a deep pool of potential candidates.¹⁹⁹ These new terrorists, not recruited by anyone, are beyond the limits of an approach based on membership and organizations.

The organization-based approach also lacks the capacity to adequately deter potential jihadists from linking to the network. The organizational model sends a weak deterrent signal, because many of the organizations the United States has designated “terrorist” have established reputations that the “terrorist” designation is unlikely to overcome.²⁰⁰ This is not to say §2339B has no deterrent effect. It does provide a strong incentive for existing non-violent organizations to remain non-violent. It also criminalizes aid to existing terrorist organizations. But that is not sufficient. To adequately prevent terrorism, United States law must also criminalize aid to known and potential terrorists. The current approach sends the wrong message by

193. SAGEMAN, *supra* note 111, at 121.

194. Gunaratna, *supra* note 25, at 93.

195. GUNARATNA, *supra* note 112, at 63.

196. Levitt, *supra* note 163, at 32.

197. *Id.*

198. SAGEMAN, *supra* note 111, at 142; ROY, *supra* note 112, at 50-51.

199. Bell, *supra* note 178, at 262.

200. Hamas, for example, is a violent terrorist organization but is widely recognized in Palestine and Lebanon for its ability to provide social services to Palestinians. It is increasingly a political force in Palestinian elections.

targeting a list of organizations, rather than a type of conduct.²⁰¹ Even when it reaches its intended audience, the signal is often too late. Section 2339B only deters contributions after an organization is listed, and terrorist violence is a prerequisite to listing.²⁰² Although the Patriot Act amended the statute to reach groups that “retain the capability and intent” to engage in terrorism, there is not a single organization on the list that has not already engaged in terrorist activity. If the goal of the material support statutes is to prevent terrorism, conviction should not require a predicate terrorist act.

The FTO approach cannot deal effectively with dynamic networks accelerated by cyber-jihad. As counterterrorism efforts increase, terrorist networks adapt and evolve.²⁰³ The prohibited list of organizations is not so agile, for a number of reasons. First, the process of listing itself is political. When the government decides to list a group as a FTO, an administrative process begins within the State Department.²⁰⁴ That process is not objective,

201. See SAGEMAN, *supra* note 111, at 176. Sageman argues that law enforcement must focus on labeling terrorist acts criminal, rather than sacred acts of martyrdom. The United States does criminalize support for individual acts of terrorism, in 18 U.S.C. §2339A. As described in Section I of this article, however, the dominant basis for U.S. criminal terrorist prosecutions is §2339B, not §2339A.

202. 8 U.S.C. §1189(a)(1)(B) (Supp. V 2005).

203. See GUNARATNA, *supra* note 112.

204. A description of that process is available on the State Department website:

Once a target is identified, S/CT prepares a detailed “administrative record,” which is a compilation of information, typically including both classified and open sources information, demonstrating that the statutory criteria for designation have been satisfied. If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary’s intent to designate the organization and given seven days to review the designation, as the INA requires. Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect. By law an organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the Federal Register.

Until recently the INA provided that FTOs must be redesignated every 2 years or the designation would lapse. Under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), however, the redesignation requirement was replaced by certain review and revocation procedures. IRTPA provides that an FTO may file a petition for revocation 2 years after its designation date (or in the case of redesignated FTOs, its most recent redesignation date) or 2 years after the determination date on its most recent petition for revocation. In order to provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different as to warrant revocation. If no such review has been conducted during a 5 year period with respect to a designation, then the Secretary of State is required to review the designation to determine whether revocation would be appropriate. In addition, the Secretary of State may at any time

however.²⁰⁵ Most notably, the two terrorist organizations that most concerned Congress during the drafting of the initial immigration and criminal anti-terrorism statutes, the IRA and the PLO, were never listed as FTOs.²⁰⁶ This is understandable. The listing process has wider effects than just criminalizing material support to the organization. Any financial institution that becomes aware it has possession or control of an asset of the organization must turn it over to the federal government.²⁰⁷ Listing an organization that was engaged in peace negotiations, as the IRA was at the time of AEDPA, could have significant political ramifications. Although politically understandable, this makes little sense with respect to the criminal law. Even if organizations are engaged in peace talks, fundraising for potential future terrorist attacks should be prohibited.

This problem is compounded by the interconnectedness of terrorist networks. Islamic terrorist organizations are expanding their operations into the political and humanitarian arenas.²⁰⁸ These multifunction organizations make the political choices behind the list increasingly difficult. For instance, some commentators in Israel believe that Fatah, the Palestinian political faction led by Palestinian President Abbas, has committed more recent terrorist attacks on Israel than Hamas. Fatah is not a listed FTO in the United States, but Hamas is.²⁰⁹ As other multipurpose organizations, like Hamas and Hezbollah, enter traditional politics, keeping them on the list of FTOs will only become more difficult.

revoke a designation upon a finding that the circumstances forming the basis for the designation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation. The same procedural requirements apply to revocations made by the Secretary of State as apply to designations. A designation may be revoked by an Act of Congress, or set aside by a Court order.

Fact Sheet, U.S. Dep't of State, Office of the Coordinator for Counterterrorism (Apr. 10, 2008), available at <http://www.america.gov/st/texttrans-english/2008/April/20080410111249xjsnommis0.111355.html>.

205. For a discussion of the political wheeling and dealing behind the listing process, from an opinionated perspective, see Robert Dreyfuss, *Colin Powell's List: The Targeting of Terrorist Groups Harks Back to Earlier Repression of Dissent*, NATION, March 25, 2002, at 16.

206. *Id.* The IRA of the 1980s experienced a schism in the 1990s, primarily over the IRA leadership's decision to enter into a ceasefire and peace negotiations with the United Kingdom. The old IRA is now primarily known as the Provisional IRA (PIRA). The Continuity Irish Republican Army and the Real IRA, violent offshoots of the original IRA, have been designated as an FTOs by the State Department. See Fact Sheet, U.S. Dep't of State, *supra* note 10.

207. Fact Sheet, U.S. Dep't of State, *supra* note 204.

208. INTERNATIONAL CRISIS GROUP, *supra* note 159.

209. Caroline B. Glick, *Bush's Information Offensive*, JERUSALEM POST, Sept. 26, 2006, at 16 ("Fatah itself which [Abbas] commands has committed more attacks against Israel than Hamas in recent years, and was involved in the cross-border attack on Israel in June where Cpl. Gilad Shalit was abducted."). I take no position on whether Fatah should be listed. The point is simply that the State Department's list of FTOs is not objectively based on participation in terrorism. Other factors are considered.

Finally, the FTO approach is a fairly static approach to a very dynamic situation. Terrorist groups are constantly changing. They change names and membership repeatedly.²¹⁰ Two days after the United States designated the group "Jam'at al-Tawhid wa'al Jihad," led by the late Al Musab al Zarqawi, as an FTO, he changed the name of the organization. The United States did not amend the listing for another two and a half months.²¹¹ This delay is significant. If an organization is not designated as a FTO at the time support is provided, there is no crime.²¹² It may be easy for prosecutors to tell a jury that the organization is the same, but there is no reason to run the risk that a potential terrorist could escape prosecution because of this loophole. Although the material support statutes were supposed to help prosecutors avoid having to link individual contributions of support to acts of terrorism, the statute creates a defense that easily frustrates achievement of the statute's function. By establishing front companies that ostensibly are not part of any listed FTO, potential terrorist financiers avoid the statute. Now, instead of having to link aid to terrorist acts, prosecutors have to link any number of international front companies with designated organizations.²¹³ This may be a less difficult task, but United States anti-terror laws should not be so easily thwarted.

Section 2339A does not fill the gaps. Section 2339A prohibits the provision of material support to anyone "knowing or intending that [the material support is] to be used in preparation for, or in carrying out," a number of different federal crimes. It could be argued that this is sufficient to catch anyone supporting terrorism who is not covered by the organization-based approach of §2339B. That argument ignores the history of the two provisions. Section 2339A was not adopted to patch the holes in §2339B. Rather, §2339B was passed because of concerns that §2339A was incapable of

210. See, e.g., NATIONAL MEMORIAL INSTITUTE FOR THE PREVENTION OF TERRORISM, TERRORISM KNOWLEDGE BASE, TERRORIST GROUP PROFILE: TANZIM QA'IDAT AL-JIHAD FI BILADAL-RAFIDAYN (2005), available at <http://www.tkb.org/Group.jsp?groupID=4416>. This is Zarqawi's group, which has operated under at least three different aliases.

211. Press Statements, U.S. Department of State (Oct. 15, 2004 & December 28, 2004), *supra* note 33. The group was initially designated on October 15, 2004, its name changed on approximately October 17, 2004, and the announcement that the designation had been amended was made on December 28, 2004.

212. *But cf. Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299-301 (3d Cir. 2004). The BIA retroactively applied the State Department's later designation of Babbar Khalsa to Singh-Kaur. The Third Circuit stated, however, that it need not decide the issue as to whether that was a mistake of law, since Singh-Kaur knew or should have known that those he assisted were terrorists. This was also not a criminal case, so there was no ex post facto issue. See generally *United States v. Afshari*, 446 F.3d 915 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc in a §2339B case in which the defendant provided support to an FTO whose designation was found to be defective and where the designation was reinstated only retroactively, after the support had been provided).

213. This was precisely the problem identified by the jurors in the trial of Dr. Al-Arian. After his acquittal, one juror stated that the government could not prove any money actually went to a terrorist organization. Michael Fechter, et al, *No Guilty Verdict in Al-Arian Trial*, TAMPA TRIB., Dec. 7, 2005, available at <http://www.tampatrib.com/MGB16ZY5XGE.html>.

reaching terrorist financiers, “non-bomb throwers,” and other terrorist supporters. As the previous discussion shows, the number of dangerous “non-bomb throwers” has only increased since the passage of §2339B in 1996. Additionally, §2339A requires levels of proof that make effective criminal prosecution of terrorists difficult. Section 2339B was designed to address the difficulties that prosecutors had in proving the nexus between terrorist activity and the donations being given to terrorist groups.

To show a violation of §2339A, the government must prove that the defendant provided material support knowing or intending that the recipient would use it for terrorism. Because many types of support are innocuous, proving what one person knew about another’s possible intent to use items like telephones, food, or even money for terrorist activity is difficult. Cash is the ultimate dual-use resource. Terrorists are also often able to use complex schemes to hide their actual purposes. As the Justice Department’s counterterrorism prosecution guide states:

[g]iven the hybrid nature of many terrorist organizations, it would be an almost insurmountable law enforcement challenge if we were required to trace the dollars coming from the United States sources, through the shadowy Third World financial sector, to their ultimate use in purchasing bombs and bullets. Perhaps more importantly, even if such law enforcement efforts succeeded, it would be even more difficult to establish that the United States-based providers specifically knew that the funds were going to the malevolent, rather than humanitarian, purposes of the group.²¹⁴

Finally, section 2339A is not sufficiently preventive. Although the statute’s language would reach support to a person if the donee knows of prospective terrorist activity, proving such knowledge would generally require evidence of a specific terrorist plot. Such evidence is extremely hard to come by. The value of the organizational approach is that it captures all donations and financial aid to institutional actors that are prone to terrorist violence. On the other hand, §2339A’s specific intent requirement makes it very difficult to prosecute those who provide fungible assets. In the few government prosecutions under §2339A since 9/11, the type of support provided – things like participating in a terrorist training camp or casing a location – has been clearly capable of aiding terrorism.²¹⁵ Therefore, if Congress truly wants to crack down on fungible aid to terrorists, §2339A is not up to the job.²¹⁶

214. BREINHOLT, *supra* note 12, at 267; *see also* Krigsman, *supra* note 121.

215. U.S. DEP’T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 15-17 (June 22, 2006).

216. Although it is impossible to draw firm conclusions from the small number of section 2339A prosecutions since 9/11, the Department of Justice lists many more successful section 2339B prosecutions in its White Paper than those under 2339A. These numbers were supported by an independent study performed by *The Washington Post*, which found that most terrorist suspects were not charged with terrorist acts. Dan Eggen & Julia Tate, *U.S. Campaign*

IV. WHERE DO WE GO FROM HERE?

The material support laws need to be revised and supplemented to address both the legal problems that have plagued their implementation and their inability to ensure terrorist activity is deterred and punished. Congress has made numerous attempts to revise the material support statutes, and there is no shortage of additional legislative reform proposals.²¹⁷

Regardless of which approach Congress eventually adopts, it is vitally important that Congress speak clearly. The lack of clarity as to what constitutes material support makes striking the balance between liberty and security more difficult at every stage of the criminal process. When it is unclear what Congress intended to prohibit, defendants are either not put on notice that their activity is prohibited, or they are deterred from exercising constitutional rights. Prosecutors cannot evaluate the strength of their potential cases with much confidence; when they take cases to trial, they are faced with costly and difficult constitutional litigation. Judges find it hard to determine the intent of Congress and give the statute its intended scope; different courts reach contradictory results. Criminal prosecutions would be more effective, and civil liberties better protected, if Congress spoke clearly on what was prohibited and what was allowed.²¹⁸ Given the complex history of the concept of "material support," this may or may not require that Congress start from whole cloth. The proposals that follow are merely a starting point. Legislative discussion and debate are needed not only on how to reform the existing statute, but on whether or not the United States should abandon the "material support" and "list based" frameworks altogether.

*A. Broad Reform: Abandoning "Material Support" and
the "List-Based" Approach*

Given the tortured legislative history of the concept of "material support," it may no longer be viable as a legal term of art. Even substituting and defining a new term would not necessarily address the fundamental policy problems that underlie the existing statutes. How can a line be drawn that

Produces Few Convictions on Terrorism Charges; Statistics Often Count Lesser Crimes, WASH. POST, June 12, 2005, at A1.

217. See Chesney, *supra* note 6, at 72, 76. Professor Chesney proposes a battery of reforms, some of which are discussed *infra*. Prof. Chesney also discusses a number of non-prosecutorial means at the hands of prosecutors to disrupt terrorist activity, such as the use of material witness warrants.

218. In the context of §2339B, asking Congress for clarity is in many ways a request that Congress limit the scope of the statute itself, rather than relying on prosecutorial discretion or court decisions. Congress has sent the clear message that it wants §2339B to sweep widely. In fact, Congress's desire to sweep broadly has produced a statute that cannot be applied literally without raising significant constitutional concerns. More precise drafting, in light of the policy issues discussed in the text, would yield a statute that could be more effective in preventing terrorism while also ameliorating civil liberties concerns.

criminalizes support to terrorists while protecting First Amendment rights? What is needed is a means of evaluating, before a terrorist act occurs, whether a person intends to aid or cause violence. Moving away from the organization-focused, list-based approach would require a new metric not solely based on the identity of the recipient. One way to do so would be to revive a version of the nexus approach, or, to put it simply, to put the “material” back into “material support.”

A possible benefit of a nexus approach is that it would provide a context within which to evaluate the provision of one instance of support to an actual or planned terrorist attack. Support is material when, in the words of Judge Fisher’s dissent in *Singh-Kaur*, it “move[s] the ball down the field for terrorism.”²¹⁹ Such an approach relies on courts and juries to evaluate when support is “material.” Courts make materiality determinations all the time in the context of federal criminal cases. In addition, they are more insulated from the political process than are prosecutors. Juries are also insulated from the political process, while also being acutely aware of the terrorist threats to American communities. They are qualified, perhaps even the best qualified, to balance the liberty and security interests in individual cases.

The primary benefit offered by the nexus approach is that it is flexible. Neither the type of support nor the recipient needs to be listed for the act to be criminal. If the defendant has “moved the ball” toward terrorism by an individual or a group, the activity is criminal no matter what form it took.²²⁰ In addition, the nexus approach would provide better notice to defendants of when their conduct is potentially unlawful. The nexus approach focuses primarily on conduct, not on recipients. Although there is some uncertainty inherent in an approach that depends upon context to determine criminality, it is much more reliable than a list that is unknown to the general populace. Many terrorist organizations use front companies,²²¹ a process which makes it even more difficult for individuals to know they are donating to a listed organization. This is not to say that the nexus approach would make irrelevant the identity of the recipient of support. As the terrorist activity of the recipient group or individual increased, so would the likelihood that aid to that group supported terrorism. Courts or juries could evaluate this as one factor in whether the support “moved the ball” toward terrorism.

The rejection of the nexus approach by Congress stemmed from two fundamental problems: 1) it could not address the fungibility of assets and donations; and 2) when the nexus at issue was attenuated, it was difficult to prove intent to aid terrorism. The nexus approach I propose here is different. Under §2339A, the nexus that must be shown is a connection between specific aid given and a specific terrorist attack. For § 2339B, however, I propose considering all the links between the support provided and the terrorist

219. *United States v. Singh-Kaur*, 385 F.3d 293, 304 (3d Cir. 2004) (Fisher, J., dissenting).

220. This assumes that the activity is not constitutionally protected.

221. Krigsman, *supra* note 121.

activities of the group. Under this approach, the Government's proof would not focus on whether the funds provided by an individual were eventually used to support terrorism. Rather, the inquiry (and the criminal act) would be the knowing provision of "material" resources to individuals or groups that the defendant knew or should have known were engaged in terrorist activities. Although the resources should be related in some way to the terrorist activities (the "nexus"), they need not be shown to have actually been used in terrorist activity. Thus, juries would consider the totality of an organization's terrorist activities, and the totality of the support provided by the defendant, in making a decision whether to convict. By taking a holistic approach to the nexus, the problems that have been encountered under §2339A can be minimized.

Looking at a gift in the context of the terrorist activities of the recipient provides some context to determine whether support was truly "material." For instance, a multi-million dollar donation of medical or school supplies would clearly free up large amounts of funds for terrorism. An individual doctor providing free medical services in a Palestinian refugee camp may not be "materially" supporting Hamas. To simplify this determination, Congress could list types of support that would be presumptively, rather than conclusively, material.²²² That would allow courts and juries to effectively evaluate fungibility claims made by the government. If the type of support was not listed, the burden of persuasion would be on the government to show that the defendant's support aided terrorist activity. If the type of support was listed, the burden would shift to the defendant to show that the support was not material to terrorist activity. The difference between this approach and the status quo is that defendants could raise a defense that their aid did not directly or indirectly fund or support terrorist activity. Under the FTO list-based approach, whether or not your aid actually supported terrorism is irrelevant. This modified nexus approach would give juries the flexibility to bless the conduct of individuals like Singh-Kaur, whose contributions to terrorism were *de minimis*, while at the same time preserving the ability of the government to argue that types of support given to a particular group were in fact material to terrorist activity.

There is some language in the IRTPA revisions of 2004 that provides guidance on how to modify the statute. Notably, the language Congress used to describe the requisite level of intent is broader than the language defining the substantive offense.²²³ To violate the statute, a person must provide support to a designated organization. However, the intent requirement is satisfied if the person provides support to an organization that is listed, or that

222. In the absence of a congressional list, courts, over time, could create law that found some types of support presumptively "material." Given the current prominence of terrorism prosecutions and the need for effective enforcement, congressional action in this area would be preferable, although I am loath to recommend the creation of another "list." Were Congress to create such a list, to ensure consistency with the nexus approach and to allow courts the flexibility to expand the list, it should not be an exclusive list.

223. See *United States v. Abdi*, 498 F. Supp. 2d 1048, 1064-1065 (S.D. Ohio 2007).

engages in terrorism or terrorist activity as defined by the Immigration and Nationality Act or the Foreign Relations Authorization Act of 1988 and 1989.²²⁴ Although these definitions present their own problems, this broader definition of terrorist organizations avoids the strictures of the current, list-based system.²²⁵ Coupled with a strengthened nexus requirement, such a change would ensure that all existing and future terrorist organizations are brought within the ambit of the statute, but that juries, not prosecutors, make decisions regarding whether certain acts are sufficiently supportive of terrorism such that they should be severely punished.

The intent issue requires a more complex solution. Congress could address that issue in the way that many states have, by adopting criminal statutes with graduated levels of intent and punishment. In an approach that would be unique to terrorism, the federal law could distinguish between negligent, reckless, and intentional support for terrorism.²²⁶ Sending money to al Qaeda in Iraq would be intentional support of terrorism; sending money to an avowedly terrorist organization might well be reckless support for terrorism.²²⁷ As the level of intent rose, so too would the punishment for the crime.²²⁸ This would preserve the broad criminalization of support and provide the government with the flexibility to charge the crime it is most able to prove, while also providing some protection for those who have minimal or attenuated contact with a group engaged in terrorism.

Although this nexus approach might sacrifice the government's ability to prosecute small donations with tenuous links to political violence, it would increase its ability to target individuals who come out of the force field of terrorism. The government would not need to show links to a pre-existing terrorist organization or predict all the possible ways that persons could aid terrorists or terrorist cells. The nexus approach would focus on individual acts

224. See *supra* note 154 and the text accompanying it.

225. Such a revision could not work without, at least, some revision of the definition of "engage in terrorist activity" in the Immigration and Nationality Act. Although that definition has been substantially revised since the 1993 version discussed above, it still defines "providing material support" as a category of "engaging in terrorist activity." Thus, just mirroring the intent portion of § 2339B risks creating a self-referential statute.

226. It could also create a substantive offense with a lower proof requirement but with a common law history that would provide courts more guidance on how to interpret it. As "material support" demonstrates, creating an entirely new substantive offense can create major problems. A substantive offense based on an existing state law offense, such as New York's "criminal facilitation" statute, may provide more interpretive guidance that starting over from scratch. See N.Y. PENAL LAW art. 115 (McKinney 2004).

227. It is important to note that aid to organizations would still play a role in a nexus-focused system. Aid to organizations that committed violence might well be evidence that an individual intended to support terrorism. The focus in a nexus-based system would not be on whether the organization was terrorist, however. It would be on what aid was provided and the effect that aid produced.

228. Professor Chesney suggests a similar reform. He argues that punishments for violation of the material support statute should be graduated and linked to different levels of *mens rea*. Chesney, *supra* note 6, at 72, 76. He does not discuss whether the government should return to the nexus approach.

of support, not recipients or their relationships to organizations. That alone would be a welcome change.

B. Better Band-Aids

Although broad reform of the material support statutes may be preferable to the status quo, such radical reform is, in reality, unlikely to be adopted. Neither Congress nor DOJ would likely support the proposed revisions. However, even much more modest changes in the existing framework for prosecuting support of criminal terrorist networks would be feasible and desirable. Readers may question whether the reforms discussed so far would actually improve the material support statutes. Though not without its problems, the list-based approach does greatly assist prosecutors. The problems with the current system may not be insuperable – it may just be we are using the wrong list.

Some organizations are purely terrorist in nature. Support of groups such as al Qaeda deserves no protection. Designation of these organizations should require a stringent process, with enumerated burdens of proof and standards of review, reviewable by the courts, with the burden on the government to prove that the organization is truly a terrorist organization. The organization should be able to defend itself against the proposed designation.²²⁹

The designation process itself should not be controlled solely by the State Department. Though the State Department certainly has expertise in international affairs and counterterrorism, its interests go beyond prosecution.

It must balance political concerns, such as those involved in designating active political groups like the IRA or Hamas. U.S. foreign policy interests should not be the only factors considered in the process. An inter-agency committee, or the Department of Justice, should gather the evidence for designation. Once an organization is designated, any contribution to it, in any amount, would be prohibited. Even dedicated civil liberties advocates, like Professor Cole, recognize that some organizations are different.²³⁰ For these, rather than enumerating what types of activity are prohibited, the government could list the activities that are allowed.²³¹ These could include “pure advocacy” that provides no financial aid whatsoever to the organization. The burden would be on the individual to show that the support did not help these “purely terrorist” organizations. This approach would constrict the scope of §2339B, but only to the extent that the government could not show that all of

229. Some of these protections are supposed to be available in the present system. Whether groups are truly able to exercise them, however, is a different question. See *United States v. Afshari*, 446 F.3d 915, 916-917 (9th Cir. 2006) (dissent from denial of petition for rehearing en banc).

230. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 14 (2003).

231. Professor Chesney's licensing approach to §2339B could be a model for this type of approach. Chesney, *supra* note 6, at 82.

the organizations currently listed are purely terrorist organizations. A dual scheme could also be used, with “purely terrorist” organizations treated one way and mixed organizations another.

It would also be possible to combine the two proposals I discuss here. A modified nexus approach and a separate list of purely terrorist organizations could be used together. The nexus approach would ensure flexibility when dealing with organizations not on the “purely terrorist” list. The list approach would ensure that any contributions to the most dangerous, violent organizations are criminal. Together, these approaches might form a better scheme for terrorism prosecutions.

CONCLUSION

Criminalizing aid to terrorists will always require balancing associational rights with society’s need for security. Congress devised the current list-based approach and has chosen to address the legal problems raised by it through continual, minor legislative corrections, leaving meaningful explanatory work to the courts. Because it adopts a one-size-fits-all approach to terrorist organizations and ignores the evolution of global terrorism, however, the current approach is unlikely to prove capable of combating terrorism effectively. There are new threats to the United States, notably the increase in unaffiliated terrorists and the expansion of the few remaining hierarchical terrorist organizations into the political and humanitarian arenas. If the Department of Justice is to function effectively in the war on terror, its tools must be up to the task.