

IN THE ABSENCE OF DEMOCRACY:  
THE DESIGNATION AND MATERIAL SUPPORT  
PROVISIONS OF THE ANTI-TERRORISM LAWS

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I. INTRODUCTION

*We must choose between freedom and fear—we cannot have both. If the citizens of the United States persist in being afraid, the real rulers of this country will be fanatics fired with a zeal to save grown men from objectionable ideas by putting them under the care of official nursemaids.*<sup>1</sup>

—Zechariah Chafee, Jr., THE BLESSINGS OF LIBERTY (1956)

*This year we are witnessing not just a series of brutal but fundamentally independent human rights violations committed by disparate governments around the globe. This year we are witnessing the orchestrated destruction by the United States of the fragile scaffolding on which international human rights have been built, painstakingly, bit by bit by bit, since World War II.*<sup>2</sup>

—Bill Schulz, Executive Director, Amnesty International

*Out, damned spot! Out, I say! One: two: why, then 'tis time to do't. Hell is murky. Fie, my lord, fie! A soldier, and afeard? What need we fear who knows it, when none can call our pow'r to accompt?*<sup>3</sup>

—Lady Macbeth

It has become popular since the terrorist attacks of September 11, 2001, to say that we now live in a different world than we did before. We say it is necessary to rethink the balance between civil liberties and national security. Some even say that this is a time of war and *inter arma silent legis*: in time of war, law is silent.

I do not agree with these statements. While it is true that Americans had not experienced an attack on American soil since the Civil War (not counting Pearl Harbor, which was an attack on a naval base), and it

<sup>1</sup> ZECHARIAH CHAFEE, THE BLESSING OF LIBERTY 156 (1956).

<sup>2</sup> William F. Schulz, Remarks at the Welcoming Plenary of the Annual General Meeting (April 4-6, 2003), available at <http://www.amnestyusa.org/events/agm2003/williamshulz.html> (last visited Jan. 29, 2004).

<sup>3</sup> WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1.

is certainly true that the September 11th attacks rightfully changed how many Americans feel and think about terrorism and security, it is also probably true that Americans, the greatest consumers of nonrenewable resources in the world, became complacent in their imagined bubble of safety from the violent world outside the United States from which they obtain much of those resources, and that the September 11th attacks woke us up in a particularly brutal way to our own inherent human vulnerability.

It is not true, however, that the world is substantially different now than it was before September 11th. Nor is it true that terrorists are a new and vastly different breed of criminals. Big business, violent crime, war, and crimes against humanity were as prevalent before as after the attacks. Spies, saboteurs, traitors, assassins, and terrorists have been acting in groups or alone since the beginnings of human history.<sup>4</sup> Their existence did not prevent the development of civil liberties. On the contrary, it has made *necessary* the development of and dedication to civil liberties and the rule of law.

Note that neither the presence of spies (such as Major Andre) nor traitors (such as Benedict Arnold) during the American Revolution prevented the formulation and ratification of the United States Constitution and the Bill of Rights. The refrain of Patrick Henry was not “Give me liberty only if it means I’m secure!” He said: “*Give me liberty, or give me death!*” Americans who risked or gave their lives in the Revolutionary War fought *for* civil liberties, and they knew that those liberties could never be sacrificed in the name of war. This conclusion has been confirmed by the wisdom of those who enacted the Hague and Geneva Conventions after World War I, clarified and extended the rights protected under those treaties, in other treaties, and formulated the Nuremberg Charter after World War II. Furthermore, so-called “terrorist cases” are in many ways similar to the Cold War “communist cases” in legal analysis.

The difference today is the existence of the internet and nuclear arms and other weapons of mass destruction, including biological and chemical weapons (none of which make civil liberties *less* necessary). The difference is that Americans now feel hated and can perhaps be persuaded to believe on some subconscious level that we deserve to sac-

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<sup>4</sup> See Anna Mulrine & Nancy Bentrup, *Special Report: Spy Stories: The Power of Secrets*, U.S. NEWS & WORLD REPORT, Jan. 27, 2003, at 48 (“Spying is a pursuit as old as civilization and a craft long practiced by the most skilled and treacherous of strategists.”).

rifice our most prized and sacred “inalienable rights.” The difference since September 11th is that we have now accepted regulations and practices, have enacted laws, and submitted to Executive orders that rend the very fabric of our own democratic rule of law, setting examples to the rest of the world that could set the course of civilization back centuries.

Nonetheless, it did not take September 11th for lawmakers in this country to enact such laws in the name of fighting terrorism. Prior to passage of the post-September 11 anti-terrorism act known as the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” Act, or USAPA,<sup>5</sup> we had passed anti-terrorism legislation, known as the Anti-Terrorism Effective Death Penalty Act, or AEDPA.<sup>6</sup>

AEDPA, enacted in 1996, laid the foundation for USAPA, giving the U.S. Government powers it had never before known. Among other powers, AEDPA gave the Secretary of State the authority to designate foreign groups, with virtually no judicial oversight, as foreign terrorist organizations.<sup>7</sup> This power would perhaps warrant no more attention than the power of the President to command troops if it were not for two facts: (1) the President has declared an ongoing “war on terrorism,” a perpetual state of national emergency, and (2) the designation statute

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<sup>5</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, 107 Pub. L. No. 56, 115 Stat. 272 (2001) [hereinafter the USAPA].

<sup>6</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 [hereinafter AEDPA]. In this article, the term “current anti-terrorism laws” means USAPA and AEDPA as amended by USAPA. To make the point that times have not changed all that much, one could point out equally odious laws enacted to fight various forms of rebellion and sedition at other points in American history: for example, the Alien and Seditions Acts of 1798 during the French Scare and the McCarthy Era Smith and McCarren-Walter Acts during the Red Scare. However, comparison of the USAPA and earlier comparable laws before AEDPA is outside the scope of this article.

<sup>7</sup> See AMERICAN CIVIL LIBERTIES UNION, *How the USA-PATRIOT Act Allows for Detention and Deportation of People Engaging in Innocent Associational Activity*, (Oct. 23, 2001), at <http://archive.aclu.org/congress/1102301h.html> [hereinafter ACLU] (“While existing INA section 219 permits designation of *foreign* groups with various procedural safeguards, section 411 of the USAPA adds a new provision to INS section 212(a)(3)(B) that permits designation of foreign *and domestic* groups, without those procedural safeguards.” (emphasis in original)) (last visited Jan. 26, 2004). While it is true that section 802 of the USAPA added a domestic terrorist category to 18 U.S.C. § 2331, the newly added category simply defines the crime. It does not provide procedure. Both INA § 219 and INA § 212(a)(3)(B) were amended by USAPA. Section 219 is 8 U.S.C. § 1189 (amended by USAPA § 411(c)) and provides for designation of foreign terrorist organizations (FTOs). Section 212(a)(3)(B) (amended by USAPA § 411(a)) is 8 U.S.C. § 1182(a)(3)(B) and defines terrorist activities. The procedural safeguards for designated foreign terrorist organizations and those charged with supporting them are discussed throughout this article. See *infra* text accompanying notes 18 and 46.

interacts in constitutionally unsound ways with a criminal statute that is being applied more and more frequently—that which criminalizes material support of designated foreign terrorist organizations. This article will discuss this interaction in some depth. As for the war on terrorism, we cannot fight it with unconstitutional laws.

## II. THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA): CRIMINALIZING TERRORISM

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted three years after the World Trade Center bombing and one year after the Oklahoma City bombing.

According to section 301(b) of AEDPA, its purpose was “to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from *providing material support or resources to foreign organizations* that engage in terrorist activities.”<sup>8</sup> Subparagraph (a) of the same section enumerated seven findings:

- (1) international terrorism is a serious and deadly problem that threatens the vital interests of the United States;
- (2) the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the *provision of material support* to foreign organizations engaged in terrorist activity;
- (3) the power of the United States over immigration and naturalization permits the exclusion from the United States of persons belonging to international terrorist organizations;
- (4) international terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States;
- (5) international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage;

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<sup>8</sup> AEDPA § 301(b), 18 U.S.C. § 2339B (emphasis added).

- (6) some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations; and
- (7) foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.<sup>9</sup>

Notice the focus on material support of foreign terrorist organizations. Note also the strict liability language in finding (7). This is the primary issue addressed in this article.

AEDPA came on the heels of the Oklahoma City bombing and was perpetrated not by a terrorist group but an individual. However, AEDPA was not enacted to stop a rogue bomber. It was enacted to cut the lines of support to terrorist organizations. The underlying rationale for AEDPA was articulated in 1999 by Michael A. Sheehan, State Department Coordinator for Counterterrorism:

Today's terrorist threat comes primarily from groups and loosely-knit networks with fewer ties to governments. Bin Ladin's [sic] organization operates on its own, without having to depend on a state sponsor for material support. He possesses financial resources and means of raising funds—often through narcotrafficking, legitimate “front” companies, and local financial support. Today's nonstate terrorists benefit from the globalization of communication, using e-mail and Internet websites to spread their message, recruit new members, raise funds, and connect elements scattered around the world.<sup>10</sup>

Thus, to combat non-state terrorism, Congress enacted AEDPA. According to one commentator:

The AEDPA . . . authorizes the Secretary of State to designate an organization as a “foreign terrorist organization” (FTO), meaning that it is a non-U.S. organization that engages in terrorist activity that threatens U.S. nationals or national security. To engage in terrorist activity is, under the act, to commit “in an individual capacity or as a member of an organization, an act of terrorist activity or an act which

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<sup>9</sup> AEDPA § 301(a) (emphasis added).

<sup>10</sup> *Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Foreign Relations Comm.*, (Nov. 2, 1999) (testimony of Ambassador Michael A. Sheehan, Coordinator for Counterterrorism, U.S. Dep't of State), *available at* [http://www.state.gov/www/policy\\_remarks/1999/991102\\_sheehan\\_terrorism.html](http://www.state.gov/www/policy_remarks/1999/991102_sheehan_terrorism.html) (last visited Jan. 26, 2004).

the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time.”<sup>11</sup> Terrorist activity includes such acts as hijacking, kidnap[ping], assassination, and the use of any explosive or firearm, “with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Threats, attempts, and conspiracies to commit the above acts also come within the definition.<sup>12</sup>

Judge Tamasuki wrote in a 2002 decision, which I will examine below, a more thorough description of the workings of the designation statute under AEDPA:

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub.L. 104-132, 110 Stat. 1214-1319 (1996) to address concerns regarding international terrorism. Title III of the AEDPA, 110 Stat. 1247, entitled “International Terrorism Prohibition,” was designed to cut off monetary and other support for such terrorist activities. In relevant part, AEDPA prohibits persons from knowingly providing “material support or resources” to “foreign terrorist organizations.”

Specifically, the AEDPA authorizes the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a “foreign terrorist organization” pursuant to 8 U.S.C. § 1189 (hereafter §1189) if the Secretary finds that the organization is a foreign organization that engages in terrorist activity (as defined in § 1182(a)(3)(B) of Title 8) and the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. Classified information may be considered in designating an organization and the Secretary is required to create an administrative record in support of the designation.

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<sup>11</sup> Under AEDPA, 8 U.S.C. § 1182 (a)(3)(B)(i)(IV) provided that a representative of an FTO “as designated by the Secretary under section 219, which the alien knows or should have known is a terrorist organization” was inadmissible. USAPA retained this language requiring knowledge. See *infra* note 117 and accompanying text for further discussion on knowledge in USAPA. See also Jennifer Van Bergen, *Chart of Antiterrorism Provisions*, available at [http://pegc.no-ip.info/jvb/articles/FTO\\_Chart\\_CPLPEJ.doc](http://pegc.no-ip.info/jvb/articles/FTO_Chart_CPLPEJ.doc) (last visited Feb. 2, 2004).

<sup>12</sup> Sean D. Murphy, *Contemporary Practice of the United States*, 94 AM. J. INT’L L. 365 (2000) (footnotes omitted). See also USAPA § 411(a)(1)(E) (adding “or other weapon or dangerous device” after the word “firearm”).

In making a designation, the Secretary, by classified communication, must notify several high ranking members of Congress of the intent to designate a foreign organization, together with the findings and factual basis in support of the foreign terrorist designation. Seven days after notification to such high ranking members of Congress, the designation is published in the Federal Register. The organization to be designated is not informed of the designation prior to publication. The designation persists for a period of two years and is renewable by the Secretary. Congress may block or subsequently revoke a designation by an Act of Congress. The Secretary may also revoke a designation based on changed circumstances. However, the revocation of a designation does not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

For purposes of a prosecution under § 2339(B), the designation takes effect immediately upon publication in the Federal Register. Once effective, a defendant in a criminal action is precluded from raising any question concerning the validity of the designation as a defense or an objection at any trial or hearing. Furthermore, any assets of the designated organization held in United States financial institutions may be frozen.

Within 30 days following publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit (hereafter D.C. Circuit). The court's review is based solely upon the administrative record, except that the government may submit, for *ex parte* and *in camera* review, classified information used in making the designation.

The D.C. Circuit court must hold unlawful and set aside a designation that it finds to be: (i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) contrary to constitutional right, power, privilege, or immunity; (iii) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (iv) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court, or (v) not in accord with the procedures required by law. Finally, the pendency of an action for judicial review does not alter or diminish the effectiveness of the designation, unless the court issues a final order setting aside the designation.<sup>13</sup>

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<sup>13</sup> United States v. Rahmani, 209 F. Supp. 2d 1045, 1048 (C.D. Cal. 2002) (emphasis omitted).

The AEDPA designation provision is clearly a strict liability statute that retains close authority in the Secretary of State. Defendants may not challenge the designation but a designated organization may—except that review is severely restricted and the administrative record may be classified, making such change rather empty. There are both due process and First Amendment problems in this provision, both of which are continued in the USAPA and will be discussed further below. However, it is worth noting here that neither AEDPA nor the USAPA requires that a person charged with providing material support of a *designated* FTO possess either *knowledge* of the unlawful ends of that organization or a *specific intent* to further those unlawful ends.

The Supreme Court has made clear that criminalizing association without knowledge of unlawful goals and specific intent to further those goals violates the Constitution.<sup>14</sup>

### III. THE USA PATRIOT ACT (USAPA) AMENDMENTS TO AEDPA AND THE INTERPLAY OF TERRORISM DEFINITIONS

The USAPA was signed into law on October 26, 2001, about six weeks after the September 11th attacks.<sup>15</sup> Much has been written in the press about the speed with which this legislation was passed in the aftermath of the attacks, in the midst of the anthrax scare and while the Senate building was closed down, with many members of Congress later admitting they did not have the chance to read what they signed under pressure from Attorney General Ashcroft, who insisted blood would be on their hands if they declined. How much this Administration knew in advance that could have prevented the attacks will perhaps never be known. What we do know is that the USAPA is, in many ways, a stain on our nation.

The USAPA is an extension of AEDPA and is grounded on a similar analysis of the terrorist threat. In 2002, an FBI official explained:

Historically, terrorism subjects of FBI investigation have been associated with terrorist organizations . . . However, we are increasingly seeing terrorist suspects who appear to operate at a distance from these organizations . . . [W]hat we see today are (1) agents of foreign powers

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<sup>14</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920-21 (1982). See also National Organization For Women, Inc. v. Scheidler, 267 F.3d 687, 703 (7th Cir. 2001) (applying the *Claiborne* test, and decided less than one month after September 11).

<sup>15</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USAPA) of 2001, Pub. L. No. 107-56, 115 Stat. 349 (2001).

in the traditional sense who are associated with some organization or discernible group, (2) individuals who appear to have connections with multiple terrorist organizations but who do not appear to owe allegiance to any one of them, but rather owe allegiance to the international jihad movement and (3) individuals who appear to be personally oriented toward terrorism but with whom there is no known connection to a foreign power.<sup>16</sup>

The foreign terrorist designation provision in AEDPA, which was amended by the USAPA, is found in Section 219 of the Immigration and Nationality Act (INA). The reason for this is that members of FTOs are inadmissible into the United States.

Where in AEDPA there was only one type of foreign terrorist organization, the USAPA defines three types: (1) a designated organization under 8 U.S.C. §1189 (“the designation provision”);<sup>17</sup> (2) “otherwise designated”;<sup>18</sup> and (3) a group of two or more individuals, whether organized or not, which engages in selected terrorist activities.<sup>19</sup> As in AEDPA, under the USAPA the Secretary of State may designate

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<sup>16</sup> *Amending FISA: Hearing Before the Senate Select Committee on Intelligence*, (July 31, 2002) (statement of Mr. Marion E. “Spike” Bowman, Deputy General Counsel, Federal Bureau of Investigation), available at <http://intelligence.senate.gov/0207hr/020731/bowman.pdf> (last visited Aug. 21, 2003) (analyzing the USAPA amendments to the Foreign Intelligence Surveillance Act (FISA), which analysis applies equally to the USAPA in its entirety) [hereinafter FISA Hearings]. See also <http://intelligence.senate.gov/0207hr/020731/witness.htm> (last visited Aug. 21, 2003) (providing additional witness testimony). FISA requires probable cause that the target of foreign intelligence investigations be a foreign power or an agent of a foreign power. 50 U.S.C. § 1801 *et seq.*

<sup>17</sup> See USAPA § 411(a)(1)(G)(vi)(I). See *infra* note 150 and accompanying text for discussion of circularity of FTO provisions.

<sup>18</sup> See USAPA § 411(a)(1)(G)(vi)(II) (defining “otherwise designated” as those organizations designated “by the Secretary of State in consultation with or upon the request of the Attorney General,” after finding that the organization engages in the activities described in 8 U.S.C. § 1182 (a)(3)(B)(iv)(I), (II), or (III), or that the organization provides material support to further terrorist activity).

<sup>19</sup> See USAPA § 411(a)(1)(G)(vi)(III). Sub-clauses (I), (II), and (III) of 8 U.S.C. § 1182 (a)(3)(B)(iv) define engaging in terrorist activity as (I) to commit or incite to commit under circumstances indicating intent to cause death or serious bodily injury, a terrorist activity, (II) to prepare or plan a terrorist activity, and (III) to gather information on potential targets for terrorist activity. See 8 U.S.C. § 1182 (a)(3)(B)(iv)(I)-(III) (2003). Terrorist activity is defined in yet another provision of the same title, 8 U.S.C. § 1182(a)(3)(B)(iii) as “any activity which is unlawful under the laws of the place where it is committed and which involves the hijacking or sabotage of any conveyance, the seizing or detaining and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained, a violent attack upon an internationally protected person or upon the liberty of such a person, an assassination, the use of any biological agent, chemical agent, or nuclear weapon device, or explosive, firearm, or other weapon or dangerous device, with the intent to endanger, directly or indirectly, the safety of one or more

an organization if the Secretary finds that the organization is a foreign organization that engages in terrorist activity<sup>20</sup> or terrorism,<sup>21</sup> and the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. National security is defined as “the national defense, foreign relations, or economic interests of the United States.”<sup>22</sup>

There are vast numbers of specified offenses listed in the definition of terrorist activity.<sup>23</sup> The term “terrorist activity” is also used within numerous other provisions (definition of FTOs, terrorist organizations, engaging in terrorist activities, and by extension, material support of terrorists, and separately, of FTOs).<sup>24</sup>

Although our concern here is with designated FTOs, designation itself draws on definitions of terrorist activity and terrorism.<sup>25</sup> Thus, the designation of FTOs, and the criminal laws that may be used in relation to these provisions, intersect and interact with classifications pertaining to admissibility of aliens. It is therefore necessary, if one wants to understand the anti-terrorism laws in this country, to be aware of the legal requirements relating to excludable aliens.

Foreign representatives of political, social, or similar groups, “whose public endorsements of terrorist activities undermine our efforts to reduce or eliminate terrorism” are now inadmissible.<sup>26</sup> The USAPA redefined two categories of terrorism-related factors which render an alien inadmissible: engaging in terrorist activity<sup>27</sup> and representing a terrorist organization.<sup>28</sup> The Act also adds three more: espousing terrorist activity, being the spouse or child of an inadmissible alien; and associating with a terrorist organization while intending to engage in activities that could endanger the welfare, safety, or security of the United States.<sup>29</sup> The USAPA further expanded the authority to designate not only any foreign organization that engages in terrorism or ter-

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*individuals or to cause substantial damage to property, or a threat, attempt, or conspiracy to do any of the foregoing. See 8 U.S.C. § 1182(a)(3)(B)(iii)(I)-(VI) (emphasis added).*

<sup>20</sup> See 8 U.S.C. § 1182(a)(3)(B) (2003) (defining terrorist activities).

<sup>21</sup> See 22 U.S.C. § 2656f(d)(2) (2003) (defining terrorism).

<sup>22</sup> 8 U.S.C. § 1189(c)(2) (2003).

<sup>23</sup> See generally 8 U.S.C. § 1182(a)(3)(B)(iii).

<sup>24</sup> See Chart of Anti-Terrorism Provisions, *supra* note 11.

<sup>25</sup> 8 U.S.C. § 1182(a)(3) (defining classes of aliens ineligible for visas or admission).

<sup>26</sup> See USAPA § 411, *amending* 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)(bb).

<sup>27</sup> See USAPA § 411, *amending* 8 U.S.C. § 1182(a)(3)(B)(iv).

<sup>28</sup> See USAPA § 411, *amending* 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)(aa).

<sup>29</sup> See USAPA § 411, *amending* 8 U.S.C. § 1182 (a)(3)(B)(i)(VI), (VII) and § 1182 (a)(3)(F). See also Congressional Research Service, *Terrorism: Section by Section Analysis of the USA PATRIOT Act 33-*

rorist activity, but also one that merely “retains the capability and intent to engage in a terrorist activity or terrorism.”<sup>30</sup>

Thus, in addition to amending immigration laws that interplay with criminal laws, the USAPA also separately and directly amends federal criminal laws.<sup>31</sup> For example, Section 802 of the Act amends the criminal code, 18 U.S.C. § 2331, to add a new definition of ‘domestic terrorism’ to include activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any States appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by mass destruction, assassination, or kidnapping, or affect the conduct of a government by mass destruction, assassination, or kidnapping, and occur primarily within the territorial jurisdiction of the United States.<sup>32</sup>

Another provision, 18 U.S.C. § 2332b, defining the “federal crime of terrorism,” criminalizes acts that transcend national boundaries, which are “calculated to influence or affect the conduct of government by intimidation or coercion, or retaliate against government conduct” and violate one or more specifically listed federal statute, usually posing a substantial risk of serious bodily injury.<sup>33</sup> The USAPA adds several specified offenses to and removes others from this provision.<sup>34</sup>

Again, as C. William Michaels notes, the “definitions of ‘terrorist activity’ and ‘engaging in terrorist activity’” which are used in designation, “do not expressly relate to the definitions . . . of ‘domestic terrorism’ (new) or ‘federal crime of terrorism’ (expanded).”<sup>35</sup> However, as in

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35 (Dec. 10, 2001), *available at* <http://fpc.state.gov/documents/organization/7952.pdf> (last visited Jan. 26, 2004) [hereinafter CRS Report].

<sup>30</sup> USAPA § 411(c), *amending* 8 U.S.C. § 1189(a), (1)(INA § 219(a)).

<sup>31</sup> C. WILLIAM MICHAELS, *NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE*, 122 (2002) [hereinafter MICHAELS]. Michaels writes that although the immigration definitions “are separate from the definition of ‘terrorism’ (that is, ‘domestic terrorism’ and the ‘the federal crime of terrorism’)” that are found in the criminal provisions, they nonetheless “have overall bearing on the extensiveness by which the Act views ‘terrorist’ activity or groups.”

<sup>32</sup> USAPA § 802, *amending* 18 U.S.C. § 2331.

<sup>33</sup> 18 U.S.C. § 2332b.

<sup>34</sup> USAPA § 808 (adding acts of violence against mass transportation systems, use of chemical weapons, assault on a flight crew with a dangerous weapon, and crimes involving computer security and protection; removing offenses relating to government contracts, producing defective national defense materials, assault, and malicious mischief). *See also* 18 U.S.C. § 2332b, *and* MICHAELS, *supra* note 31, at 153-54 (providing full listings).

<sup>35</sup> MICHAELS, *supra* note 31, at 121.

the *Boim* case,<sup>36</sup> the immigration and criminal statutes may be used in tandem, and courts may draw on definitions in one category to assist in interpreting the law in the other.

Michaels remarks that “the scope of federal surveillance, investigation, information sharing, and prosecution of terrorism will be based in general on the terrorism definitions” in the federal criminal statutes, as amended by the USAPA, and adds that “[a]ny reference in any other USAPA section of ‘terrorism’ or ‘terrorist acts,’ including certification of an alien as a terrorist or a member of a terrorist group . . . or investigation of money laundering or funds transfer for ‘terrorism’” in Treasury Department lists of blocked persons, could also reference the definitions in the criminal statutes.<sup>37</sup> Finally, Michaels points out that “federal investigation into this entire list of crimes [in the federal crime of terrorism], including attempts and conspiracies, would be legitimate investigation into ‘terrorism.’”<sup>38</sup> In conclusion, Michaels notes:

With each USAPA Title building upon the other and linking together an entire federal investigatory, surveillance, intelligence, and law enforcement apparatus, a disturbing amount of unchecked power is now placed in the Executive Branch. What is even more disturbing is that these . . . provisions are permanent.<sup>39</sup>

In 2002, two officers of the Rutherford Institute wrote that while the Justice Department “assures Americans that its new legal and investigatory authority is ‘carefully drawn’ to target only ‘terrorists,’” at the same time, “it has greatly expanded that class of suspects through the Patriot Act.”<sup>40</sup>

The Rutherford Institute authors add that the USAPA amendments to the definitions of terrorism “include any such acts that result in virtually any federal crime of violence.”<sup>41</sup> They note that while John Ashcroft “recently assured the Senate that the U.S. government’s definition of terrorism has, since 1983, included as terrorists only ‘those who

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<sup>36</sup> *Boim v. Quranic Literacy Inst. and Holy Land Foundation for Relief and Development*, 291 F.3d 1000 (7th Cir. 2002). See *infra* Part XII.

<sup>37</sup> MICHAELS, *supra* note 31, at 152.

<sup>38</sup> *Id.* at 153.

<sup>39</sup> *Id.* at 127.

<sup>40</sup> John W. Whitehead & Steven H. Aden, *Forfeiting ‘Enduring Freedom’ for ‘Homeland Security’: A Constitutional Analysis of the USA PATRIOT Act and the Justice Departments Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1092 (August 2002) [hereinafter Whitehead].

<sup>41</sup> *Id.* at 1093.

perpetrate premeditated, politically motivated violence against noncombatant targets' . . . [i]f that is true, it certainly begs the question of why the Bush Administration felt the need to redefine 'terrorism' to include a wide variety of domestic criminal acts."<sup>42</sup>

Further, in light of the argument made in 2002 by FBI Deputy General Counsel Bowman to the Senate Select Committee on Intelligence, asserting that terrorists "world-wide speak of jihad and wonder why the western world is focused on groups rather than on the concepts that make them a community," and that "[t]hese militants are linked by ideas and goals, not by organizational structure,"<sup>43</sup> one must question why AEDPA and the USAPA focus so heavily on foreign terrorist organizations. The Immigration Law Service (ILS) January 2003 update noted that:

On December 7, 2001, the Secretary of State designated, by publication in the Federal Register 39 entities as "terrorist organizations" pursuant to the new procedures under §411(a)(1)(G) of the USA PATRIOT Act [which provides the three classifications of terrorist organizations], which modified INA §212(a)(3)(B)(vi) (8 U.S.C.A. §1182(a)(3)(B)(vi)) [defining "terrorist organization"]. The Federal Register notice does not mention INA §219 [the FTO designation provision], leading to the conclusion that the designations are based on INA §212(a)(3)(B)(vi)(II) ["otherwise designated"].<sup>44</sup>

This is a sneaky bit of business, since on August 2002, the Secretary of State designated another thirty-four organizations as FTOs under the designation provision. Thus, a group that succeeds in challenging its designation under one list may still be liable under the other. Furthermore, as the ILS points out, the three methods of defining a terrorist organization "make for potentially confusing situation for the alien seeking to avoid contact with a proscribed organization."<sup>45</sup>

#### *Material Support: Two Cases*

The AEDPA/USAPA designation provision is reminiscent of McCarthy era laws that trod upon Americans' First Amendment rights of

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<sup>42</sup> *Id.*

<sup>43</sup> *See supra* text accompanying note 16.

<sup>44</sup> ANNA GALLAGHER, IMMIGRATION LAW SERVICE 2D § 3:52 (2003) (bracketed comments added).

<sup>45</sup> *Id.*

freedom of association. Any foreign organization can be designated<sup>46</sup> and anyone who supports it can be convicted.<sup>47</sup> As noted earlier, the provision also raises due process concerns, since a criminal prosecution can be brought against anyone who provides material support to a designated organization, but the statute prohibits the individual from challenging the designation.<sup>48</sup>

Two cases where material support of terrorism is charged that have received the most media coverage are the Lynne Stewart and the Sami Al-Arian cases.<sup>49</sup> Lynne Stewart is a New York criminal defense attorney initially charged with violation of 18 U.S.C. § 2339B (material support of a designated FTO) and conspiracy to violate § 2339B because she purportedly “facilitated and concealed communications between [her incarcerated client] Sheikh Abdel Rahman and [terrorist] leaders around the world” by allegedly distracting guards while the translator passed messages to her client, and by announcing to the media that her client had withdrawn his support for a cease-fire between factions of the designated terrorist group.<sup>50</sup>

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<sup>46</sup> Initially only foreign organizations were subject to designation. *But see* USAPA § 802, *amending* 18 U.S.C. § 2331 (adding a new category of “domestic terrorism,” which is defined as “activities that involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any State, that appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the U.S.”). This is identical to the definition of “international terrorism,” except that the international terrorism is defined as occurring outside of the United States. *See* 18 U.S.C. § 2331(1) (2003). The definition of international terrorism is not used in designation of a foreign terrorist organization. *See also* 18 U.S.C. § 2332b (2003) (providing penalties for acts of terrorism transcending national boundaries).

<sup>47</sup> *See* 8 U.S.C. § 2339B (2003) (discussing penalties for those “providing material support or resources to designated foreign terrorist organizations”).

<sup>48</sup> *See* 8 U.S.C. § 1189(b) (providing for judicial review of designation as an FTO). However, review is limited to the Court of Appeals for the District of Columbia and “shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.” 8 U.S.C. § 1189(b)(1)-(2). Also, “a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.” 8 U.S.C. § 1189(a)(8).

<sup>49</sup> Similar indictments include those of Earnest James Ujaama (Seattle resident accused of supporting terrorism under 18 U.S.C. §§ 956 (a) (1) and (b), and 2339A & B), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf>, and Enaam M. Arnaout (Director of Islamic charity in Illinois accused of funding al Qaeda under 18 U.S.C. §§ 2, 1341, 1343, 1956, 1962 & 2339A), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/usarnaout10902ind.pdf>.

<sup>50</sup> Indictment, *United States v. Sattar*, (S.D.N.Y. Apr. 9, 2002) (02 Crim. 395), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf>. [hereinafter *Sattar* Indictment]. On July 22, 2003, the material support charges in the Stewart case were dismissed by Judge Koeltl in the District Court of the Southern District of New York. *United States v. Sattar*, 272 F.

Sami Al-Arian, a tenured professor at University of South Florida in Tampa, was arrested on charges of conspiracy to commit racketeering, wire fraud, material support of a designated FTO, and conspiracy to provide material support to a designated FTO.<sup>51</sup> Because the Al-Arian case combines four of the most troubling laws (or types of laws) in America, I draw first on his indictment for purposes of illustration and discussion.

#### IV. THE *AL-ARIAN* CASE: THE ANTI-TERRORISM LAWS IN ACTION

The indictment against Professor Al-Arian is over a hundred pages in length and contains more than fifty counts that describe in detail every separate act. These involve mostly purported transfers of money to accounts later allegedly used to fund terrorist acts. Numerous counts attempt to establish the connections between Al-Arian and the accounts, or between the accounts and the terrorist acts.

The Department of Justice (DOJ) claims the indictment was made possible by the information sharing provision of the USAPA, which was upheld by the Foreign Intelligence Surveillance Act (FISA) court of review. The DOJ's answers provided in response to questions from the House Committee on the Judiciary state:

The recent indictment of Sami Al-Arian and other alleged members of a Palestinian Islamic Jihad (PIJ) cell in Tampa, Florida, illustrates a case that benefited from the new standards. The allegations contained in the conspiracy indictment were based largely on electronic surveillance authorized pursuant to FISA and conducted prior to the USA PATRIOT Act. \*\*\* The . . . Act's amendments to FISA . . . enabled

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Supp. 2d 348 (S.D.N.Y. 2003). On November 19, 2003, subsequent to dismissal of the 2339B charges, the government filed a superseding indictment against Stewart under 18 U.S.C. § 2339A (providing material support to terrorists), available at <http://www.lynnstewart.org/Indictment-Superseding.pdf>, which is still pending as of this writing. See *infra* section VIII for discussion of the differences between 2339A and 2339B. The Stewart case is discussed at the conclusion of this article. The indictment makes two additional charges that are not dealt with in this article: (1) alleged violations of the Bureau of Prisons Special Administration Measures (SAM), and (2) attorney ethical obligations to clients. See Alexandra A.E. Shapiro & Noreen A. Kelly Najah, *Indictment Raises Questions About Scope of Federal False Statement Statute* (April 19, 2002), available at [http://www.lw.com/resource/publications/\\_pdf/pub487.pdf](http://www.lw.com/resource/publications/_pdf/pub487.pdf) (discussing the federal "False Statements Statute" in the SAM violation) (last visited Feb. 2, 2004). See also Heidi Boghosian, *Taint Teams & Firewalls: Thin Armor for Attorney-Client Privilege*, 1 *CARDOZO PUB. L. POL'Y & ETHICS J.* 15 (2003) (discussing the attorney question in the Stewart case).

<sup>51</sup> Indictment, *United States v. Al-Arian*, (M.D. Fla. 2003) (No. 8:03-CR-T), available at <http://news.findlaw.com/hdocs/docs/alarian/usalarian0203ind.pdf> (last visited Jan. 26, 2004) [hereinafter *Al-Arian Indictment*]. Al-Arian was arrested on Feb. 20, 2003.

criminal investigators in Tampa finally to obtain and systematically consider the full range of evidence of the alleged conspiracy.”<sup>52</sup>

The Deputy General Counsel of the CIA noted that the USAPA “removed artificial statutory barriers to law enforcement information sharing with the intelligence community and clarified the authorities of the DCI [Director of Central Intelligence] with respect to FISA.”<sup>53</sup>

The Al-Arian indictment is a phenomenal accomplishment for law enforcement and prosecutors, who logged thousands of hours over the course of more than ten years of investigation and surveillance. Unfortunately, although the information sharing provision may have helped the FBI pull together sufficient information for the government to indict Al-Arian, the provisions under which the indictment is brought suffer from constitutional infirmities. In fact, while there are good reasons to share foreign surveillance information with criminal investigators, the mixing of these two forms of information may undermine constitutional protections, since foreign intelligence need not meet Fourth Amendment probable cause requirements. The designation and material support provisions (particularly in a conspiracy context) compound the constitutional error initiated by the information mixing, creating a constitutional morass that may undermine or altogether undo the investigative work of our law enforcement personnel and prosecutors.

John Loftus, a former federal prosecutor and whistleblower, filed a civil lawsuit against Al-Arian in 2002, accusing him of terrorist acts.<sup>54</sup> Loftus had obtained confidential information through his own sources that convinced him that Al-Arian was a terrorist in our midst and he felt that the government was doing nothing about it. The information he alleges is damning, showing strong ties between Al-Arian’s activities and terrorism.<sup>55</sup> After he filed suit, government officials approached him

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<sup>52</sup> Responses of Department of Justice to questions from Sensenbrenner and Conyers, House Committee on the Judiciary 15-16 (June 13, 2002), *available at* <http://www.fas.org/irp/news/2002/10/doj101702.pdf>.

<sup>53</sup> Frederic F. Manget, Deputy General Counsel of the Central Intelligence Agency, Opening Remarks before the Senate Select Committee on Intelligence (Jul. 31, 2002), *available at* <http://intelligence.senate.gov/0207hr/020731/manget.pdf> (last visited Aug. 19, 2003).

<sup>54</sup> See Press Release, John Loftus, Lawsuit exposes Federal cover-up of Saudi-funded terrorist net in Florida (2003), *available at* [http://www.john-loftus.com/press\\_release.asp](http://www.john-loftus.com/press_release.asp) (last visited Aug. 19, 2003).

<sup>55</sup> Loftus filed the suit pursuant to Chapter 501, § 211, et. seq., of the Florida Statutes (Florida Deceptive or Unfair Trade and Practices Act (FDUTPA), also known as the Florida “Little FTC” Act or Consumer Protection Act), to “enjoin Defendant and his purported Florida charities from continuing fraudulent, deceptive and unconscionable practices, to wit: laundering money for extreme racist,

and asked him to delay the suit because they were working on putting together a criminal case against Al-Arian.<sup>56</sup>

Loftus has not pursued his civil action, but intends to keep it alive, despite the fact that the U.S. government has now indicted and arrested Al-Arian, because Loftus believes, as I do, that the laws upon which the indictment rests are inadequate to obtain a solid conviction. Loftus believes that Al-Arian will be convicted and the conviction will be overturned on appeal.

In my opinion, our present anti-terrorism laws have put law enforcement in a double bind. Where government is provided with surveillance powers that violate the Constitution, law enforcement is damned if they use the powers and damned if they do not. Where the laws are unconstitutional, there will be no convictions, or convictions will be overturned, and terrorists will go free despite the work of law enforcement. Alternatively, if a conviction on bad laws holds, it will set bad precedent, undermine constitutional rights, and erode the rule of law. It is the rule of law which makes our society civilized and guarantees our freedoms.

Designation is like a container ship upon which are loaded containers (material support, conspiracy, etc.) within which are contained the substantive charges (specific terrorist activities). However, designation, although a structurally unsound ship itself, is not by any means the only problem with the Al-Arian indictment. That document rests on three other legal bases, each of which separately, are problematic. These are conspiracy, RICO, and material support.

In a nutshell, what these provisions allow and even encourage prosecutors to do, is to create a chain of mere inferences, to obtain convictions on nothing more than guilt by association. Particularly when these laws are used in tandem, there is danger of constitutional incursions and unsound convictions.

Such convictions violate the Constitution. They violate due process and the freedom to associate. Violating due process and the freedom to associate does not help the fight against terrorism. Violating constitutional protections can only promote the goals of terrorists.

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terrorist, and other non-charitable organizations.” Complaint of John Loftus, Plaintiff, *available at* <http://www.john-loftus.com/complaint.asp> (last visited Aug. 19, 2003).

<sup>56</sup> John Loftus, Speech at “Civil Rights v. Security” Oxford Style Debate at Nova Southeastern University (Mar. 26, 2003) *and* Interview with John Loftus, Plaintiff, at Nova Southeastern University (Mar. 26, 2003).

*Layers of Inferences Within Layers of Laws*

In order to understand what is wrong with the Al-Arian indictment, we must deconstruct the laws on which it rests. We will focus on only two of the charges, the material support charges.<sup>57</sup>

## (1) Conspiracy to commit racketeering (Count One)

–Al-Arian and others are charged with “being persons employed by or associated with the enterprise [the Palestinian Islamic Jihad]” which. . . did. . . conspire. . . to conduct the affairs of that enterprise through a pattern of racketeering activity. . . consisting of. . . *providing material support* or resources to *designated* foreign terrorist organizations.

## (2) Conspiracy to provide material support (Count Three)

–Al-Arian and others are charged with conspiring to “knowingly *provide material support* and resources . . . to a *designated* foreign terrorist organization, namely, the Palestinian Islamic Jihad (PIJ).”<sup>58</sup>

Note that both of these counts have at least three layers: (1) conspiracy, (2) material support, and (3) designation. Count One has a fourth: (4) a “pattern of racketeering” layer. As we will see, each of these laws separately is troubling. Their combined use is even more so.

As a side note, since these laws are being used prolifically today in terrorist prosecutions, and given recent reports of rampant misconduct by prosecutors throughout the United States,<sup>59</sup> courts should handle these cases with great care and be certain to maintain constitutionally mandated standards of proof. Lawmakers should strongly consider abolition or reform of these laws.

## V. THE TROUBLE WITH CONSPIRACY

Conspiracy law and the material support/designation provisions of the current anti-terrorism laws have much in common and are both favored prosecutorial tools. At common law, a conspiracy consists of an agreement, which need not be expressed, to commit an unlawful act or

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<sup>57</sup> Other charges include murder, mail fraud, attempting to procure citizenship unlawfully, false statement in immigration application, obstruction of justice and perjury. Al-Arian Indictment, *supra* note 51.

<sup>58</sup> Al-Arian Indictment, *supra* note 51, at 9-10 (emphasis added). At § (C), Count One charges Al-Arian with conspiracy to violate 18 U.S.C. § 1962(c). Subsection (f) is where the material support (18 U.S.C. § 2339B) charge is found. *Id.*

<sup>59</sup> See, e.g., The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors* (Jan. 27, 2004), available at <http://www.publicintegrity.org/pm/> (last visited Feb. 2, 2004).

acts or a lawful act by unlawful means. Under federal law, 18 U.S.C. § 371, conspiracy is an agreement to commit a crime, plus an overt act. The agreement may be proven directly or through circumstantial evidence. Because of the clandestine nature of the crime, courts have permitted broad inferences to be drawn from evidence. The danger of this practice is that it may lead to impermissible piling of inference upon inference.<sup>60</sup>

Judge Learned Hand once described conspiracy as the “darling of the modern prosecutor’s nursery.”<sup>61</sup> Joshua Dressler writes that conspiracy “is an extremely controversial crime.”<sup>62</sup> He notes three criticisms: (1) the “crime of conspiracy is so vague that it almost defies definition,” (2) a person may be convicted of the offense well before she commits any act in perpetration of a substantive crime, and (3) the crime “is always predominantly mental in composition” because it consists primarily of a meeting of minds and an intent.<sup>63</sup> Dressler notes a fourth critique that compares “[conspiracy] to Einstein’s theory of relativity, stating that the concept is ‘so far removed from ordinary human experience or modes of thought . . . [that] it escapes just beyond the boundaries of the mind.’”<sup>64</sup> Jethro Lieberman writes:

Conspiracy is an offense of such sweeping breadth that, had it been invented in the twentieth century, the courts might well have voided it for violating due process. But because of its ancient lineage and because it has proved so powerful a device for securing convictions in criminal cases, the courts have consistently refused to find a constitutional flaw in its central feature. \*\*\* But conspiracy laws have frequently been used to deter the exercise of various civil rights and civil liberties, such as freedom of association and freedom of speech, as in many of the World War I espionage prosecutions.<sup>65</sup>

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<sup>60</sup> See *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997) (“Although the jury may draw reasonable inferences from direct and circumstantial evidence, such inference must be more than speculation and conjecture in order to be reasonable, and the conviction must not be obtained by piling inference upon inference.”) See also RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR THINKING* 28-33 (1997) (discussing legal reasoning and the drawing of inferences generally).

<sup>61</sup> *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

<sup>62</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 393 (1995).

<sup>63</sup> *Id.* (quoting *Krulewitch v. United States*, 336 U.S. 440, 446-48 (1949) (Jackson, J., concurring)).

<sup>64</sup> *Id.* at 393 n.6 (quoting JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* 61 (1969)).

<sup>65</sup> JETHRO K. LIEBERMAN, *A PRACTICAL COMPANION TO THE CONSTITUTION* 117 (1999).

In order to find a criminal conspiracy, “the government must [show] beyond a reasonable doubt, if only by circumstantial evidence that a conspiracy existed, that [defendant] knew of it and that he intended to associate himself with the objectives of the conspiracy.”<sup>66</sup> As stated by the Eleventh Circuit, “Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts.”<sup>67</sup> However, not all judges or juries are able to discern the difference between a reasonable inference from a sound premise leading to a logical probability, and an inference piled onto another inference, or based on false premises or false logic.<sup>68</sup> As Dressler noted of conspiracy, “[t]he difficulty in demonstrating an agreement has proven to be the prosecutor’s greatest advantage because ‘in their zeal to emphasize that the agreement need not be proved directly, the courts sometimes neglect to say that it need be proved at all.’”<sup>69</sup>

The terrorist support/designation laws suffer from similar defects. Defendants in numerous material support cases have already raised the complaint of vagueness. Material support of terrorism is a crime of which a person may be convicted without knowingly or intentionally participating in an act of terrorism. Some courts have been duped by the material support/designation provisions into making First Amendment analyses which fail to comport with the constitutional requirements, set forth in Supreme Court case law, that knowledge and specific intent be found to connect the support to the terrorism.

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<sup>66</sup> United States v. Horton, 646 F.2d 181, 185 (5th Cir. 1981). See also United States v. Pielago, 135 F.3d 703, 720 (11th Cir. 1998) (“[A] defendant’s association with conspirators and her knowledge of the conspirators’ actions are not themselves sufficient proof of participation in the conspiracy.”). See also United States v. Lyons, 53 F.3d 1198, 1201 (11th Cir. 1995) (“Mere presence, guilty knowledge, even sympathetic observation have all been held by this court to fall short of the proof required to support her conviction in this case. A showing of *knowing participation* is required. The government, in this case, must have proved that an agreement existed between two or more persons illegally to possess and distribute drugs and that [defendant] knowingly and voluntarily joined or participated in the conspiracy.”).

<sup>67</sup> United States v. Villegas, 911 F.2d 623, 628 (11th Cir., 1990).

<sup>68</sup> ALDISERT, *supra* note 60, at 1 (“Some never master ‘thinking like a lawyer’ even though they graduate, pass the bar exam, and become financially successful attorneys. Even those who master the technique of legal reasoning are not always certain what it is . . . . Often students, and unfortunately, lawyers and judges, do not know exactly what is being done.”).

<sup>69</sup> DRESSLER, *supra* note 62, at 398, quoting *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 933 (1959)).

Similarly, as Dressler remarks, “Because of conspiracy law’s emphasis on *mens rea* and its consequent de-emphasis on conduct, there exists a greater than normal risk that ‘persons will be punished for what they say rather than for what they do, or for associating with others who are found culpable.’”<sup>70</sup>

However, the point of discussing conspiracy is not to illustrate how it is similar to the support/designation provisions, but to show that layering these inchoate laws, one on top of the other, is dangerous to the judicial system, to civil liberties, and to democracy. It is like putting a leaky lifeboat on top of a ship with a breached hull. This is not to say that at least some of these laws cannot meet constitutional standards where the court is careful to apply the proper tests, but where a conspiracy charge is layered on top of a material support charge which is layered on top of a foreign terrorist designation and, as we will see below, where RICO is also used, there is great danger that the law will simply “escape just beyond the boundaries of the mind.” Courts are likely to allow the prosecution to prove its case by piling inference upon inference, and will “neglect to say that [the charges] be proved at all.”

## VI. THE TROUBLE WITH RICO

Al-Arian is charged with conspiracy to violate RICO. The Racketeer Influence and Corrupt Organizations Act of 1970, makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”<sup>71</sup> “Racketeering activity” includes a great variety of serious criminal conduct, including murder, kidnapping, arson, robbery, bribery, extortion and drug dealing.<sup>72</sup> There must be at least two such acts within a ten-year span for it to constitute a pattern.<sup>73</sup> The three elements in a substantive RICO violation are: (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity.

RICO assists prosecutors where “a single agreement or common objective could not be inferred from the commission of highly diverse

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<sup>70</sup> *Id.*, (quoting Phillip Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1139 (1973)).

<sup>71</sup> 18 U.S.C. § 1962(c) (2003).

<sup>72</sup> 18 U.S.C. § 1961(1) (2003).

<sup>73</sup> 18 U.S.C. § 1961(5) (2003).

crimes by apparently unrelated individuals” by “creating a substantive offense which ties together these diverse parties and crimes.”<sup>74</sup>

The association problem in RICO was made clear by the government’s argument in a 1979 Sixth Circuit case, *United States v. Sutton*.<sup>75</sup> The government argued that “the statute on its face does not distinguish between ‘legitimate’ and ‘illegitimate’ enterprises but instead, by its express terms, applies to ‘any enterprise.’”<sup>76</sup> The government claimed that the “evidence demonstrates that appellants were a ‘group of individuals associated in fact’ and that each committed the required number of racketeering offenses while in that association.”<sup>77</sup> The court noted the problem with the government’s thinking: “Individuals and groups do not become ‘enterprises’ except in relation to something they do. The statutory definition of ‘enterprise’ contained in §1961(4) is incomplete because it does not tell us what that ‘something’ is.”<sup>78</sup>

The court noted that “[t]he government would finesse the problem,” and added that “[t]he government had successfully applied the statute in the same fashion on numerous other occasions.”<sup>79</sup> The court concluded, “It requires no great insight to recognize that applying the statute in this fashion renders the ‘enterprise’ element of the crime wholly redundant and transforms the statute into a simple proscription against ‘patterns of racketeering activity.’”<sup>80</sup> The court then stated:

In a passage which the government urges us to follow, the Fifth Circuit describes a ‘criminal enterprise’ as ‘an amoeba-like infra-structure that controls a secret criminal network.’ With all due respect, we think greater precision than that is required if the statute is not to violate ‘the first essential of due process of law’ by forbidding ‘the doing of an act in terms so vague that [persons] of common intelligence [would] necessarily [have to] guess at its meaning and differ as to its application.’ Although government prosecutors may be trained nowadays to recognize an ‘amoeba-like infra-structure’ when they see one, our instincts are not so keenly developed, and we think even racketeers are

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<sup>74</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 554 (2d. ed. 1986), (quoting *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978)).

<sup>75</sup> 605 F.2d 260 (6th Cir. 1979).

<sup>76</sup> *Id.* at 264.

<sup>77</sup> *Id.* at 264-65.

<sup>78</sup> *Id.* at 265.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

entitled to know before the fact at what point their criminal activities will be deemed sufficiently ‘amoeba-like’ to transgress the statute.<sup>81</sup>

Defense attorneys note that RICO was originally enacted to catch Mafia members, but has since been greatly expanded to use in white collar crimes.<sup>82</sup> In addition to RICO’s immense reach, a RICO conspiracy, unlike the general federal conspiracy statute (18 U.S.C. § 371), does not require an overt or specific act.<sup>83</sup> This raises the troubling possibility that, even though a RICO violation requires two or more predicate acts, a RICO conspirator can be convicted of the conspiracy without having committed or agreed to commit any act at all. The rationale for this view is that a RICO conspirator can agree to plan or support the conspiracy without carrying out any acts himself. However, the Supreme Court, while deciding to uphold this view, noted:

In some cases the connection the defendant had to the alleged enterprise or to the conspiracy to further it may be tenuous enough so that his own commission of two predicate acts may become an important part of the Government’s case. Perhaps these were the considerations leading some of the Circuits to require in [RICO] conspiracy cases that each conspirator himself commit or agree to commit two or more predicate acts. Nevertheless, that proposition cannot be sustained as a definition of the [RICO] conspiracy offense . . . .<sup>84</sup>

Once again, RICO, and more specifically, the RICO conspiracy provision, are constitutionally troubling, especially when the substantive offense is itself troubling. Where the underlying substantive offense is

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<sup>81</sup> *Id.* at 266, (quoting *United States v. Culbert*, 435 U.S. 371, 374 (1978) (internal quotation omitted)). The *Sutton* decision was vacated in part and remanded on the issue of whether RICO applied only to legitimate enterprises (engaging in unlawful activity) or included illegitimate ones, as well.

<sup>82</sup> Interviews with Barry Slotnick (Mar. 24, 2003), and John Loftus (Mar. 26, 2003). Both attorneys expressed concern that use of the USAPA, intended to fight terrorism, would similarly be expanded over time to other crimes not originally intended to be covered by the statute.

<sup>83</sup> *Salinas v. United States*, 522 U.S. 52, 63 (1997).

<sup>84</sup> *Id.* at 65-66. (“It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense. True, though an “enterprise” under § 1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity; and this in turn may make it somewhat difficult to determine just where the enterprise ends and the conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances.” *Id.* at 65. (Kennedy, J.))

material support of a designated foreign terrorist organization, constitutional concerns rise to the level of red alert.

## VII. CONCERNS WITH DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS (FTOs)

Al-Arian is accused of conspiring to provide support to a designated foreign terrorist organization. Joanne Mariner, Deputy Director of the Americas Division of Human Rights Watch (HRW), describes the process and rationale of designation:

The United States started drawing up an official list of terrorist groups a few years ago, pursuant to the Anti-terrorism and Effective Death Penalty Act of 1996. That law included a ban on fundraising in the United States by terrorist organizations designated by the Secretary of State, as well as provisions for deporting the members of such groups. The legal criteria for inclusion on the list are threefold: the organization must be foreign; it must engage in terrorist activity as defined in §212(a)(3)(B) of the Immigration and Nationality Act (INA), and its activities must threaten the security of U.S. nationals or the national security of the United States.

The relevant section of the INA is extremely broad, defining terrorist activity to cover hijacking, hostage-taking, violent attacks, the use of biological or chemical agents, and even the use of explosives or firearms “with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Besides covering the acts themselves, it also covers the threat, attempt or conspiracy to commit such acts.<sup>85</sup>

Mariner concludes:

Given the breadth of the law’s definition of terrorist activity, there is no shortage of groups that can arguably be deemed to engage in it. A survey of the activities of the many armed factions around the world indicates, in fact, that the more obviously subjective criterion of posing a threat to U.S. nationals or U.S. national security is likely to filter out more groups than the criterion of engaging in terrorist activity.<sup>86</sup>

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<sup>85</sup> Joanne Mariner, *The EU, The FARC, The PKK, and The PFLP: Distinguishing Politics From Terror*, Findlaw’s Writ Column, available at <http://writ.news.findlaw.com/mariner/20020513.html> (May 13, 2003) [hereinafter Mariner, EU].

<sup>86</sup> *Id.*

Mariner voices two concerns: *Designation is a political act*—“As a quick review of these lists and their history shows, the decision to classify a given group as ‘terrorist’ is far from a mechanical one: it involves political calculations as well as a factual assessment of a group’s actions.”<sup>87</sup> She adds that “the designation process is extremely vulnerable to political manipulation.”<sup>88</sup> She also notes that “the locus of dispute” over how to define terrorism “has shifted from facts to definitions.” On one side of this debate, some nations insist “that any definition of terrorism must clearly distinguish terrorist groups from national liberation movements.”<sup>89</sup> Other nations “would like to ensure that terrorism cannot, by definition, be committed by the armed forces of a legitimate government.”<sup>90</sup> Either definition, Mariner says, “would permit a horrifying set of acts as long as these acts were committed by certain favored groups.”<sup>91</sup>

*Designation raises due process concerns*— “[U]nder the law’s procedural provisions, the organization that is classified as terrorist is not notified prior to the designation.”<sup>92</sup> Indeed, as we shall later see, the due process problems of the designation statute are greater than simply a lack of notice. Mariner adds that the “due process shortcomings of the designation process are worrisome enough when money and other assets are at stake. When people are facing prison terms . . . however, these shortcomings merit the most serious attention.”<sup>93</sup> These concerns are discussed below in the *Rahmani* case.

*No Distinction Between Lawful versus Unlawful Activities*—David Cole and James Dempsey raise a third concern, noting,

[T]he Secretary of State can designate organizations that engage in both lawful and unlawful activity, based on a determination that the group’s activities threaten our foreign policy or economic interests. Since courts are reluctant to second-guess the Secretary of State on

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<sup>87</sup> *Id.*

<sup>88</sup> Joanne Mariner, *Make a List But Check It Twice: Prosecuting Suspected Supporters of Terrorist Groups*, available at <http://writ.news.findlaw.com/mariner/20020902.html> (Sept. 2, 2003) (noting that some commentators suggest the government’s recent designation of the Muslim separatist group in Xinjiang was more aimed at placating the Chinese government than fighting terrorism.) [hereinafter Mariner, *List*].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

what threatens our foreign policy, the law effectively gives the Secretary of State a blank check to blacklist disfavored foreign groups.<sup>94</sup>

*Inadequate Judicial Review*—A fourth problem with designation is inadequate or ineffective judicial review. Cole and Dempsey note that “designation is effectively unreviewable.”<sup>95</sup>

*Overbroad Definitions*—A fifth problem is that designation relies on overbroad definitions of terrorism. For example, Nancy Chang, Senior Litigation Attorney for the Center for Constitutional Rights, writes: “[S]ection 411 now includes as ‘terrorist organizations’ groups that have never been designated as terrorist if they fall under the loose criterion of ‘two or more individuals, whether organized or not,’ which engage in specified terrorist activities.”<sup>96</sup> Furthermore, under the USAPA, an organization may be designated if it merely “retains the capability and intent to engage in terrorist activities or terrorism.”<sup>97</sup>

#### *Overbroad definitions*

The Congressional Research Service Report on the USAPA states that the earlier statute (namely AEDPA, amending INA), which defined engaging in terrorist activity,

. . . did not explain in so many words . . . what constituted a ‘terrorist organization,’ although it presumably at the very least included groups designated a terrorist organizations [sic] under Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189). Although only effective after designation, §411(c), Section 411 defines ‘terrorist organization’ to include not only organizations designated under §219 but also organizations which the Secretary [of State] has identified in the *Federal Register* as having provided material support for, committed, incited, planned, or gathered information on potential targets of,

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<sup>94</sup> DAVID COLE & JAMES DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 119-20 (2002) [hereinafter COLE & DEMPSEY]. See also Jennifer Van Bergen, *The USA PATRIOT Act Was Planned Before 9/11*, at [http://www.truthout.org/docs\\_02/05.21B,jvb.usapa.911.htm](http://www.truthout.org/docs_02/05.21B,jvb.usapa.911.htm) (surveying USAPA’s background, based on Cole and Dempsey’s book) (last visited Aug. 19, 2003).

<sup>95</sup> COLE & DEMPSEY, *supra* note 94, at 121. See *infra* Part IX for a discussion of this issue in the *Rahmani* case.

<sup>96</sup> Nancy Chang, *The USA PATRIOT Act: What’s So Patriotic About Trampling on the Bill of Rights?* (Nov. 2001), available at [http://www.ccr-ny-org/v2/reports/docs/USA\\_PATRIOT\\_ACT.pdf](http://www.ccr-ny-org/v2/reports/docs/USA_PATRIOT_ACT.pdf) (last visited Jan. 28, 2004) (quoting USAPA § 411(a)).

<sup>97</sup> 18 U.S.C. § 1189 (a)(1)(B).

terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C. 1182(a)(3)(B)(iv).<sup>98</sup>

The ACLU notes that the USAPA amends the definition of terrorist activity “so that it now covers use of a ‘weapon or other dangerous device . . . to cause substantial damage to property,’ even if such damage created no danger of injury.”<sup>99</sup>

The American Bar Association Task Force on Terrorism and the Law criticizes the “subjective ‘mens rea’ type approach” of the USAPA. Noting that the Act requires “the government to show that the crimes were ‘calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct,’” the ABA Task Force states that “[t]here is not only a risk under the subjective approach of failing to include within the definition true acts of terrorism, but there is an equal risk of bringing within the definition acts that may be too trivial to warrant the terrorism label.”<sup>100</sup>

The ABA Task Force posits, “[s]uppose, for example, an individual commits a violation of one of the statutes, acts alone and causes little harm, but has the intent to influence the government. He or she would be swept under the definition.”<sup>101</sup>

The ACLU notes that “groups such as World Trade Organization protestors who engage in minor vandalism, abortion foes who engage in civil disobedience, or protestors at Vieques, Puerto Rico who damage a fence, would be deemed terrorist organizations.”<sup>102</sup>

Chang notes that the provision saddles the suspect “with the difficult, if not impossible, burden of ‘demonstrat[ing] that he did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity.’”<sup>103</sup> Cole and Dempsey note:

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<sup>98</sup> CRS Report, *supra* note 29, at 34.

<sup>99</sup> ACLU, *supra* note 7 (quoting INA § 212(a)(3)(B)(ii)(V), amended by USAPA § 411).

<sup>100</sup> American Bar Association Task Force on Terrorism and Law, *Comments on Pending House and Senate Anti-Terrorism Legislation* (Oct. 8, 2001), available at [http://www.abanet.org/leadership/anti-terrorism\\_legislation.html](http://www.abanet.org/leadership/anti-terrorism_legislation.html) (last visited Jan. 28, 2004). The proposed language which the Task Force discusses was enacted as written in the bill.

<sup>101</sup> *Id.*

<sup>102</sup> ACLU, *supra* note 7.

<sup>103</sup> Chang, *supra* note 96 (quoting USAPA § 411(a) (amending 8 U.S.C. §§ 1182(a)(3)(B)(iv)(IV)(cc), (V)(cc) and (VI)(dd))).

[A]n alien who sent coloring books to a day-care center run by a designated organization would apparently be deportable as a terrorist, even if she could show that the coloring books were used only by 3-year olds. Indeed, the law apparently extends even to those who seek to support a group in the interest of *countering* terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain and forestalling further violence could be deported as a terrorist if the Secretary of State chose to designate the Irish Republican Army (IRA) as [a] terrorist [organization].<sup>104</sup>

#### VIII. MATERIAL SUPPORT: LAWFUL VERSUS UNLAWFUL AIMS

Al-Arian is charged under 18 U.S.C. § 2339B with providing material support to a designated foreign terrorist organization.<sup>105</sup> The provision against supporting foreign terrorist organizations was enacted in AEDPA. Section 805 of the USAPA defines the crime of material support of terrorism<sup>106</sup> and expands the material support offenses.<sup>107</sup>

Cole and Dempsey remark that this provision “exempts medicine and religious materials, but all other humanitarian or political aid is prohibited.”<sup>108</sup> They add that “the uncertainty and ambiguity inherent in the fundraising prohibition invites the FBI to conduct wide-ranging investigations of lawful activities.”<sup>109</sup>

According to Mariner, anonymous government officials quoted in the press have stated that the material support prosecutions, such as that of James Ujaama and the U.S. incorporated Global Relief Foundation (founded by Rabid Haddad, whose closed deportation hearings were

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<sup>104</sup> COLE & DEMPSEY, *supra* note 94, at 153-54.

<sup>105</sup> Al-Arian Indictment, *supra* note 51, at 9-10. Al-Arian is also charged with conspiring to conduct a racketeering enterprise through a pattern of racketeering activity to provide material support or resources to a designated foreign terrorist organization. *Id.*

<sup>106</sup> See USAPA § 805, *amending* 18 U.S.C. §§ 2339A-B.

<sup>107</sup> Added to the list by the section 805 of USAPA are chemical weapons offenses, terrorist attacks on mass transportation, sabotage of a nuclear facility, and sabotage of interstate pipelines. 18 U.S.C. § 2339A(a). See also Mariner, *List, supra* note 88 (“It is important to note that even before this law was passed, it was a federal crime to provide material support to foreign terrorists. The respect in which the law was changed was in allowing entire groups to be designated as terrorist, facilitating the prosecution of people who fund such groups.”).

<sup>108</sup> COLE & DEMPSEY, *supra* note 94, at 121.

<sup>109</sup> *Id.* at 122-22.

litigated *sub nom Detroit Free Press v. Ashcroft* and recently ruled unconstitutional by the Sixth Circuit), are a harbinger of things to come.<sup>110</sup>

There are actually two separate definitions of material support in the anti-terrorism laws. One provision, found in the criminal code, 18 U.S.C. § 2339A, defines material support as “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, transportation, and other physical assets, except medicine and religious materials.”<sup>111</sup> This provision is the one that criminalizes material support to “terrorists,” without providing a specific definition of “terrorists.” Instead, the statute has a long list of underlying crimes that it is unlawful to support.

Section 2339B, on the other hand, criminalizes providing material support or resources to a *designated* foreign terrorist organization. This is the provision that is most often used in conjunction with the designation provision. Both Sami Al-Arian and Lynne Stewart have been charged under this provision. After the New York district court threw out the Section 2339B charges against Stewart, the government returned with an indictment under 2339A, under which the case presently continues.<sup>112</sup>

A separate provision, found in the immigration statute, 8 U.S.C. § 1182, lists material support as “providing 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.”<sup>113</sup> This is contained in the provisions that relate to excludable aliens. The list, however, is found under the definition of “engage in terrorist activity,” which is used in relation to the designation of foreign terrorist organizations, which is in turn used in the statute criminalizing material support to designated FTOs. In other words, the Secretary of

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<sup>110</sup> See Mariner, *List, supra* note 88 (“[T]he momentum toward greater use of the [material support provision] seems to be growing.”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

<sup>111</sup> 18 U.S.C. § 2339A(b). Section 805 of the USAPA added the words “monetary assistance” and “expert advice or assistance.”

<sup>112</sup> See Mark Hamblett, Judge Narrows Charges Against Lynne Stewart (July 23, 2003), *available at* <http://www.law.com/jsp/article.jsp?id=1058416408552> (last visited Feb. 1, 2004). See also Mark Hamblett, *New Charges Lodged Against Lynne Stewart* (Nov. 20, 2003), *available at* <http://www.law.com/jsp/nlj/PubArticleSuperNLJ.jsp?id=1069170409840> (last visited Feb. 1, 2004). See *e.g.*, Sattar Indictments, *supra* note 50 (indicting Lynne Stewart).

<sup>113</sup> 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI) [also found at INA 212(a)(3)].

State may designate a foreign organization if it engages in “terrorist activity,” which may include acts of providing material support, under this list.

Section 2339B (drawing on 2339A’s definition) prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization.”<sup>114</sup> Both sections 2339B and 1182 have a scienter component. Section 1182 criminalizes support that the actor “knows or reasonably should know, affords material support.”<sup>115</sup> The statute then lists the prohibited types of support. The knowledge required, therefore, is not knowledge that the organization is engaged in unlawful activities. Nor is it knowledge that the organization to which you are providing support is, in fact, a terrorist organization.<sup>116</sup> The knowledge required is merely knowledge that what one is providing is material support.<sup>117</sup>

Note that a group may not be designated as an FTO if it merely provides expert advice or assistance, but it may be designated if it provides medicine or religious materials, while an individual may be prosecuted for providing expert advice or assistance to an FTO but not for providing medicine or religious materials.

One of the problems with this provision is the fact that one can be convicted for support of lawful activity of a terrorist organization. David Cole writes, “[l]ike the criminal ‘material support’ provisions of the 1996 Antiterrorism Act, the new law contains no requirement that

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<sup>114</sup> 18 U.S.C. § 2339B.

<sup>115</sup> Another subsection of 1182 provides another tricky knowledge requirement, stating that an alien who is a member of an organization which “the alien knows or should have known is a terrorist organization” is inadmissible, or ineligible for a visa. 8 U.S.C. § 1182 (a)(3)(B)(i)(V).

<sup>116</sup> It could be argued that the statute does require knowledge not only just that one is giving support but that one is giving it *to* a designated foreign terrorist organization. One would therefore argue that the designation itself takes care of the scienter analysis, since the designation puts everyone on notice that the government considers these organizations engaged in terrorist activities. “You know because we told you!” To the extent that one can assume that people read the *Federal Register*, where the designations are published, this knowledge analysis is nevertheless fraudulent. The knowledge required by this line of reasoning is merely knowledge that the *government* considers these organizations terrorist ones. The element of knowledge is meaningless where the statute does not prohibit the knowing support of specific, ascertainable wrongful acts. Furthermore, considering, as noted earlier, that “the three methods of defining a terrorist organization make for a potentially confusing situation for the alien seeking to avoid contact with a proscribed organization,” knowledge under these provisions is a snare. See *supra* notes 17-19 and accompanying text.

<sup>117</sup> The scienter component in section 2339A of Title 18, however, *does* require knowledge of an unlawful activity. The statute prohibits providing material support, knowing or intending that the support is to be used in preparation for any number of underlying criminal offenses, including killing, kidnapping, destruction of aircraft, use of chemical weapons, and so on.

the [person's] support have any connection whatsoever to a designated organization's violent activity."<sup>118</sup>

"This list-based approach to fighting terrorism," according to Cole, "produces some absurd results. For example, it is not a crime to raise and contribute money for violent conduct abroad that is not otherwise a crime under U.S. law, if carried out by a group that is not designated . . . but it is a crime to raise money for the peaceful activities of designated groups," even if they have renounced violence, unless and until they are removed from the government's list of terrorist organizations.<sup>119</sup>

In sum, Cole says that the material support provision, "ignores what has long been a fundamental precept of our constitutional law—that a 'blanket prohibition of association with a group having both legal and illegal aims,' without a showing of specific intent to further the unlawful aims of the group, is an unconstitutional infringement" on First Amendment rights.<sup>120</sup>

In 1982, the United States Supreme Court formulated the standard for associational cases in *NAACP v. Clairborne Hardware Co.*<sup>121</sup> The Court stated that, "in order to impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims."<sup>122</sup>

In 1961, the Supreme Court noted that membership crime "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes."<sup>123</sup>

So far, court decisions have varied in construing the material support provisions. *Humanitarian Law Project v. Reno*<sup>124</sup> illustrates the exact danger of the statute, allowing convictions to stand where there is no proof that the defendant has any intent to provide support to unlawful

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<sup>118</sup> COLE & DEMPSEY, *supra* note 94, at 153.

<sup>119</sup> *Id.* at 122.

<sup>120</sup> *Id.* at 123 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)).

<sup>121</sup> 458 U.S. 886 (1982).

<sup>122</sup> *Id.* at 920.

<sup>123</sup> *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

<sup>124</sup> *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied* 532 U.S. 904 (2001) (finding the proscription of material support constitutional, even if the donor did not have specific intent to aid in unlawful activities).

purposes, or proof that he knows the organization is engaged in such unlawful activities.

One danger of this provision is made clear in the court's decision in the *Lindh* case.<sup>125</sup> John Walker Lindh, the so-called "American Taliban," argued that the combined material support/designation provisions violated his right to associate with foreign individuals and groups. Echoing HLP, the court disagreed, declaring that Lindh is

not accused of merely associating with a disfavored or subversive group whose activities are limited to circulating inflammatory political or religious material exhorting opposition to the government . . . [but] is accused of joining groups that do not merely advocate terror, violence, and murder of innocents; these groups actually carry out what they advocate and those who join them, at whatever level, participate in the groups' acts of terror, violence, and murder.<sup>126</sup>

The court here clearly upholds guilt by association. It essentially says one can be found guilty of a crime for merely joining a disfavored group, even if there is no evidence of any knowledge of or intent to participate in any criminal activities.

It is also clear that the court draws vaguely on conspiracy and/or racketeering law in its reliance on group participation, without utilizing the safeguards in those fields. While both conspiracy and RICO are prone to prosecutorial abuse, both at minimum require proof of knowledge and agreement.

The material support provision was troubling enough under AEDPA, but the USAPA expanded on it. One commentator notes that the USAPA "expands the definition of material support to include expert advice and assistance."<sup>127</sup> The Congressional Research Service Analysis of the Act remarks that "[p]rosecutions grounded on providing material assistance in the form of expert advice may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of 'training' and 'personnel.'"<sup>128</sup> However, the court in *Lindh* rejected this challenge to the provision. This is again troubling since Lindh was accused of providing personnel to a designated FTO, a designation which he was not allowed to challenge.

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<sup>125</sup> United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

<sup>126</sup> *Id.* at 569.

<sup>127</sup> MICHAELS, *supra* note 31, at 151, n.8.

<sup>128</sup> CRS Report, *supra* note 29, at 48 (quoting HLP, 205 F.3d at 1130, 1137-8).

IX. DUE PROCESS & EFFECTIVE JUDICIAL REVIEW:  
THE *RAHMANI* CASE

It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.<sup>129</sup>

As noted earlier, the designation provision (and USAPA amendments) is found in the section of the Immigration and Nationality Act (INA) that deals with admissibility of aliens.<sup>130</sup> This placement is deceptive. Clearly, the United States has a positive obligation to keep terrorists out of the country. Further, the Supreme Court has determined that courts are not required to give the same due process to persons who are requesting admission to this country as to those living in the country, in various legal contexts.<sup>131</sup> Thus, it is logical that the government would have a duty and right to control admission. However, designation becomes problematic when mixed with criminal laws, which is what the current anti-terrorism laws do and were intended to do. Designation is used in conjunction with the material support provisions. Thus, it is a crime to give material support to a designated foreign terrorist organization (FTO).

If it is a crime to give support to an organization, the designation of which cannot be challenged, you could be deprived of liberty and property without the legal process that allows you to confront the evidence against you. What if the underlying information on which an FTO was designated were hearsay and/or false? You would not know it or be able to challenge it. You would have no defense against the charge that you supported that organization, even if you only supported clearly lawful activities.

In *United States v. Rahmani*,<sup>132</sup> the District Court determined that the designation provision was facially unconstitutional and could not be

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<sup>129</sup> *Rahmani*, 209 F. Supp. 2d at 1057, n.15.

<sup>130</sup> USAPA § 411(c), amending 8 U.S.C. § 1189(a).

<sup>131</sup> See Hiroshi Motomura, *The Curious Evolution of Immigrant Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (November 1992).

<sup>132</sup> *Rahmani*, 209 F. Supp. 2d 1045.

used to predicate a criminal prosecution under 18 U.S.C. § 2339B. The court wrote: “A facial challenge to the constitutionality of a statute is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the statute would be valid.”<sup>133</sup>

One of the troubling things about the designation process and one of the reasons given by the court for why the statute is facially invalid, is that the statute not only purports to restrict review to the D.C. Circuit, but that even that court could not effectively review the designation since no court can evaluate the accuracy of sources in a record compiled solely by the Secretary of State based on confidential sources.<sup>134</sup> The court in *Rahmani* notes that “justice and fairness require that such judicial review be effective.”<sup>135</sup> Without the ability to effectively review, courts must abdicate their constitutional roles. The *Rahmani* court refused, stating, it would not “abdicate this duty and allow this criminal case to proceed if the evidence indicates that one element of the offense (the foreign terrorist designation) was procured in violation of the Constitution.”<sup>136</sup>

The *Rahmani* Court noted that the D.C. Circuit Court determined that the designation provision was in violation of due process but had nonetheless allowed that designation to persist.<sup>137</sup> It then stated the D.C. Circuit could not be the only reviewing court. The California District Court must also review, based on the principle of effective judicial review and because the court was “duty bound to scrutinize the laws

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<sup>133</sup> *Id.* at 1055. Recently, two other California courts have ruled portions of the anti-terrorism laws unconstitutional. See *Federal Judge Rules Part of Patriot Act Unconstitutional* (Jan. 26, 2004), available at <http://www.rense.com/general48/fesdd.htm> (last visited Feb. 2, 2004).

<sup>134</sup> *Id.* at 1053, n.10 (“The information recited [in the administrative record] is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.” (quoting *People’s Mojahedin Organization of Iran v. U.S. Dept. of State*, 182 F.3d 17, 19 (D.C. Cir. 1999))). See also *National Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

<sup>135</sup> *Rahmani*, 209 F. Supp. 2d at 1053.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1050 (“The NCRI court, though acknowledging that the Secretary made no showing of national security concerns, nevertheless, did not set aside the existing designation, relying upon unstated national security concerns for its position! Instead, the court remanded the issue to the Secretary with the instructions that the entity be afforded the opportunity to file responses to the non-classified evidence against it, introduce evidence to support its allegations that it is not a terrorist organization, and be given an opportunity to be meaningfully heard by the Secretary upon the relevant findings.” (citing *NCRI*, 251 F. 3d at 208-09)).

applied in my court for conformance with the Constitution lest I apply an unconstitutional law.”<sup>138</sup>

According to the court, Section 1189(a)(8) prohibits a defendant in a criminal action or an alien in a removal proceeding from raising “any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.”<sup>139</sup> The *Rahmani* Court considered this “an impermissible limitation on the federal courts’ jurisdiction to hear constitutional challenges to the sufficiency of an indictment.”<sup>140</sup>

The Court further believed that the D.C. Circuit Court decision violated the separation of powers doctrine. The D.C. Circuit Court had mandated procedures in order for the Act to comply with the constitutional use. The *Rahmani* Court declared the additions were impermissible judicial rewriting. The Court noted, “If I were to accept the government’s ‘construction’ argument, I would obliterate any distinction between a facial and as applied challenge to a statute. A court faced with a facially unconstitutional statute could simply ‘construe’ non-existent provisions into a statute to save it from unconstitutionality.”<sup>141</sup>

While the *Rahmani* Court decided that designation itself is facially unconstitutional, the Court noted in addition that designated FTOs had at least some right to judicial review under section 1189, but that the provision violates due process rights of individual defendants facing a section 2339B prosecution—for providing material support to an FTO—because defendants “are deprived of their liberty based on an unconstitutional designation they could never challenge.”<sup>142</sup> The Court felt that:

When weighed against a fundamental constitutional right which defines our very existence, the argument of national security should not serve as an excuse for obliterating the Constitution. Every effort should be made to weigh the circumstances where national security concerns can rationally coexist within a constitutional atmosphere. No such attempts were made by the Secretary.

The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally

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<sup>138</sup> *Id.* at 1054.

<sup>139</sup> *Id.* at 1054, n.11 (quoting 8 U.S.C. § 1189(a)(8)).

<sup>140</sup> *Id.* at 1054.

<sup>141</sup> *Id.* at 1057.

<sup>142</sup> *Id.* at 1054-55.

moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections.<sup>143</sup>

#### X. THE *LINDH* CASE & DESIGNATION

Another case that involved the identical application of section 1189 in a 2339B prosecution, but in which the due process claim was not raised by the defense, was *United States v. Lindh*.<sup>144</sup> Lindh was accused of providing material support in the form of personnel to an FTO in violation of section 2339B, the same material support provision the *Rahmani* Court determined could not be predicated on section 1189. Lindh claimed that section 2339B violated his right to freedom of association, but he did not raise the issue of whether designation violated his due process rights.

The facts of this case illustrate all too clearly the trouble with designation. When Lindh joined the Taliban, the U.S. Government was still doing business with that organization, despite its designation as an FTO. Lindh joined the Taliban for religious reasons and it was never established in court that he fired upon or did battle against U.S. troops or agents. Thus, the basis of the court's decision could hardly have been the evidence against Lindh, which in any event was never proven, as the case never made it beyond initial pleadings. The decision was made on the law alone and it forced Lindh to accept a plea.

The prosecution wrote in an internal e-mail that was leaked to *Newsweek* prior to the trial, that they had "no knowledge that [Lindh] did anything other than join the Taliban."<sup>145</sup>

Indeed, Lindh's defense counsel argued that he "was not involved with the terrorist attacks on the World Trade Center and Pentagon but served only as a foot soldier of the Taliban in its war with the Northern Alliance," and was not involved in "a nebulous war on terrorism."<sup>146</sup>

Essentially, what the U.S. Government argued in *Lindh* was that it could view an individual as a criminal where he fought *in a foreign land*

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<sup>143</sup> *Id.* at 1057 (citations omitted).

<sup>144</sup> 212 F. Supp. 2d 541 (E.D. Va. 2002). See note 125 *supra* and accompanying text for earlier discussion of Lindh case.

<sup>145</sup> Michael Isikoff, *The Lindh Case E-Mails; The Justice Department's Own Lawyers Have Raised Questions About the Government's Case Against the American Taliban*, NEWSWEEK, June 24, 2002 (The prosecution also noted that an FBI interview of Lindh while he was in their custody in Afghanistan "would be a pre-indictment, custodial overt interview, which is not authorized by law.").

<sup>146</sup> Brenda Sandburg, *After 9/11*, THE RECORDER, Sept. 12, 2002, at 1.

*within a foreign group against another foreign group* simply because the U.S. has designated the group as a foreign terrorist organization. They do not need to show any ties between the disfavored group and any act against any American or American soil. They do not even have to show that the individual has any ties to criminal acts by the designated FTO.<sup>147</sup> If this is so, the Secretary of State of the United States may unilaterally overrule any law anywhere in the world. He can enter into any foreign conflict anywhere and determine that an individual has committed a crime against the United States simply because that person happened to be on the “wrong” side of that foreign battle.

Lindh was not allowed to challenge the Taliban’s designation. George Harris, one of the counsel on the Lindh case, said, “Do I think it’s fair or just or right? No, I don’t think it is[,] given who he is, what he did, given how the case was tried and the decisions the court made.”<sup>148</sup>

## XI. CIRCULAR LAWS

Another feature of the designation provision, in addition to clear constitutional concerns, is that it requires resort to several other provisions, which in turn circle back to the designation provision. This makes the laws confusing and hard to follow. Another confusing feature of these laws is the overlap between immigration and criminal law. Designation does not only affect the admissibility of an alien. It can affect the freedom of any person, citizen or immigrant, because of the way it is combined with the material support provisions.

Sami Al-Arian is accused of providing material support to a designated FTO. He is also accused of conspiring to conduct a pattern of racketeering activity to provide material support to a designated FTO. Thus, it is clear that the designation statute can be applied in various criminal contexts, whether a person is an alien or U.S. citizen. (Al-Arian is not a U.S. citizen.)

The cross-application of the designation definition is less confusing than the fact that the definitions of “terrorist activity” and “terrorist organization” are in the immigration section without any explicit application to the criminal provisions, while the definitions of international and domestic terrorism are found in the criminal sections without any

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<sup>147</sup> This view is not far from that which the U.S. government makes in declaring that it can detain anyone it wants in Guantanamo and it cannot be held accountable for it since it is on Cuban territory.

<sup>148</sup> Sandburg, *supra* note 146.

express relation to the immigration provisions. Yet, it seems likely that courts will look from one statute to the other when trying to construe these laws.

As C. William Michaels notes, the immigration/terrorist definitions “are separate from the definition of ‘terrorism’ . . . incorporated into the [criminal provisions of the] Act, but have overall bearing on the extensiveness by which the Act views ‘terrorist’ activity or groups.”<sup>149</sup>

As noted above, another confusing and legally problematic aspect of the provisions relating to designation of FTOs is the circular way in which they work. For example, one definition of an FTO is a foreign organization that engages in “terrorist activity.” One of the definitions under “terrorist activities” is “any alien . . . who is a representative . . . of a [designated] FTO.”<sup>150</sup> Thus, a foreign terrorist organization could be any alien who is a representative of a foreign terrorist organization. This definition appears to circumvent the portions of the statute that clearly define terrorist activity, and leads to the conclusion that a foreign terrorist organization can be simply what the Secretary of State says it is.

Another example of the circularity of these provisions is the definition of terrorism as the “material support of terrorism.” “Material support of terrorism” could be material support of material support of terrorism. It is not easy to determine where this might lead.

Michaels notes that while § 1182 provides for judicial review of designated FTOs, it is unclear from viewing the three types of terrorist groups listed in § 1182 (designated FTO, otherwise designated after finding organization engages in terrorist activities, and two or more individuals, organized or not, engaged in terrorist activities) whether any judicial review is provided at all for the other two types.<sup>151</sup>

## XII. THE *BOIM* CASE: THE RATIONALE AND MEANING OF THE MATERIAL SUPPORT PROVISIONS AND THE PROPER WAY TO APPLY THEM

*Boim v. Quranic Literacy Institute*<sup>152</sup> is enlightening, not only because of what it reveals about terrorist funding techniques, but with respect to the comparative meaning of §§ 2339A and B (material support of terrorism and material support of a designated FTO, respec-

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<sup>149</sup> MICHAELS, *supra* note 31, at 120.

<sup>150</sup> 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(aa) (2003). *See supra* notes 17-19 and accompanying text.

<sup>151</sup> Telephone Interview with C. William Michaels (Sept. 21, 2003).

<sup>152</sup> 291 F.3d 1000 (7th Cir. 2002).

tively). The Seventh Circuit discusses the rationale behind the designation statute and provides the proper way to apply the material support provisions in relation to terrorism charges.

*Boim* was argued only two weeks after the September 11th attacks and one month before the passage of the USAPA, but the decision was issued some eight and a half months later, on June 5, 2002. Although it was a terrorism case, *Boim* was unrelated to the September 11th attacks. The case stemmed from a death caused by a Hamas suicide attack in Israel prior to the enactment of the designation provisions. It was not a criminal action brought under §§ 2339A or B, although the decision discusses both. It was a civil action brought by the parents of the victim under 18 U.S.C. § 2333, which provides for civil liability for acts of international terrorism.

The Seventh Circuit decided that giving money to a group which then sponsored a terrorist act without knowledge of the donee's intended criminal use of the funds did not constitute an act of "international terrorism" within the meaning of § 2333. The court also determined that the First Amendment right to freedom of association did not prohibit imposition of civil liability against those who [knowingly] directed funds to terrorist groups for the purpose of funding terrorist activities.

The Boims, the parents of the victim of the suicide attack, asserted that the "allegedly humanitarian functions" of the Quranic Literacy Institute (QLI) and the Holy Land Foundation for Relief and Development (HLF or Holy Land) "mask their core mission of raising and funneling money and other resources to Hamas operatives in support of terrorist activities."<sup>153</sup> The Court described the Quranic Literacy Institute:

QLI is an Illinois not-for-profit corporation that purports to translate and publish sacred Islamic texts, but the Boims believe it is also engaged in raising and laundering money for Hamas. QLI also employed another defendant, Mohammed Abdul Hamid Khalil Salah, nominally as a computer analyst. The FBI has seized \$1.4 million in cash and property from Salah, who is the admitted United States based leader of the military branch of Hamas. He has been prosecuted for channeling money to Hamas and for recruiting, organizing and training terrorist operatives in Israel. Salah is named on a list of Spe-

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<sup>153</sup> *Id.* at 1003.

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cially Designated Terrorists compiled by the United States Treasury Department's Office of Foreign Assets Control.<sup>154</sup>

The Court also described the Holy Land Foundation:

HLF is also a not-for-profit corporation, whose ostensible mission is to fund humanitarian relief and development efforts. HLF's director has acknowledged providing money to Hamas, and the Boims allege that, although HLF purports to have a charitable purpose, its true function is to raise and channel money to Hamas for terrorist activities. The U.S. base of HLF's operations is in Texas. HLF also has offices in Jerusalem and in Illinois. HLF, QLI and the other organizational defendants are linked by interlocking directorates and by ties to Salah and Mousa Mohammed Abu Marzook, another individual defendant (not involved in this appeal) who has a leadership role in the military branch of Hamas.<sup>155</sup>

The Court continued:

According to the Boims, money flows from American contributors to Hamas in a three-step process: first, the front organizations solicit contributions; second, the leaders arrange for the money to be laundered and wired overseas; and third, Hamas operatives in Gaza and the West Bank use the money to finance terrorist activities. Because it is illegal to provide financial support to recognized terrorist groups, the money flows through a series of complicated transactions, changing hands a number of times, and being commingled with funds from the front organizations' legitimate charitable and business dealings. The funds are laundered in a variety of ways, including through real estate deals and through Swiss bank accounts. The Boims allege that money raised by HLF and QLI was transferred to Hamas terrorists using these various methods in order to finance terrorist activities.<sup>156</sup>

The Boims asserted that the organizational defendants provided material support or resources to Hamas as defined in §§ 2339A and B.<sup>157</sup> According to the Seventh Circuit, the Boims:

argued to the district court that their complaint could be sustained under any one of three different theories of liability. First, they main-

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<sup>154</sup> *Id.* at 1003 (citation omitted).

<sup>155</sup> *Id.* at 1003-4.

<sup>156</sup> *Id.* at 1004.

<sup>157</sup> *Id.*

tained that providing material support to a terrorist organization was itself an act of international terrorism as defined in §2331. Second, they argued that the defendants could be held civilly liable under §2333 because they violated §2339A and B, the criminal statutes prohibiting the provision of material support to terrorists. Third, they contended that the defendants could be held liable under section 2333 on an aiding and abetting theory.<sup>158</sup>

The Boims claimed that §§ 2339A and B had clarified the meaning of the phrase “involves violent acts or acts dangerous to human life” in 18 U.S.C. § 2331(1) (defining international terrorism). The Seventh Circuit noted that “as a matter of statutory interpretation, the Boims’ allegations of funding terrorist organizations, without more direct dealing with the group, did not constitute activity involving violent acts or acts dangerous to human life.”<sup>159</sup> Affirming the underlying Illinois District Court decision, the Court noted that “where funding a terrorist group was the main allegation, the plaintiffs must also be able to show that the defendants providing the funds *knew* about the violent act and *participated* in the preparation of the plan to commit the violent act.”<sup>160</sup>

The District Court also decided that “Congress indicated by its passage of §§ 2339A and B its belief that funding terrorism causes the harm of the terrorists’ subsequent actions” and that the term “material” provides the causal link between the funds and the injury.<sup>161</sup>

However, both the District Court and Seventh Circuit agreed that “[t]o say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach.” The Court noted that “any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor’s intent, could be construed to ‘involve’ terrorism,” and concluded that “[w]ithout also requiring the plaintiffs to show *knowledge* of and *intent* to further the payee’s violent criminal acts, such a broad definition might also lead to consti-

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<sup>158</sup> *Id.* at 1005.

<sup>159</sup> *Id.* (citation omitted).

<sup>160</sup> *Id.* (emphasis added).

<sup>161</sup> *Id.* at 1007. The Seventh Circuit noted that the district court incorrectly redefined the term “material” in the context of §§ 2339A and B as meaning substantial and considerable, where the statute itself defined “material support or resources” as “currency or other financial securities, financial services, lodging, training, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials” This definition is found in § 2339A and applies also to § 2339B. See 18 U.S.C. § 2339B(g)(4) (“the term ‘material support or resources’ has the same meaning as in section 2339A”).

tutional infirmities by punishing mere association with groups that engage in terrorism.”<sup>162</sup>

Applying *Claiborne*, the Seventh Circuit ruled that “in order to impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”<sup>163</sup> The Court, however, noted that “§ 2333 does not seek to impose liability for association alone but rather for involvement in acts of international terrorism.”<sup>164</sup> Applying this standard to the *Boim* action, the Seventh Circuit declared that in order to prove that the defendants aided and abetted the murder, the Boims had to “prove that the defendants knew of Hamas’ illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities.”<sup>165</sup> Finally, the court stated: “That Hamas may also engage in legitimate advocacy or humanitarian efforts is irrelevant for First Amendment purposes if HLF and QLI knew about Hamas’ illegal operations, and intended to help Hamas accomplish those illegal goals when they contributed money to the organization.”<sup>166</sup>

Thus, the *Boim* court made it clear that, even where a statute seeks to impose liability for involvement in acts of international terrorism, the government was still required to prove knowledge and intent. This standard comports with decades of sound First Amendment analysis.<sup>167</sup>

XIII. THE STANDARD IN *HUMANITARIAN LAW PROJECT (HLP) V. RENO*: “NO CONSTITUTIONAL RIGHT TO FACILITATE TERRORISM”

In *Holy Land Foundation for Relief and Development v. Ashcroft*,<sup>168</sup> the court declared that the *Claiborne* standard did not apply.<sup>169</sup> On

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<sup>162</sup> *Boim*, 291 F.3d at 1011 (emphasis added).

<sup>163</sup> *Id.* at 1022.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1023.

<sup>166</sup> *Id.* at 1024.

<sup>167</sup> See also *Morissette v. United States*, 342 U.S. 246 (1952).

<sup>168</sup> *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F.Supp.2d 57 (D.D.C. 2002). *Holy Land* was brought under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701, Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>169</sup> *Claiborne* is, of course, in the civil context and *Boim* is a criminal case, as is *Holy Land*. The *Holy Land* court stated: “First and foremost, this is simply not a case like *Claiborne Hardware*, because OFAC’s action [designating Holy Land Foundation as a “specially designated terrorist” and blocking

December 4, 2001, the Office of Foreign Asset Control (OFAC) of the United States Department of Treasury designated the Holy Land Foundation as a specially designated terrorist (SDT) and as a specially designated global terrorist (SDGT), and blocked all of its assets. The District of Columbia District Court decision was issued on August 8, 2002, two months after the *Boim* decision, but obviously the D.C. Court was not bound by the Seventh Circuit.

The D.C. Court decided it did not need to determine whether there was specific intent since the laws under which *Holy Land* was brought did not prohibit membership. Rather, they prohibited, according to the court, providing financial support to a designated terrorist organization—in this case, Hamas.<sup>170</sup> *Holy Land* cited to *Humanitarian Law Project v. Reno (HLP)*, under the material support (18 U.S.C. § 2339B) and designation provisions (18 U.S.C. § 1189) of AEDPA.<sup>171</sup>

*HLP*<sup>172</sup> has become the standard in support/designation cases. Reasoning that AEDPA did “not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group,” the Ninth Circuit held that the provisions did not violate the First Amendment right to free association.<sup>173</sup> The Court distinguished advocacy, where “the government must establish a ‘knowing affiliation’” with an organization’s unlawful purposes, “and a ‘specific intent to further those illegal aims’”<sup>174</sup> to prove criminal liability, on the one hand, from “making donations of material support,”<sup>175</sup> on the other hand, which the court said did not require such a test. The Court clarified that “[a]dvocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts.”<sup>176</sup>

The argument that fundraising activity permits “a more relaxed First Amendment inquiry” than advocacy was first raised by the government in *American-Arab Anti-Discrimination Committee v. Reno*.<sup>177</sup> The

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it assets] was not taken against HLF for ‘reason of association alone.’” *Holy Land*, 219 F. Supp. 2d at 80, citing *Claiborne*, 458 U.S. at 920. *Holy Land*, however, cites to *HLP*, which is a criminal case.

<sup>170</sup> *Holy Land*, 219 F. Supp. 2d at 81.

<sup>171</sup> *Id.*

<sup>172</sup> *Humanitarian Law Project*, 205 F.3d 1130 (9th Cir. 2000).

<sup>173</sup> *See id.* at 1133.

<sup>174</sup> *Id.* at 1133 (citing *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) [hereinafter ADC I]).

<sup>175</sup> *Id.* (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

<sup>176</sup> *Id.* at 1134.

<sup>177</sup> *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367 (9th Cir. 1997) [hereinafter ADC II].

Ninth Circuit initially rejected the government's argument, stating that "the government was required to show that the Plaintiffs had the 'specific intent' to engage in illegal group aims because the Plaintiffs had demonstrated that they were targeted for their 'associational *activities* with particular disfavored groups."<sup>178</sup> The Court stated that "targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals."<sup>179</sup>

When the case was appealed to the United States Supreme Court, the Court vacated on the grounds that the District Court did not have jurisdiction. Subsequently, in *Humanitarian Law Project*, the Ninth Circuit declared that they were "not bound by" their earlier characterization in ADC II, and now found it "unpersuasive."<sup>180</sup> They declared:

Material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used. We therefore do not agree . . . that the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds.<sup>181</sup>

The Court thus interpreted the material support provision as a strict liability law.<sup>182</sup>

Out of this logic has arisen the mantra, repeated by other courts, such as those in *Holy Land* and *Lindh*, that "there is no constitutional right to facilitate terrorism."<sup>183</sup> This notion is unarguably true, but has

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<sup>178</sup> *Id.* (emphasis in original) (quoting ADC I, 70 F.3d at 1063). Note that ADC II was a different context than the support/designation context.

<sup>179</sup> ADC II, 119 F.3d at 1376.

<sup>180</sup> *Humanitarian Law Project*, 205 F.3d at 1134.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* *See also* 18 U.S.C. § 2339B(c). *But see* *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (holding that congressional omission of the element of intent in a statute does not require the court to eliminate that element from the crime denounced and declaring that to eliminate intent would be "a feat of construction [that would] radically . . . change the weights and balances in the scales of justice" which would cause "a manifest impairment of the immunities of the individual."); *Staples v. United States*, 511 U.S. 600, 610-11 (1994) (taking "particular care . . . to avoid construing a statute to dispense with *mens rea* where doing so would criminalize a broad range of apparently innocent conduct." The Court also stated that dangerousness, alone, did not necessarily suggest lack of innocence.).

<sup>183</sup> *Holy Land*, 219 F. Supp. 2d at 81 (quoting *HLP*, 205 F.3d at 1133; *United States v. Lindh*, 212 F. Supp. 2d 541, 571 (E.D. Va. 2002)).

nothing to do with whether it is a crime to donate funds to a group that has both lawful and unlawful purposes, or whether a statute that creates such a crime violates the First Amendment right of association. To say that material support can be used to promote unlawful activities regardless of donor intent is to say nothing. Einstein's theory of relativity ultimately led to the creation of the atomic bomb, regardless of his intent as to its use. This does not make him a criminal. On the other hand, the work of Oppenheimer, who headed the project to create the atom bomb that ultimately led to the bombing of Japan, could more easily be viewed as criminal, since it is clear that he *knew* how his work might be used, even if he did not intend that it be so used. Intent, in that event, would have to be imputed. (Why figure out how to make a bomb if you do not intend to make one, and why make a bomb if you do not intend it to be used? And, if you intend its use, do you not intend the consequence of its use?) In these instances, the work carried out by scientists could be easily considered material support of the Hiroshima and Nagasaki bombings. But, it is not sufficient to say that because the *use* of the scientific work was criminal, the scientific work itself was also criminal.<sup>184</sup>

The question is somewhat different in the context of AEDPA and the USAPA, because, as the Seventh Circuit pointed out in *Boim*, material support under these statutes does not mean "substantial and considerable," but is defined by specific activities. Nonetheless, without knowledge and intent these acts have no inherent meaning, even in conjunction with a criminal result. If you lend a telephone to somebody and he uses it to commit a terrorist act without your knowledge, you are not thereby a criminal, unless it can be shown that you knew or reasonably should have known how it would be used. No type of legal analysis, not even conspiracy or complicity analysis, requires guilt on such a tenuous basis.

#### XIV. THE *SCALES* STANDARD: KNOWLEDGE AND INTENT

As the Supreme Court noted in *Scales v. United States*:

Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar

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<sup>184</sup> Note that the analysis of knowledge and specific intent is sometimes collapsed into analysis of only one of these elements, since knowledge can imply intent and intent implies knowledge.

concepts of the law of conspiracy and complicity. While both are commonplace in the landscape of the criminal law, they are not natural features. Rather they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.<sup>185</sup>

The principle has equal weight today in the fight against terrorism as it did during the Cold War, when *Scales* was decided. But, while the Court noted this important principle, it recognized that even where the statute did not require courts to utilize a conspiracy or complicity analysis, it was not permissible for courts to ignore a constitutional analysis. Rather, “that Congress has not resorted to either of these familiar concepts means only that the enquiry . . . must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability.”<sup>186</sup>

The *Scales* court, of course, was focused on membership rather than material support, and here we are concerned with material support only, which the *HLP* court viewed as not deserving of constitutional analysis commensurate with membership questions. However, the *Scales* decision may assist us in navigating through the constitutional black hole created by the *HLP* membership/support distinction. The Court stated that “problems in attributing criminal behavior to an abstract entity rather than to specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof.”<sup>187</sup> In other words, the difficulties in First Amendment analysis under challenges to the material support/designation provisions “as a practical matter resolve themselves into problems of proof.” The Court continued:

Whether it has been successfully shown that a particular group engages in forbidden advocacy must depend on the nature of the organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy. Understood in this way, there is no

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<sup>185</sup> *Scales v. United States*, 361 U.S. 203, 225 (1961).

<sup>186</sup> *Id.* at 226.

<sup>187</sup> *Id.* at 226 n.18.

great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court. Whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular defendant is concerned, by the requirement of proof that he knew that the organization engages in criminal advocacy, and that it was his purpose to further that criminal advocacy.<sup>188</sup>

Let us translate this into language appropriate to the present analysis. As in *Scales*, in current support/designation terrorism cases, the court is viewing “‘an abstract entity’ (the FTO)” which is deemed criminal. The court must decide whether a specified individual is liable for providing material support to that entity. This question, under the reasoning in *Scales*, resolves itself into a problem of proof. Under the designation statute, neither the designated organization nor a defendant charged with providing material support to it may challenge the proof. Thus, the first part of the *Scales* “test” is addressed, albeit inadequately, (e.g., the problem of proof cannot be resolved where the defendant may not challenge it and the court cannot properly address it).<sup>189</sup> Under the second part of the analysis, the “difficulties [that] might be thought to inhere in ascribing a course of criminal conduct to an abstract entity [i.e. a terrorist organization] are certainly cured, so far as any particular defendant is concerned [i.e. one charged with providing material support to the terrorist organization], by the requirement of proof that he *knew* that the organization engages in criminal [activities], and that it was *his purpose* to further that criminal [activity].”

The *Scales* Court concluded that in the context of “an organization which engages in criminal activity . . . we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.”<sup>190</sup> This standard is sufficiently stringent for terrorist cases.

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<sup>188</sup> *Id.* (internal citation omitted).

<sup>189</sup> This naturally leaves the question: is the court thus stripped of its powers to resolve this problem of proof?

<sup>190</sup> *Scales*, 361 U.S. at 226-27.

XV. THE MONEY LAUNDERING STANDARD<sup>191</sup>

Prosecutions for the material support of terrorism often involve monetary transactions. In this respect, terrorism/support cases resemble money laundering cases. In fact, where a terrorist suspect is charged with material support of a designated FTO, he may also be charged with the separate offense of money laundering for the same activities. William G. Phelps writes:

In 1986, Congress enacted 18 U.S.C.A. § 1956, which prohibits money laundering. This statute was intended to combat criminal activities, such as drug trafficking, that generate large amounts of cash income. Defendants have repeatedly argued that this statute is unconstitutional, but courts . . . have consistently rejected this argument.<sup>192</sup>

Money laundering is “essentially, conducting transactions involving the proceeds of unlawful activities with one of the culpable types of intent or knowledge.”<sup>193</sup>

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<sup>191</sup> E-mail from C. William Michaels to author (Sept. 27, 2003). Michaels pointed out that investigations into any “material support” for terrorism on a financial matter, can go through the extremely broad provisions of Title III of the USAPA, also called “The International Money Laundering Abatement and Anti Terrorist Financing Act of 2001.” Michaels notes that Title III, by far the largest title in USAPA, does four major things: “(1) gives federal agents (which usually would be Treasury agents or perhaps FBI but the Title does not get that specific) powers of investigation and surveillance into banking records and account transactions, especially into certain types of international accounts, beyond what existed in federal law, (2) imposes upon all US banks strict new duties (called “minimal” and “enhanced” due diligence) regarding the opening, maintaining, and even monitoring of certain accounts, and also clarifies or increases information which banks are to provide, either directly or upon request, concerning account holders and etc. of certain international accounts, AND increases the categories of persons who must file what is called a “SAR” (suspicious activity report) (rather complex, but the name itself suggests what that report is about), (3) expands federal court jurisdiction for money laundering crimes, and (4) permits a court to order asset “forfeiture” in money laundering crimes, in provisions that are so extreme that they might actually (as suggested by the CRS analysis of the USAPA) violate the ancient prohibition against ‘corruption of blood.’” Michaels states that the powers of investigation into banking records can extend to what the Act calls a “special measures order” an administrative order generated through the Treasury Department, which would give investigators vast amounts of information about everything and everyone connected in any way with investigated accounts or transactions. Michaels states that these may also cover what could be considered “material support” of FTO’s.

<sup>192</sup> William G. Phelps, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 1956, Which Criminalizes Money Laundering*, 121 A.L.R. FED. 525, 539-540 (1994) (“The Money Laundering Control Act of 1986 was enacted in October 1986 to combat the pernicious problem of money laundering. This Act was codified at 18 U.S.C.A. §§ 1956 and 1957, and 31 U.S.C.A. § 5324.”).

<sup>193</sup> *Id.* at 540.

Different parts of § 1956 require different types of knowledge or intent. Among these is a requirement, common to all portions of § 1956(a)(1), and also found in § 1956(a)(2)(B) that the person charged knew that the funds involved represented the proceeds of some form of unlawful activity. Courts have generally held that there was sufficient evidence to establish this knowledge in a number of cases—often cases in which the person supplying money derived his income from drug trafficking although there is authority to the contrary.<sup>194</sup>

A large body of case law has developed since the enactment of the money laundering statute. Because the material support provision often involves financial transactions, the money laundering provision may provide a standard of legal analysis that could be used in prosecuting material support of terrorism. The elements of knowledge and intent in money laundering are not vastly different from those required in proper conspiracy or association analysis. In one district court case:

[t]he court declared that a plain reading of § 1956 compels the conclusion that an ordinary person would understand that he cannot conduct a financial transaction with what he knows are the proceeds of some form of unlawful activity with the intention of promoting specified unlawful activity; or with knowledge that the financial transaction is designed to hide the nature, source or control of the proceeds of the specified unlawful activity; or with knowledge that the transaction is designed to avoid a reporting requirement under State or Federal law.<sup>195</sup>

Here again, as in the *Boim* and *Scales* analyses, knowledge and intent are essential.

## XVI. THE LYNNE STEWART DECISION

On July 22, 2003, Judge Koeltl of the Southern District of New York dismissed the charges against Lynn Stewart and her co-defendants as unconstitutionally vague. They were charged with providing material support or resources to a designated foreign terrorist organization.<sup>196</sup>

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<sup>194</sup> *Id.* at 541 (citations omitted).

<sup>195</sup> *Id.* at 543 (citing *United States v. Sierra-Garcia*, 760 F. Supp. 252 (E.D.N.Y. 1991) (adopting the reasoning in *United States v. Ortiz*, 738 F. Supp. 1394 (S.D. Fla. 1990))).

<sup>196</sup> *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). Both the defendants and the government agreed that the amended definition of the material support provision in the USAPA,

The court examined the sections relating to material support in the form of communications equipment and personnel in order to determine whether they were too vague. Koeltl decided that the defendants were correct that “by criminalizing the mere use of phones and others means of communication[,] the statute provides neither notice nor standards for its application such that it is unconstitutionally vague as applied.”<sup>197</sup>

Noting very simply the heart of the issue surrounding the personnel component that has spawned so much press coverage of this case, the Court stated that the government “fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a ‘quasi-employee’ allegedly covered by the statute.”<sup>198</sup> The court, thus, having found the personnel provision void and finding “no reasonable way to redact the first two counts of the Indictment to excise the allegations relating to the conspiracy and related substantive offense of providing communications equipment and personnel to an FTO which are unconstitutionally vague as applied to the circumstances of this case,”<sup>199</sup> it dismissed the first two counts.<sup>200</sup>

Many persons inside and outside of the legal profession were concerned when Lynne Stewart was brought up on the material support charges. There was concern that the Department of Justice was invading the sacred realms of attorney-client confidentiality and the Sixth Amendment right to counsel, not to mention professional ethical duties such as the obligation to zealously represent every client. Many people were certainly pleased by the dismissal of these charges against Stewart.<sup>201</sup>

However, those who have closely followed the material support/designation cases find less reason to cheer this decision. Judge Koeltl did not agree that the designation violated the due process rights of a defendant charged under section 2339B. In effect, the court refused to look at one of the issues that is most constitutionally troubling: the

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which includes monetary instruments and expert advice or assistance, did not apply retroactively to the conduct charged in the Indictment. *Id.* at 356 n.4.

<sup>197</sup> *Id.* at 358.

<sup>198</sup> *Id.* at 359.

<sup>199</sup> *Id.* at 361.

<sup>200</sup> *Id.*

<sup>201</sup> Many in the defense bar felt the charges were intentionally meant to chill defense advocacy. Since Koeltl’s dismissal, the DOJ has rendered a superseding indictment that charges Stewart, et al., with violating 18 U.S.C. § 2339A, material support to terrorists. *See supra* note 50.

violation of due process rights when someone is charged with material support of a designated FTO.

Judge Koeltl declared that “[t]he element at issue in this case is simply whether IG was designated as an FTO, and the defendants thereafter knowingly provided, or conspired to provide, material support or assistance to it, not whether the Secretary of State correctly designated IG as an FTO.”<sup>202</sup> The court stated that “[w]hile the defendants can challenge the allegation that they violated section 2339B by providing material support to an FTO or could contest that IG was, in fact, designated as an FTO, they cannot assert the due process claims of the FTO and challenge the underlying designation.”<sup>203</sup> Finally, the court concluded that “[t]he correctness of the designation itself is not an element of the offense and therefore the defendants’ right to due process is not violated by their inability to challenge the factual correctness of that determination.”<sup>204</sup>

This decision is not, of course, in line with the reasoning in *Rahmani*, which Judge Koeltl found “unpersuasive.”<sup>205</sup> Judge Koeltl was persuaded by the government’s argument that “it is for IG, not the defendants, to raise IG’s due process concerns . . . .”<sup>206</sup> The court also was persuaded that “the statute clearly provides a procedure by which IG can challenge its designation” and “[o]rganizations designated as FTOs have availed themselves of this process.”<sup>207</sup> The Court concluded: “[I]t is clear that Congress provided IG with judicial review of its own designation. The administrative determination of the designation of an FTO is potentially subject to extensive judicial review but that review is not to occur as a defense in a criminal proceeding.”<sup>208</sup>

The statute provides for judicial review, but not for the individual who has been charged under it. An FTO, which has no constitutional due process rights, is, of course, permitted to challenge the designation. An individual, who does have due process rights, cannot. An FTO can, naturally, be designated and challenge it, but to no effect other than saving its assets from being seized, if they are identifiable. An individual

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<sup>202</sup> *Id.* at 364-5.

<sup>203</sup> *Id.* at 364.

<sup>204</sup> *Id.* at 368.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 366 (citation omitted).

cannot be designated and cannot challenge a designation but he can go to jail for the rest of his life because of that designation.

The issue is not whether designation is “an element of the criminal offense charged” and therefore, as the court decided, reviewable only if it is such an element.<sup>209</sup> The issue is whether the designation, which a defendant is not allowed to challenge, violates that individual’s due process and Sixth Amendment rights to confront the evidence against him. The constitutional issue cannot be avoided by simply stating that the challenged provision is not an element of the offense—particularly not when it is, in fact, the very foundation of the charged offense.

There is further reason for concern over Judge Koeltl’s decision. The court was completely dismissive on the First Amendment associational issue. As noted earlier, the issue resolves into a question of knowledge and intent.<sup>210</sup> Judge Koeltl appeared at the outset to recognize this element when he observed that section 2339B requires “only that a person ‘knowingly’ ‘provides’ ‘material support or resources’ to a ‘foreign terrorist organization’ . . . in section 2339B” as there is in section 2339A.<sup>211</sup> Thirty pages later, however, when the court addressed the First Amendment issue, it lapsed into parroting *HLP*. The court repeated the mantra:

“[I]t is clear that what the statute ‘prohibits is the act of giving material support, and there is *no constitutional right to facilitate* terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor of course, is there a right to provide resources with which terrorists can buy weapons and explosives.”<sup>212</sup>

As stated earlier in this article, this line of thinking is not logically sound. Nor does it comport with constitutional standards or the *Morissette* line of cases.<sup>213</sup> The fact that a court might not only rely on logically unsound reasoning that does not comport with Supreme Court or constitutional standards, but that other courts may follow its alluring but errant lead, is a sufficient ground for deep and abiding concern over the application of these laws. Laws which are themselves dangerous.

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<sup>209</sup> *Id.* at 367.

<sup>210</sup> *See supra* Part XIV.

<sup>211</sup> *Sattar*, 272 F.Supp.2d at 356.

<sup>212</sup> *Id.* at 368 (emphasis added) (quoting *HLP*, 205 F.3d at 1133).

<sup>213</sup> *Morissette v. United States*, 342 U.S. 246, 263 (1952), and *supra* Part XIII.

Laws that are lawless. Laws that multiply and eat up the marrow of human rights. Only a strong judiciary, only courageous judges, and only energetic judicial review can stave the flow of such bad law.

#### XVII. CONCLUSION

September 11, 2001, brought this country into crisis, but the crisis is greater than the disaster that happened at the World Trade Center and aboard those hijacked planes. Terrorism is a grave threat to this country. There is no doubt that our enemies despise us. There is no doubt that they murder and maim. There is no doubt that we need laws that can protect us and prevent terrorism. It is clear that law enforcement needs tools to unearth terrorists and stop their terrible deeds. But there will be nothing left to protect if we allow our own laws to ravage the precious rights our ancestors died fighting to guarantee. If we cannot stand for civil liberty, our country and our laws stand for nothing.

The material support and designation provisions are desperately in need of repeal or revision to bring them into compliance with the Bill of Rights. The simultaneous analysis of these two provisions *must* rest on a requirement of knowledge of unlawful activities and a specific intent to support those unlawful activities.