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AIDING TERRORISTS: AN EXAMINATION OF THE MATERIAL SUPPORT STATUTE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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AIDING TERRORISTS: AN EXAMINATION OF THE MATERIAL SUPPORT STATUTE

WEDNESDAY, MAY 5, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10:08 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Craig, Leahy, Durbin, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I think we will begin the hearing. I think every American would agree that our government continues to face an unprecedented challenge. On September 11, 2001, we suffered a devastating attack on American soil that resulted in the unprovoked and tragic death of well over 3,000 of our fellow citizens. The Bush administration responded in a decisive and careful manner, as we did here in Congress.

One of the key actions this Committee took was to write, pass, and oversee the PATRIOT Act and other laws that provide the tools, information, and resources necessary to combat terrorist threats. As equally important, this Committee took the responsibility of overseeing the application of these laws.

This is part of our continuing bipartisan series of hearings examining the effectiveness of current laws aimed at protecting America from terrorism. One of this Committee's challenges is to ask whether additional tools and oversight are needed as we evaluate the adequacy of current laws, including the PATRIOT Act's impact on our security, privacy, and civil liberties. I would like to thank my colleague, Senator Leahy, as well as other members of this Committee for their cooperation in conducting these important hearings. I also want to express my appreciation to the men and women in the Justice Department who are leading this Nation's vital efforts to prevent terrorism, and I look forward to hearing the Department's witnesses today and their views.

Two of the Justice Department's most respected prosecutors recently represented the Department of Justice at a Judiciary Committee field hearing in my home State of Utah. Deputy Attorney General James Comey and U.S. Attorney Paul Warner provided very thoughtful testimony on how the anti-terrorism statutes are being implemented.

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Prior to the enactment of the 2001 law, uncertainty existed as to whether the ban on giving material support to terrorists by U.S. citizens included expert advice and assistance applied to acts occurring outside the United States. We fixed that uncertainty with Section 805, which also strengthened the prior material support ban by, one, adding to the list of underlying terrorist crimes; two, making it clear that material support includes all types of monetary instruments and activities; and three, enhancing penalties for those convicted of providing material support to terrorists.

The law has enabled prosecutors to stop a number of terrorist plots, and this law has facilitated the prosecution and conviction of several terrorist cells and many individuals throughout our country. In one of the first cases using this new provision, six U.S. citizens who lived near Buffalo, New York, were convicted for providing support or resources to terrorists by participating in a weapons training camp at an Al Qaeda terrorist training camp in Afghanistan. In March, Section 805 enabled the successful convictions of terrorists in Virginia who aided the Taliban. And currently, Section 805 is allowing the prosecution of a graduate student in Idaho charged with aiding terrorist groups devoted to waging jihad against Russia and Israel. I think this Committee can be justifiably proud of writing and passing Section 805.

Of course, I am aware that some people are concerned that, at some point in the future, one of the as-yet-unused material support provisions might be misused. I am opposed to any misuse of the provisions, as anyone else.

I am also mindful that on two separate occasions, once in the Ninth Circuit and most recently in a California district court, this statute has been found to be vague. It is unfortunately the case the courts in the Ninth Circuit are often not the best barometer of constitutionality. I look forward to learning more about this litigation today and I am pleased to read that the Department is open to making any necessary refinements or additions to this particular section of the statute.

I hope that this hearing will both bring to light the very real successes stemming from the PATRIOT Act's terror-fighting tools as well as to provide the Committee an opportunity to share constructive suggestions for clarifying the Act, if necessary, and I know that our witnesses will share those things with us today.

I know that everyone on this Committee shares the common goal of protecting our country from additional terrorist attacks, and I believe we are all committed to achieving that goal with complete respect for the fundamental freedoms that all of us as American people come to appreciate and to expect.

This Committee has an historical tradition of examining, debating, and resolving some of the most important legal and policy issues that have been presented to Congress. We are once again faced with an important task that will have a profound effect on our country's security and liberty. As we face the reauthorization of the PATRIOT Act next year, by the end of next year, I know we will be up to the task, and it is going to be because of excellent witnesses like we have today who will help us to understand these things more. We appreciate your taking time. We appreciate your being here and we look forward to your testimony.

[The prepared statement of Senator Hatch appears as a submission for the record.]

With that, I will turn to our Democrat leader on the Committee, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I am glad to have this long-awaited continuation of the series of oversight hearings that we started last year on the USA PATRIOT Act. It is the first, really, oversight hearing of any kind we have had this year and I welcome it and I welcome our distinguished witnesses.

I thank the Chairman for scheduling this at a time when witnesses on all sides could be heard. This is a complex issue and sometimes we have a time when we can hear one side or the other. Of course, it is a lot better if we can hear all the sides.

We are still waiting for Attorney General Ashcroft to appear before this Committee. He made a brief appearance and told us it could only be brief on March 4 of last year. I know he has been hospitalized, but I think of how this Committee used to bring his predecessor up here and see her almost every other day because one or another member of the Committee, including, at that time, then-Senator Ashcroft, wanted to ask her questions, ask the AG questions. I know the Attorney General was hospitalized for a medical condition, but he did return to work 2 months ago. He has had a number of press conferences around the country, and I wish he would find time to come by this Committee, so we could at least give Americans the impression that we really are carrying out our oversight duties.

In that regard, if there is anybody here from the Justice Department other than our distinguished witnesses, if you might, I am sure you still have the same address down there. Check on some of the dozens of letters that have been sent to you by myself and by Republican members and other Democratic members of this Committee that seem to go into the lost letter division down there. Feel free to answer them. Our address remains the same, U.S. Senate, Washington, D.C. I have a listed number. Feel free to call if you would like to answer. I would love to do it while the administration is still here.

We are also still working on a time to hear FBI Director Mueller. I understand that he was available to testify next Wednesday, but we cannot do it that day because Secretary Ridge is unavailable. I would like to hear from the FBI Director: after all, we have direct oversight over his agency. Let us hear from him. There seems to be this feeling that you have to have people testify in tandem. The FBI Director is the FBI Director. He is not Director of Homeland Security. The Homeland Security Director is the Homeland Security Director, he is not the Director of the FBI. We should not have to wait until they can both be here like ventriloquists or something. We ought to be able to hear them separately.

If we cannot have a hearing next week with the FBI Director because the Homeland Security Director is not available, then maybe we could hold a hearing on the administration's claim that it can designate United States citizens as enemy combatants and hold

them incommunicado without charges. We see the *Hamdi* and *Padilla* cases working themselves all the way up to the Supreme Court—they will be decided by that Court within the next two months and we have not found time to do any oversight on the issue ourselves.

I have also asked the Chairman to hold a hearing on the reported abuse of prisoners by Americans in Iraq. Given the wide-ranging jurisdiction of this Committee over civil liberties and prisons, the reported role of civilian contractors, our role in enactment of the Military Extraterritorial Jurisdiction Act, and the lack of Congressional oversight, I think we need to act.

It is amazing to me that the Bush administration has known about these atrocious things in the prisons of Iraq for 5 months and never said a word to either the Republican leadership or the Democratic leadership of the House or the Senate. They knew about it for 5 months, and then when the press reports it, they said they are shocked. They are appalled. Well, I think all Americans are shocked and appalled and the very, very brave American men and women who are fighting in Iraq and following the rules, and following our traditions and doing what they are supposed to do are equally shocked and appalled.

But the administration has known about this for 5 months and they only become shocked when the press reports it. In fact, they asked the press to hold off reporting it for a couple of weeks. Now, I realize by not allowing it to come out until the time they did, it did not interrupt campaign schedules. But this should go way beyond campaign schedules. We have created a horrendous problem for ourselves in the Middle East and a horrendous problem for the next time, God forbid, an American soldier is captured.

And to keep it well hidden from everybody, including—and maybe it is an example of what happens in this Congress—we don't do oversight and maybe the White House knows they have such a complacent Congress that we will never ask questions, so why bother to volunteer any answers?

But it is the height of hypocrisy for anybody in the chain of command in this administration to stand up and say they are shocked because it became public when it is something they have known about for 5 months, and never once did they express that shock to the people they are supposed to respond to.

Now, back to the focus of this morning's hearing. We have two criminal statutes that have come under fire in the Federal courts. Sections 2339A and 2339B of title 18 prohibit the provision of material support to terrorists and to designated foreign terrorist organizations. Since the 9/11 attacks, these statutes have become the weapon of choice for domestic anti-terrorism prosecution efforts. But with the increased use of these statutes, some problems have come to light.

For example, several courts have held parts of the definition of material support to be unconstitutionally vague, and the Chairman has referred to that. Other courts have raised questions about the level of intent required to obtain a conviction. Many have expressed justifiable concern that the statutes impose guilt by association. We all know that was rejected by the Supreme Court decades ago during the McCarthy era.

There have been other problems raised, as well. Former Assistant Attorney General Viet Dinh, who has been a staunch defender of the PATRIOT Act, has recognized a need to clarify the material support laws to avoid government overreaching. In January 2004, he said, quote, "I think we can all agree that there are certain core activities that constitute material support for terrorists which should be prohibited and others which would not be prohibited. Congress needs to take a hard look and draw the lines very clearly to make sure that we do not throw out the baby with the bathwater," close quote. This hearing should give us a chance to discuss where those lines should be drawn.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you, Senator.

I, too, have been very upset and disturbed by what has happened over in Iraq and am happy that the Intelligence Committee is holding a hearing today that I will attend.

Senator LEAHY. A closed-door hearing.

Chairman HATCH. Well, I agree, but it is a very important hearing. And then the Armed Services Committee is very strongly looking into it and I think will hold hearings on this. I am not objecting to hearings in this Committee, but we are going to have to see what our jurisdiction is before—I have to be satisfied to that before we do anything along those lines. But I am hopeful that at least those two Committees in the Senate will get to the bottom of this, and I hope that the people who committed these atrocities will be punished severely for them.

Senator LEAHY. If I might, Mr. Chairman, I absolutely agree with you in saying the people who did this should be punished, because the vast majority of the American men and women who are over there putting their lives on the line do follow the rules. What bothered me is that this Congress, both the Republican and Democratic leadership, was never told about something that we should have been told about. The question comes to my mind, are there other things we haven't been told about? And I have a terrifying suspicion that what we have seen is only the tip of the iceberg and the rest has been held back.

Chairman HATCH. I hope you are wrong, Senator—

Senator LEAHY. I do, too.

Chairman HATCH. —but assuming that you are wrong, what has happened is unjustifiable under any circumstances. Americans and our military are certainly not the type of people who would do things like this ordinarily. So this has been a terrible, terrible chapter and a very difficult time for, I think, the world and our country, as well. I think we have got to get to the bottom of it and we will.

I am pleased to have our first panel of witnesses here today. I am pleased to have Christopher Wray, who is the Assistant Attorney General of the Criminal Division in the Department of justice; Hon. Dan Bryant, who is the Assistant Attorney General of the Office of Legal Policy at the Department of Justice; and finally we are going to hear from Gary Bald, Assistant Director of the Counterterrorism Division at the Federal Bureau of Investigation.

We really appreciate all three of you being here and appreciate the Department of Justice in sending so many of its representatives to join us today, those who really do have expert opinions and information on this matter and we look forward to hearing your testimony today.

We will start with you, Mr. Wray.

STATEMENT OF CHRISTOPHER A. WRAY, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. WRAY. Mr. Chairman, Senator Leahy, members of the Committee, thank you for asking the three of us here today. I am pleased to discuss with you the importance of the material support statutes in our efforts to prevent future terrorist attacks.

We have scored key victories. Since September 11, we have charged 310 defendants with criminal offenses as a result of terrorism investigations. One hundred seventy-nine of those have already been convicted. We have broken up terrorist cells in Buffalo—

Chairman HATCH. How many did you say you have charged?

Mr. WRAY. We have charged 310 with criminal offenses that arise directly out of terrorism investigations.

Chairman HATCH. And 170—

Mr. WRAY. And 179 have been convicted thus far.

Chairman HATCH. They have actually been convicted of terrorist activities?

Mr. WRAY. Yes, sir, and we have—a number of the other cases are, of course, pending at this time. We also have a wide geographic scope. We have broken up terrorist cells in Buffalo, Charlotte, Portland, and Northern Virginia. We are dismantling the terrorists' financial network. One hundred thirty-six million dollars have been frozen in 660 accounts around the world.

But the recent tragedy in Madrid was yet another grim reminder that our enemies continue to plot catastrophic attacks. Several weeks after that, British authorities arrested nine suspects and seized half a ton of ammonium nitrate fertilizer. And just a few weeks ago, Osama bin Laden urged Al Qaeda and its supporters to continue their terrorist attacks against the United States.

The Department's top priority is to prevent terrorist attacks. Because our adversaries not only accept, but glorify killing themselves in the course of attacking innocent people, we cannot and will not limit our role to simply picking up the pieces after terrorist attacks. Our offensive strategy targets both the perpetrators of violence and those who give them material support.

The chronology of a terrorist plot, I think, is best understood as a continuum from idea to planning to preparation to execution and attack, and the material support statutes enable us to strike earlier and earlier on that continuum. We would much rather catch a terrorist with his hands on a check than on a bomb.

The statutory definition of material support indicates the breadth of resources that terrorists need. They need weapons, obviously, but they also need the money to buy them, the training to use them, and the personnel to wield them. Furthermore, while planning their attacks, they need housing, expert advice on targets

and methods, means of transportation, and documents to cross borders.

Of course, the material support statutes also allow us to prosecute those who actually seek to commit violence. Members of a cell in Lackawanna, New York, as you mentioned, Mr. Chairman, attended a terrorist training camp in Afghanistan and pleaded guilty to material support charges and have all agreed to cooperate. They are serving prison terms ranging from eight to 10 years. Members of another cell in Portland, Oregon, tried to travel to Afghanistan after September 11 to fight with the Taliban, and after being charged with conspiring to provide material support, they pleaded guilty to seditious conspiracy and IEEPA violations and were sentenced to terms ranging from seven to 18 years.

Tens of thousands have attended camps to learn skills like bomb-making and covert communications, and it is very difficult to know when and how they may go operational. Nor should we wait to find out. The material support statutes enable us to take these defendants off the streets, into court, and on to prison. These statutes also allow us to disrupt earlier stages of terrorist plots by pursuing those who support the front-line killers.

For example, Iyman Faris extended airline tickets and surveyed a potential target for Al Qaeda. He was recently sentenced to 20 years for providing material support. In March in San Diego, two other men plead guilty to providing material support to Al Qaeda. They sought to buy missiles to sell in turn to Al Qaeda associates. Each of them faces up to 15 years in prison for this offense.

And, of course, terrorist supporters can also provide money itself. For example, we uncovered a group in Charlotte, North Carolina, that used the proceeds of a cigarette smuggling ring to fund Hezbollah. The lead defendant in that case was convicted of 16 counts, including material support, and was sentenced to 155 years in prison.

Terrorist financiers also conceal their activity through front organizations. For example, in Tampa, former professor Sami Al-Arian faces material support charges for allegedly serving as a leader of the Palestinian Islamic Jihad, sometimes called PIJ, and PIJ, as the Committee may know, has killed over 100 people, including U.S. citizens.

Terrorists themselves have voiced frustration at the success of our efforts thus far to cut off their funds. I keep coming back to the example of Jeffrey Battle, who is a member of the Portland cell, who in a recorded conversation that Mr. Bald's colleagues at the FBI picked up, complained, and I am quoting now, "We don't have support. Everybody is scared to give up any money to help us because that law that Bush wrote about, everybody is scared. He made a law that says, for instance, I left out of the country and I fought, right, but I wasn't able to afford a ticket but you bought my plane ticket. You gave me the money to do it, and by me going and me fighting, by this new law, they can come and take you and put you in jail."

Battle was right. His ex-wife, who knowingly helped fund his travel to fight in Afghanistan, was prosecuted, pleaded guilty, and is now in prison, like Battle himself.

We also know that our pursuit of terrorist financiers can lead to the conviction of the violent terrorists themselves. As I noted earlier, members of a cell just across the river in Northern Virginia were recently convicted of providing material support. In her opinion, Judge Brinkema quoted a report admitted into evidence that was written by a fundraiser for Benevolence International Foundation, or BIF, which I think, as Senator Durbin knows, is an Islamic charity in Chicago. This fundraiser had been invited, the evidence showed, to observe the Virginia cell members' military-style training, and he praised their fervor and their training in his report.

This report first came to the attention of investigators in Chicago, who suspected BIF of diverting charitable contributions to terrorist organizations. They forwarded the report to the Department and to Federal prosecutors in Virginia. The result is that in Chicago, the BIF director pleaded guilty to racketeering conspiracy, admitting that donors were misled into believing that their donations would be supporting peaceful causes when they weren't. He was sentenced to over 11 years in prison.

In Virginia, nine defendants on the other end have been convicted of offenses arising out of their jihad training. The relationship between these two cases and between these two investigations illustrates the proactive strategy that the Department is pursuing and needs to pursue to win the war on terror.

Mr. Chairman, I thank you again for inviting us here and giving us the opportunity to discuss how the material support statutes are being used to fight terrorism, and after you hear from my colleagues, Mr. Bryant and Mr. Bald, I would be happy to respond to any questions you or the other members may have.

Chairman HATCH. Thank you, Mr. Wray.

[The prepared statement of Mr. Wray appears as a submission for the record.]

Chairman HATCH. We will turn to Mr. Bryant now.

STATEMENT OF DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRYANT. Good morning, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you to discuss recent court decisions concerning the material support statutes and to offer some ideas for improving those important statutes.

A critical aspect of the Department's strategy for fighting and winning the war against terrorism is preventing and disrupting terrorist attacks before they occur, and the material support statutes are an invaluable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction.

As this Committee is well aware, there has been recent litigation involving certain provisions of the material support statutes. In my testimony today, I will review some concerns expressed by courts a bout various aspects of the material support statutes, concerns that, unfortunately, may interfere in the future with the Department's ability to prosecute those providing vital assistance to terrorists and terrorist organizations. I will then discuss the Depart-

ment's response to these concerns and some ways that Congress might consider addressing them. Finally, I will briefly suggest a couple of other ideas for improving the material support statutes.

Some courts have found key terms in the material support statutes' definition of material support or resources to be unconstitutionally vague, potentially undermining the Department's ability to prosecute those supplying assistance to terrorists or terrorist organizations.

The Ninth Circuit, for instance, has held that the terms "personnel" and "training" in the definition of material support or resources are void for vagueness under the First and Fifth Amendments because they bring within their ambit constitutionally protected speech and advocacy. The Ninth Circuit has specifically expressed the concern that an individual who independently advocates the cause of a terrorist organization could be seen as supplying that organization with personnel, and thus has concluded that the term "personnel" could be construed to include unequivocally pure speech and advocacy protected by the First Amendment.

Likewise, the Ninth Circuit has asserted that the term "training" could be interpreted by reasonable people to encompass First Amendment protected activities, such as instructing members of foreign terrorist organizations on how to use humanitarian and international human rights laws to seek the peaceful resolution of conflicts. Applying this Ninth Circuit precedent, the United States District Court for the Central District of California recently held the term "expert advice or assistance" in the definition of material support or resources to be impermissibly vague.

The Justice Department respectfully disagrees with these decisions holding key terms in the definition of material support or resources to be unconstitutionally vague, and is either pursuing or contemplating whether to pursue further judicial review in these cases.

The Department, for example, has filed a petition for rehearing en banc with the Ninth Circuit, asking that the court reconsider the decision of the three-judge panel finding the terms "personnel" and "training" to be unconstitutionally vague. In its petition, the Department has pointed out that the term "personnel" has a discernible and specific meaning found in basic dictionary definitions of the word. It describes those working under the direction or control of a specific entity.

As a result, independent advocacy of a designated foreign terrorist organization's interests or agenda falls outside the scope of the statutes' coverage. Just as one independently extolling the virtues of McDonald's hamburgers is not supplying personnel to the restaurant chain, neither is one independently advocating on behalf of a foreign terrorist organization supplying personnel to the organization.

Likewise, the Department has argued in its petition for rehearing en banc that the term "training" is not unconstitutionally vague. The material support statutes unequivocally prohibit persons within the United States or subject to its jurisdiction from providing any form of training to terrorists or to designated foreign terrorist organizations, and again, the word "training" is a common

term in the English language, a clear definition of which can be found in any dictionary.

The Department is also currently considering whether to appeal to the Ninth Circuit the Central District of California's decision holding the term "expert advice or assistance" to be impermissibly vague. As the Department argued in the district court in that case, the Department does not believe that the meaning of the term "expert advice or assistance" is insufficiently clear. Expertise is a familiar concept both in the law and to those outside of the legal profession. Rule 702 of the Federal Rules of Evidence, for example, defines "expert testimony" to be testimony based on scientific, technical, or other specialized knowledge.

To be absolutely clear, the Department believes that the terms "personnel," "training," and "expert advice or assistance," as they are used in the material support statutes, are not unconstitutionally vague and should not need further clarification in order to withstand constitutional scrutiny. Even so, given the court decisions reviewed above, which, if not overturned, threaten to hamper the Department's ability to prosecute those who provide assistance to foreign terrorist organizations, Congress may wish to consider amending the material support statute to provide more specific definitions of "personnel," "training," and "expert advice or assistance."

Similarly, in light of the reservations expressed by some courts that the material support statutes could be interpreted to prohibit activities protected by the First Amendment, Congress may wish to consider amending the statute to make it absolutely clear that the statute should not be construed so as to abridge the exercise of First Amendment rights.

In addition, if Congress were to revise the material support statutes to respond to these court decisions, there are at least two deficiencies with the current statutory language that Congress might also well consider addressing. First, at present, the material support statutes reach a limited number of situations where material support or resources are provided to facilitate the commission of terrorism. Title 18 U.S.C. § 2339A currently forbids the provision of material support or resources for only certain Federal crimes likely to be committed by terrorists, but not others. Consequently, the Department would support clarifying the scope of the statute to ensure that all terrorist attacks are covered, and we would be happy to work with Congress toward that end.

In addition, Congress may wish to consider revising the definition of material support or resources. The types of property and services specifically enumerated in this definition potentially may not include all of the possible types and forms of support that could be given to terrorists or to foreign terrorist organizations.

For this reason, the Department would support refining the definition to encompass any tangible or intangible property, or service, while at the same time maintaining the current statutory exemptions for medicine and religious materials. Such a refinement would heighten the efficacy of the material support statutes and make it less likely that an individual prosecuted in the future for providing property or services to a terrorist or a foreign terrorist

organization would be able to take advantage of any lack of clarity in the statutes.

Thank you, Mr. Chairman and members of the Committee, and I look forward to answering your questions.

Chairman HATCH. Thank you, Mr. Bryant.

[The prepared statement of Mr. Bryant appears as a submission for the record.]

Chairman HATCH. Mr. Bald, we will turn to you.

STATEMENT OF GARY M. BALD, ASSISTANT DIRECTOR, COUNTERTERRORISM DIVISION, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BALD. Good morning and thank you, Mr. Chairman, Senator Leahy, for inviting me here to speak to you today on the importance of the material support statutes to the FBI's investigative efforts in the counterterrorism program.

Since 9/11, the FBI's counterterrorism program has made comprehensive changes to meet its primary mission of detecting, disrupting, and defeating terrorist operations before they occur. We have spent the last two-and-a-half years transforming operations and realigning resources to meet the threats of the post-September 11 environment.

As a part of this transformation, the FBI has undertaken a number of initiatives to improve information sharing and coordination with our National and international partners. We are committed to the interagency partnerships we have forged through our Joint Terrorism Task Forces. Likewise, we are committed to fostering international partnerships and recognize the critical role that they play in our ability to develop actionable intelligence. To be fully successful, however, these partnerships must have the legal tools necessary to investigate the entire range of terrorist activities, including the provision of material support.

To prevent terrorist attacks, we need to be able to dismantle the entire terrorist network, from those that actually pull the cord on a suicide vest, to those who train the person making the bomb, to those who raise the money and facilitated the planning of the attack. By aggressively attacking the entire network, we maximize our ability to disable the networks on which successful terrorist operations depend.

To accomplish this goal, we need the means to neutralize persons who occupy positions within the terrorist organizational structure but are also at a distance from the actual terrorist attacks themselves. The material support statutes, as broadened by the USA PATRIOT Act, are a vital component of our investigative and preventative efforts, targeting the support and resource needs of terrorist networks.

Post-9/11, the FBI's main focus has been on preventing the next attack. In order to accomplish this mission, we must be able to identify and disrupt and dismantle what we refer to as "sleeper cells" present in the United States. Once we identify these groups and their members, we must be able to take proactive measures to ensure that their future plans are no longer viable. We must be able to take appropriate law enforcement action to put them out of

commission, either through the appropriate material support statutes or other criminal violations or by using immigration laws to deport them.

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

Mr. Chairman, I will skip the portions of my written for-the-record statement that deal with specific successes that we have had, many of which were detailed by Mr. Wray previously, and I will be happy to answer any questions that you might have.

Chairman HATCH. Thank you, and we will put all full statements in the record as if delivered.

[The prepared statement of Mr. Bald appears as a submission for the record.]

Chairman HATCH. Let me begin with you, Mr. Wray. In your written testimony, you describe the danger we face from sleeper agents, individuals who attended terrorist training camps and then entered our country where they keep a low profile until the day that they become operational. In light of the fact that there may have been tens of thousands around the world who received such training in the camps, I am deeply concerned that there may be a number of sleepers in the United States right now.

If you were to locate a person who had traveled from some other country to a terrorist camp where he received months, if not years of training in things like bombs, bioterror, and conducting terrorist operations and then took up residence in the United States, and even if he made no explicit threats against our country, do the statutes we have been discussing today provide law enforcement with all the legal tools that are necessary in order to incapacitate such a person?

Mr. WRAY. Mr. Chairman, I think you have kind of put your finger on a significant concern that I think we all have. I think that my guess is that most Americans would think that an individual found within the United States fitting the profile that you have described should be behind bars. The truth is, it may be harder than most people would expect for us to put him there.

And while the sort of person you describe is regarded as extremely dangerous and not someone we would want walking the streets, it may be more difficult than people would expect or that I believe Congress intended for us to make a case against such a person, because training to commit terror under certain circumstances may not be a crime, which just stands logic on its head.

And, of course, a sleeper by definition is someone who has, in effect, gone to sleep, is in a sort of dormant wait-and-see kind of mode, and if the person has been well trained in covert communications and operational discipline, it may be very hard to—even if we know the person, for example, has been in a terrorist training camp in the past, to identify something right here, right now that the person is actually doing. They may be waiting for a message, for a signal, that kind of thing.

Analyzing our options, our starting point would always be the material support statutes, in particular whether the camp that that person might have been at was associated with something like Al Qaeda and whether we might be able to charge 2239B, providing material support to a foreign terrorist organization.

But we still have to prove that the sleeper did something that qualified as providing material support, and usually, we would go in the direction of showing that the person provided himself as personnel. The person went and trained in a terrorist training camp, intending to conduct terrorist activities. But even in the Ninth Circuit, especially in the Ninth Circuit, that and all the people who live in that circuit, that is a risky option now in light of some of these court cases. We think the court got it wrong, but that is a problem in that district, I mean, that circuit now.

Assuming we got over those hurdles, though, we still have the issue of looking for—it may often be that the information that links the person to the kinds of acts that would get us over the hump are often foreign intelligence information that is of such a sensitivity that even with the protections of CIPA, the Classified Information Procedures Act, we can't use it because of agreements with the Foreign Intelligence Service and that sort of thing.

So even leaving all those aside, we may be able to deport the person under the immigration laws, and while that should give us some comfort, the fact is, if we go that route, the person is removed to another country and turned loose there and we have no ability to make sure that they are not engaged in further terrorist activity.

Chairman HATCH. Thank you. Mr. Bryant, let me just ask you this question. Some people are concerned that prosecutors might use this section against completely innocent people who, through no fault of their own, donate money or other resources to an organization they would have no reason to believe is a foreign terrorist organization.

The Ninth Circuit's opinion quoted my statement upon introduction of the Senate conference report as proof that Congress intended that there be a scienter requirement in the statute. The court defined the term, quote, "knowingly" in 18 U.S.C. 2239B to mean that the government must prove that the defendant either, one, knew of the organization's designation as a terrorist organization, or two, knew of the unlawful activities of that organization.

Do you think that Congress needs to clarify the scienter requirement in the statute, and if so, do you think that the Ninth Circuit's approach is the correct way to define the scienter requirement?

Mr. BRYANT. Thank you, Senator. We think that Congress may do well to clarify the scienter requirement after the Ninth Circuit's decision in *Humanitarian Law Project* v. *Department of Justice* in December of last year. The reason for that, as you have laid out,

is that the scienter requirement articulated by the court in that case is not what we think is appropriate under Section 2239B. That is, the court there held that a defendant either needed to know of the designation of the foreign terrorist organization, or have knowledge of the underlying activities that gave rise to the designation made by the Secretary of State.

Those underlying activities are often classified, known only to a small number of people that participate with the Secretary in the designation order. As a consequence, we think that is an unduly burdensome scienter requirement that the government would be hard-pressed to meet.

As a consequence, we think, and we have argued as such in our petition for rehearing en banc in the Ninth Circuit, that the scienter requirement should be understood to require either knowledge of the designation of the foreign terrorist organization or knowledge that that organization participates in terrorist activities.

Chairman HATCH. Thank you. Senator Leahy, my time is up.

Senator LEAHY. Thank you, Mr. Chairman.

We had extensive notice of this hearing, actually not just for weeks but for months, but for some reason, we didn't receive the administration's testimony until late last night. We would be happy to drive down and pick up these things if you are having trouble getting stuff through the mail, or we also have fax machines, too. So I will send—this seems to be the rule, not the exception for the Department of Justice. I will send you detailed questions on that, but let me ask you a couple of questions.

Mr. Wray, perhaps you can answer this. What actions has the Department of Justice taken with respect to investigating and possibly prosecuting criminal conduct by American civilians at the Abu Ghraib prison in Iraq or at any of the other places where the administration has evidence, and the administration does have evidence, of other torture that has not been made public yet? What actions have you taken?

Mr. WRAY. Senator Leahy, my principal awareness of the abuse that you are describing, that you are referring to, is through the news media, and like you and like so many others, obviously I deplore any mistreatment—

Senator LEAHY. Sure. I know you do, and I don't question that.

Mr. WRAY. I just think it is—

Senator LEAHY. What steps have you taken since you heard about it?

Mr. WRAY. Since we have heard about it, we have attempted to determine whether—what sort of Federal jurisdictional requirements apply to the Justice Department as opposed to the Department of Defense. As you may know, there is a fairly intricate framework of statutes and MOUs that apply to dividing up responsibility and jurisdiction between—

Senator LEAHY. Would the Military Extraterritorial Jurisdiction Act of 2000, would that not give you jurisdiction?

Mr. WRAY. The Military Extraterritorial Jurisdiction Act, or MEJA, applies to certain kinds of offenses and provides us with jurisdiction over certain kinds of people when evidence has been referred to us of a possible Federal crime. In the instance that we are discussing right now, I gather that the Department of Defense

has been conducting an investigation for some time and the normal practice would be for, as the Department of Defense is conducting an investigation—which I have reason to believe and every confidence that they are conducting thoroughly and fairly—if they come across evidence that a Federal crime may have been committed over which we would have jurisdiction and they would not, the normal practice would be for them to refer that matter or report that matter to us.

I am not aware of any referral from the Department of Defense to the Justice Department or the FBI relating to these matters.

Senator LEAHY. I want to make sure I understand that. Even though you would have jurisdiction, for example, over criminal acts of civilians who are accompanying U.S. Armed Forces, the Department of Justice waits for the Department of Defense to determine whether you have jurisdiction and something should be referred? Are you doing any proactive investigation of your own? That is basically my question.

Mr. WRAY. We have begun reviewing the information that we have received. As I said, there has been a longstanding Defense Department investigation, and as a professional investigator and prosecutor myself, when there is an ongoing longstanding investigation, I have always believed that it is very important to proceed carefully so that we don't disrupt the existing investigation to which they clearly have devoted a significant amount of attention and time.

And so while I am not suggesting that we should sit still or anything like that, I am suggesting that because there has been, in this instance, a longstanding investigation by another agency, consistent with our usual practice, even in matters of this significance, we need to proceed very carefully so that we don't disrupt their investigation.

Senator LEAHY. Do you think there is any possibility the Department of Justice could keep the Chairman, at least, and following the procedure of certainly the 30 years I have been here, the Chairman and the Ranking Member apprised of your proceedings?

Mr. WRAY. Consistent with whatever professional obligations and legal and ethical obligations we have, I think it is certainly appropriate that we work closely with the Committee in its oversight responsibility.

Senator LEAHY. That would be a welcome change.

My other question is, Mr. Wray, you said that the Department should be able to prosecute a person for training at a terrorist camp to become a sleeper agent on the theory that the person, and I believe I am restating this, the person gave his own services as personnel to the terrorist organization.

Why couldn't you just simply use the conspiracy laws that have been on the books for decades? You are a prosecutor. I was a prosecutor. I know my experience as a prosecutor was always to use something that had been on the books for some time because you have built up stare decisis and you are less apt to make a mistake. Why not just use those conspiracy laws?

Mr. WRAY. We do often charge and use the conspiracy provisions, both separately in Title 18 and in the material support statutes themselves. However, as you know from your prior experience,

sometimes you get into issues with the court and the defense about whether you have got a single conspiracy or multiple conspiracies. There may be disputes or evidentiary problems over whether or not the scope of the agreement between our proposed defendant and his co-conspirators is over the same objective. That can get complicated.

We prefer to be able to charge material support because, frankly, when we don't have the problems that Mr. Bryant and I have gone through, it is actually a more user-friendly statute for the kinds of scenarios that we are coming across. These terrorist training camps churn out huge numbers of people who are often going in different directions for different plots, and so sometimes that makes—your question is a good one, but sometimes that is, for prosecutorial consideration, it makes using that theory more complicated than it might at first blush appear.

Senator LEAHY. Thank you. Thank you, Mr. Chairman. I will have other questions.

Chairman HATCH. Thank you, Senator Leahy.

We will turn to Senator Craig.

Senator CRAIG. Mr. Chairman, thank you very much. I might say to the Ranking Member, I had the opportunity to have dinner the other night with the Attorney General. He grows increasingly robust and strong and I would guess there would be a time when he would want to come before the Committee again. But he sends his high regards.

Senator LEAHY. I am sure he does. After a year and a half, I would hope that he would be strong enough to come up here for more than a couple hours.

Chairman HATCH. I don't blame anybody for not wanting to come before this Committee.

[Laughter.]

Senator LEAHY. He probably, having been a member of this Committee for a number of years and seeing how we used to have his predecessor up here almost every week, he probably wants to make sure that doesn't happen to him.

Senator CRAIG. In other words, you are suggesting he knows better? Well, anyway—

Senator LEAHY. He knows how he treated her and he probably doesn't want the same treatment.

Senator CRAIG. Let me turn to the gentlemen on the panel, and thank you for being here today. I, like all of us on this Committee, feel that oversight and extensive oversight on the PATRIOT Act is necessary and appropriate and will continue to be so as we move toward the reauthorization of it.

One of the reasons the oversight is important and one of the reasons most of us are extremely concerned about the way it is being administered, I think, is reflective of the circumstance and situation and the tragedy oftentimes that occurs under given circumstances. We are now faced with what appears to be one coming out of Iraq. Man's inhumanity to man simply goes on, tragically enough, and if this Committee and others don't do extensive oversight, under the best of intentions, sometimes structures break down and civility breaks down.

But I must tell you that I am pleased you are here, and I am also pleased that you are recognizing, as some would not suggest, that there may be need to fine-tune the PATRIOT Act.

In the area of material support, I think we have a case going on in Idaho right now, and we will find out how far that can be taken under the statute, because I want to make sure that this is an effective law and that if there are areas of ambiguity, as the Ninth Circuit might propose, then I am pleased you are willing to come before us and say, here are ways to correct it.

I notice in doing so, at least I hope in doing so, you will not be called less than patriotic or less than diligent in your job, because I am one who believes the PATRIOT Act is a necessary law, and I support it. But now I am being accused of being less than patriotic when I propose changes to it. So I am glad to see the administration coming forward and proposing changes, also.

It is necessary and important. This is work in progress. We have got to get it right, and I think we will, because the end result in getting it right is making sure that this country is a safer place for all of us, and, at the same time, that we are not willing to allow the environment of terrorism in this country to take away from us our civil liberties.

That is a fine line that we are now walking, and I am extremely pleased, Dan, that you would come forward to suggest that there are areas that we need to look at that might disallow what I sometimes call the most dysfunctional circuit in the nation from misjudging the intent of the Act. If they misjudge it or if they view it in a certain way, others may do the same, and if that is the case and if we can clarify that, then let us do that.

You are proposing changes. The President has proposed changes. And I must tell you, I am proposing some changes. Other colleagues on this Committee are proposing changes, as well. And that is why, Mr. Chairman, it is so darned important that we do a very thorough oversight process as we move toward reauthorization.

I want to vote again for the PATRIOT Act, but I want to vote for it again knowing that we have corrected some areas, adjusted some areas, that it is a finer-tuned law that can get at the heart of any terrorist activity or organized effort in this country to perpetrate wrongdoing against the American citizens.

So I thank you gentlemen for being here today. I have no specific questions. I do appreciate your dedication and your successes. I think we are a safer country today, although some would allege that is not the case, because of your diligence and because of this law. So let us move forward, Mr. Chairman, with a very thorough oversight prior to our effort to reauthorize. Thank you for being here.

Chairman HATCH. Thank you, Senator Craig.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you for holding this hearing.

Let me first just compliment Senator Craig for his leadership and bipartisanship in trying to do what he just said, getting this thing right. It is a difficult environment in which to raise these issues, but I am extremely proud of his courage in indicating to the American people that this is about Republicans and Democrats together, particularly on this Committee, working together to make the changes that need to be made to make the PATRIOT Act legislation that Americans can be comfortable with, so I thank you for that.

Mr. Chairman, I was pleased when you announced last fall that you would hold a series of oversight hearings on the administration's anti-terrorism efforts. I am glad that the Committee is resuming this task. I certainly hope we will have the additional hearings that you planned soon, including, as the Ranking Member indicated, a chance to discuss these issues with the Attorney General, who has not appeared before the Committee in over a year.

Mr. Chairman, as you know, the President recently made a number of speeches calling on Congress to renew the PATRIOT Act now. Most of the PATRIOT Act is, of course, already permanent law. Of the over 150 provisions in the law, only 16 provisions are due to expire at the end of 2005. There is, I think, a public misconception that the whole bill is set to expire. That simply isn't true.

The sunset provision was a recognition by Congress in October 2001 that it was acting without the kind of deliberation that such an important piece of legislation would normally receive, especially in the area of surveillance. Significant changes in the law were enacted without the kind of close scrutiny that provisions that touch on delicate constitutional balances deserve.

The sunset was an important and crucial provision. It would allow Congress to revisit some of the more controversial provisions with more care and with more information on which to base its judgment.

Mr. Chairman, between now and December 2005, I urge you to hold hearings on how the administration has used the powers granted by the PATRIOT Act. I also urge you to hold hearings on reasonable proposals to address concerns raised by the PATRIOT Act, such as the SAFE Act, which Senator Craig and I both have cosponsored and which has been introduced by Senator Durbin, as well, and which I strongly support.

Mr. Bryant, Mr. Wray, as you know, in January, a Federal judge in California ruled that a provision of the PATRIOT Act criminalizing the provision of expert advice and assistance to a terrorist organization was vague and, therefore, unconstitutional. The judge found that the term "expert advice and assistance" could be interpreted to include unequivocally pure speech and advocacy protected by the First Amendment. The judge found that the PATRIOT Act bans all expert advice and assistance and places no limit on the type of expert advice and assistant that is banned.

The Justice Department has argued to the court that the PATRIOT Act does not criminalize advocacy, association, or other activities protected by the First Amendment. Does the Department believe that providing peacemaking and conflict resolution advice is barred by the PATRIOT Act, and what other kinds of advocacy or

associational activity does the Department believe is not barred by the PATRIOT Act? Mr. Wray?

Mr. WRAY. Senator, I think the Department has tried to construe and apply the provisions at issue judiciously. I wouldn't want to—I don't think I am in a position to sort of sit here and describe every form of activity that I think would not be covered. I do believe that Congress, I think intended, and we would all want for the material support statutes to reach every form of support to terrorism that does not run afoul of constitutional limitations.

In other words, I would think that the appropriate objective of Congress—and we believe it is reflected in the statute, but obviously the Ninth Circuit disagreed—is to reach all forms of support other than those protected by the Constitution.

Senator FEINGOLD. It sounds like you would not want to bring into the sweep of that, then, peacemaking and conflict resolution advice, would you?

Mr. WRAY. Well, the reason I am hesitating is the following. You may be familiar with, and I want to be careful about how far I go into this just because it is a pending case, but you may be familiar with the case in the Southern District of New York, the *Sattar* case. I am not sure how you pronounce the defendant's last name, but it involves Lynne Stewart and others and relates to their assistance to the so-called "Blind Sheikh". And underlying the allegations in that case, as described in, I believe, public record information is the Sheikh's imposition and then withdrawal of support for a cease fire.

So that may not be—I assume that is not the kind of peacemaking that you are describing, but you could see why that, under certain definitions, that could be a kind of peacemaking in the sense that he says to his followers, "stop attacking," and then withdraws his support, which in effect says "resume attacking." So in that situation, we would—

Senator FEINGOLD. I appreciate that answer. I think it is a little different than what I was referring to, but I look forward to further refining this issue.

Mr. WRAY. I don't know if Mr. Bryant may have a—

Senator FEINGOLD. Mr. Bryant, do you have something to add on this?

Mr. BRYANT. Only that, as Chris has indicated, we respectfully disagree with the Central District's finding that the term "expert advice or assistance" is unconstitutionally vague. We think it is a term that has a common meaning. Certainly the notion of expertise is well known within the law and outside of the law. Federal Rule of Evidence 702 provides a useful definition which involves defining expert testimony as testimony based on scientific, technical, or other specialized knowledge.

So I think the answer to your question would turn on whether or not the nature of the assistance provided was assistance based on scientific, technical, or other specialized knowledge, which then assisted the foreign terrorist organization in question.

Senator FEINGOLD. Mr. Bryant, last September, after much public outcry about the potential abuse of Section 215, the business records provision of the PATRIOT Act, the Department disclosed that it had not yet used this provision. But since that time, Depart-

ment officials have been cagey about whether they have used this section since September.

In March, I sent a letter to the Attorney General asking to clarify whether Section 215 has been used since September 18, 2003. Mr. Bryant, I have not received a response to that letter. Can you tell me whether the Department has used Section 215 of the PATRIOT Act since September 18, 2003, and will you make sure that my questions about the use of these provisions are answered properly?

Mr. BRYANT. I will do what I can with respect to seeing that you receive an answer to your letter, Senator. I am not in a position to tell you whether or not that section has been used since September when the number was declassified because I don't know the number. Moreover, as you know, it is a classified number. The number itself is classified unless unclassified, so we would need to discuss it in a different setting.

Senator FEINGOLD. So when the statement was made to the Committee previously that it had not been used, that fact had to be declassified, is that correct?

Mr. BRYANT. That is correct.

Senator FEINGOLD. So you have to go through that process again?

Mr. BRYANT. That is correct.

Senator FEINGOLD. Well, I would urge you to do so quickly in light of my request, and in light of the fact that you gave this information before, I think it would only make sense that it would be declassified again so that we can know what is happening with this provision.

Mr. Chairman, is my time up on this round?

Chairman HATCH. Yes, but I am not going to go another round, so if you have—

Senator FEINGOLD. Could I ask one more question, if I may?

Chairman HATCH. Sure.

Senator FEINGOLD. I thank you, Mr. Chairman.

Mr. Wray, prior to the PATRIOT Act, the legal standards for delayed notification or "sneak and peek" search warrants were set by the courts. Section 213 of the PATRIOT Act has been characterized of the Second Circuit decisions on the delayed notification warrants. Section 213 allows sneak and peek searches where the court finds reasonable cause to believe that notification would have certain adverse results. Adverse results are defined to include not only instances where notification would threaten human life or the destruction of evidence, but also any situation that might otherwise, quote, "seriously jeopardize an investigation or unduly delay a trial."

I am concerned about this catch-all provision for delayed notification warrants. I am concerned that it could swallow the rule, because notification of almost any search warrant arguably jeopardizes the criminal investigation. Last October, the Department reported that as of April 1, 2003, it had sought and courts had ordered delayed notice warrants 47 times. That was over a year ago and I am sure that the number is much higher now.

How many times has the Department sought and received authorization to execute a delayed notification search since enactment of the PATRIOT Act, and obviously you can provide this in writing

if you prefer, but if you could give us a ballpark figure now of the number of such searches since April 1, 2003, it would be very useful.

Mr. WRAY. Senator Feingold, I don't have an updated number for you. The 47 number was the number that I had the last time I collected the number, so I wouldn't want to try to guesstimate here just because I think I would be doing you and the Committee a disservice by doing so. But I would be happy to take a look at that and see what information we can provide to supplement my testimony on the number issue.

I do think it is important to point out that a court—not the government unilaterally—decides not only whether or not there is probable cause for the warrant in the first place, but also whether or not it is appropriate to delay notice—not deny notice—but delay notice for the various reasons set forth. So a court has to agree and accept the government's reasons for that. We have high faith in the integrity and the independence and the good judgment of the courts in this country and I think the fact that the 47 times we sought delayed-notice approval by a court for a search, the courts agreed with and accepted our reasoning in those cases.

So I certainly take your concern. We try to be very careful and judicious in our pursuit of that particular technique, but as you know, it has been in the law for a long time and it is a very important tool for us to ensure that, especially as we are acting more and more proactively, terrorists aren't able to be tipped off and essentially jump the gun in particularly critical investigations.

Senator FEINGOLD. I know I am over my time, but let me just say in response that this particular variation on sneak and peek has not been in the law for a long time. In fact, Senator Craig and I and others have proposed in the SAFE Act that there be a renewal process, that the delayed notice not be indefinite. The only way we are going to be able to evaluate with our colleagues whether we are right or you are right or what we should do is by getting this information.

So I am going to urge you to give us this information, and Mr. Bryant, as soon as possible. I would just remind you, the President of the United States in his State of the Union demanded that these provisions be renewed now. For this Committee to be asked to act in response to the President's request without this fundamental information is unreasonable. We need this information at this time.

So I am making that request as strongly as I can and I would appreciate the information as soon as possible so this Committee can evaluate it.

Thank you, Mr. Chairman, for the extra time.

Chairman HATCH. Thank you, Senator.

Just one question so we don't ignore Mr. Bald. I understand that the Department of Justice has brought approximately 60 prosecutions involving the material support statute. Can you please explain to us how this statute has changed the handling of terrorism investigations at the Bureau, the FBI?

Mr. BALD. Thank you, Mr. Chairman. The material support statutes provide us the opportunity to get involved and take action earlier in an investigation than we typically would be able to. Some of the facilitating actions that we are investigating may fall outside

of other criminal statutes. For example, we may have a particular scientist that is providing advice, guidance, or training to terrorists on how to weaponize a particular type of biological weapon, that in and of itself, the providing of training might not be illegal. However, with the material support statutes, it does allow us to address those kinds of very serious weapons of mass destruction terrorist support actions that we face.

So I appreciate your question and I appreciate the Committee's work on the material support statutes. It is a very vital tool for us.

Chairman HATCH. Thank you. I do encourage you to help us on the Committee to understand this as well as we can, because we do have some objections to the PATRIOT Act. I haven't seen any really legitimate objections, in other words, where the Act has been misused. But we want to get it right when we reauthorize it next year and I would like to see that it is done in the best possible way we can so that you can continue to use this very, very important Act to protect our citizens. I want to compliment each of you for doing exactly that.

Did you have another question, Senator?

Senator LEAHY. I was just curious. There is one, and I am not asking you to talk about an ongoing case, but what prompted my attention, there is an article in the paper that the Department is using the material support statute to prosecute a Saudi graduate student, basically charged, as I understand it, with serving as a webmaster, a discussion group moderator. He is not writing anything, but he is the webmaster, and the theory of the prosecution seems to be that he helped to create and maintain websites for various Islamic groups that publish content advocating jihad and provided, quote, "expert advice and assistance" to those groups.

Now, as I say, I don't want to talk about an ongoing case, but what would prevent the Department from using the same theory to go after an Internet service provider. They often give technical assistance if you want to set up a website. You might want to set up a website, "Tours of the Middle East," for example. They could set that up and then as you get into that, people are using the chat room or whatever to send things back and forth. Could you not go after that, the same theory, could you not go after the Internet service provider? Could you go after a repairman who came by to work on the computer?

Mr. WRAY. Senator Leahy, I appreciate your concern, which I share, about speaking too precisely about a case that is pending, and not only is it pending, but the case in question, as Senator Craig knows, is pending in front of a District judge and a jury in his State, and out of respect for them, I want to be very careful not to do anything—

Senator LEAHY. I don't want to go into that.

Mr. WRAY. Okay.

Senator LEAHY. That was what prompted my attention, but I am just asking, what about my hypothetical?

Mr. WRAY. Sure.

Senator LEAHY. Christopher Wray helps set up the "Tours of the Middle East" web site and you are the Internet service provider and then it is used from then on, or a lot of the use of it is a chat room to talk about these various issues.

Mr. WRAY. Again, not speaking about a particular case, but since we are talking in general terms, the key to the kinds of scenarios that you are alluding to is the intent requirement of the statute.

So take the repairman that you mentioned, for example. If he goes to someone's house and repairs the guy's telephone or his computer and it happens that the person whose house he went to is one of these sleepers that we were talking about before, but he doesn't know the guy is a sleeper or has no idea that the guy is going to be using the phone or the computer for terrorist activity, then there would be a significant issue, to say the least, as to his intent.

On the other hand, if the sleeper needed his phone fixed so he could communicate with his accomplices and called an associate who happens to be a repairman and says, "You need to come over and fix my phone and computer so I can communicate with the other Al Qaeda associates with whom I am working," and the guy says, "I will come over and fix the phone to help you do just that," then I think we might be in a situation where he was providing services to assist in terrorist activity and there would be an intent issue that would be satisfied.

Senator LEAHY. Let me take another step. We put a criminal prohibition in the PATRIOT Act, a prohibition on providing expert advice and assistance. Can that be applied to a lawyer who is representing a designated terrorist group and challenging the group's designation? I understand the Department has given licenses to lawyers to represent groups in such challenges, but suppose they said, no, we are not going to give a license. They say to the group, you are on your own. We are not going to license an attorney for you. Would then, if the attorney went and challenged the designation, would that be criminally prescribed?

Mr. WRAY. Well, obviously, whatever we did in connection with a lawyer's services would have to be done in a manner consistent with the Constitution and the rights to effective assistance and counsel and so forth that are provided therein. There are, of course, instances, including one pending case, in which a lawyer provided her services specifically to facilitate, as we allege, a terrorist activity, and that is a pending case in New York right now, so—

Senator LEAHY. I am well aware of that case. I am trying to stay away from that one.

Mr. WRAY. So I think it depends a lot, again, on the question of intent, on exactly what the activity was that the lawyer was engaged in. Certainly, we would not suggest that a lawyer who is, for example, defending his client in a terrorism case is in itself providing material support to terrorist activity.

If you start getting into situations where lawyers are effectively like in-house counsel, sort of like the old mob analogies to a terrorist organization, then there might be situations in which the statute could be constitutionally applied.

Senator LEAHY. How do you determine this license?

Mr. WRAY. I am not in a position to address the licensing issue. I would be happy to try to follow up in writing if that would be helpful, but—

Senator LEAHY. You have argued, I am told, that the Department charged under 2239B a defendant who may not have intended to

further terrorist activities, just it needs to know that it was a terrorist organization, is that correct?

Mr. WRAY. I believe the—

Senator LEAHY. So to use the mob analogy, here comes—the capo di capi comes down the road in his car and you put gasoline in it because he is low on gasoline, do you get charged? If these are terrorist organizations and you don't intend to further any of their activities, but you knew it was a terrorist organization and you served a meal to them, can you be charged?

Mr. WRAY. I think the position that we have consistently taken is that the defendant must know the identity of the foreign terrorist organization recipient and either one of two things, that the recipient of the support was a designated foreign terrorist organization, or that the organization was engaged in violence and terrorist-type activity.

Senator LEAHY. I have another question, and I may want to follow up on this with you. I will try and do this, but I will go into specific cases. Maybe you and I should just have a conversation, because I do know the Idaho case, of course, and New York case and I do not want to ask questions here to compromise an ongoing case, but I think we should have a further discussion of this, Mr. Wray, perhaps privately.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We appreciate you gentlemen coming today and we appreciate the advice that you have given to the Committee and we will try to heed it. Thanks so much for being here.

We welcome our second panel of witnesses. We will first hear from David Cole, Professor of Law at the Georgetown University Law Center. Mr. Cole has been involved in numerous cases involving the material support provision.

Following Mr. Cole will be Paul Rosenzweig, the Senior Legal Research Fellow at the Heritage Foundation. Mr. Rosenzweig is an adjunct professor of law at George Mason University.

We want to thank both of you for being with us today and we look forward to hearing your testimony and any suggestions you can make for us. Mr. Cole?

STATEMENT OF DAVID COLE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. COLE. Thank you, Senator Hatch. Thank you for inviting me to testify, and I ask that my written remarks be incorporated into the record.

Chairman HATCH. Without objection, we will put all written remarks into the record as written.

Mr. COLE. There is no doubt that cutting off funding for terrorist activity is an important and legitimate government objective, but Congress and the executive have pursued it through unlawful means.

There are, in fact, three statutes that impose penalties on people for their associational support of organizations that have been designated as terrorists. One is 2339B that is the principal focus of this hearing.

Another is IEEPA, the International Emergency Economic Powers Act, which allows the government to designate anyone—citizen, foreign national, U.S. corporation, nonprofit, or foreign organization—as a terrorist using a definition that is nowhere provided in any statute or any regulation and then make it a crime for people to support that individual or group.

And the Immigration Act, as amended by the PATRIOT Act, authorizes the government to deport foreign nationals for providing support, whether or not it is wholly innocent or not, to any organization that the Attorney General and the Secretary of State have designated as terrorists under a definition so broad that it would literally include the Department of Homeland Security. That is how broad the definition is.

There are three problems with these statutes, generically speaking. First, they impose guilt by association. They penalize not material support for terrorist activity. That is 2339A. There is no problem with that statute. But instead, they penalize support for blacklisted organizations, organizations that have been labeled terrorist regardless of whether the support has anything whatsoever to do with the terrorist activity of that group.

So, for example, in the case I am litigating in California, the *Humanitarian Law Project*, the government has maintained that our client, who is providing—was providing human rights advocacy training to a group in Turkey that represents the Kurds to encourage it to pursue its means through lawful, nonviolent means, is covered by this statute and would be prosecutable if they continued to urge this group to stop engaging in terrorism and to engage in lawful, nonviolent means.

Second, the statute is vague and over-broad. It would include the person who gives gas to a person who—knowing that the person is a leader of a foreign terrorist organization. It would, as a Federal judge in Miami recently wrote, it would include a cab driver who gave a ride to the leader of a foreign terrorist organization who was here to testify at the U.N. All the government would have to prove is that the cab driver knew that the person was a leader of this terrorist organization and that the organization was designated. There would be no requirement that the cab driver's ride in any way facilitated any kind of criminal activity.

Third, these statutes afford the executive branch unfettered discretion in labeling political groups as terrorist groups. They either provide no review of the labeling process or meaningless review. Under the International Emergency Economic Powers Act, as I referred to before, there is literally no definition of what a specially designated terrorist is.

Yet President Clinton named a U.S. citizen, Mohammed Salah, a specially designated terrorist. That means that it is now a crime for anyone to provide Mr. Salah with any support whatsoever, whether it be a piece of bread, whether it be a newspaper, whether it be medical services, whether it be legal services. The statute makes it a crime to provide support to him in any way, shape, or form. He is essentially subject to internal banishment, and if this were enforced literally, he would starve to death.

Yet he has never been provided a hearing. There has been no grand jury. There is no jury trial whatsoever. And there is no defi-

nition of the label that President Clinton affixed to him, specially designated terrorist. I submit that that is a statute which is written far too broadly to deal with the legitimate objective of cutting off support for terrorist activity.

We have seen this kind of government response before. In the Cold War, we were concerned about a foreign organization, the Communist Party, that had illegal ends, that Congress found engaged in terrorist means to further those ends. And the argument was, we need to cut off all support to that group and we need to facilitate investigation of communists whether or not they are supporting the illegal activities of the group.

The Supreme Court accepted the factual assertion that the Communist Party engaged in illegal ends, used terrorist means to further those ends. But it nonetheless held that it was unconstitutional to punish someone for support or membership of that group, the Communist Party, without proof of specific intent to further the terrorist activity or the illegal activity of the Communist Party, and it held that in a series of cases.

Section 2239B, if construed not to require that kind of specific intent to further the terrorist activity of the group, imposes guilt by association in violation of the First Amendment and in violation of the Fifth Amendment. Thank you very much.

Chairman HATCH. Thank you. We appreciate having you here.

[The prepared statement of Mr. Cole appears as a submission for the record.]

Chairman HATCH. Mr. Rosenzweig, we will take your testimony.

STATEMENT OF PAUL ROSENZWEIG, SENIOR LEGAL RESEARCH FELLOW, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. ROSENZWEIG. Thank you very much, Mr. Chairman, members of the Committee. Thank you very much for inviting me to come to be with you today.

I join with everybody else who has appeared today in agreeing that thoughtful consideration of the provisions of the PATRIOT Act is an important and ongoing obligation of this Committee, and as the Act comes up for reenactment next year, it will no doubt occupy far more of your time.

I think, also, that it is important to note that there seems almost uniform agreement as to some aspects of the material support provisions that are the immediate subject of your discussion amongst all the panelists, from the Department and Professor Cole and I, which is that the key, or the single most significant way in which we can cabin the potential for prosecutorial abuse, which there is a real potential in any system of laws, the key is proper construction of the scienter requirements.

I agree, by and large, with the Ninth Circuit's construction of the statute requiring some showing of specificity, some showing of specific intent to actively support an organization, knowing either the organization has been designated by the executive branch as a terrorist organization, or knowing the true nature of the conduct which the organization is engaged in. I think we could all agree that the knowing support in advancing terrorist activity is wrongful conduct that can and should be punishable.

Where I think the courts in the Ninth Circuit and the District Court in California have gone slightly off the rails is in misusing the vagueness doctrine where what I think they are really talking about, or what they ought to have been talking about is the question of over-breadth.

There is, in my judgment, nothing vague in the statutory terms used by this Congress. It may prove necessary for you to clarify them if the Ninth Circuit decisions become more widely adopted, but verbs like "to train," as in training, are commonly used in all sorts of provisions. We use "cell," we use "pollute," we use "harass." All of them are simple verbs of conduct addressing particular things that an individual is engaged in and are commonly understood by those natural meanings. If the verb "to train" and "training," its related cognate, are unclear and vague, then so, too, is selling drugs. So, too, is polluting, and I think that that is wrong.

Similarly for personnel. If the idea of a personnel is vague, then the Office of Personnel Management doesn't know what it is doing in our executive branch. It is clearly intended to encompass not independent advocacy, but the provision so employee-type services, agency relationship under somebody's direction and control. I have similar reservations about the understanding of expert advice given by this Central District of California.

What is really at issue here, however, is over-breadth, that is, the potential application of these clear terms to protected core First Amendment or Sixth Amendment activity, and I will answer your question, Senator Leahy. I would be quite confident and would urge a court that if the Department of Justice were to try and deny a license and thereby deny somebody their attorney, that interpretation of the material support provisions would be, as applied in that particular instance, unconstitutional and over-broad, and I would urge that position on any court in the land.

I think what we need to talk about here, or where the courts have gone wrong, is whether or not over-breadth challenges should be made on a complete facial basis, thereby invalidating an entire statute and all of its potential uses, including the core uses that everybody would seem to agree are appropriate uses, or whether or not those over-breadth challenges should come as applied in individual cases.

If the Department of Justice were to go crazy and seek to prevent people from having lawyers, or, as Senator Feingold mentioned, seek to prosecute somebody for giving legitimate training in peace advocacy to an organization, that is right at the core of your First Amendment concerns. I would assume that, first off, it would never get out of the Department of Justice, but if it did, that the District courts would rightly shut it down. But that is not a reason, in my judgment to invalidate the entire statute as facially vague or over-broad and thereby disable the completely legitimate and appropriate uses of the statute at the core that everybody agrees are the right things to be prosecuted.

I see my time is up, so I will be happy to answer your questions.

Chairman HATCH. Thank you so much.

[The prepared statement of Mr. Rosenzweig appears as a submission for the record.]

Chairman HATCH. Professor Cole, I have read your statement and I find it intriguing. It is an interesting and very well thought out statement. I don't agree with it all, but I am open to some of the suggestions you make.

You take the position that the current material support statutes unwisely and unconstitutionally, that this statute unwisely and unconstitutionally penalizes innocent association activity. What I am going to challenge you and Mr. Rosenzweig to do for us, because we are going to rewrite this bill next year and we may reauthorize, I think, almost all of it, but this is a particularly important section. What I would like you to help us to decide is where we draw the line between innocent association and culpable conduct. This is important that you help us with this, and we are open to your suggestions. I want them to be valid suggestions and I would expect no less from you.

Now, I will ask both you and Mr. Rosenzweig to provide us for the record a marked-up version of the current statute with your suggested changes and, of course, your rationale for making those changes. That would be very helpful to the Committee. I think we would love to have you do that, if you would.

Senator LEAHY. Lucky guys.

Chairman HATCH. What?

Senator LEAHY. I said, lucky guys.

Mr. COLE. Could I address that orally, just very briefly?

Chairman HATCH. Well, you have taken a great interest in this, as I do and as many others do, and I think it would be very helpful to us if, with your wisdom, you could give us some assistance here, so sure.

Mr. COLE. I think that there is a way to solve the problem and that is essentially to impose a scienter requirement, as Mr. Rosenzweig has suggested, but a different scienter requirement from the one that he suggests. Mainly, the scienter requirement that should be imposed is the one that the Supreme Court said is constitutionally required with respect to all the Communist Party cases, and that is that you can penalize someone for supporting a terrorist organization if you show that his purpose in doing so was to further its terrorist activities.

But if you show that his purpose in doing so was to further its lawful activities or to discourage its terrorist activities, you cannot punish that person. In fact, that is the line that Congress itself thought it was adopting in the PATRIOT Act when it adopted expert advice and assistance.

Chairman HATCH. I would be very interested in getting your suggestions on that.

Mr. COLE. But the way Congress—if you look in my testimony on page 12, I quote the House report and the section-by-section analysis of the PATRIOT Act that was offered in the Senate, both of which say that expert advice or assistance would be a crime only if it is provided knowing or intending that the assistance will be used in preparation for or in carrying out any Federal terrorism offense.

That was Congress's understanding. The problem is, the drafters wrote it—the drafters, the Justice Department—wrote it more broadly so that it includes not only supporting—providing expert

assistance and knowing that it is going to further a terrorist expense, but also any expert advice or assistance provided to any organization that has been labeled, even if that expert advice or assistance is designed to discourage terrorism, as is the case in—

Chairman HATCH. The way for somebody to interpret what you are suggesting here, and what your testimony seems to suggest to me, as well, is that Congress can avoid vagueness issues by merely listing the crimes that we intend to prohibit. Now, that solution itself would concern me as it would, I think, be nearly impossible to anticipate the myriad ways that terrorists could receive material support. Furthermore, I think it may very well give the terrorists a road map of how to comply with the letter of the law and still achieving their goals.

So again, I am not confronting you. I am saying, help us. Help us with this so that we can accomplish our goals to protect the American people but not hamstring law enforcement so much, overly hamstring them to the point where we can't prevent the terrorist activities that are about to occur.

Mr. Rosenzweig, I found your statement particularly persuasive with regard to the term "personnel," that the term "personnel" was not unconstitutionally vague because it can be easily defined by just looking in the dictionary. In fact, as you note, the term has been used in a variety of other statutory contexts.

Would you please tell the Committee what other contexts, if you can right off the top of your head, what other areas that term has been used and how long these statutes have been on the books, and as far as you know, have any of those other statutes that use the term "personnel" been determined to be unconstitutionally vague?

Mr. ROSENZWEIG. Mr. Chairman, I listed several instances in which the term "personnel" was used on page nine of my testimony. There were one, two, three, four, five, six, seven different instances, all in title 18—

Chairman HATCH. Have any of those been declared unconstitutional?

Mr. ROSENZWEIG. I have found—I was once advised never to say never, but I have found no such instances. I confess I do not know how long any of those statutes have been on the books. I do hazard the guess that all of them predate the AEDPA in 1996, though I am not even 100 percent certain of that.

Chairman HATCH. Okay. Again, I am going to challenge you, as well, to give us legitimate suggestions as to how we might improve this bill, because my goal here is not to uphold the PATRIOT Act regardless of what anybody says. We want to improve it if we can. No statute, to my knowledge, is absolutely perfect unless it is a one-liner, maybe. I might be able to come up with some that are perfect, but there aren't very many that are because we have got to get too many people to agree in this 535-dual-member body.

Mr. Rosenzweig, let me ask you this. Mr. Bryant has suggested in his testimony that we consider clarifying the definitions of the terms "personnel," "training," "expert advice or assistance." We would also like to have both of your advice, if you can, on how we might better define them. You have heard Mr. Bryant's testimony of how he would further redefine. We would like you to look at that testimony and give us your best suggestions as to how we might

further improve on the language of the PATRIOT Act in these areas.

Now, they made the case that they did not think that the Ninth Circuit is right or that the District court out there is right in these cases. But they also have indicated a willingness to consider stronger language. But where the balk, and I think rightly so, is are we going to put language in that makes it even more difficult to interdict and stop the terrorists, for instance, the 310 that we have already stopped and 179 that have been convicted. If we are going to make it more difficult to accomplish those very important goals, then let us find a way of doing it within the law and within the definitions of the law that hopefully can be improved through your suggestions to the Committee.

I am offering to both of you and other, for those who are watching, other constitutional experts, as well, to help us to write the provisions so that they are written better. Nobody here—I believe the PATRIOT Act has done a terrific job for this country and I think most people do believe that and it is absolutely true. But that doesn't mean it is perfect. It doesn't mean we can't perfect it. It doesn't mean we can't make it better.

So we are looking forward to reading whatever you two submit to the Committee and others, as well. We challenge all constitutional experts to help us to understand this better, how we might better do our job here in the Senate Judiciary Committee.

I will turn to Senator Leahy at this time.

Senator LEAHY. Thank you. He has not enthusiastically supported the sunset provisions that Dick Armey and I put in.

Chairman HATCH. I don't support that.

Senator LEAHY. Interesting philosophical coalition, if you don't have one.

Chairman HATCH. It shows the two extremes can get together.

[Laughter.]

Senator LEAHY. I do appreciate the testimony I have heard here. Mr. Rosenzweig, I absolutely agree with you on the question of counsel. I can't—I remember different times when I was a prosecutor, we had some heinous crime and somebody said, "Isn't it awful that John Smith or Mary Jones is defending that terrible person," and I said, "Why? How can you possibly say that?" I am doing my job to prosecute the terrible person and I hope I will get a conviction. But I would hate to think that they didn't have strong defense because the next day it may be me, or it may be you or anybody else.

I know from your own writings and your own statements that you have always been consistent in that and I applaud you for it. It doesn't mean, and again, as defense counsel, we like the people or support the people or agree with the people that are being defended, but we are going to protect all of us in doing that.

Mr. ROSENZWEIG. I certainly hope that is the case. One of my current clients is doing nine life terms for nine serial—nine alleged—well, he has been convicted—nine murders. His case is on appeal. So I wouldn't want it to be the case that my representation of him necessarily affiliated me with his acts and I don't think that is a fair thing to say.

Senator LEAHY. No, and as I said, I know the more heinous the crime that I prosecuted, especially if there is assigned counsel, the more I would urge the court to assign very good counsel. For one thing, it made it not only a better trial but you didn't have to worry about, if you did get a conviction, it getting overturned based on incompetent counsel. With you, they would not have incompetent counsel.

Professor Cole, I am delighted to see somebody here from my alma mater, Georgetown, and I appreciate your willingness, and both Mr. Rosenzweig's willingness, to give your section-by-section comments.

In his written testimony, Assistant Attorney General Bryant proposed several amendments of the material support laws, including expanding the list of predicate offenses. He wants to include all Federal crimes of terrorism. He wants to specify that material support can include both tangible and intangible property or services. Do you have a comment on those proposals?

Mr. COLE. Well, with respect to the first, it depends on what "all Federal terrorism offenses" mean. I don't generally have a problem with Section 2339A because it requires proof that someone provided material support to a specific terrorist act and there is no constitutional right to provide support of any kind to a terrorist act. It, of course, depends on what you mean by Federal terrorism offenses, because one of the statutes that the Justice Department refers to as a Federal terrorism offense is, of course, 2239B, which permits convictions without any connection to any kind of terrorist act. So if it included 2339B, it would obviously cause problems. But with respect to others, I don't think that would be a problem.

With respect to adding tangible and intangible property or services to the definition of material support, the Justice Department has just lost cases involving personnel, involving training, and involving expert advice or assistance. Now they want to expand it further to something that includes intangible services. If expert advice and assistance, personnel, and training are too vague and over-broad, intangible—I don't even know what intangible services are.

So I think that would raise many of the same concerns. It would presumably—it could certainly conceivably include all sorts of speech, just as personnel, training, and expert advice or assistance do, and, therefore, raise very serious First Amendment concerns, as outlined in my testimony.

Senator LEAHY. Mr. Rosenzweig?

Mr. ROSENZWEIG. While I think I disagree with Professor Cole about training, personnel, and expert advice, and I think I probably would disagree about tangible property—I think I know what that means and I think that that is pretty clearly defined—I, too, was struck by the idea of an intangible service, and perhaps that was just a drafting error and they didn't mean it. I can't even think of what that is, and if I can't think of what that is, then it may very well be a bit vague, though I am obviously not the test.

Senator LEAHY. I am glad to hear that, because I couldn't figure out what it meant, either, and I thought I would go to guys like you who are far more knowledgeable to see what you thought.

Mr. ROSENZWEIG. We do have a concept of intangible property, I mean, tangible and intangible property, but intangible services is new.

Senator LEAHY. Let me ask just one more question, and I apologize to Senator Craig for taking time on this, but the government has argued that money is fungible and so it should be able to cut off all funds to any group that engages in terrorism, whether the group also supports vital social services. What is wrong with that rationale?

Mr. COLE. Well, this is—

Senator LEAHY. Is there any constitutional difference between a prohibition on providing funds to a terrorist organization and a prohibition on providing other sorts of physical assets and services?

Mr. COLE. This is the government's principal argument. Money is fungible and, therefore, the cab driver who gives the ride to the leader of the foreign terrorist organization is somehow providing some support that even if it doesn't lead to a terrorist act would free up some other individual who otherwise would have given him the ride to the U.N., and therefore—and that individual might then engage in terrorism and therefore we should be able to criminalize the cab driver.

What is wrong with that is that it goes way too far, and I would suggest that we don't believe—

Senator LEAHY. Isn't that a little bit more specific, Professor, than the question of money? If I am going to send—

Mr. COLE. Right.

Senator LEAHY. —ten thousand dollars to a known terrorist organization because I do like the fact that they also have a school lunch program, and I think, gee, that is nice to have the school lunch program so here, guys, here is ten grand. Gee, I really hope you put it in the school lunch program. Isn't that a little bit different than the cab driver?

Mr. COLE. I am not sure that it is. The government certainly argues that it isn't. That is why they define material support to include not just money but all services, all sorts of personnel, training, and the like. But even with respect to money, I don't believe we as an American people believe that you are personally liable because you have paid money that has then been used by someone else.

I pay taxes, but I don't think anyone would suggest that because my taxes support the U.S. military, I am personally liable for the torture inflicted on Iraqi prisoners. We don't believe that because money is fungible, it is unconstitutional for the State to provide subsidized transportation and subsidized textbooks to children in religious schools. If the argument was money was fungible was accepted, then that would be an establishment of religion. But no, that is not an establishment of religion.

We don't believe that everyone who donates to the anti-abortion group Operation Rescue is personally liable because Operation Rescue has violated criminal laws. Those in Operation Rescue who have violated criminal laws are personally liable, but those who have made a donation to this organization are not, by virtue of that donation, liable.

We don't believe that every person who donated to President Nixon's Committee to Re-Elect the President is personally liable for the Watergate burglaries. We believe that the people who committed those burglaries and who authorized them and who supported those burglaries are liable, but not every person who made a donation to the Committee to Re-Elect the President.

So I think we have historically drawn a line between people who support an organization that happens to engage in illegal activities and people who support the illegal activities itself, and I think that line is precisely the line that the Supreme Court has held is constitutionally required both by the First Amendment right of association and by the Fifth Amendment requirement of a showing of personal guilt.

Mr. ROSENZWEIG. If I might, because this is, I think, perhaps the most difficult question you face and perhaps one where I disagree more with Professor Cole than in other areas, because the deepest difficulty you face is the question of blended organizations, organizations that serve or purport to serve two purposes, a terrorist purpose and an unrelated humanitarian purpose, and how you deal with that.

I don't think, frankly, that it is too much of a burden to oblige organizations that are blended to split apart when one of the activities engaged in is, ex hypothesi, a support for terrorist activity, and that type of activity is far different from the types of things that Professor Cole was discussing, affiliation with CREEP. If you gave money to President Nixon's Committee to Re-Elect knowing that that money would go to support an organization that was going to engage in criminal activity, then you might be liable under some broad conspiracy theories of the type you alluded to.

Most people don't pay the taxes to America knowing that it is going to go to fostering the abuses in Iraq that we all condemn. In fact, we assume it won't.

So the question for you is, where is the balance, and in that regard, you have to begin with something that doesn't get mentioned, but we know now, at least after the BCRA, that money isn't speech, right? At least in most instances, the giving of money has an expressive form, but it is regulable speech in a way that is different from core expressive conduct, and the Supreme Court has told us that.

So I don't think that it is at all unreasonable for Congress to say, if you want to have a humanitarian arm, you have got to make it a different humanitarian body and you cannot act in affiliation with an existing organization that has been designated lawfully, through the processes of the Department of Treasury, as a terrorist organization. That doesn't seem to me a huge burden to impose upon the organization to be able to receive the funds.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman HATCH. Senator Craig?

Senator LEAHY. I thank the Senator from Idaho because I know he could have asked to have his time at that point. I thought these were important questions and I appreciate his usual courtesy.

Senator CRAIG. Thank you. Gentlemen, thank you, and I appreciate the challenge the Chairman has put before you. I hope you will engage in that energetically as we work through this process.

Let me for a moment this morning, Mr. Rosenzweig, turn to you because I am frustrated by some of the things you have said, but more importantly, some of the things you have written. Let me first go to a paragraph in your opening statement before the Committee—I should say your written statement before the Committee. Mr. Chairman, I am going to take the luxury of reading it into the record.

"It is a commonplace for those called to testify before Congress to condemn the Representatives or Senators before whom"—to commend, excuse me.

[Laughter.]

Senator CRAIG. —"Representatives or Senators"—

Chairman HATCH. I was wondering about that.

[Laughter.]

Senator CRAIG. —"before whom they appear for their wisdom in recognizing the importance of whatever topic is to be discussed, so much so that the platitude is often regarded as mere puffery. Today, however, when I commend this Committee for its attention to the topic at hand, the difficulty of both protecting individual liberty and engaging our intelligence and law enforcement organizations to combat terror, it is no puffery but rather a heartfelt view. I have said often since September 11 that the civil liberty/national security question is the single most significant domestic legal issue facing America today, bar none, and, as is reflected in my testimony today, in my judgment, one of the most important components of a reasonable governmental policy addressing this difficult question will be the sustained, thoughtful, nonpartisan attention of America's elected leaders of Congress," and so on.

Now I have before me your legal memorandum from the Heritage Foundation entitled, "The SAFE Act Will Not Make Us Safer." I found it interesting reading. In it, you use words like "fig leaf," political fig leaf. You go on to talk about pandering to hysteria and not being a leader, and then you use a variety of other terms, and lastly, you use one here, it says the proposed modifications of the PATRIOT Act misses the point completely, so much so that one doubts whether any of the authors is a serious student of either law enforcement or intelligence activities. I think those could generally be classified as ad hominem attacks.

Mr. ROSENZWEIG. Well—

Senator CRAIG. Let me now go to the concluding paragraph of this article. These are your words and the words of Ed Meese. "In reviewing our policies and planning for the future, we must be guided by the realization that this is not a zero-sum game. We can achieve both goals, liberty, and security to an appreciable degree. The key is empowering government to do the right things while exercising oversight to prevent the abuse of authority. So long as we keep a vibrant eye on police authority, so long as the Federal courts remain open, so long as the debate about governmental conduct is a vibrant part of the American dialogue, the risk of excessive encroachment on our fundamental liberties can be avoided."

I find that all very curious and I find that in phenomenal conflict, and I guess I will just leave it at that. To be accused of being less than patriotic, to be accused of pandering to hysteria, to be accused of crafting a political fig leaf, legislative proposals "based on

fear. . ." You are darn right I have fear, fear that somewhere, at some time down the road, these statutes might get misused. And I would suggest that I am going to err on the side of a person being free and unabused rather than having to defend them in court because they were abused and lost their freedoms and their reputations were destroyed.

So I am going to be easy on you today. I am going to suggest that you retitle this, and you call it "The SAFE Act Will Not Make Us Safer." Why don't you say, "But the SAFE Act Might Make Us Freer"?

Gentlemen, I thank you for your participation today and look forward to continuing to engage with you as we work through this most difficult time in our country. We have got to get it right, but I would suggest that it is less than constructive to be involved in ad hominem attacks against those of us who work as diligently as do you to try to get it right. Thank you, gentlemen.

Chairman HATCH. You can respond, Mr. Rosenzweig. If I could add, I read the same article and I don't think they were ad hominem attacks. I think they were your opinion that, you know, every time we give law enforcement tools, if they are abused, they can invade civil liberties But I would be interested in your response to Senator Craig.

Senator CRAIG. Certainly.

Mr. ROSENZWEIG. Thank you very much, Senator Craig, at least for reading the paper. I appreciate that.

Senator CRAIG. You see, I am a fan of the Heritage Foundation. I read most of its work.

Mr. ROSENZWEIG. I do want to make at least one clarification, and I believe that this is 100 percent correct. Nothing in anything I have ever written has ever suggested that anybody with whom I disagree on substantive provisions of the SAFE Act or any other provision of the PATRIOT Act is in any way less than patriotic. I will eat that paper if you can find that in it.

As for the characterization of some of the responses to the PATRIOT Act as hysterical, I, and by these I mean the external responses, I stand by that characterization. I have seen ads of hands ripping up the Constitution. I have seen ads of teary-eyed white-haired gentlemen coming out of bookstores saying, "I don't want the government to read my books."

I don't, either, and I am sure you don't. But in my judgment, with respect to the SAFE Act, the provisions, and I know that Senator Durbin is here, too, and I am sure that he will ask me some more questions, but with respect to the provisions identified in the SAFE Act for correction, I think you are looking in the wrong direction. Those are not the sources of problems.

The material support provisions are potential sources of problems and we have been talking about them. I call them the way I see them, and in my judgment, on the merits, the fears that have given rise to the SAFE Act are not founded in a realistic appraisal either of the realities of executive and judicial oversight, and legislative, I might add, or in a realistic understanding of the legal structures that exist out in the world today.

If you perceive that as an ad hominem attack, I sincerely regret that. It was not our intention in any way to be speaking in an ad

hominem manner. But I do think it is a fair criticism of some who support the PATRIOT Act to say that they are basing their legislative proposals to you more in fear than in reality.

I take great comfort and great heartfelt comfort in the notion that you are here and are approaching this in the forthright and thoughtful manner that you are. I, with respect, disagree with you as to the necessity of the SAFE Act provisions. There were other portions of the SAFE Act, by the way, that we did not say were unnecessary because I don't think that they are unnecessary. I think the national security letter provision, for example, is one as to which I have some concerns about the expanded government use, and that is not addressed in the paper. Perhaps it ought to have been, and I might rethink that at this point or write another paper about it.

But in candor, I think that some of the provisions of the SAFE Act that you have sponsored rest upon premises of abuse that are not well founded.

I will end where I end when I often answer this question. I am comfortable with the PATRIOT Act provisions even if the next President is John Kerry, and I will stand by that and I will say that next year if that is what happens.

Senator CRAIG. Well, I thank you for those comments. Mr. Chairman, thank you for the indulgence here. I have not yet had a chance to get to know you, Paul. I know Ed Meese and value his friendship. I will remain diligent in this area no matter what the Heritage Foundation might suggest. As I did when I voted for this Act, I voted for it with caution, recognizing a time and place and a need. At the same time, I said my job is scrutiny, constant oversight to make sure that the powers of government are not abusive.

I would also suggest that I have a healthy fear of an abusive government, and as a result of that, I am going to err on the side of a freer citizenry. Thank you, Mr. Chairman.

Chairman HATCH. Thank you. Some think we are erring on the side of a safer citizen, so as you can see, this debate is a very important debate and I, for one, personally appreciate the ideas of others, as I am sure both of you do.

Senator Durbin, we will turn to you.

Senator DURBIN. Thanks, Mr. Chairman. I want to thank my colleague for joining me in this effort. We couldn't be more different in terms of our votes on the floor. We are probably at polar ends of the spectrum when it comes to the way we vote. But we do come together in common cause here, I believe because, as they say, this political spectrum is not linear, it is circular. When you move to a certain point to the left, you end up finding yourself on the right. At this point, we have found left, right, and center coming together in support of the SAFE Act.

Let me try to remember some of the basics from my logic course, and this goes back many decades in college, about what an ad hominem attack is, and that is a generalized attack. All lawyers are crooks. All politicians are dishonest. Those are ad hominem attacks. Another example would be a statement made by former Attorney General Ed Meese on the "Today" show where he said, "I think librarians, unfortunately, some of them, at least, are more in-

terested in allowing pornography to go to children than they are fighting terrorism." That would be an ad hominem attack.

I think your statements, Mr. Rosenzweig, in the beginning of your article do qualify as ad hominem attacks in that they say, "in the end, they appear to be little more than a political fig leaf intended to allow politicians to assert they have responded to public will and fixed the PATRIOT Act. But capitulating to hysteria is pandering, not leadership. The SAFE Act will not make America safer."

So I think that is a generalized ad hominem attack, but you get more specific in your article. You decide that you want to really address the authors of the SAFE Act, who happen to be here today greeting you, and let me quote. "The proposed modification of the PATRIOT Act misses the point completely, so much so that one doubts whether any of the authors is a serious student of either law enforcement or intelligence activity." Those are your words.

So if we take some umbrage at what you have written, I am afraid you have to live with it. You wrote these words, you published them, and I assume you still stand by them. I hope that you understand that many of us on this panel, including Senator Craig and myself, believe that questioning motives at this point is not appropriate.

But let me start, and I would like to ask you both this question. I want to know your starting point on the debate. We just had an interesting statement made by Senator Craig. He said, "I think we ought to err on the side of a freer citizenry," to which Senator Hatch responded, "I think we ought to err on the side of a safer citizenry." There is the debate. It is freedom versus security.

So what is the starting point for both you, Mr. Rosenzweig, and for you, Professor Cole? Do you start with the premise that we do have certain inalienable rights and liberties, that they are protected and embodied in the Constitution, and that when this government wants to take away any of our rights, invade our privacy, the burden is on the government to prove that we should have to surrender our rights, or is it the other way around, and your quote from Locke and others suggest the first thing is order and security. Then we can talk about freedom. So where is your starting point, Mr. Rosenzweig?

Mr. ROSENZWEIG. We need both, order, liberty—

Senator DURBIN. Oh, that sounds like a good political answer.

Mr. ROSENZWEIG. Well, I am going to try very hard to be politic today since I obviously failed, in your judgment, in the drafting.

Our Constitution recognizes that both are important. It speaks of unreasonable searches and seizures, for example. Reasonable is a variable that changes in the circumstances. The same type of search that is unreasonable in order to prevent drunk driving becomes immensely reasonable—

Chairman HATCH. It is a pretty vague word, isn't it?

[Laughter.]

Senator DURBIN. Let me ask you, this Fourth Amendment that you are referring to also talks about probable cause and specificity. Now, that is not too equivocal, and frankly, when it gets down to it, the PATRIOT Act, at least my objections to it, get to that point, whether there is probable cause, whether there is specificity in

terms of government action. That, I think, is the standard of reasonableness that we ought to be looking for.

Mr. ROSENZWEIG. Actually, you are addressing what is a longstanding debate in the history of the Fourth Amendment, because obviously, as you know, the particularity and probable cause standards apply to the issuance of warrants and are in the second clause of the amendment. The reasonableness standard is in the first clause, and many scholars believe that the two were at least originally intended to act as independent, that the warrant requirement with the particularity and probable cause that you have addressed was simply going to be a protector for the police officer against subsequent tort actions for violations. If he got a warrant, he couldn't be sued in tort because he had satisfied these requirements. And that the initial standard is essentially a free-standing definition of what is and is not reasonable.

We went away from that and defined reasonableness in terms exclusively of probable cause and particularity, most in the 1950s, 1960s, and 1970s through the Warren Court, but in the last 15 years or so, the Court, the Supreme Court and most of the other courts, have gone back towards kind of a divergent view of those two.

If we really believed that particularity was an absolute requirement for all searches and seizures, then, for example, this Congress could not have approved roving wiretaps in the 1980s and the courts would have rejected them. They have not because they understand that the two are not necessarily—

Senator DURBIN. I want to let Professor Cole also respond, but I think that you are too far off in the weeds here. The question is whether or not under the PATRIOT Act our government should be given authority over our liberties and freedom and privacy where they cannot clearly demonstrate it is necessary for the security of this country, for example, those sections of the PATRIOT Act that have not been used and those that loom over us, and the administration is saying, not only do we want those, we want more. We want more of your liberty. We want more of your freedom.

And I assume the premise that I hear from many is, in the name of security, give it up. Professor Cole, what is your thought?

Mr. COLE. This is a hard question. My view is that there is a balancing act that has to be struck here, that it is a difficult balance, that most rights in the Constitution are not absolute but do envision that for compelling State interests, it is justified to infringe upon them. But—so I start with the proposition that it is a balance and there are trade-offs to be made.

But then I go to looking at our history, and what you see if you look at our history is that in every period of crisis, we have overreacted. In every period of crisis, we have given the government too much power, given it too broad a scope to go after people in the name of facilitating investigation, as Senator Hatch suggested with the question to Mr. Boyd, and facilitated investigation to make it a crime to speak out against the war during World War I. It facilitated investigation to make it a crime to advocate communism during the Cold War.

But in each of those historical periods, we have learned that those kinds of responses are a mistake and we regret them after

the fact. Therefore, it seems to me, we ought to put a thumb on the scale, and a pretty strong thumb on the scale of liberty and require precisely the showing that you are suggesting, that is that there is a demonstrated need for this particular measure in order to respond to the problem.

Third, it seems to me that in striking the balance between liberty and security, we ought to do so in ways that equally affect all of us. We ought not take the easy way out and strike the balances in a way that impose burdens and obligations on others that we would not bear ourselves. And I think, unfortunately, in the wake of 9/11, we have taken that easy route out, particularly by targeting foreign nationals, and I think that is problematic.

And then the fourth point is that I think there is a—this is not often stated, but I think there is a relationship between liberty and security which is that when we sacrifice basic liberties, we may make ourselves more insecure. If you look at a world opinion about the United States today and compare it to September 12, 2001, September 12, 2001, we had the world's sympathy. We had the world's sympathy. Le Monde's headline, "We Are All Americans," right?

Today, there is a higher degree of anti-Americanism around the world than ever before in the history of this country. That is the greatest threat to our insecurity—to our security over time. That is what makes it hard for us to find the terrorists. That is what makes it easy for terrorists to recruit people to our side.

And if you look at what is the basis for that rising tide of anti-Americanism, it is perceived hypocrisy on the part of the United States in sacrificing liberties that we insisted other countries must abide by, and asserting powers to lock people up without any showing that they are, in fact, dangerous, without any hearing, without any trial, and imposing on other people's nationals burdens and obligations that we would not bear ourselves.

So I think it behooves us from a security standpoint to put a thumb on the side of liberty as well as from a liberty standpoint.

Senator DURBIN. Thank you. I am way over my time and I thank you for your forbearance, Mr. Chairman. I would like to ask, last fall, you suggested and said that you would schedule a hearing on enemy combatants, and I hope that in light of this discussion, what has happened with the Iraqi prisoners, I hope that we can do that. I really think that is an important thing for us to talk about, the standards for detention and imprisonment that we are abusing in Guantanamo and other places, and I hope this Committee will do that. Thank you, Mr. Chairman.

Chairman HATCH. That is a fair comment. I am headed down to Guantanamo in just a short while and I am going to go look that situation over and we will certainly—I think we probably will do exactly that.

I want to thank both of you for being here. I think you both added a lot to this hearing and I think you both have agreed that we need to be safe, we need to be secure, but we need to be free, and we have got to balance those great goals, and the question is, how do you do it?

Now, one of the most amazing things to me is that this is now the fifth hearing on the PATRIOT Act that I have conducted and

I have yet to see one evidence of abuse of the Act. Now, I hear a lot of theory and I hear a lot of legal theory from the left to the right, but the Act has worked particularly well. As everybody knows, I was against sunsetting it.

Now, there are a number of proposals floating around Congress dealing with various provisions of the PATRIOT Act. One of the reasons I have been holding this series of hearings and of terrorism-related hearings is to hear complaints or concerns about the PATRIOT Act, to see if changes are necessary. Proponents of the SAFE Act argue that additional provisions of the PATRIOT Act should sunset so that the Congress can provide oversight.

Well, I have got news for them. The Senate Judiciary Committee always has the authority to hold oversight hearings over the Department of Justice regardless of whether various provisions in the criminal laws of this country are subject to sunsets or expiration dates. We have the right to do that no matter what and we are going to.

For example, after the recess, we will again have a hearing on the material support clause of the PATRIOT Act which does not sunset. Additionally, I am wary of adding sunsets to a host of new provisions.

As many of you know, the Senate has been the site of unprecedented filibusters this Congress. This has allowed a minority of Senators to thwart the will of the majority. We have had obstruction like I have never seen in my 28 years in the Senate over the last couple of years. Almost every bill that has any question by the other side is going to be filibustered and is going to have to have 60 votes in the Senate. It used to be you would have maybe one, two filibusters a year and it was always on some profound, very, very important issue where there really was tremendous division. Now, it is on everything.

So a minority of Senators can thwart the will of the minority, and should a minority of Senators decide that they don't want any PATRIOT Act provisions reauthorized, that minority could then filibuster and cause these provisions to lapse despite the will of the majority.

So naturally, I haven't been very enthusiastic about the sunset clause, but I lost in that matter, primarily because the left and the right getting together, and maybe that is for the best. I don't know.

But I will tell you this. If we don't reauthorize the PATRIOT Act and a number of these provisions, I think this country is going to be really in peril.

I have read your article on the SAFE Act and you make a lot of powerful points there. And Larry, I think they are worthwhile reading, as you have done. I also know my colleague from Idaho, what a fine man he is and how patriotic he is and how very much he yearns and gives every aspect of his being to try to do what is right here. And so I interpret the SAFE Act to be a great attempt at trying to do what is right here, and there are differences on the PATRIOT Act.

I happen to differ on the SAFE Act. I can't imagine why anybody wouldn't get rid of roving wiretaps in this modern age. I just can't imagine it, especially since they have been used for 20 years in other forms of law, which brought the PATRIOT Act finally up to

speed with regard to domestic terrorism. You can go down each one of these provisions that are being criticized and, I think, show the validity of them and the necessity of them.

And I agree with Professor Cole. They could be misused, just like all criminal laws can be misused by an improper and obnoxious set of law enforcement officials who don't abide by the laws themselves, yes. That is why we have oversight. Yes, they can be misused, but that is true of any criminal law, or virtually any criminal law. I guess I had better not be that broad because I can think of some things that might not be able to be abused, they are so insignificant.

At this time, I would like to submit into the record the written testimony of Professor Robert Chesney from the Wake Forest Law School, who was unable to appear before us today.

We are going to leave the record open for one week for any written questions by Senators on these matters.

I am also going to put into the record a May 5 letter from the Department of Justice to me as Chairman and it is an interesting letter from William E. Moschella, the Assistant Attorney General, and we will put that in the record, as well.

In the meantime, I have kept the door open for both of you, as experts in the field, to write to us and help us know how to do this better, because we are going to reauthorize this bill, and personally, I would like to reauthorize all those sections that you, Mr. Cole, think should not be, and some of which you might have questions about, Mr. Rosenzweig, but I can be convinced. I can be persuaded with good legal reasoning.

So I am opening the door for you to persuade me. If nothing else, give us your suggestions on how we make this better, how we resolve some of these conflicts that you think are constitutional conflicts that are currently unresolvable. Believe it or not, we really want to do what is right.

The one thing I do want to do is I want to make sure that with the protection of the freedoms of this country, we do the ultimate that we can to protect the safety of the people in this country, because that safety was not protected very well before the PATRIOT Act. It is now being protected as well as we can with the PATRIOT Act, and that is not to say we can't provide greater protections through a renewal of the PATRIOT Act by adding some sections that might be even better than what we have.

But again, I will come back to my point. I have had five hearings and I have yet to have one substantive showing of an abuse—

Senator CRAIG. Mr. Chairman, I totally agree with you.

Chairman HATCH. That is the thing that amazes me.

Senator CRAIG. We are being prospective.

Chairman HATCH. No, I understand.

Senator CRAIG. We have got quality people at the Justice Department. You and I both know the integrity of our Attorney General, and if he ever sensed there was going to be abuse under his administration, he would pull it back.

Chairman HATCH. Yes, he would.

Senator CRAIG. The SAFE Act is prospective, and I think that is a very important part of it. I would fear that we would act after

the fact, after we had destroyed somebody's reputation because of an abuse—

Chairman HATCH. Well, I—

Senator CRAIG. —and that is where we come from here.

Chairman HATCH. And I think that is where you come from and I admire you for it and respect you for it, but I also fear that if we do away with some of these provisions that the SAFE Act would do away with, that we are exposing American citizens to unnecessary and undue exposure to terrorism, and that is why the PATRIOT Act was enacted to begin with.

And I think before we change those provisions, somebody ought to show me where those provisions have not operated properly, where those provisions have been abused, where those provisions will not do for us what 310 criminals indicted and 179 of them convicted has done for us.

You know, I may be considered a hard-nose on crime, but I will tell you, I want to see some real substantive reasons.

We had a hearing out in Utah. It was amazing to me. We allowed the other side to come in and people from the Eagle Forum and from others came in. I mean, there were a lot of generalities, a lot of generalities. There was not one substantive thing said as to what was wrong with the PATRIOT Act, or what really has been done wrong with the PATRIOT Act, not one thing. And yet the media played it like they were all there really giving us the business on the PATRIOT Act.

Well, I think you have got to have some substance behind it and not just fears that law enforcement might not live up to law enforcement's obligations. Yes, we have got to make sure law enforcement does, but we ought to have some substantive criticism before we take away provisions that may save American citizens from another 9/11. I think that is just a given.

But then again, there are 535 members here and maybe a majority will not agree with me, and if that is so, I can live with that. What I can't live with is another 9/11. What I can't live with is not doing everything in our power to protect the people of this country. I think the PATRIOT Act does that. I think most people believe that because they have seen it do it, and here is the testimony here today, pretty strong testimony that it has been doing it for us.

Before we change it, and I just cite roving wiretaps as an illustration. In this day of cell phones, Blackberries, you name it, it is nuts to go with what was the law before, basically having to go to the FISA court to get a warrant every time against the phone and not against the terrorist and have to get one in every jurisdiction where the phone shows up. I mean, that is ridiculous, and yet that is what the state of the law was with regard to terrorism beforehand and—

Senator CRAIG. Mr. Chairman—

Chairman HATCH. —how we can combat terrorists.

Senator CRAIG. I am not here to debate you.

Chairman HATCH. I know.

Senator CRAIG. It does not eliminate roving wiretaps. It creates greater specificity. You and I started this debate and worked together some years ago when we saw the technologies changing and the hard wire moving to digital and all of us understand that. But

I do believe you are not erring when you are asking for some degree of specificity instead of just a general approach.

Chairman HATCH. Well, they do have a degree of specificity. That is the point that I am trying to make.

Senator CRAIG. We will have ample time to debate this, but the idea of suggesting that we have eliminated it, I don't believe is a fair analysis.

Chairman HATCH. Let me be more clear on that, then. It prevents the government—the SAFE Act would prevent the government from obtaining a roving wiretap, as I understand it, unless the government can specify the suspect's name, and currently the government can obtain an order to intercept the communications of a suspect even when the identity of the suspect is not known. All they have to do is provide a sufficient description of the subject. And this would make it harder to get roving wiretaps in terrorism cases than in narcotics investigations, where roving wiretaps were available prior to the USA PATRIOT Act. I don't think anybody can deny that.

Senator CRAIG. And I support that. Mr. Chairman—

Chairman HATCH. No, that is not what it says.

Senator CRAIG. —there is a difference between a roving wiretap and a John Doe wiretap. That is what we eliminate.

Chairman HATCH. Okay.

Senator CRAIG. Thank you.

Chairman HATCH. Well, we are probably going to have a hearing on it and see, but I don't agree with that. And frankly, I think it is a dangerous thing. But be that as it may, Senator Craig, I know you are sincere and I know you may prevail on it and that may be the case. I don't know. I just hope not. It will be a worthy debate and I just hope not because I am concerned.

I am concerned that we should do everything we possibly can to protect our people while at the same time protecting civil liberties, and I think the PATRIOT Act, even with some of the defects that have been mentioned, does that.

With that, we will recess until further notice. I want to thank you two again for being here.

[Whereupon, at 12:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 14, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to the Department's representatives following their appearance before the Committee on May 5, 2004. The subject of the Committee's hearing was "Aiding Terrorists: An Examination of the Material Support Statute."

We hope this information is helpful to you. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

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Hearing of the Senate Committee on the Judiciary
"Aiding Terrorists: An Examination of the Material Support Statutes"
May 5, 2004

Questions for Assistant Attorney General Christopher Wray from Senator Leahy:

1. In his testimony, Assistant Attorney General Bryant proposed several amendments to the material support statutes, including expanding the definition of material support so that it includes "any tangible or intangible property or service."

a. Both of the outside expert witnesses at the hearing stated that the term "intangible service" was so vague that they did not know what it meant, and Mr. Rosenzweig suggested that it was perhaps "just a drafting error and [DOJ] didn't mean it." Was the suggestion to amend the definition of material support to include "intangible property and service" just a drafting error or does the Department support such an amendment?

ANSWER: Assistant Attorney General Bryant's testimony on this point has been misinterpreted, and I thank you for the opportunity to clarify the record. The Department does not support, and has never supported, amending the definition of the term "material support and resources" in 18 U.S.C. § 2339A(b) to include "intangible services." Rather, the Department supports the amendment to 18 U.S.C. § 2339A(b) contained in section 6603(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458, enacted December 17, 2004), which made clear that the term "material support or resources" means any property, tangible or intangible, or service, except for medicine or religious materials.

b. If the Department does support this language, how would it propose to define, and what would be some examples of, "intangible property' and "intangible services"? How does your proposed expansion of the definition preclude the potential for the application of the statute in "outlandish or remote circumstances," as Professor Robert Chesney wrote in his statement, that, as a matter of prosecutorial discretion, may not be brought but which create a window for abuse.?

ANSWER: As indicated above, the Department does not support amending the definition of "material support or resources" in 18 U.S.C. § 2339A(b) to include "intangible services." Rather, the Department supports the amendment to 18 U.S.C. § 2339A(b) contained in section 6603(b) of the Intelligence Reform and Terrorism Prevention Act of 2004, which made clear that the term "material support or resources" means any property, tangible or intangible, or service, except for medicine or religious materials.

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With respect to the meaning of the term "intangible property," that term is defined in *Black's Law Dictionary* as "property that has no intrinsic and marketable value, but is merely representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, or franchises." *Black's Law Dictionary* (6th ed. 1990) at 809. I do not believe that the clarification of the definition of "material support or resources" contained in the Intelligence Reform and Terrorism Prevention Act of 2004 in this regard will lead to the application of the statute in "outlandish or remote circumstances" as the provision of intangible property to designated foreign terrorist organizations (FTOs) could help those organizations further the violent aims and goals of the organization and thus threaten the vital interests and national security of the United States. Moreover, I do not believe that the statute as it was previously drafted could have been applied in "outlandish or remote circumstances" either. Because material support or resources of any kind is fungible and frees up resources that can be used to promote violence, the provision of any material support or resources to a designated FTO facilitates and furthers the organization's unlawful and violent activities regardless of the benign intent of the donor. Referring, however, to Professor Chesney's suggestion that Congress should consider amending the material support statutes to expressly preclude the possibility of prosecution "for pure advocacy in a situation not complying with the *Brandenburg* standard of incitement to illegal conduct," the Department supports the amendment to 18 U.S.C. § 2339B contained in section 6603(f) of the Intelligence Reform and Terrorism Prevention Act of 2004, which clarified that nothing in that statute should be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

c. Assistant Attorney General Bryant said that the current definition of material support "potentially may not include all of the possible types and forms of support." As head of the criminal division, do you believe there is any real, not potential, need for an expansion of the definition? Specifically, have there been any situations in which the Department was not able to prosecute a person who supported terrorist activities because the definition of material support was not broad enough, and there was no other statute under which to charge the person? If so, please describe those situations.

ANSWER: I believe that there was a definite and real need for the expansion and clarification of the definition of material support contained in section 6603(b) of the Intelligence Reform and Terrorism Prevention Act of 2004. As Congress found when first enacting Section 2339B, any type of support, whether as property or services, given to an entity designated as an FTO furthers the violent aims and goals of the organization and threatens the vital interests and national security of the United States. See Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, § 301(a), 110 Stat. 1214 (1996). This is true even if the material support is not outwardly violent or lethal in nature or directly related to

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violent activities because the support permits the FTO to more efficiently allocate its resources to enhance its ability to commit terrorist acts.

By limiting "material support" to an enumerated list of largely physical assets, the statute previously permitted such organizations to freely obtain critical property, services, and assistance that might not have been explicitly listed and unduly hampered effective prosecution. Given the flexible, adaptable and varying nature of FTOs, it is very difficult to anticipate all of the types of support that potentially could arise in future investigations and cases. Without discussing particular former or current investigations, the Department has encountered subjects who were engaging in activities that benefit the FTO but did not clearly fall into one of the previously enumerated types of "material support."

As a result, when such cases were indicted and brought to trial, the Department was forced to expend considerable resources litigating not the merits of the case, but rather the bounds of the definition of 'material support. For example, in United States v. Sattar, the court held that Lynne Stewart and Ahmed Abdel Sattar could not be prosecuted under Section 2339B for providing "communications equipment" to the Islamic Group (IG) because they used their own communications equipment in furtherance of the organization's goals rather than providing the equipment itself to the organization. See United States v. Sattar, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003). The Sattar court further concluded that Stewart's and Sattar's provision of themselves to the FTO could not constitute providing "personnel" under Section 2339B. In the end, the government superseded the original indictment and charged Stewart and Sattar with violating Section 2339A on the theory that they conspired to provide and conceal personnel (Sheik Rahman) to the IG by smuggling his communications out of his prison, knowing that they would be used in a 18 U.S.C. § 956 conspiracy to kill or maim people abroad. Simply defining "material support" to include any property or service, as was done in the Intelligence Reform and Terrorism Prevention Act of 2004, will eliminate much of this unnecessary litigation and increase the efficacy of Section 2339B.

2. In the Lackawanna case, the Department prosecuted six men for providing material support in the form of "personnel" on the grounds that they attended an al-Qaeda affiliated training camp. Similarly, defense attorney Lynne Stewart has been charged with providing her own self as "personnel."

a. Is it the Department's view that anyone who provides services to or is hired by a designated terrorist organization is providing themselves with "support" in the form of personnel?

ANSWER: Section 6603(f) of the Intelligence Reform and Terrorism Prevention Act of 2004 amended 18 U.S.C. § 2339B to provide that "[n]o person may be prosecuted under this section in connection with the term 'personnel' unless that

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person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." This provision is entirely consistent with the guidance that was previously found and remains contained in the United States Attorney's Manual.

Therefore, it remains the Department's view that an individual who knowingly provides himself to work under the direction or control of a designated FTO, or to direct the operation of that organization, is providing that organization with personnel for purposes of the material support statutes.

b. In answer to a question by Senator Hatch, you stated that, in order to prosecute a sleeper cell individual for providing himself as personnel, you would need to show, for example, that, "The person went and trained in a terrorist training camp, intending to conduct terrorist activities." Do you agree then, that when a defendant is charged under the statute with providing himself as "personnel," due process requires proof that the defendant intended to facilitate the harmful ends of the organization? Please explain why or why not. If not, how does the Department reconcile prosecution in such cases with the Supreme Court precedent prohibiting guilt by association?

ANSWER: No, I do not agree that, when a defendant is charged with violating 18 U.S.C. § 2339B by providing himself as "personnel" to a designated FTO, the government must prove that the defendant intended to facilitate the harmful ends of the organization. Rather, as section 6603(c) and (f) of the Intelligence Reform and Terrorism Prevention Act of 2004 made clear, the government must prove that the defendant knowingly provided himself to work under the direction and control of the organization and did so with the knowledge that the organization had been designated as an FTO by the Secretary of State or had engaged or engages in terrorism or terrorist activity.

Neither the Due Process Clause nor the First Amendment requires proof that the defendant specifically intended to facilitate the unlawful acts of the organization. As the Ninth Circuit explained in rejecting such arguments in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (2000), "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." And, addressing the contention that 18 U.S.C. § 2339B infringed on the freedom of association, the Ninth Circuit explained that the statute "does not regulate speech or association per se. Rather, the restriction is on the act of giving

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material support to designated foreign organizations." ***Id*; *see Humanitarian Law Project v. U.S. Dep't of Justice*, Nos. 02-55082, 02-55083 (9th Cir. Dec. 21, 2004) (*en banc*) (rejecting First Amendment challenge to 18 U.S.C. § 2339B "for the reason set out in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000)"), *see also United States v. Lindh*, 212 F. Supp. 2d 541, 570 (E.D. Va. 2002) ("The First Amendment's guarantee of associational freedom is no license to supply terrorist organizations with resources or material support in any form, including services as a combatant. Those who choose to furnish such material support to terrorists cannot hide or shield their conduct behind the First Amendment."). One can associate with a foreign terrorist organization without providing that organization with personnel in violation of 18 U.S.C. § 2339B as "one can readily associate with others without also committing himself to the direction or control of the organization." *Lindh*, 212 F. Supp. 2d at 572 n.76.**

c. Section 9-91.100 of the U.S. Attorney's Manual sets forth the Department's prosecutive policy on two of the terms in the "material support" definition -- "personnel" and "training." Does the Department have an official policy on any of the other terms in that definition, such as the term "expert advice or assistance"?

ANSWER: **Most of the terms listed in the "material support" definition are self-explanatory, including currency, personnel, monetary instruments, financial securities, financial services, lodging, communications equipment, safehouses, false documentation or identification, weapons, lethal substances and explosives. As set forth in the amendment to 18 U.S.C. § 2339A(b) contained in section 6603(b) of the Intelligence Reform and Terrorism Prevention Act of 2004, the Department interprets "expert advice or assistance" to include the provision of any advice or assistance derived from scientific, technical, or other specialized knowledge, regardless of whether such expertise relates to violent or benign skills or conduct. However, "expert advice or assistance" is not intended to prohibit persons from simply advocating in support of FTOs or their causes.**

3. I would like to clarify your position regarding the appropriate level of intent required for conviction under section 2339B. In answering one of my questions about whether a repairman could be prosecuted under the material support statute, you said, "If he goes to someone's house and repairs the guy's telephone or his computer . . . but he doesn't know the guy is a sleeper or has no idea that the guy is going to be using the phone or the computer for terrorist activity, then there would be a significant issue, to say the least, as to his intent." You contrast this with a repairman who is asked specifically to fix a phone so that members of a terrorist organization can communicate and who says he will "come over and fix the phone to help you just do just that." Your statements support the view that, in order to be prosecuted under section 2339B, the individual must intend to further the unlawful acts of the organization -- in this case, that the repairman must know that the support provided, fixing the phone, is going to be used to further terrorist

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activity.

a. Do you stand by that statement? If not, please explain.

ANSWER: I appreciate the opportunity to clarify the requirements of section 2339B, one of the Department's most important tools in the fight against terrorists and their supporters. As one Senator said, "Most important is the provision in this bill that will cut off the ability of terrorist groups such as Hamas to raise huge sums in the United States for supposedly 'humanitarian' purposes, where in reality a large part of those funds go toward conducting terrorist activities." 142 Cong. Rec. S3380 (daily ed. April 16, 1996) (Sen. Snowe).

My quoted statements accurately reflect the intent requirements of section 2339B that were clarified by section 6603(c) of the Intelligence Reform and Terrorism Prevention Act of 2004. The second repairman clearly satisfies the necessary level of intent: He has provided material support to individuals whom he knows are members of a designated FTO. The first repairman, by providing the same expert assistance, has not violated section 2339B because he does not know that the recipients of that assistance are members of a designated FTO. In the words of the statute, he has not "knowingly provide[d] material support or resources to a foreign terrorist organization."

The intent requirement of section 2339B is satisfied by the knowledge that the recipient of the "material support" is either a member of an FTO that has been designated as a "foreign terrorist organization," or, alternatively, knowledge that the organization engages in terrorist activities or terrorism as those terms are defined in section 212(a)(3)(B) of the Immigration and Nationality Act or section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989. The statute does not require that the provider either intend or know that the support he provides will be used for terrorist activity. Indeed, Congress' express reason for enacting section 2339B implicitly rejected such a requirement. *See* Pub. L. No. 104-132, § 301 (1996) ("[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.") Money and other resources are fungible; when given to terrorist organizations, they allow these organizations to flourish even if the resources are not specifically used to further terrorist activity. Thus, using the material support statutes to prosecute terrorists *and* those who knowingly support them is a critical part of our strategy to identify, disrupt, and deter future terrorist attacks. As Sen. Feinstein said, "I simply do not accept that so-called humanitarian works by terrorist groups can be kept separate from their other operations. I think the money will ultimately go to bombs and bullets, rather than babies, or, because money is fungible, free up other funds to be used on terrorist activities." 141 Cong. Rec. S7661 (daily ed. June 5, 1995).

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b. Given your statement, would you support applying a *mens rea* requirement to the material support element of section 2339B requiring proof that the defendant intended to further unlawful acts, in addition to applying a *mens rea* requirement to the foreign designated terrorist organization element of the statute, which the Department has already said it supports.

ANSWER: No, that would be 18 U.S.C. § 2339A. The Department does not support defining the *mens rea* element of section 2339B as requiring proof that the defendant intended to further unlawful acts. Rather, the Department supports the amendment to section 2339B contained in section 6603(c) of the Intelligence Reform and Terrorism Prevention Act of 2004, which clarified that the *mens rea* element of the material support offense under section 2339B requires proof that: (1) the defendant knowingly provided support to the organization in question; and (2) the defendant either knew that the organization was a designated FTO or knew that the organization has engaged or engages in terrorism or terrorist activity, as those terms are defined by relevant provisions of federal law. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B); 22 U.S.C. § 2656f(d)(2).

c. If you do not support revising Section 2339B to require that the defendant intends to further unlawful acts, then please explain what interest we have in criminalizing support to a group that is designed and intended to encourage the group to pursue lawful, nonviolent means to its ends. For example, could you prosecute someone for sending a terrorist group a book on non-violence? What about activities that aid the lawful activities of a designated terrorist organization, such as sending children's books to a day care center run by such an organization? Under your construction, could a hotel clerk be guilty of providing lodging to a member of a designated foreign terrorist organization, if he knows that the person is a member of the organization or that the organization at some time conducted unlawful activities, even if he has no intent to further the illegal acts and is merely working to make a living?

ANSWER: The Department does not support revising section 2339B to require that the defendant intends to further unlawful acts for the following three reasons.

First, because material support of any kind is fungible and frees up resources that may then be used to promote violence, the provision of any material support facilitates and furthers the organization's unlawful and violent activities regardless of the benign intent of the donor. As the Ninth Circuit recognized in rejecting the argument that 18 U.S.C. § 2339B is unconstitutional because it proscribes the giving of material support even if the donor does not have the specific intent to aid in the organization's unlawful purposes, "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

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how it is used." *Humanitarian Law Project v. Reno*, 205 F. 3d 1130, 1134 (2000).

Even support designed and intended to encourage a group to pursue lawful, nonviolent means to achieve its ends may be used to further the organization's violent aims. For example, a terrorist organization could use the knowledge derived from training in the art of peaceful negotiation to pretend to negotiate peacefully while the organization gains time to plan a terrorist campaign.

Second, some terrorist organizations use their humanitarian activities as an integral part of an overall program that includes murdering innocent civilians and assassinating government officials. For example, one expert on terrorist organizations, Matthew Levitt, describes in "Hamas from Cradle to Grave," *Middle East Quarterly*, Winter 2004, at 3-15, that this foreign terrorist organization is one unified body, and that its social welfare organizations, supported by numerous charities, answer to the same leaders who set Hamas political and terrorist policy. Levitt describes how Hamas charity committees, mosque classes, student unions, and sport clubs serve as places where Hamas activists recruit Palestinian youth for terrorist training courses in Syria and Iran, or for suicidal terrorist attacks. And, he discusses how a single soccer team from the Jihad mosque in Hebron has produced several Hamas terrorists responsible for five suicide bombings in 2003.

Even more frightening, Levitt explains how Hamas charities, social service organizations, hospitals, schools, and mosques openly laud suicide bombings. Hamas-run schools and summer camps begin indoctrinating children as early as kindergarten for later use as suicide bombers. As Levitt notes, Palestinian children raised in this environment make willing terrorist recruits. This program is accomplished in significant part by the multi-faceted nature of Hamas, which gains strength through its humanitarian and charitable activities in the community.

Thus, even if individuals are providing material support, such as money, for groups like the Hamas, and are somehow able to ensure that this money is spent by these FTOs only for humanitarian activities, such as a school, the problem remains that this money enables these groups to gain more general support, loyalty, and popularity among the local people and to earn a measure of legitimacy. This support and legitimacy then allows groups such as Hamas to recruit suicide bombers, as well as accomplices to provide critical services such as transportation, lodging, and local intelligence for terrorist operations. Accordingly, even those who are providing material support with the sincere hope and assurance that their money is not being used directly for terrorism are nevertheless providing groups such as Hamas with the type of overall support they need in order to operate successfully as terrorists.

Third, the *9/11 Commission Report* demonstrates how important it is to wall

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off charitable funds and other charitable activities from terrorist organizations. The *Report* describes how charities were a major source of funding for Osama Bin Laden and al Qaeda. Also, in the words of the *Report*, charitable organizations "provided significant cover, which enabled operatives to travel undetected under the guise of working for a humanitarian organization".

With respect to the hypotheticals raised in this question, I do not believe that it would be appropriate for me to speculate as to whether the activities described in these scenarios would run afoul of the statute. Such an answer could prejudice prosecutorial decisions that I may be called on to make in the future. Moreover, such determinations must be made on a case-by-case basis and involve the examination of facts and circumstances not referenced in your question.

d. Muslims are required to donate money to charities as part of their obligation to their religion. How can we strike a balance in section 2339B to ensure that those who support only peaceful initiatives of proscribed organizations, and have absolutely no intent to further terrorism, are not prosecuted for their donations?

ANSWER: The Department believes that it strikes the right balance under 18 U.S.C. § 2339B to require proof that: (1) the defendant knowingly provided support to the organization in question; and (2) the defendant either knew that the organization was a designated foreign terrorist organization or knew that the organization has engaged or engages in terrorism or terrorist activity, as those terms are defined by relevant provisions of federal law.

If an individual provides support to a designated foreign terrorist organization without knowing that the organization has been designated as a foreign terrorist organization and without knowing that the organization in question has engaged or engages in terrorism or terrorist activity, then that individual should not be held criminally liable. If, however, an individual provides material support to a foreign terrorist organization knowing that the organization has been designated a foreign terrorist organization or knowing that it has engaged or engages in terrorism, then he or she should be held criminally liable, even if that individual only intended to support the organization's non-violent activities, for the reasons described in the previous answer.

It is also worth pointing out that Muslims and those practicing any other faith remain free to contribute to the wide variety of charities around the world that have not been designated as foreign terrorist organizations under section 219 of the Immigration and Nationality Act or as specially designated global terrorist entities under Executive Order 13224.

4. In 2002, officials of the University of California at San Diego directed two

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student groups to remove links from their Web sites to the Web sites of groups that the State Department had identified as "terrorist organizations." The American Association of University Professors (AAUP) and others petitioned the school to reverse course, arguing that its construction of the term "material support" was overbroad and would prevent any professor, student, or campus news organization from using links for scholarly and reportorial purposes. As AAUP wrote to the University, "Americans have a right to inform themselves of any group, no matter how abhorrent its positions. Acts in furtherance of terrorism are prohibited; speech is not."

a. Do you agree with the University's original position or with AAUP?

ANSWER: Without viewing the Web sites in question, it would be inappropriate for me to speculate as to whether the University or the AAUP was correct in this instance. I certainly agree with the AAUP, however, that 18 U.S.C. § 2339B prohibits the act of providing material support to a designated foreign terrorist organization and does not proscribe speech protected by the First Amendment. *See* 18 U.S.C. § 2339B(i) ("Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."). Furthermore, the AAUP is correct to the extent that it is not necessarily the case that linking one's Web site to the Web site of a designated foreign terrorist organization would run afoul of 18 U.S.C. § 2339B.

b. Are there modifications we can make to the definition of "material support" to prevent it from reaching people who exercise their constitutional right to freedom of expression?

ANSWER: The Department supported the amendment to the material support statute contained in section 6603(f) of the Intelligence Reform and Terrorism Prevention Act of 2004, which clarified that nothing contained in the statute shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States. The Department believes that 18 U.S.C. § 2339B, as it is currently drafted, does not infringe the exercise of First Amendment rights, such as the freedom of expression or freedom of association. The Department also believes that section 2339B, as it existed before the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004, did not infringe on the exercise of First Amendment rights.

5. In March, the district court in the case *U.S. v. Al-Arian* interpreted section 2339B to require proof that the defendant (1) knew that the organization he was supporting was a designated foreign terrorist organization or had committed unlawful activities that caused it to be so designated; and (2) had a specific intent that his support would further the organization's illegal activities. 2004 U.S. Dist. LEXIS 4227 (M.D. Fla. 2004). The court stated that it did not believe this standard would impose a great burden in the typical case and that, often, such intent will be easily inferred: "For example, a jury could

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infer a specific intent to further the illegal activities of a FTO when a defendant knowingly provides weapons, explosives, or lethal substances to an organization that he knows is an FTO because of the nature of the support. Likewise, a jury could infer a specific intent when a defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization . . . ." *Id.* at 40.

Do you agree with the court that such a standard would pose merely a slight burden for the government but the impact on protecting constitutional rights would be significant? If not, why not and what do you think the burden would be of such an intent requirement? Can you provide any specific examples of how such a requirement would have hindered any of your prosecutions?

ANSWER: The Department strongly disagrees with that portion of the district court ruling which you cite. On March 12, 2004, the district court in *United States* v. *Al-Arian* issued rulings on various defense motions to dismiss the indictment, rejecting most of them. Although the issue of the proper interpretation of Section 2339B *mens rea* requirement was not squarely addressed in the motions or responses, the court nonetheless determined that, in order to avoid Fifth Amendment personal guilt problems, in a prosecution under Section 2339B, the Government must show that the defendant knew or had a specific intent that the support would further the illegal activities of a Foreign Terrorist Organization. On April 26, 2004, the Government filed a motion with the court seeking reconsideration of this portion of its decision. In that motion we propounded the view that the phrase "knowingly provides" requires proof that (1) the defendant knows the identity of the organization to which he provides "material support" and (2) that he "knows" either its designation as an FTO or that it engages in terrorist activities that would warrant such a designation. On August 4, 2004, the district court denied the Government's motion and reaffirmed its prior ruling. The court first stated that section 2339B raises due process concerns under the Fifth Amendment by tying criminal liability of the defendant to the criminal activities of the FTO. Requiring proof of specific intent on the part of the defendant to further the illegal activities of an FTO ensures that the defendant is convicted based on his or her personal involvement in unlawful conduct and not solely on the criminal activities of others. The court next determined that proof of specific intent was also required to prevent section 2339B from being unconstitutionally vague under the First Amendment because the statute reaches a substantial amount of protected conduct. Last, the court held that the specific intent requirement relieves any concern that section 2339B's blanket prohibition of tangible support to FTOs infringes on the right to freedom of association.

At the outset, it is important to note that regardless of the weight of the burden of proof on the Government that a specific intent standard would impose, importation of such a standard is improper under the plain language of the statute as well as inconsistent with congressional intent. In contrast to Section 2339A,

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which proscribes providing material support knowing or intending that it is to be used to commit terrorist activities, Congress made clear that a violation of Section 2339B consists only of knowingly providing material support to an FTO. In enacting Section 2339B, Congress was determined to strictly prohibit terrorist fundraising in the United States, and to ensure that this country could not be used as a staging ground for those who seek to commit acts of terrorism against persons in other countries. H.R. Rep. No. 104-383, at 43 (1995) (legislative history pertaining to a bill that was a predecessor of AEDPA). And it specifically found that foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. AEDPA, 301(a)(7), 110 Stat. 1247. In other words, material support furthers an FTO's terrorist activities, either directly as in the case of explosives or, because it is fungible and therefore frees up other FTO resources to further terrorism. Thus, Congress meant to hamstring international terrorism by proscribing *all support*, even seemingly minimal support or support given with the naive intention that it not assist terrorism. Hinging criminality on the donor's intent eviscerates Congress's purpose. Indeed, Congress clarified the knowledge requirement in section 6603(c) of the Intelligence Reform and Terrorism Prevention Act of 2004 by specifically providing that the defendant either must know that the organization is a designated foreign terrorist organization or know that the organization has engaged or engages in terrorism or terrorist activity, as those terms are defined by relevant provisions of federal law.

Most importantly, a specific intent standard is unnecessary to protect the statute against constitutional challenge. Specific intent to further illegal activities is only required where the *actus reus* of the criminal offense is based on membership or affiliation with certain groups or persons. *See Scales* v. *United States*, 367 U.S. 203 (1961). Section 2339B, by contrast, does not predicate guilt on association, but rather on personal conduct that is the personal provision of material support. Thus, there is no due process *Scales* concern. Even if *Scales* were applied, however, section 2339B's knowingly requirement is sufficient to ensure personal guilt. A contributor who knowingly provides material support to an organization that he knows is an FTO provides that organization with something that can further its terrorist goals directly or indirectly whether he specifically intends to further those activities or not. Because he knows that the recipient of the support is an FTO or an entity that engages in terrorist activities, such a defendant could hardly be surprised to learn that such a contribution is not an innocent act. Thus, it is unnecessary also to require that the defendant specifically intend to further terrorist activities with his contribution.

The *Al-Arian* court's own example reinforces this point. In its memorandum opinion, the court gave as an example of sufficient *mens rea* a situation in which a defendant knows that the organization continues to commit illegal acts and the

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defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses. *Al-Arian*, 308 F. Supp. 2d 1322 at 10 (M.D. Fla. March 12, 2004). This very fact pattern illustrates the application of the knowingly scienter already contained within Section 2339B. A specific intent standard need not be imposed upon the statute to arrive at the same point.

We would note that the court's reasoning in the *Al-Arian* case, with respect to overbreadth and vagueness under the First Amendment and freedom of association, was categorically rejected by the Fourth Circuit Court of Appeals sitting *en banc* in *United States v. Hammoud,* 381 F.3d 316 (4th Cir. 2004).

While the burden of proving specific intent may be slight in certain circumstances, it would substantially hinder prosecution in others. Section 2339B was originally passed because of the difficulty of proving the donor intent to further particular crimes under Section 2339A. Furthermore, many terrorist organizations, such as Harakat al Muqawama al Islamiyya, a.k.a. Hamas, or the Islamic Resistance Movement, the Partiya Karkeran Kurdistan (PKK), a.k.a. the Kurdistan Workers Party, and the Liberation Tigers of Tamil Eelam (LTTE), use their resources both to fund lethal terrorist activities to intimidate and coerce one segment of a population and to supply social services such as orphanages and schools to win over the hearts and minds of another segment. Imposing a specific intent requirement would grant people who provide support to such FTOs knowing of their deadly activities an easy escape hatch. As explained above, Congress has already determined that even innocently provided donations further the FTO's violent aims and threaten the security of the United States. Thus, it is wholly inappropriate to permit people who knowingly provide support to an FTO to evade prosecution simply based on their declaration that they intended only to support the organization's humanitarian activities.

6. On its face, 8 U.S.C. § 1189 provides little due process protection for organizations that the Secretary of State is considering designating as Foreign Terrorist Organizations. In *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), the D.C. Circuit held that U.S.-based organizations must be notified and provided an opportunity to challenge their designation at some point in the process. How can we modify section 1189 to ensure that organizations have adequate and fair process before they are included on the list of proscribed organizations, including access to the relevant evidence supporting their designation?

ANSWER: The Department does not believe that 8 U.S.C. § 1189 needs to be modified to ensure that organizations are given due process before they are designated by the Secretary of State as a foreign terrorist organization. To begin with, foreign organizations with no cognizable presence in the United States are not entitled to the protections of the U.S. Constitution. *See, e.g., People's Mojahedin*

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***Organization of Iran v. Department of State*, 182 F. 3d 17, 22 (D.C. Cir. 1999). And, with respect to those entities with a sufficient presence in the United States to be protected by the Due Process Clause, the D.C. Circuit held in 2001 that 8 U.S.C. § 1189 is constitutional so long as the process required by the statute is supplemented by additional procedures that the statute neither requires nor precludes. *See National Council of Resistance of Iran v. Department of State*, 251 F. 3d 192 (D.C. Cir. 2001). These procedures include: (1) notice of an impending designation and those unclassified items upon which the Secretary of State proposes to rely in designating the organization as a foreign terrorist organization; and (2) an opportunity for the organization to present, at least in written form, such evidence as that organization may be able to produce to rebut the administrative record or otherwise negate the proposition that it is a foreign terrorist organization.**

The D.C. Circuit, however, also recognized the possibility that alerting a previously undesignated organization to its impending designation could harm the nation's foreign policy goals in particular cases. It therefore also held that the State Department does not have to provide an organization notice of its impending designation in cases where the State Department is able to make a showing of particularized need. *See id.* at 208.

The Secretary of State has implemented the D.C. Circuit's guidance on how to constitutionally apply 8 U.S.C. § 1189 to organizations with a constitutional presence of the United States, and these procedures were upheld by the D.C. Circuit in *People's Mojahedin Organization of Iran v. Department of State*, 327 F. 3d 1238 (D.C. Cir. 2003). The Department therefore sees no need to incorporate that guidance expressly into the statute.

7. Individuals have a Fifth Amendment due process right to defend themselves against every element of a crime. How can we tailor 18 U.S.C. 2339B to ensure that individuals who are prosecuted for giving material support to proscribed organizations are permitted to exercise their constitutional right to challenge every element of their crime when the statute currently does not allow them to collaterally challenge the designation of a foreign terrorist organization?

ANSWER: The Department does not support modifying 18 U.S.C. § 2339B in this manner. Rather, the Department supports the decision of Congress to preclude defendants in material support prosecutions from collaterally challenging the designation of a foreign terrorist organization and, instead, to provide for the centralized review of such designations in the D.C. Circuit upon a timely petition for review filed by the designated organization.

The centralization of judicial review and the express preclusion of collateral attacks on the designation of foreign terrorist organizations serve important government interests. Foreign terrorist organization designations have a major

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impact on foreign relations, and it is vital that judicial challenges to such designations be resolved quickly and authoritatively. *See, e.g.*, *United States v. Sattar*, 272 F. Supp. 2d 348, 367 (S.D.N.Y. 2003) ("Centralized review under the statute is important because designations have significant foreign relations implications that Congress could reasonably conclude should be resolved by a court that is able to develop a unified body of relevant law."); *see also United States v. Afshari*, 2004 WL 2924339 (9th Cir. Dec. 20, 2004) ("[T]he scheme avoids the awkwardness of criminalizing material support for a designated organization in some circuits but not others, as varying decisions in the different regional circuits might."); *cf. Humanitarian Law Project v. Reno*, 205 F. 3d 1130, 1136-37 (2000) (holding that challenge to adequacy of judicial review of designation must be reviewed in D.C. Circuit). Additionally, because all challenges to the designation of foreign terrorist organizations involve classified information, centralized judicial review in the D.C. Circuit minimizes the chances that such information will be inadvertently disclosed both because the State Department is located in the District of Columbia and because the D.C. Circuit's Clerk's Office routinely handles classified information.

Moreover, it is important to recognize that defendants in material support cases do not have a due process right to challenge collaterally the Secretary of State's designation of a foreign terrorist organization. The propriety of an organization's designation as a foreign terrorist organization is not an element of the criminal offense of providing material support to a designated foreign terrorist organization. It is the fact of the designation, rather than its propriety, that triggers the criminal ban on the provision of material support. For example, the United States District Court for the Southern District of New York has stated: "The element at issue in this case is simply whether [the Islamic Group] 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 [the Islamic Group] as an FTO." *United States v. Sattar*, 272 F. Supp. 2d 348, 364-65 (S.D.N.Y. 2003). *See also United States v. Afshari*, 2004 WL 2924339 (9th Cir. Dec. 20, 2004) ("[The element of the crime that the prosecutor must prove in a § 2339B case is the predicate fact that a particular organization *was* designated at the time the material support was given, not whether the government made a correct designation.") (emphasis in original). Consequently, because "[t]he correctness of the designation itself is not an element of the offense . . . the defendants' right to due process is not violated by their inability to challenge the factual correctness of that determination." *Sattar*, 272 F. Supp. 2d at 368. *See also United States v. Afshari*, 2004 WL 2924339 (9th Cir. Dec. 20, 2004) ("Section 1189 provides for the organizations to seek review of the predicate designation, and that review was had in this case. Therefore, due process does not require another review of the predicate by the court adjudicating the instant § 2339B criminal proceeding.").

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8. According to news articles, President Bush has asserted that, by including an expiration date, Congress was saying that "maybe the war on terror won't go on very long." In fact, in his radio address on April 17th, he said, "Some politicians in Washington act as if the threat to America will also expire." On what basis has the Administration asserted that the PATRIOT Act sunset was inserted because Congress thought that the war on terror would be over, rather than for the real purpose, which was to ensure meaningful oversight about how the government is using these sweeping powers?

ANSWER: Like every member of this Administration, I appreciate the important oversight responsibilities exercised by Congress and am committed to working with Congress to fulfill those duties. As the scope of the 9/11 Commission's work demonstrates, a broad array of factors affects the Government's capacity to detect, disrupt, and prevent acts of terrorism. The President's remarks were based on a belief, shared by all of us dedicated to the war on terror, that members of the law enforcement and intelligence communities require a correspondingly broad set of tools to flexibly and aggressively confront terrorists and their supporters. In a world where our enemies' determination does not flag and their sophistication grows, removing any one of these tools from our agents' investigative arsenal dangerously hinders their ability to protect the American people from terrorist attacks.

Toward that end, I believe we can all agree that there were shortcomings in the structure and tools provided to the law enforcement and intelligence communities prior to the passage of the USA PATRIOT Act. I cannot emphasize enough how vital that Act has been to the Justice Department's efforts in the investigation and prosecution of terrorists, and in the protection of the American people from future terrorist attacks. Those of us on the front lines of the war against terrorism are very grateful that you recognized the value of the tools provided by the Act and therefore voted in its favor together with an overwhelming bipartisan majority of your colleagues.

9. You testified that, "Since September 11, we have charged 310 defendants with criminal offenses as a result of terrorism investigations," and that "179 of those have already been convicted."

    a. Of the 310 defendants charged, describe the applicable criminal program category for each case.

ANSWER: We are only able to determine program categories for cases that are entered into Executive Office of United States Attorney's (EOUSA) case management system. Since the "310 defendants charged" is information that comes from the subset of cases tracked by the Criminal Division, and differs from the

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terrorism and anti-terrorism cases tracked through EOUSA's case management system, we are unable to provide the specific program categories for these 310 defendants (the number of which is now 375).

b. Would you classify these matters as international or domestic terrorism cases or some combination of both? Please explain your answer using explicit definitions and the source of those definitions.

ANSWER: All of the cases have an international nexus. The cases referenced in my testimony reflected those cases identified by the Criminal Division as terrorism or anti-terrorism cases since September 11, 2001. These cases include certain investigations conducted by Joint Terrorism Task Force (JTTF) agents and any other cases known to the Criminal Division in which there is evidence that an individual was engaged in terrorist activity or associated with terrorists or foreign terrorist organizations.

It should be noted that the Criminal Division tracks a subset of cases that are reported through the case management system of the United States Attorney's Offices (USAO). The USAO's case management system reflects that, during FY 2003, 661 terrorism and anti-terrorism defendants were convicted. For purposes of this system, "Terrorism" cases include International Terrorism, Domestic Terrorism, Terrorist Financing, and Terrorism-Related Hoaxes; and "Anti-Terrorism" cases include Immigration, Identity Theft, OCDETF, Environmental, and Violent Crime--all in cases where the defendant is reasonably linked to terrorist activity or where the case results from activity intended to prevent or disrupt potential or actual terrorist threats.

c. Of the 310 defendants, how many were charged with an offense that constitutes a "Federal crime of terrorism," as defined in 18 U.S.C. 2332b(g)(5)?

ANSWER: Of the 310 defendants that I referenced in my testimony, 84 were charged with an offense that constitutes a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).

The fact that a particular defendant was not charged with such an offense or publicly linked to terrorism by the FBI does not mean that law enforcement had no concerns or evidence regarding his connection with terrorism. Likewise, the fact that an alien was deported rather than prosecuted does not mean that he had no knowledge of, or connection to, terrorism. In certain cases, a defendant's knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement

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perspective is to pursue other disruption options, including prosecution for non-terrorism offenses and removal from the United States.

d. For each of the 310 charged, please list the statutory citation of the major offense charged.

ANSWER: This information for most of the 310 (now 375) defendants charged is included on the attached chart. The chart does not include information that is presently under seal, classified or otherwise non-public.

e. For each of the 179 convicted who has already been sentenced, please provide the actual sentence imposed.

ANSWER: This information for most of the 310 (now 375) defendants charged is included on the attached chart. The chart does not include information that is presently under seal, classified or otherwise non-public.

f. In how many of the cases in which a conviction was obtained and a sentence imposed was section 3A1.4 (Terrorism) of the U.S. Sentencing Guidelines either: (i) sought by the government, or (ii) applied by the court.

ANSWER: Neither the Criminal Division nor the Executive Office for United States Attorneys routinely collects this information.

10. Recent data compiled by the Transactional Records Access Clearinghouse (TRAC), reflects that, for all the FBI matters that were classified as international terrorism cases by the Justice Department -- and in one way or another were acted upon during the six months following September 11 federal prosecutors declined to prosecute 61% of them. The TRAC data also reflects that the proportion of terrorism matters rejected by federal prosecutors is higher than for all matters handled by the FBI. Considering the fact that international terrorism must be the single most serious threat confronting the FBI, the comparatively high declination rate is surprising. According to TRAC, during the first months of FY2002, half of the referrals were turned down because Assistant U.S. Attorneys decided there was a "lack of evidence of criminal intent" or that "no federal offense [was] evident."

a. Do you agree that there is a substantial declination rate for international

b. What do you believe is the reason for the declination rate in these important cases?

c. Can you provide information on what happens to an international terrorism referral after it has been declined? For example, is the subject

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or the target of the investigation otherwise addressed? If so, in what specific ways?

ANSWER: The highest priority of terrorism enforcement is the prevention of terrorist acts. As a result, investigations are initiated at the first indication of possible terrorist activity. Focusing first on activity within the United States: Although the TRAC analysis refers to a high number of terrorism investigations reported by the FBI, that number is not further broken down to reflect the number of intelligence investigations, which are not likely to result in referral for prosecution, and the number of criminal investigations. Focusing on criminal investigations, subsequent investigation often establishes that the initial information was inaccurate and that no criminal activity was underway. In other instances, insufficient evidence may be developed to support a criminal prosecution, but the information developed may be used to support a deportation action. Additionally, in some instances prosecution by local authorities may prove to be a more effective way of dealing with the conduct uncovered in the course of the investigation. Notwithstanding the fact that, under these and other circumstances, a federal prosecution may not result, the federal investigation has served a salutary purpose. Focusing on the international terrorism area, the State Department maintains statistics on all international terrorist acts worldwide. These statistics demonstrate that for the decade of the 1990's, there were an average of 137 terrorist acts per year against Americans. The overwhelming bulk of these offenses are directed against Americans overseas. These statistics serve to demonstrate why the number of terrorist investigations and prosecutions is relatively low when compared against all federal law enforcement activity. It is the nature of terrorist activity, with its potentially catastrophic consequences, and not the quantity of terrorist acts that renders this area of law enforcement so critical. For example, a single terrorist act such as the bombing of Pan Am Flight 103, the bombing of the Murrah Federal Building, or the recent attacks on the World Trade Center and the Pentagon can have staggering consequences. Since most international terrorism offenses against Americans occur overseas, they are particularly difficult to investigate. Additionally, in some instances they are dealt with effectively by the country in which they occur and U.S. prosecutive action is neither necessary nor possible. Additionally, in some instances murders of Americans overseas are the subject of investigative activity by the FBI which results in the development of evidence indicating clearly that the attack lacked a jurisdictional element necessary to the initiation of the prosecution under 18 U.S.C. § 2332, murder of an American as part of terrorist activity. In such instances, there is no U.S. jurisdiction and it is necessary that the matter be declined.

11. Since September 11, 2001, has the Department of Justice been unable to prosecute any international terrorism case because of an actual or perceived loophole in the federal criminal code -- in other words, because no applicable federal statute existed to address the conduct? If so, please provide what detailed information

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you can about the problem without, of course, disclosing any information that would jeopardize an ongoing investigation.

ANSWER: The Department is constantly reviewing criminal statutes for possible loopholes or gaps in our investigative or prosecutorial arsenals that need to be closed or filled. As you know, one area for improvement we identified in connection with terrorism cases concerned the material support statutes. We are pleased that in enacting the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458), Congress did provide some needed improvements to the material support statutes.

12. You observed in your statement that the recent tragedy in Madrid is another grim reminder that our enemies continue to plot such catastrophic attacks.

    a. Given that (i) an unprecedented number of FISA wiretaps have been authorized since September 11, 2001, (ii) the government learned of possibly relevant but untranslated FISA tapes that forebode the September 11 attacks after September 11, and (iii) the press is reporting that the fingerprints of an American were allegedly found on evidence at the scene of the Madrid bombings, do you know whether or not the U.S. gleaned any information from FISA wiretaps that implicated, mentioned or pertained to the bombing plot? If so, was the information timely translated? Was it timely provided to the Spanish authorities?

ANSWER: FBI Director Mueller has made clear his interest in having all material derived from the FBI's use of FISA authority reviewed and analyzed as quickly as possible. Since the majority of this material is in languages other than English, FBI Language Services Section personnel meet with the FBI's National FISA Manager and other management officials every two weeks to discuss national operational priorities and the most effective utilization of finite linguist resources. The operational plan established by this meeting is modified almost daily based on ever-shifting investigative priorities. These tactics ensure that all of the highest priority intelligence collected in a foreign language is reviewed immediately and that any outstanding work is limited to matters assigned a lower relative priority.

The FBI currently has sufficient translation capacity to promptly address all translation needs with respect to its highest priority, CT operations, often within 12 hours. While there are instances in which the FBI is not able to address translation needs as quickly as it would like, such as when the language or dialect involved is initially unidentifiable, this usually pertains to lower priority matters.

Conventional digital systems used to collect FISA-derived materials were not

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designed to measure the average time between intercept and initial monitoring. Recognizing the tactical value of having such aging reports for command and control purposes, a nationally integrated FISA statistical collection and reporting system has been developed and is undergoing a test and evaluation process to validate the mapping of meta data. It is clear, however, based on information provided by FBI field office managers, that the vast majority of communications in a foreign language relating to terrorism operations are being afforded full review by a qualified linguist within, at most, a few days of collection.

In respect to the specific matter cited in your question, we cannot comment as that matter remains open and pending.

b. On March 2, 2004, I sent a letter to the Attorney General regarding the acquittal in Germany of Abdelghani Mzoudi, one of the 9-11 conspirators. I expressed concerns I had about published reports that the U.S. government had failed to provide important assistance to the prosecution. On a similar vein, regarding the Madrid bombings, can you assure me that the Department is fully supporting the Spanish government in the investigation and prosecution of those involved in that heinous terrorism plot?

ANSWER: We can assure you that this Department and this Administration stand firm with Spain and every ally in the war on terror to prevent and to prosecute such despicable acts of terrorism.

13. I am deeply concerned by recent reports of a substantial increase in acts of violence against Muslims in the United States. I believe it is critical that the Department of Justice take aggressive measures to safeguard the civil rights and safety of Muslims and those who are perceived to be Muslims.

a. How many investigations has the Department of Justice opened concerning allegations of an act of violence in 2003 or 2004 against Arab-Americans, Muslims, Sikhs, South -Asian Americans and other individuals perceived to be of Middle Eastern origin?

ANSWER: The Department of Justice opened 125 such investigations in 2003. The Department had opened 100 such investigations in 2004.

b. Please list all cases in which Federal charges have been brought against individuals accused of an act of violence in 2003 or 2004 against Arab-Americans, Muslims, Sikhs, South -Asian Americans and other individuals perceived to be of Middle Eastern origin.

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a. Please list all cases in which Federal charges have been brought against individuals accused of an act of violence in 2003 or 2004 against Arab-Americans, Muslims, Sikhs, South -Asian Americans and other individuals perceived to be of Middle Eastern origin.

ANSWER: Federal charges have been brought in the following cases:

1. **United States v. Irving David Rubin and Earl Leslie Krugel (C.D. Cal.).**
   § 371 conspiracy to violate § 844 & § 924 complaint filed 12/12/01,
   §§ 844, 2332, 922 & 924 charges indicted by superceding indictment 8/1/02.
   On 11/13/02 Defendant Rubin died from self-inflicted injury in prison.
   On 2/4/03 guilty plea by Krugel to one count § 241 and 844 as disposition of criminal conduct. But, defendant Krugel breached his plea agreement by failing to provide truthful information about other crimes.
   Trial is pending for the remaining counts of the superceding indictment. No date set yet. Sentencing for the offense to which Krugel pled guilty to be set after that trial. Defendants conspired to bomb Los Angeles mosque and the California offices of the Muslim Public Affairs Council and an Arab American member of the United States House of Representatives.

2. **United States v. Matthew John Burdick (E.D. Cal.).**
   18 U.S.C. § 111(a)(1), § 1001, 922(g)(1), § 924(c)(1), 21 U.S.C. § 841.
   Indictment 10/30/02. Defendant shot and wounded Sikh postal carrier with a pellet gun in Sacramento. Plea 5/28/03 to one count 18 U.S.C. 111(a)(1).
   9/17/03 sentenced to 70 months in prison and ordered to pay $25,395 restitution.

3. **United States v. Daniel J. Middleman (D.C.).**
   18 U.S.C. § 245 and §875 indictment 10/7/04. Plea 1/26/05 to 18 U.S.C. § 875.
   Defendant allegedly sent threatening e-mail from Iowa to president of Arab-American Institute in Washington, D.C.

4. **United States v. Robert Goldstein (M.D. Fla.).**
   Complaint filed 8/23/02, Information and Plea 4/3/03 to 18 U.S.C. § 241, 26 U.S.C. §5 861(d) and 18 U.S.C. § 247. 6/19/03 sentenced to 151 months in prison.
   United States v. Hardee.
   Plea 10/9/02 to §241 information. Sentenced to 41 months incarceration on 5/1/03.
   United States v. Shannahan.
   26 U.S.C. § 5861 (illegal firearms possession). Indicted 10/17/02.
   Plea 4/16/03 to 26 U.S.C. § 5861(e). Sentenced to 56 months in prison.

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United States v. Kristi Goldstein.
Plea 2/26/03 plea to 26 U.S.C. § 5861 (illegal firearms possession). 6/13/03 sentenced to 37 months in prison. Defendants plotting to destroy mosques and Islamic centers in Florida.

5. United States v. Charles D. Franklin (N.D. Fla).
§ 247 complaint filed 3/28,/2002. Superseding indictment 6/21/02.
Plea 11/8/02 to § 247(a)(1). Plea withdrawn by Franklin.
Conviction 2/20/03 to one count § 247(c) [interference with worshipers because of their ethnicity], sentenced 5/19/03 to 27 months imprisonment, three years supervised release and ordered to pay $63,668.75 restitution.
Defendant intentionally crashed truck into Tallahassee mosque.

6. United States v. Rolnik (D. Mass).
Plea 6/6/02 to § 245 information; sentenced 8/28/02 to 2 mos community confinement & $5,000 fine. Defendant placed telephone call from Boston, leaving threatening message on voice mail of the president of the Arab-American Institute in Washington, D.C.

7. United States v. Justin Scott-Priestley Bolen (E.D. Mich.).
§ 3631 information plea 2/6/02, sentenced 5/14/02 to 10 months incarceration.
Defendant placed telephone call to Pakistani family's home in Detroit, leaving threatening message on their voice mail.

8. United States v. Michael Bratisax (E.D. Mich).
§§ 247 and 875 indictment on 11/4/04.
Defendant sent two e-mail threats to Islamic Center of America in Detroit from defendant's home in New York state. Pending arraignment.

9. United States v. John Barnett (E.D. Mich).
§§ 247 and 875 indictment on 11/4/04. Trial set for 3/21/05.
Defendant sent e-mail threat to Islamic Center of America in Detroit from defendant's home in New York state.

10. United States v. George M. Doyle, II (D. Neb.).
§ 247 information filed 6/8/04, plea 11/17/04, sentenced to 10 days incarceration with apology to victims.
Defendant allegedly left threatening voice mail messages on the answering machine of the Islamic Center of Omaha.

11. United States v. Dale T. Ehrgott (D. Nev.).
18 U.S.C. § 875 indictment 3/4/04, re-trial set for 1/13/05 after 9/14/04 mistrial.

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Plea to violating 18 U.S.C. § 245 on 1/13/05, sentenced to 1 year probation, 50 hours community service.
Defendant allegedly sent threatening interstate e-mail communication from Reno to D.C office of Council on American-Islamic Relations.

12. United States v. Leonard Arthur Stern (D. Nev.).
18 U.S.C. § 875 and § 1001 indictment 8/11/04; pending trial 6/7/05.
Defendant allegedly transmitted threatening communications to an Arab American individual and subsequently provided false statements to the FBI denying knowing the Arab American or participating in transmitting the threatening e-mails to the individual.

13. United States v. Jason Kitts and Travis Kitts (E.D. Tenn.).
§ 245 complaint filed 9/27/01, § 245 Information and Guilty pleas on 9/11/02. 12/10/02, Travis Kitts sentenced to 36 months in prison and Jason Kitts sentenced to 20 months in prison. Defendants assaulted two Indian resident managers of a motel in Alcoa.

14. United States v. Norman Lee Warden (E.D. Tex.).
18 U.S.C. § 922 (possession of firearm by felon) plea 10/15/02, sentenced to 37 months in prison on 1/23/03. Subsequent, local prosecution resulted in guilty plea to setting fire and 16 year prison sentence. Defendant set the gas pumps on fire at a convenience store owned by a Middle Eastern man, leaving a threatening note at the scene.

15. United States v. Curtis William Murrillo (E.D. Tex.).
18 U.S.C. § 245 indictment returned 5/26/04. Defendant acquitted 11/10/04. Defendant charged with assaulting an Iranian-American man who was a patron at a McDonald's restaurant.

16. United States v. Jared Bjarason (W.D. Tex.).
18 U.S.C. § 247 and § 875 Indictment returned 5/19/04. Defendant pled guilty to both charges on 9/30/04. 12/21/04 sentenced to 18 months in prison, 2 years supervised release and ordered to perform 150 hours of community service.
Defendant allegedly sent e-mail threatening to burn down Islamic Center of El Paso mosque unless hostages were freed in Iraq.

17. United States v. Joe Luis Montes (W.D. Tex.).
47 U.S.C. § 223 plea 12/4/01, sentenced to 2 years probation, $500 fine on 1/30/02.
Defendant made threats over the telephone to Indian employees working at truck stop in Hewitt.

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18. United States v. Nunez-Flores (W.D. Tex.).
18 U.S.C. § 844(i) complaint filed 9/21/04. Indicted 11/20/04 on § 247, § 844(i), § 924(c). Docket call hearing scheduled for 2/14/05.
Defendant allegedly threw an incediary device, "Molotov Cocktail" at the Islamic Center of El Paso Mosque.

19. United States v. James Herrick (D. Utah).
§ 245 plead guilty 10/24/01, sentenced to 51 months on 1/7/02.
Defendant set fire to a Salt Lake City Pakistani-American restaurant. The defendant pled simultaneously in a related local prosecution and was sentenced to 5 years to life, concurrent to the federal sentence.

20. United States v. Patrick Cunningham (W.D. Wash.).
§ 247 indicted 9/26/01, plea 5/9/02. 12/17/02, sentenced to 78 months in prison.Defendant attempt to set fire to parishioner's automobiles and then shot at them outside their Seattle mosque.

21. United States v. Wesley Fritts (W.D. Wisc.).
§ 876 & § 2332 plea 3/4/02 to § 2332, sentenced 5/13/02 to 21 months incarceration. Defendant mailed fake anthrax and a threat to an Arab-American restaurant in Janesville.

22. United States v. Thomas Iverson (W.D. Wisc.).
§ 844 indicted 11/7/01, plea 1/31/02, sentenced 4/12/02 to 27 months incarceration.
Defendant telephoned a bomb threat to a Jordanian liquor store and to the 911 operator in Beloit, Wisconsin. The defendant thereafter pled guilty in a local prosecution to a state hate crime, receiving a 2 year sentence of incarceration consecutive to the federal sentence.

c. Please list all State prosecutions of individuals accused of an act of violence in 2003 or 2004 against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin, in which the Department of Justice has provided substantial assistance. For each such case, please also describe the nature of that assistance.

ANSWER: We do not keep records on State prosecutions in a form that would enable us to provide a full and up-to-date response to this question. Cases being prosecuted at the local level are monitored, and aided in varying degrees on a case-by-case basis, by a combination of attorneys in Main Justice, FBI agents in the field, FBI agents in headquarters, and assistant U.S. attorneys throughout the country.

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14. At the hearing, I asked you about the Justice Department's procedure for licensing lawyers to represent groups that are challenging their designation as terrorist organizations. You responded that you were not in a position to address the licensing issue, but would be happy to follow up in writing. Please describe the procedure and, specifically, discuss how the Department decides whether to license a lawyer, and how it decides who, in particular, to license. In addition, please explain what would happen if the Department refused to license an attorney for the group. Would the group still be entitled to challenge its designation? If so, could the Department prosecute an attorney who gave his or her "expert advice or assistance" to the group so that it could bring such a challenge?

ANSWER: Under Section 219 of the Immigration and Nationality Act, the list of Foreign Terrorist Organizations (FTOs) is designated by the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury. The Treasury Department's Office of Foreign Assets Control (OFAC) administers the regulations that address economic sanctions imposed on FTOs. *See* 31 C.F.R. Part 597. Consistent with 18 U.S.C. section 2339B(a)(2), section 597.201(b) of the regulations provides that, except as otherwise authorized by OFAC, any U.S. financial institution that becomes aware that it has possession or control over any funds in which an FTO or its agent has an interest shall: (1) retain possession of or maintain control over such funds; and (2) report the existence of such funds to OFAC.

Another section of the OFAC regulations addresses the provision of legal services to an FTO. Section 597.505 provides that "[s]pecific licenses may be issued, on a case-by-case basis, authorizing receipt of payment of professional fees and reimbursement of incurred expenses through a U.S. financial institution" for certain legal services provided by U.S. persons. The regulation enumerates six categories of legal services that are authorized, provided that related payments and reimbursements through a U.S. financial institution must be specifically licensed. 31 C.F.R. § 597.505(a)-(f). For example, OFAC may license the receipt of payment of legal fees for representation of an FTO seeking judicial review of its designation before the U.S. Court of Appeals for the D.C. Circuit. (Judicial review of the designation is authorized in the INA, 8 U.S.C. § 1189(b)). As can be seen, these standards are discretionary. Because this is an OFAC process, we respectfully refer the Committee to OFAC for a description of how specific licensing decisions are made.

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Questions for Assistant Attorney General Christopher Wray from Senator Grassley:

You testified that the Justice Department has charged 310 defendants with criminal offenses as a result of terrorism investigations, and 179 persons have been convicted, since 9-11.

1) For each of the 310 persons charged with crimes as a result of terrorism investigations please provide the following information:

- A) Citizenship and country of origin.
- B) The criminal violations the person was charged with.
- C) The date that the person was charged with each criminal violation.
- D) Name of judicial district where charges were filed, and location where arrest took place, if different.
- E) Name of the law enforcement agency that made the referral to the Justice Department.
- F) A list of the charges the law enforcement agency recommended that the Justice Department file (as opposed to the criminal violations that ultimately were filed).
- G) Name of the terrorist group and/or foreign power the defendant is suspected of being, or known to be, a member of, linked to or otherwise in any way associated with.
- H) A general description of the criminal activity involved in the case.

ANSWER: The total number of individual defendants is now 375. Most of these are listed on the attached chart, along with much of the requested information, including in most cases the criminal violations each person was charged with; the date that each person was initially charged; the name of the judicial district where the charges were filed; and in some cases, the popular name of the case or the terrorist group the defendant is suspected of being linked to. Note that the Criminal Division has compiled more information about cases as we have moved away from the immediate response to the 9/11 attacks, so there is less information reflected on the chart for cases developed from the "PENTTBOM" investigation of those attacks. The chart also does not include information that is presently under seal, classified, or otherwise non-public, such as certain individuals' suspected or known links to terrorist groups or activity. The Criminal Division does not collect the remaining information requested in the question.

2) Is the figure of 179 persons convicted contained within the set of 310 defendants charged?

ANSWER: Yes, the number of defendants convicted, which is now 195, is within the total of 375 defendants charged.

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A) If so, how many of the remainder of the 131 persons were acquitted, how many had their charges dropped by the Justice Department, and how many of their cases are still pending? For each of these persons, please specify what happened and provide the information requested in A through H in question 1.

ANSWER: The defendants now in this category are listed among the defendants on the attached chart, along with much of the requested information, including in most cases whether the defendant was acquitted, the charges against him or her were dismissed by the Department, or the case is still pending (including cases in which the defendant is a fugitive); the criminal violations each person was charged with; the date that each person was initially charged; the name of the judicial district where the charges were filed; and in some cases the popular name of the case or the terrorist group the defendant is suspected of being linked to. The chart does not include information that is presently under seal, classified, or otherwise non-public, such as certain individuals' suspected or known links to terrorist groups or activity. The Criminal Division does not collect the remaining information requested in the question.

B) If not, how many of the 310 defendants have been convicted, acquitted, had the charges dropped, or their cases are still pending?
i) For the defendants convicted, please provide the information requested in A through H in question 1, as well as each person's name, any aliases and date of birth.
ii) For the persons who were acquitted, whose charged were dropped, or their cases are still pending, please provide the information requested in A through H in question 1 (but not their name, any aliases or date of birth).

ANSWER: Please refer to the attached chart for this information.

C) For each of the 179 persons convicted, please provide the following information:
- Name, date of birth, citizenship and country of origin.
- The criminal violations the person was charged with.
- The date that the person was charged with each criminal violation.
- Name of judicial district where charges were filed, and location where arrest took place, if different.
- Name of the law enforcement agency that made the referral to the Justice Department.
- A list of the charges the law enforcement agency recommended that the Justice Department file (as opposed to the criminal violations that ultimately were filed).
- Name of the terrorist group and/or foreign power the defendant is suspected of being or known to be a member of, linked to or otherwise in any way associated with.
- A general description of the criminal activity involved in the case.
- Whether they plead guilty to charges in a plea agreement, or whether they were convicted by a jury.

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- The charges they either plead guilty to or were convicted of by a jury (as opposed to the charges filed against them).
- The length of the prison sentence the persons received.

ANSWER: Most of the convicted defendants -- now totaling 195 -- are listed on the attached chart, along with much of the information you request, including in most cases the criminal violations each person was charged with; the date that each person was initially charged; the name of the judicial district where the charges were filed; and in some cases the popular name of the case or the terrorist group the defendant is suspected of being linked to. The chart does not include information that is presently under seal, classified, or otherwise non-public, such as certain individuals' suspected or known links to terrorist groups or activity. The Criminal Division does not collect the remaining information requested in the question.

3) Why and how has the Justice Department classified the investigations leading to charges against these 310 persons as "terrorism investigations"?

ANSWER: These cases, which are tracked by the Criminal Division, include certain investigations conducted by Joint Terrorism Task Force (JTTF) agents and any other cases known to the Criminal Division in which there is evidence that an individual was engaged in terrorist activity or associated with terrorists or foreign terrorist organizations. The charges and convictions tracked by the Criminal Division reflect not only "terrorism" charges such as violations of the material support statutes, 18 U.S.C. §§ 2339A and 2339B, but also non-terrorism charges such as immigration, firearms, and document fraud violations that have some nexus to international terrorism.

It should be noted that the Criminal Division tracks a subset of cases that are reported through the case management system of the United States Attorney's Offices (USAOs). The USAOs' case management system reflects that, during FY 2003, 661 terrorism and anti-terrorism defendants were convicted. For purposes of this system, "Terrorism" cases include International Terrorism, Domestic Terrorism, Terrorist Financing, and Terrorism-Related Hoaxes; and "Anti-Terrorism" cases include Immigration, Identity Theft, OCDETF, Environmental, and Violent Crime -- all in cases where the defendant is reasonably linked to terrorist activity or where the case results from activity intended to prevent or disrupt potential or actual terrorist threats.

A) Did the Department/FBI obtain warrants under the Foreign Intelligence Surveillance Act during any of the investigations leading to charges against these 310 persons? If so, has information obtained under FISA been used, i.e., filed with the court in support of the criminal charges.

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B) For each FISA warrant obtained for any of the 310 defendants, how many defendants were working on behalf of Saudi Arabia and/or were Saudi nationals? Also, please identify by name all the other foreign powers or countries they are working on behalf of or are from.

ANSWER: The Department component that handles FISA matters is the Office of Intelligence and Policy Review (OIPR), not the Criminal Division. The Criminal Division does not maintain a list of FISA warrants or a list of when FISA-derived evidence has been used in these or other cases. However, some examples of prosecutions in which the government has used (or publicly stated its intention to use) FISA-derived evidence include the Arnaout/BIF case (#63 on the chart), the Charlotte Hizballah case (##72-74), Sami Al-Hussayen (#128), the Infocom case (##130-136), the Portland cell case (##155-161), the Sattar/Stewart case (##162-165), the Al-Arian/PIJ case (##147-154), and the Hassoun/Youssef case (##16-17).

4) You stated that terrorist cells have been broken up in Buffalo, Charlotte, Portland and Northern Virginia.
A) Please list all other cities where the government has broken up or otherwise disrupted a terrorist cell since 9-11, please specify if the lead agency was not the FBI, and identify that agency.
B) Please state the current status of each member of the cell in each city: under investigation, arrested, charged with a crime, deported, declared an enemy combatant, etc.

ANSWER: The government has also broken up terrorist cells related to the Seattle, Washington area (James Earnest Ujaama and Mustafa Kamel Mustafa, aka Abu Hamza al-Masri) and Columbus, Ohio (Iyman Faris and Nuradin Abdi). The FBI, along with the relevant Joint Terrorism Task Forces, was the lead investigative agency in those cases. The requested information is provided on the attached chart. The chart does not include information that is presently under seal, classified, or otherwise non-public, including information about persons under investigation but not yet publicly charged.

5) Mr. Wray testified that the following material support statutes have been a crucial part of the Justice Department's prevention strategy: 18 U.S.C. Sec. 2339A; 18 U.S.C. Sec. 2339B; International Emergency Economic Powers Act (IEEPA), 50 U.S.C. Sec. 1701 *et seq.*; and seditious conspiracy, 18 U.S.C. Sec. 2384.
A) Since 9-11, how many persons have been charged with each of these offenses? For each person charged with one or more of the offenses listed above, please provide the following information:
- Citizenship and country of origin.
- Which of the specified criminal violations the person was charged with.
- The date that the person was charged with each criminal violation.

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- Name of judicial district where charges were filed, and location where arrest took place, if different.
- Name of the law enforcement agency that made the referral to the Justice Department.
- A list of the charges the law enforcement agency recommended that the Justice Department file (as opposed to the criminal violations that ultimately were filed).
- Name of the terrorist group and/or foreign power the defendant is suspected of being or known to be a member of, linked to or otherwise in any way associated with.
- A general description of the criminal activity involved in the case.
- Whether the person was convicted, acquitted, their charges were dropped or the case is still pending.
- If the person was convicted, whether they plead guilty to charges in a plea agreement, or whether they were convicted by a jury.
- The charges they either plead guilty to or were convicted of by a jury (as opposed to the charges filed against them).
- The length of the prison sentence the persons received.

B) For the persons convicted, please also provide their name, any aliases and date of birth.

ANSWER: Of the defendants now listed on the attached chart, 84 have been charged with one or more of the offenses you list. Those defendants are listed on the attached chart, along with much of the requested information, including in most cases the defendant's name; the criminal violations charged to each person; the date that each person was initially charged; the name of the judicial district where the charges were filed; in some cases the popular name of the case or the terrorist group the defendant is suspected of being linked to whether the person was convicted, acquitted, their charges were dropped or the case is still pending; if the person was convicted, whether he pleaded guilty or was convicted by a jury; the charges to which he pleaded guilty or was convicted of; and the length of the prison sentence each defendant received. The chart does not include information that is presently under seal, classified, or otherwise non-public, such as certain individuals' suspected or known links to terrorist groups or activity. The Criminal Division does not routinely collect the remaining information requested in the question.

6) The President's Budget of the United States Government for Fiscal Year 2005, issued by the Office of Management and Budget, states that the Department of Justice has "Prosecuted and gained convictions in more than 1,000 terrorism-related and anti-terrorism cases" since 9-11. Mr. Wray testified that the Justice Department has charged 310 defendants with criminal offenses as a result of terrorism investigations, and 179 persons have been convicted, since 9-11.

A) Please explain the data source used by the Justice Department for its calculation, and why it is different from the Presidential budget document.

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B) What is the difference between a "terrorism-related" case and an "anti-terrorism" case? How do those categories differ from the category Mr. Wray referred to, "criminal offenses as a result of terrorism investigations?"

ANSWER: As stated in my response to Question 3 above, the cases to which the Department official referred are tracked by the Criminal Division and include certain investigations conducted by Joint Terrorism Task Force (JTTF) agents and any other cases known to the Criminal Division in which there is evidence that an individual was engaged in terrorist activity or associated with terrorists or foreign terrorist organizations. The charges and convictions tracked by the Criminal Division reflect not only "terrorism" charges, such as violations of the material support statutes, 18 U.S.C. §§ 2339A and 2339B, but also non-terrorism charges such as immigration, firearms, and document fraud violations that have some nexus to international terrorism.

The Criminal Division tracks a subset of cases that are reported through the case management system of the United States Attorney's Offices (USAOs).

C) For the figure of 1,000 terrorism-related and anti-terrorism cases, how many are terrorism-related cases and how many are anti-terrorism cases?

ANSWER: The Criminal Division collects detailed information only on the 375 cases that we track, most of which are listed on the attached chart.

D) For each of the 1,000 cases, please provide the following information:

- Whether it was a terrorism-related case or an anti-terrorism case.
- Citizenship and country of origin of defendant.
- Which of the specified criminal violations the person was charged with.
- The date that the person was charged with each criminal violation.
- Name of judicial district where charges were filed, and location where arrest took place, if different.
- Name of the law enforcement agency that made the referral to the Justice Department.
- A list of the charges the law enforcement agency recommended that the Justice Department file (as opposed to the criminal violations that ultimately were filed).
- Name of the terrorist group and/or foreign power the defendant is suspected of being or known to be a member of, linked to or otherwise in any way associated with.
- A general description of the criminal activity involved in the case.
- Whether the person was convicted, acquitted, their charges were dropped or the case is still pending.
- If the person was convicted, whether they plead guilty to charges in a plea agreement, or whether they were convicted by a jury.

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- The charges they either plead guilty to or were convicted of by a jury (as opposed to the charges filed against them).
- The length of the prison sentence the persons received.

E) For the persons convicted, also please provide their name, any aliases and date of birth.

ANSWER: The Criminal Division only collects detailed information on the cases that we track, which are summarized in the attached chart.

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Questions for Assistant Attorney General Daniel Bryant from Senator Feingold:

1. In September 2003, the U.S. Department of Justice disclosed that it had not yet used section 215 of the USA PATRIOT Act. On March 9, 2004, I sent a letter to the Attorney General asking him to clarify whether section 215 has been used since September 18, 2003. (Copy of letter attached.) I have not yet received a response to that letter. Please provide a response to the letter forthwith.

ANSWER: The Department responded to your March 9, 2004, letter on June 2, 2004. In addition, the Attorney General's semi-annual reports on FISA, including the report on business records under section 215 have been transmitted to the House and Senate Committees on Intelligence and the House Committee on the Judiciary. The Senate Committee on the Judiciary receives its reports through the Office of Senate Security, which has also received copies of these reports.

2. As you know, there is a significant history of the Administration not adequately consulting with Congress before proposing and urging passage of anti-terrorism legislation. The PATRIOT Act was proposed just days after the September 11th attacks, without consultation with Congress, and the bill was passed and signed into law within six weeks after the attacks. In January 2003, a draft "PATRIOT II" bill was leaked. There was no consultation with Congress before that draft was put together, nor has there been any since. Recently, the President has been campaigning for various additional powers that were first outlined in the "PATRIOT II" bill leaked over a year ago. It is unfortunate that this discussion is occurring in a political campaign rather than in thoughtful consultation between people of good will who hold differing, but valid, views. You are the head of the Office of Legal Policy at the Department, which I presume is heavily involved with the development of anti-terrorism legislative initiatives. Will you commit to consulting with Congress, particularly the House and Senate Judiciary Committees, before the Administration takes a position on legislation proposing additional "PATRIOT II" powers or proposes additional "PATRIOT II" powers?

ANSWER: The Department welcomes the opportunity to consult with Members of Congress on efforts to give prosecutors and investigators the tools need to prevail in the war against terrorism while at the same time preserving our nation's fundamental commitment to the protection of civil rights and civil liberties. In this regard, the Department works with Members of Congress on new ways to detect and prevent terrorism. At this time, however, the Department has not formally transmitted any such proposals to Congress.

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Question for Assistant Attorney General Christopher Wray from Senator Feingold:

3. As we discussed at the hearing, last October, the Department reported that as of April 1, 2003, it had sought, and courts had ordered, delayed notice warrants 47 times.
(a) As of the date of your response to these questions, or some reasonable recent date, how many times has the Department sought and received authorization to execute a delayed notification search since enactment of the PATRIOT Act?

ANSWER: The Department is currently querying various U.S. Attorney's Offices for this information and will forward it under separate cover as soon as it is compiled.

(b) How many of the delayed notification warrants issued since passage of the Patriot Act were granted because contemporaneous notification would have "seriously jeopardized an investigation or unduly delayed a trial"?

ANSWER: The Department is currently querying various U.S. Attorney's Offices for this information and will forward it under separate cover as soon as it is compiled.

(c) How many of the delayed notification warrants issued since the PATRIOT Act was passed were used in non-terrorism criminal matters?

ANSWER: The Department is currently querying various U.S. Attorney's Offices for this information and will forward it under separate cover as soon as it is compiled.

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No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
1	Edris, Abdul Mukim	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2	N	Philippines	-	-	-	-
2	Hanno, Toting Craft (Jakaria)	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2	N	Philippines	-	-	-	-
3	Hapilon, Bakkal Totoni (Abu Omar)	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2	N	*At large*	-	-	-	-
4	Hapilon, Isnilon Totoni (Abu Musab)	Abu Sayyaf	DDC	12 Feb 02	18/1203, 18/1203, 18/1203, 18/2	N	*At large*	-	-	-	-
5	Janjalani, Khadafi Abubakar (Abu Muktar)	Abu Sayyaf	DDC	12 Feb 02	18/1203, 18/1203, 18/1203, 18/2, 18/2332, 18/924	N	*At large*	-	-	-	-
6	Manatad, Alhamzer Limbong (Kosovo)	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2, 18/2332, 18/924	N	Philippines	-	-	-	-
7	Ngaya, Abdul Azzam (Abu Umbran)	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2	N	Philippines	-	-	-	-
8	Opao, Wahab (Abu Fatima)	Abu Sayyaf	DDC	10 Dec 02	18/1203, 18/1203, 18/1203, 18/2, 18/2332, 18/924	N	*At large*	-	-	-	-
9	Sali, Hamsiraji Marusi (Jose Ramirez)	Abu Sayyaf	DDC	12 Feb 02	18/1203, 18/1203, 18/1203, 18/2	N	*At large*	-	-	-	-
10	Sali, Jainal Antel, Jr. (Abu Solaiman)	Abu Sayyaf	DDC	12 Feb 02	18/1203, 18/1203, 18/1203, 18/2, 18/2332, 18/924	N	*At large*	-	-	-	-
11	Tilao, Aldam (Abu Sabaya)	Abu Sayyaf	DDC	12 Feb 02	18/1203, 18/1203, 18/1203, 18/2, 18/2332, 18/924	N	*At large*	-	-	-	-
12	Subeh, Mohammed	Al Aqsa Martyrs Brigade	WDNY	21 Apr 04	18/1001	N	Pretrial	-	-	-	-
13	Abdi, Nuradin M.	Al Qaeda	SDOH	14 Jun 04	18/371(2339A), 2339B, 2x1546	N	Pretrial	-	-	-	-
14	El-Zahabi, Mohammed	Violent jihad	DMN	25 Jun 04	2x18/1001	N	Pretrial	-	-	-	-
15	[redacted]	Al Qaeda	EDVA	30 Apr 03	2x18/2339B	N	Sentenced	[redacted]	Pleaded 1 May 03	18/371, 2339B	20 yrs (5 conspiracy, 15 matsupp) (28 Oct 03)
16	Hassoun, Adham	Violent jihad	SDFL	8 Jan 04	18/2339A, 371, 922, 1001, 1621, 1505, 924; 21/853	N	Pretrial	-	-	-	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
17	Youssef, Mohamed Hesham	Violent jihad	SDFL	16 Sep 04	18/2339A, 371, 922, 1001, 1621, 1505, 924; 21/853	N	Egyptian custody	-	-	-	-
18	Mustafa, Mustafa Kamel (Abu Hamza al-Masri)	Al Qaeda	SDNY	19 Apr 04	18/1203, 8x18/2339A, IEEPA	N	UK custody	-	Awaiting extradition	-	-
19	Paracha, Uzair	Al Qaeda	SDNY	8 Aug 03	2x18/2339B, 2xIEEPA, 18/1028	N	Pretrial	-	Tr date pending	-	-
20	Elfgeeh, Abad	Al Qaeda	EDNY	4 Feb 03	18/1960	N	House arrest	-	Motion for reconsideration of plea withdrawal pending	18/960, 18/371	-
21	Abdallah, Mohamed Suleiman	Al Qaeda (Embassy)	SDNY	22 Mar 01	18/2155	N	Sentenced	Y	Pleaded 31 Jan 03	18/2155	10 Years (20 Feb 03)
22	Hassan, Diane Yousef	Al Qaeda (related)	SDCA	22 Aug 02	18/1546	N	Deported	Y	Pleaded 21 Oct 02	18/1546	Tm Srv/deport (21 Oct 02)
23	Awalah, Mazen	Al Qaeda (related)	SDCA	22 Aug 02	18/1546	N	Deported	Y	Pleaded 21 Oct 02	18/1546	Tm Srv/deport (21 Oct 02)
24	Sandah, Hasan Ascandar (Sammy)	Al Qaeda (related)	CDCA	25 Mar 03	42/208	N	Sentenced	Y	Pleaded 23 May 03	42/408	112 days, 3yr SR (2 Jul 03)
25	Jaber, Hussam Ahmed (Abdo)	Al-Arian (related)	MDFL	19 Mar 03	18/1546	N	Sentenced	Y	Pleaded 14 Aug 03	18/1546	5 months (6 Nov 03)
26	Alfarahin, Osama Musa	Arizona	DAZ	14 Sep 03	18/1425(e)	N	Pretrial	-	-	18/1425(e)	-
27	[redacted]	AUC/White Terror	SDTX	4 Dec 02	18/2339B, 21/841	N	Await sent	Y	Pleaded 24 Jun 03	18/2339B; 21/841	Sent Hrg: 28 Jun 04
28	[redacted]	AUC/White Terror	SDTX	4 Sep 03	18/2339B; 21/841	N	Await sent	Y	Pleaded 26 Jan 04	18/2339B; 21/841	-
29	Puerta, Edgar Fernando Blanco (Commandante Emilio)	AUC/White Terror	SDTX	4 Dec 02	18/2339B, 21/841	N	Costa Rica custody	-	Tr date pending	-	-
30	[redacted]	AUC/White Terror	SDTX	4 Dec 02	18/2339B, 21/841	N	Await sent	[redacted]	Pleaded 5 Nov 03	18/2339B	Sent Hrg: 28 Jun 04
31	[redacted]	AUC/White Terror	SDTX	4 Dec 02	18/2339B, 21/841	N	Sentenced	[redacted]	Pleaded 23 Apr 03	18/2339B; 21/841	Sent Hrg: 8 Oct 04
32	[redacted]	Detroit	EDMI	7 Jan 03	18/1962	N	Sentenced	[redacted]	Pleaded 16 Sep 03	18/1962	12 months (11 Dec 03)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
33	[redacted]	Detroit	EDMI	23 Jan 03	18/1952, 18/1962	N	Sentenced	[redacted]	Pleaded 29 Jul 03	18/1962	70 months (8 Jan 04)
34	Atat, Mona	Detroit	EDMI	29 Jan 03	-	N	*At large (Lebanon)*	-	-	-	-
35	[redacted]	Detroit	EDMI	5 Feb 03	18/1962	N	Sentenced	[redacted]	Pleaded 18 Apr 03	18/1962	Time served/14 months (8 Apr 04)
36	Berjaoui, Issam	Detroit	EDMI	29 Jan 03	-	N	*At large (Jordan)*	-	-	-	-
37	[redacted]	Detroit	EDMI	14 Feb 03	18/1962	N	Sentenced	[redacted]	Pleaded 16 Apr 03	18/1962	4 months (8 Apr 04)
38	[redacted]	Detroit	EDMI	7 Jan 03	18/1962	N	Await sent	[redacted]	Pleaded 1 Mar 04	18/1962	Sent Hrg: 7 Jun 04
39	[redacted]	Detroit	EDMI	7 Jan 03	18/1962	N	Sentenced	[redacted]	Pleaded 9 Mar 04	18/1962	5 months halfway house, 3 months home confinement w/ tether, 3 yrs probation
40	Farhat, Jamal	Detroit	EDMI	12 Jun 03	-	N	*At large*	-	-	-	-
41	[redacted]	Detroit	EDMI	14 Feb 03	18/1962	N	Sentenced	[redacted]	Pleaded 9 Mar 04	18/1962	15 months (14 Jul 04)
42	[redacted]	Detroit	EDMI	14 Feb 03	18/1962 (conspiracy RICO)	N	Sentenced	[redacted]	Pleaded 16 Apr 03	18/1962 (conspiracy RICO)	7 months (8 Apr 04)
43	[redacted]	Detroit	EDMI	5 Feb 03	18/1962	N	Sentenced	[redacted]	Pleaded 1 Apr 03	18/1962	6 months (time served) (17 Jun 04)
44	[redacted]	Detroit	EDMI	24 Apr 03	18/2314	N	Await sent	[redacted]	Pleaded 28 Oct 03	18/2314	Sent Hrg: TBD
45	[redacted]	Detroit	EDMI	6 Jan 03	18/1962 (conspiracy RICO)	N	Sentenced	[redacted]	Pleaded 18 Apr 03	18/1962 (conspiracy RICO)	Time served/12 months (8 Apr 04)
46	Krayem, Mohamad	Detroit	EDMI	25 Sep 03	-	N	*At large*	-	-	-	-
47	Makki, Ali	Detroit	EDMI	26 Jun 03	-	N	Bond	-	-	-	-
48	[redacted]	Detroit	EDMI	23 Jan 03	18/2339B; 18/1961	N	Sentenced	[redacted]	Pleaded 18 Sep 03	18/2339B; 18/1961	57 months (16 Dec 03)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
49	Makki, Tarek	Detroit	EDMI	26 Jun 03	-	N	Bond	-	-	-	-
50	[redacted]	Detroit	EDMI	29 Jan 03	Bank fraud	N	Await sent	[redacted]	Pleaded 17 Aug 04	Bank fraud	-
51	Farhat, Ali Abdul Karim	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
52	Berro, Abdulamir	Detroit	EDMI	26 Apr 04	18/2339B; 21/841, 846	N	Pretrial	-	-	-	-
53	Farhat, Hassan Abdul Karim	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
54	Berro, Akram Abdul Karim	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
55	Berro, Jamal Saadallah	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
56	Berro, Hussein A.	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
57	Berro, Abdul Halim	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
58	El-Sablani, Bilal	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
59	Berro, Noura	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
60	Berro, Sami Ahmad	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
61	Berro, Zeinab	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
62	Berro, Sadek	Detroit	EDMI	26 Apr 04	-	N	Pretrial	-	-	-	-
63	[redacted]	BIF	NDIL	9 Oct 03	18/2339A, 18/1962, 18/371, 18/1956, 18/1341, 18/1343	N	Sentenced	[redacted]	Pleaded 10 Feb 03	18/1962	136 Months (18 Aug 03)
64	[redacted]	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	[redacted]	Pleaded 19 May 03	18/2339B	120 months (3 Dec 03)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
65	Al-Ali, Salim	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	Y	Pleaded 8 Apr 03	18/2339B	114 months (17 Dec 03)
66	Elbaneh, Jaber	Buffalo Cell	WDNY	21 Oct 02	18/2339B, IEEPA	N	*Yemeni custody*	-	-	-	-
67	Galab, Faysal	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	Y	Pleaded 10 Jan 03	IEEPA	84 months (16 Dec 03)
68	Goba, Yahya	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	Y	Pleaded 25 Mar 03	18/2339B	120 months (10 Dec 03)
69	Mokea, Shafal	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	Y	Pleaded 24 Mar 03	18/2339B	96 months (9 Dec 03)
70	Taher, Yasein	Buffalo Cell	WDNY	21 Oct 02	2x18/2339B	N	Sentenced	Y	Pleaded 12 May 03	18/2339B	96 months (4 Dec 03)
71	Ahmed, Aref	Buffalo Cell	WDNY	??	Consp to launder $, contraband trafficking	N	Await sent	Y	Convicted 3 Mar 04	Consp to launder $, contraband trafficking	Sent Hrg: 7 Jun 04
72	Hammoud, Chawki	Charlotte Hizbollah	WDNC	28 Mar 01	18/371, 18/1029, 18/1956, 18/2342	N	Sentenced	Y	Conv/Trial 23 Jun 02	18/371, 18/1029, 18/1956, 18/2342	51 Months (28 Feb 03)
73	Hammoud, Mohamad Ali	Charlotte Hizbollah	WDNC	28 Mar 01	18/2339B, et al.	N	Sentenced	Y	Conv/Trial 23 Jun 02	18/2339B, et al.	155 Years (28 Feb 03)
74	Hariri, Said	Charlotte Hizbollah	WDNC	28 Mar 01	18/371, 1956	N	Sentenced	Y	Pleaded 25 Feb 02	18/371, 1956	41 Months (19 Mar 03)
75	Kamran, Irfam	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Bond	-	Tr date pending	-	-
76	Khan, Imran	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Sentenced	Y	Sentenced	18/1028	Time served (17 months) + deportation to PK (30 Aug 04))
77	Nasser, Sajad	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Sentenced	Y	Sentenced	18/1028	Time served (17 months) + deportation to PK (2 Aug 04)
78	Qayyum, Abdul	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Bond	-	Tr date pending	-	-
79	Rashid, Haroon	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Pretrial	-	Tr date pending	-	-
80	Saima, Saima	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Bond	-	Tr date pending	-	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
81	Warren, Chris Marie	Denver	DCO	26 Mar 03	18/371, 8/1324	N	Bond	-	Tr date pending	-	-
82	[redacted]	Detroit Cell (related)	EDMI	21 Jul 02	Possession of fraudulent checks	N	Sentenced	[redacted]	Pleaded 21 Apr 03	Possession of fraudulent checks	57 months (18 Nov 03)
83	[redacted]	Drugs for Stinger Missiles	SDCA	30 Oct 02	18/2339B; 21/846, 841	N	Await sent	[redacted]	Pleaded 3 Mar 04	21/846, 841; 18/2339B	Sent Hrg: TBD
84	[redacted]	Drugs for Stinger Missiles	SDCA	30 Oct 02	18/2339B; 21/846, 841	N	Await sent	[redacted]	Pleaded 3 Mar 04	21/846, 841; 18/2339B	Sent Hrg: TBD
85	Shah, Syed Mustajab	Drugs for Stinger Missiles	SDCA	30 Oct 02	18/2339B; 21/846, 841	N	Pretrial	-	Tr date pending	-	-
86	Guarin, Carlos	ELN	DDC	4 Apr 03	18/1203, 18/924	N	*At large*	-	-	-	-
87	Aguablanca, Gustavo Bocola	FARC	DDC	30 Apr 02	18/2332(b), 18/2332(a), 18/924	N	*At large*	-	-	-	-
88	Caracas, Tomas Molina	FARC	DDC	29 Oct 02	18/1203, 18/924	N	*At large*	-	-	-	-
89	Dumar (alias)	FARC	DDC	30 Apr 02	18/2332(b), 18/2332(a), 18/924	N	*At large*	-	-	-	-
90	El Loco (alias)	FARC	DDC	29 Oct 02	18/1203, 18/924	N	*At large*	-	-	-	-
91	El Marrano (alias)	FARC	DDC	30 Apr 02	18/2332(b), 18/2332(a), 18/924	N	*At large*	-	-	-	-
92	Garzon, Henry Castellanos	FARC	DDC	22 Dec 98	18/1203	N	*At large*	-	-	-	-
93	Jeronimo (alias)	FARC	DDC	30 Apr 02	18/2332(b), 18/2332(a), 18/924	N	*At large*	-	-	-	-
94	Rueda, Nelson Vargas	FARC	DDC	30 Apr 02	18/2332(b), 18/2332(a), 18/924	N	Colombian custody	-	Charges dismissed 7/7/04	-	-
95	Suarez, German Briceno	FARC	DDC	29 Oct 02	18/2332(b), 18/2332(a), 18/924	N	*At large*	-	-	-	-
96	[redacted]	FARC money laund	SDFL	22 Oct 02	18/1960	N	Sentenced	[redacted]	Pleaded 4 Apr 2003	18/1960	18 months, 2 yrs SR (25 Jul 03)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
97	Aybar-Cancho, Jose Luis	FARC weapons	SDFL	25 Mar 03	18/2339B	N	Incarcerated in Peru	-	-	-	-
98	Aybar-Cancho, Luis Frank	FARC weapons	SDFL	25 Mar 03	18/2339B	N	Incarcerated in Peru	-	-	-	-
99	Gamarra-Murillo, Carlos	FARC weapons	MDFL	1 Apr 04	22/2778	N	Pretrial	-	-	-	-
100	Torres, Arturo Montaño (aka Wilson, El Barbado, El Barbudo)	FARC (Bogota Beer)	DDC	30 Jul 04	5x18/2332; 2x2332a; 18/2	N	Colombian custody	-	-	-	-
101	[redacted]	FLEC	DDC	25 Sep 91	18/1203	N	Sentenced	[redacted]	Convicted 12 Sep 03	18/1203	24 yrs, 5 mos (12 Sep 03)
102	Al-Moayad, Mohammed Ali Hasan	Al Qaeda/HAMAS	EDNY	4 Jan 03	2x18/2339B	N	Pretrial	-	Tr date pending	-	-
103	Zayed, Mohammed Moshen Yahya	Al Qaeda/HAMAS	EDNY	4 Jan 03	18/2339B	N	Pretrial	-	Tr date pending	-	-
104	[redacted]	Al Qaeda/HAMAS (related)	EDNY	14 Apr 03	18/1001	N	Sentenced	[redacted]	Convicted 18 Feb 04	18/1001	60 months (9 July 04)
105	Salah, Muhammad Hamid Khalil	HAMAS	NDIL	19 Aug 04	18/2339B, RICO	N	Pretrial	-	-	-	-
106	Ashqar, Abdelhaleem Hasan Abdelraziq	HAMAS	NDIL	19 Aug 04	RICO	N	Pretrial	-	-	-	-
107	Abdallah, Hassan	Hamas (related)	EDTX	2 Apr 03	18/659, 18/2342	N	Bond	-	**Tr date: 6 Oct 03**	-	-
108	[redacted]	Hamas (related)	EDTX	2 Apr 03	18/659, 18/2342	N	Sentenced	[redacted]	Pleaded 19 Jun 03	18/371	12 months (29 Apr 04)
109	[redacted]	Help the Needy	NDNY	19 Feb 03	IEEPA	N	Await sent	[redacted]	Pleaded 22 Apr 03	IEEPA	Sent Hrg: 1 Jun 04
110	Dhafir, Rafil	Help the Needy	NDNY	19 Feb 03	IEEPA, 18/1956, 18/371	N	Pretrial	-	Tr date: 27 Sep 04		
111	[redacted]	Help the Needy	NDNY	19 Feb 03	IEEPA	N	Await sent	[redacted]	Pleaded 25 Apr 03	IEEPA	Sent Hrg: 1 Jun 04
112	Zagha, Maher	Help the Needy	NDNY	19 Feb 03	IEEPA, 18/1956, 18/371	N	*At large*	-	-	-	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
113	Ali, Ahmed	Help the Needy (related)	NDNY	16 May 03	IEEPA	N	Await sent	[redacted]	Pleaded 16 May 03	26/7206	Sent Hrg: 2 Jun 04
114	Basir, Priscilla	Help the Needy (related)	NDNY	01 Jul 03	18/1001	N	Await sent	[redacted]	Pleaded 1 Jul 03	18/1001	Sent Hrg: 3 Jun 04
115	Hallard, Jr, William	Help the Needy (related)	NDNY	03 Jul 03	26/7201	N	Await sent	[redacted]	Pleaded 3 Jul 03	26/7201	Sent Hrg: 2 Jun 04
116	Al-Amoudi, Abdurahman Mohammed	Herndon Charities	EDVA	28 Sep 03	IEEPA, 18/1001, 18/2332d, 18/1956, 31/5324, 18/1544, 18/1425, 31/5322	N	Await sent	[redacted]	Pleaded 30 Jul 04	IEEPA, 18/1425, 26/7212	Sent Hrg: TBD
117	Ibrahim, Soliman S	Herndon Charities	EDVA	8 Aug 03	18/1425, 18/1001, 18/1015	N	Sentenced; pretrial	[redacted]	Convicted 9 Oct 03; 2d trial date 5 Oct 04	18/1425, 1015, 1001, 1546	12 months (12 Jan 04)
118	Kourani, Mahmoud Youssef	Hizballah	EDMI	19 Nov 03	18/2339B	N	Jailed for harboring alien (18/1324)	-	-	18/2339B	-
119	Boughader-Mucharrafille, Salim	Hizballah/HAMAS	SDCA	15 Nov 02	18/1324	N	Sentenced	[redacted]	Pleaded 19 Mar 03	18/1324	12 months + 1 day
120	Serrano-Valdez, Patricia	Hizballah/HAMAS	SDCA	15 Nov 02	18/1324	N	Sentenced	[redacted]	Pleaded 19 Mar 03	18/1324	10 months
121	Alvarez-Duenas, Jose Guillermo	Hizballah/HAMAS	SDCA	15 Nov 02	18/1324	N	Sentenced	[redacted]	Pleaded 19 Mar 03	18/1324	71 days
122	Abu Baker, Shukri	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	Pretrial	-	-	-	-
123	El-Mezain, Mohammed	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	Pretrial	-	-	-	-
124	Maghawri, Haitham	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	*At large abroad*	-	-	-	-
125	Mishal, Akram	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	*At large abroad*	-	-	-	-
126	Abdulqader, Mufid	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	Pretrial	-	-	-	-
127	Odeh, Abulraham	HLF	NDTX	26 Jul 04	11x18/2339B; 9xIEEPA; 11x18/1956; 3x26/7206; 4x18/371	N	Pretrial	-	-	-	-
128	Al-Hussayen, Sami Omar	IANA	DID	12 Feb 03	18/2339A, 18/1546, 18/1001	N	Deported	-	Acquitted/mistrial 10 Jun 04	N/A	N/A

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
129	[redacted]	IANA	EDMI	24 Jan 03	18/1344; 18/1546	N	Sentenced	Y	Pleaded 9 Sep 03	18/1344; 18/1546	Time served/10 months (13 Nov 03)
130	[redacted]	Infocom	NDTX	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957	N	Await sent	Y	Convicted 7 July 04	IEEPA, 18/1001, 18/371, 18/1957	
131	[redacted]	Infocom	NDTX	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957	N	Await sent	Y	Convicted 7 July 04	IEEPA, 18/1001, 18/371, 18/1957	
132	[redacted]	Infocom/HLF	NDTX	20 Feb 02/26 Jul 04	IEEPA, 18/1001, 18/371, 18/1956, 18/1957 + HLF charges	N	Await sent	Y	Convicted 7 July 04	IEEPA, 18/1001, 18/371, 18/1957	
133	[redacted]	Infocom	NDTX	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957	N	Await sent	Y	Convicted 7 July 04	IEEPA, 18/1001, 18/371, 18/1957	
134	Elashi, Nadia	Infocom	NDTX	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957	N	*At large*	-	-	-	-
135	[redacted]	Infocom	NDTX	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957	N	Sentenced; await sent	Y	Pleaded 17 Jun 02; convicted 7 July 04	IEEPA, 18/1029, 1956, 1343, 371, 1001	48 Months (22 Oct 02)
136	Marzook, Mousa Abu	Infocom & HAMAS	NDTX & NDIL	20 Feb 02	IEEPA, 18/1001, 18/371, 18/1956, 18/1957; RICO in NDIL	N	*At large*	-	-	-	-
137	Foley, Lori	Sallam	CDCA	30 Jul 03	-	N	Bond	-	Tr date: 27 Jan 04	-	-
138	Sallam, Tarek Abdelhamid	Sallam	CDCA	7 Apr 03	-	N	Bond	-	Tr date: 27 Jan 04	-	-
139	[redacted]	NJ Missile	DNJ	12 Aug 03	18/1960	N	Await sent	Y	Pleaded 30 Mar 04	18/1960	Sent Hrg: 19 Jul 04
140	[redacted]	NJ Missile	DNJ	13 Aug 03	18/1960	N	Await sent	Y	Pleaded 19 Apr 04	18/371, 1960	-
141	Lakhani, Hemant	NJ Missile	DNJ	12 Aug 03	18/2339A, 22/2778, 18/1956	N	Pretrial	-	Tr date pending	-	-
142	Raja, Vijay	NJ Missile	DNJ	??	18/1956, 222778	N	Await sent	Y	Pleaded 10 Sep 04	-	-
143	Aref, Yassin Muhiddin	NY Missile	NDNY	4 Aug 04	18/2339A, 1956	N	Pretrial	-	-	-	-
144	Hossain, Mohammed Mosharref	NY Missile	NDNY	4 Aug 04	18/2339A, 1956	N	Pretrial	-	-	-	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
145	Wamang, Anthonius	OPM (Tamika)	DDC	16 Jun 04	17x18/2332, 924	N	Indonesian custody	-	-	-	-
146	Jamal, Samih	Phoenix Infant Formula	DAZ	30 Jul 03	18/2314, 18/2315, 18/1956, 18/1001	N	Pretrial	-	-	-	-
147	Al-Arian, Sami Amin	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	Pretrial	-	Tr date: 10 Jan 05	-	-
148	Al-Khatib, Mohammed Tasir Hassan	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	Pretrial	-	Tr date: 10 Jan 05	-	-
149	Awda, Abd Al-Aziz	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	*At large*	-	-	-	-
150	Ballut, Ghassan Zayed	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	Bond	-	Tr date: 10 Jan 05	-	-
151	Fariz, Hatim Naji	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	Bond	-	Tr date: 10 Jan 05	-	-
152	Hammoudeh, Sameeh	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	Pretrial	-	-	-	-
153	Nafi, Bashir Musa Mohammed	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	*At large*	-	-	-	-
154	Shallah, Ramadan Abdullah	PIJ	MDFL	19 Feb 03	18/2339B, 1962, 956, 371, 1952, 1425, 1546, 1505, 1621, 1963	N	*At large*	-	-	-	-
155	Al-Saoub, Habis Abdulla	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, IEEPA, 924	N	*At large*	-	-	-	-
156	[redacted]	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, 924, IEEPA	N	Sentenced	[redacted]	Pleaded 16 Oct 03	18/2384	18 years (24 Nov 03)
157	[redacted]	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, 924, IEEPA	N	Sentenced	[redacted]	Pleaded 18 Sep 03	IEEPA, 18/924(c)	10 years (9 Feb 04)
158	[redacted]	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, IEEPA	N	Sentenced	[redacted]	Pleaded 18 Sep 03	IEEPA, 18/924(c)	8 years (9 Feb 04)
159	[redacted]	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, 1956, 924, IEEPA	N	Sentenced	[redacted]	Pleaded 16 Oct 03	18/2384	18 years (24 Nov 03)
160	[redacted]	Portland Cell	DOR	2 May 03	18/2339B, 2384, 924, IEEPA	N	Sentenced	[redacted]	Pleaded 6 Aug 03	IEEPA	7 years (9 Feb 04)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
161	[redacted]	Portland Cell	DOR	3 Oct 02	18/2339B, 2384, 1956, IEEPA	N	Sentenced	[redacted]	Pleaded 26 Sep 03	18/1956	36 months (1 Dec 03)
162	Al-Sirri, Yassir	Rahman	SDNY	9 Apr 02	2x18/2339B, 373, 371, 1001	N	UK custody	-	-	-	-
163	Sattar, Ahmed Abdel	Rahman	SDNY	9 Apr 02	2x18/2339B, 373, 371, 1001, 956	N	Pretrial	-	Tr date: 17 May 04	-	-
164	Stewart, Lynne	Rahman	SDNY	9 Apr 02	2x18/2339B, 2x18/2339A, 373, 371, 1001	N	Pretrial	-	Tr date: 17 May 04	-	-
165	Yousry, Mohammed	Rahman	SDNY	9 Apr 02	2x18/2339B, 2x18/2339A, 373, 371, 1001	N	Pretrial	-	Tr date: 17 May 04	-	-
166	Bimenyimana, Leonidas	Rwanda	DDC	25 Feb 03	18/2332(b), 18/2332(a), 18/924	N	Pretrial	-	Tr date pending	-	-
167	Karake, Francois	Rwanda	DDC	25 Feb 03	18/2332(b), 18/2332(a), 18/924	N	Pretrial	-	Tr date pending	-	-
168	Nyaminani, Gregoire	Rwanda	DDC	25 Feb 03	18/2332(b), 18/2332(a), 18/924	N	Pretrial	-	Tr date pending	-	-
169	[redacted]	Seattle	WDWA	28 Aug 02	18/2339B, 924	N	Sentenced	[redacted]	Pleaded 14 Apr 03	IEEPA	24 months (13 Feb 04)
170	[redacted]	Detroit	EDMI	4 Dec 02	18/1546, 18/1001, 18/1028	N	Await sent	[redacted]	Pleaded 9 Jan 03, 2 Mar 04	18/1546, 18/1001, 18/1028	Superseding filed 9 Oct 03 (18/1001, 1028, 1546)
171	Al-Badawi, Jamal Ahmed Mohammed Ali	USS Cole	SDNY	12 May 03	18/2339B, 2332A, 2332, 1111, 1114, 1117	N	*At large*	-	-	-	-
172	Al-Quso, Fahd	USS Cole	SDNY	12 May 03	18/2339B, 2332A, 2332, 1111, 1114, 1117	N	*At large*	-	-	-	-
173	[redacted]	Virginia Jihad	EDVA	25 Jun 03	18/960, 1001, 924, 371, 1543, 112	N	Sentenced	[redacted]	Pleaded 22 Sep 03	924(c), 960	126 months (17 Dec 03)
174	Abdur-Raheem, Caliph Basha ibn	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Acquitted	N	Acquitted 20 Feb 04	N/A	N/A
175	[redacted]	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Sentenced	[redacted]	Convicted 4 Mar 04	18/371, 18/2339A, 18/924	97 months (15 Jun 04)
176	[redacted]	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Sentenced	[redacted]	Pleaded 5 Jun 03, 16 Jan 04	18/924, 18/924, 18/844	18 months (1 Aug 03); 15 years (9 Apr 04)

No.	Defendant (non-corporate)	Case / FTD	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
177	Benkhala, Sabri	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Acquitted	N	Acquitted 9 Mar 04	N/A	N/A
178	[redacted]	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Sentenced	[redacted]	Convicted 4 Mar 04	18/371, 18/2339A, 18/924	1020 months (15 Jun 04)
179	[redacted]	Virginia Jihad	EDVA	25 Jun 03	18/960, 1001, 924, 371, 1543, 112	N	Sentenced	[redacted]	Pleaded 21 Aug 03	18/371, 924	135 months (7 Nov 03)
180	[redacted]	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Sentenced	[redacted]	Convicted 4 Mar 04	IEEPA, 18/2339A, 371, 2384, 924	Life w/o parole (15 Jun 04)
181	[redacted]	Virginia Jihad	EDVA	25 Jun 03	18/960, 1001, 924, 371, 1543, 112	N	Sentenced	[redacted]	Pleaded 25 Aug 03	18/371, 924, 960	138 months (7 Nov 03)
182	[redacted]	Virginia Jihad	EDVA	25 Jun 03	IEEPA, 18/2339A, 2339B, 371, 2384, 960, 924, 1001	N	Sentenced	[redacted]	Pleaded 16 Jan 04	18/924, 18/844	20 years (9 Apr 04)
183	[redacted]	Virginia Jihad	EDVA	25 Jun 03	18/960, 1001, 924, 371, 1543, 112	N	Sentenced	[redacted]	Pleaded 22 Aug 03	18/371, 924	46 months (7 Nov 03)
184	Abodyah, Akrem	-	DNJ	3 Dec 03	distributing crack	N	Pretrial	-	-	-	-
185	Almohandis, Essam Y.	-	DMA	13 Jan 04	49/46505, 18/1001	N	Acquitted	N	-	N/A	N/A
186	Awada, Monir	-	CDCA	14 Jan 03	30/5316, 31/5332	N	TBD	-	-	-	-
187	[redacted]	-	NDOH	16 Dec 03	18/1425	N	Await sent	[redacted]	Convicted 17 Jun 04	18/1425	Sent Hrg: TBD + deportation
188	Driss, Khaled	-	MDFL	2 Mar 03	18/1028	N	TBD	-	-	-	-
189	[redacted]	-	EDNY	??	31/5324	N	Await sent	[redacted]	Pleaded 1 Jun 04	31/5324	Sent Hrg: TBD + deportation
190	Malike, Sayed Abdul	-	EDNY	23 May 03	illegal valium possession	N	Pretrial	-	Tr date pending	-	-
191	Mohamed, Omar Abdi	-	SDCA	22 Jan 04	2x18/1546, 1015	N	Pretrial	-	-	-	-
192	Al Mosaleh, Ali Mohammed	-	DMN	28 Jul 04	3x18/1001	N	CBP custody	-	-	-	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
193	Shaikh, Kamran (a/k/a Kamran Akhtar)	-	WDNC	2 Aug 04	18/1001, 1253	N	ICE custody	-	-	-	-
194	[redacted]	-	EDLA	9 Jan 04	2xIEEPA	N	Sentenced	[redacted]	Pleaded 29 Jan 04	2xIEEPA	10 months (29 Apr 04)
195	Tumer, Yildirim Beyozit	-	EDPA	23 Jul 04	18/1001, 844	N	TBD	-	-	-	-
196	Zameer, Mohamed	-	CDCA	4 May 04	18/844	N	Pretrial	-	-	-	-
197	[redacted]			[redacted]		[redacted]					
198	[redacted]			[redacted]		[redacted]					
199	[redacted]			[redacted]		[redacted]					
200	[redacted]			[redacted]		[redacted]					
201	[redacted]			[redacted]		[redacted]					
202	[redacted]			[redacted]		[redacted]					
203	[redacted]			[redacted]		[redacted]					
204	[redacted]			[redacted]		[redacted]					
205	[redacted]			[redacted]		[redacted]					
206	[redacted]			[redacted]		[redacted]					
207	[redacted]			[redacted]		[redacted]					
208	[redacted]			[redacted]		[redacted]					

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
209	[redacted]			[redacted]		[redacted]					
210	[redacted]			[redacted]		[redacted]					
211	[redacted]			[redacted]		[redacted]					
212	[redacted]			[redacted]		[redacted]					
213	[redacted]			[redacted]		[redacted]					
214	[redacted]			[redacted]		[redacted]					
215	[redacted]			[redacted]		[redacted]					
216	[redacted]			[redacted]		[redacted]					
217	[redacted]			[redacted]		[redacted]					
218	[redacted]			[redacted]		[redacted]					
219	[redacted]			[redacted]		[redacted]					
220	[redacted]			[redacted]		[redacted]					
221	[redacted]			[redacted]		[redacted]					
222	[redacted]			[redacted]		[redacted]					
223	[redacted]			[redacted]		[redacted]					
224	[redacted]			[redacted]		[redacted]					

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
225	[redacted]			[redacted]		[redacted]					
226											
227											
	SUBTOTAL (non-PENTTBOM-related cases)			227				82			
228	[redacted]	PENTTBOM	SDAL	-	18/1029	N	Deported	[redacted]	Pleaded 19 Oct 01	18/1029(a)(2)	Time served (140 days), restitution
229	[redacted]	PENTTBOM	DAZ	-	18/1001	N	Deported	[redacted]	Convicted 14 Feb 02	18 USC 1001	6 Months
230	[redacted]	PENTTBOM	DAZ	-	18/408, 1001	N	To be Deported	[redacted]	Convicted	18 USC 408, 1001	3 Years probation
231	[redacted]	PENTTBOM	DAZ	-	18/1001, 42/408	N	Deported	[redacted]	Pleaded 2002	18 USC 1001, 408(a)(7)(A)	Time served (5 1/2 months)
232	[redacted]	PENTTBOM	CDCA	-	18/1001, 1546	N	-	[redacted]	Pleaded 2002	18 USC 408, 1546	6 Months
233	[redacted]	PENTTBOM	CDCA	-	18/408	N	Deported	[redacted]	Pleaded 10 Jun 02	18 USC 408	Time served (1 month), deported
234	[redacted]	PENTTBOM	CDCA	-	18/1546	N	Deported	[redacted]	Pleaded 3 Jan 02	18 USC 1028, 1546	Time served (65 days), deported
235	[redacted]	PENTTBOM	CDCA	-	18/1546	N	Deported	[redacted]	Pleaded 10 Jan 02	18 USC 1546	4 Months, deported
236	[redacted]	PENTTBOM	CDCA	-	18/922, 8/1253	N	Await sent	[redacted]	Pleaded 18 Mar 03	18 USC 922, 8 USC 1253	-
237	[redacted]	PENTTBOM	NDCA	-	18/1546	N	Deported	[redacted]	Pleaded 25 Sept 02	8 USC 1325	Time served (10 Months)
238	[redacted]	PENTTBOM	SDCA	-	18/1546	N	Deported	[redacted]	Pleaded 2002	18 USC 1001	Time served (335 days)

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
239	[redacted]	PENTTBOM	SDCA	-	18/1546, 42/408	N	To be Deported	[redacted]	Pleaded guilty	18 USC 1546, 408	To be sentenced
240	[redacted]	PENTTBOM	DCO	-	18/911	N	Deported	[redacted]	Pleaded 2002	18 USC 911	Time served (2 months, 3 wks)
241	[redacted]	PENTTBOM	DCO	-	18/922, 911	N	To be Deported	[redacted]	Pleaded 2002	18 USC 922(g)(5), 911	Time served (3 months), 2 yrs SR
242	[redacted]	PENTTBOM	DDE	-	18/922	N	-	[redacted]	Pleaded Feb 02	18 USC 922	177 days, 2 years SR
243	[redacted]	PENTTBOM	MDFL	-	18/1325	N	Deported	[redacted]	Pleaded guilty	18 USC 1325	Time served (5 months)
244	[redacted]	PENTTBOM	MDFL	-	18/1325	N	Deported	[redacted]	Pleaded 10 Jan 02	18 USC 1325	3 Months
245	[redacted]	PENTTBOM	MDFL	-	18/1546	N	Deported	[redacted]	Pleaded 10 Jan 02	18 USC 1546	128 days
246	[redacted]	PENTTBOM	MDFL	-	18/1325	N	Deported	[redacted]	Pleaded 2002	18 USC 1325	Time served (124 days)
247	[redacted]	PENTTBOM	MDFL	-	18/1001	N	Deported	[redacted]	Pleaded 9 Nov 01	18 USC 1001	Time served + 7 days (4 months)
248	[redacted]	PENTTBOM	MDFL	-	18/1001	N	Deported	[redacted]	Convicted	18 USC 1001	Time served (7 months), 24 mos. SR
249	[redacted]	PENTTBOM	MDFL	-	18/1546, 1001, 1621	N	Deported	[redacted]	Pleaded 12 Dec 01	18 USC 1546	Time served (36 days), 2 yrs SR
250	[redacted]	PENTTBOM	SDFL	-	18/1028, 1546; 21/841	N	Deported	[redacted]	Pleaded 2002	21 USC 841(a)(1)	Time served (6 months), 3 years SR
251	[redacted]	PENTTBOM	NDIL	-	18/1542, 1546	N	-	[redacted]	Pleaded 15 Jan 03	18 USC 1546	Time served (15 Months)
252	[redacted]	PENTTBOM	NDIN	-	18/1344	N	Sentenced	[redacted]	Pleaded 17 Apr 02	18 USC 1344	21 Months
253	[redacted]	PENTTBOM	NDIN	-	8/1305	N	Deported	[redacted]	Pleaded 22 Oct 01	8 USC 1305	30 Days
254	[redacted]	PENTTBOM	NDIN	-	8/1305	N	Vol. Departure	[redacted]	Pleaded 22 Oct 01	8 USC 1305	30 Days

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
255	Reid, Richard	PENTTBOM	DMA	-	18/2332a, 2332, 32, 924, 1993; 49/46505, 46506, 46504	N	Sentenced	Y	Pleaded 4 Oct 02	18 USC 2332(a), 924	Life Imprisonment
256	Hussein, Mohamed	PENTTBOM	DMA	-	18/1960	N	Sentenced	Y	Convicted	18 USC 1960	18 Months
257	Graham, Francis	PENTTBOM	DME	-	8/1326	N	Sentenced	Y	Pleaded 2002	8 USC 1326	20 Months, 3 yrs SR
258	Hamam, Ahmed	PENTTBOM	EDMI	-	18/1546, 1028	N	Pretrial	N	Convicted 3 Jun 03	18 USC 371	New trial ordered 2 Sep 2004; awaiting retrial (non-terror)
259	Hussein, Yousef	PENTTBOM	EDMI	-	18/1546, 1028	N	Await sent	Y	Pleaded 7 Apr 03	18 USC 1546, 1028	-
260	Kourani, Samir	PENTTBOM	EDMI	-	18/1546, 1028, 2339A	N	Pretrial	N	Convicted 3 Jun 03	18 USC 371	New trial ordered 2 Sep 2004; awaiting retrial (non-terror)
261	Emerdo-al, Abdallah	PENTTBOM	EDMI	-	18/1546, 1028, 2339A, 371	N	Pretrial	N	Convicted 3 Jun 03	18 USC 2339A, 371	New trial ordered 2 Sep 2004; awaiting retrial (non-terror)
262	Isaac, Avial	PENTTBOM	WDMO	-	18/1344	N	Deported	Y	Pleaded 7 Jan 02	18 USC 1344	Time served (4 1/2 months), 3 yrs SR
263	Abu-Ahmad, Maher Yousif	PENTTBOM	DMT	-	18/911, 922	N	-	Y	Pleaded 2002	18 USC 922(g)	10 Months, 3 yrs SR
264	Ahmed, Jubair	PENTTBOM	EDNC	-	18/1546, 1028	N	Await sent	Y	Pleaded 18 Mar 02	18 USC 1546, 1028	-
265	Tajir, Akram	PENTTBOM	MDNC	-	18/1014	N	Deported	Y	Convicted 10 Dec 01	18 USC 1014	Time served (6 months)
266	Sechan, Jorge	PENTTBOM	MDNC	-	18/911	N	Deported	Y	Pleaded 6 Dec 01	18 USC 911	5 months, 1 yr SR
267	Abdallah, Ali-Sedi	PENTTBOM	DNJ	-	18/371	N	Await sent	Y	Pleaded 6/03	18 USC 371	5 months, 3 yrs SR
268	Abdallah, Nasser	PENTTBOM	DNJ	-	18/371	N	Await sent	Y	Pleaded 27 Mar 02	18 USC 371	5 months, 3 yrs SR
269	Ahmed, Rafiq	PENTTBOM	DNJ	-	18/371	N	Await sent	Y	Pleaded 11 Dec 02	18 USC 371	4 months, 2 yrs SR
270	Gilani, Ahmed	PENTTBOM	DNJ	-	18/1343, 2	N	Deported	Y	Pleaded 26 Mar 02	18 USC 1343, 2	Time servedm, 3 yrs SR

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
271	Khalil Mustafa	PENTTBOM	DNJ	-	18/1543, 2	N	Deported	Y	Pleaded 13 Feb 02	18 USC 1543, 2	Time served (6 Months)
272	Kishk, Wael	PENTTBOM	EDNY	-	18/1001	N	Deported	Y	Convicted 2002	18 USC 1001	6 Months
273	Awan, Khalid	PENTTBOM	EDNY	-	18/1029	N	Await sent	Y	Pleaded 7 Mar 03	18 USC 1029	-
274	Farshchi-Tabrizi, Ahmad Ali	PENTTBOM	EDNY	-	18/1341	N	Sentenced	Y	Pleaded 9 Jul 02	18 USC 1343, 1001, 1029	44 Months
275	Elmaghraby, Elias	PENTTBOM	EDNY	-	18/1029	N	Sentenced	Y	Pleaded 13 Feb 02	18 USC 1029	24 Months, 3 yrs SR
276	Hussein, Chowdry	PENTTBOM	EDNY	-	18/1029	N	Sentenced	Y	Pleaded 7 Mar 03	18 USC 1029	21 Months, 3 yrs SR, deportation
277	Iqbal, Javed	PENTTBOM	EDNY	-	18/1001	N	Sentenced	Y	Pleaded 2002	18 USC 1001	15 Months, 3 yrs SR, deportation
278	Haddy, Mohammed	PENTTBOM	EDNY	-	18/1543; 8/1324, 1325	N	Deported	Y	Pleaded 2002	18/1543; 8/1324, 1325	Time served (6 mos.), 5 yrs SR
279	Mahmoud, Amne	PENTTBOM	EDNY	-	18/1029	N	Sentenced	Y	Pleaded 1 Oct 03	18 USC 1029	3 yrs probation, 3 mos. home confinement, $100 SA, restitution $67,306 ($25/month).
280	Sawar, Suhail	PENTTBOM	EDNY	-	18/1029	N	Await sent	Y	Pleaded 7 Mar 03	18 USC 1029	-
281	Assem, Akram	PENTTBOM	EDNY	-	18/1001	N	Deported	Y	Pleaded 15 Feb 02	18 USC 1001	6 Months, 3 yrs SR
282	[illegible]	PENTTBOM	EDNY	-	18/2315	N	Deported	Y	Pleaded 5 Sept 02	18 USC 2315	Time served (6 months)
283	Iqbal, Jameel (aka Jimmy)	PENTTBOM	NDNY	-	8/1325; 18/2	N	Deported	Y	Pleaded	8 USC 1325, 18 USC 2	5 Years Probation
284	Iqbal, Javed	PENTTBOM	NDNY	-	8/1325; 18/2	N	-	Y	Pleaded	8 USC 1325, 18 USC 2	5 Years Probation, $3000
285	Mahmood, Anser	PENTTBOM	NDNY	-	8/1324	N	-	Y	Pleaded	8 USC 1324	5 Years Probation, $3000
286	[illegible]	PENTTBOM	NDNY	-	18/1546	N	Deported	Y	Pleaded 2001	18 USC 1546	5 Years Probation

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
287	[redacted]	PENTTBOM	NDNY	-	18/1546	N	Deported	[redacted]	Pleaded 2001	18 USC 1546	5 Years Probation
288	[redacted]	PENTTBOM	SDNY	-	18/1029	N	Deported	[redacted]	Pleaded 6 Jun 02	18 USC 1029	Time served (9 Months)
289	[redacted]	PENTTBOM	SDNY	-	18/1001	N	Deported	[redacted]	Pleaded 13 Feb 02	18 USC 1001	Time served (6 Months)
290	[redacted]	PENTTBOM	SDNY	-	18/1029	N	Sentenced	[redacted]	Pleaded 13 Jun 02	18 USC 1029	1 Year, 1 day, 3 yrs SR
291	[redacted]	PENTTBOM	SDNY	-	18/1029	N	Deported	[redacted]	Pleaded 22 Feb 02	18 USC 1029	Time served (2 1/2 months), 2 yrs SR
292	[redacted]	PENTTBOM	SDNY	-	18/1001	N	Await sent, MatWit	[redacted]	Pleaded 2002	18 USC 1001	Time served (3 months), 2 yrs SR
293	[redacted]	PENTTBOM	WDNY	-	18/1324	N	Deported	[redacted]	Pleaded 2002	18 USC 371, 1001, 1324	8 months, 3 yrs SR
294	[redacted]	PENTTBOM	WDNY	-	18/1544	N	Deported	[redacted]	Pleaded	18 USC 1544	Time served (3 months)
295	[redacted]	PENTTBOM	NDOH	-	8/1325	N	-	[redacted]	Pleaded 28 Feb 02	18 USC 1325	6 Months
296	[redacted]	PENTTBOM	NDOH	-	18/1001, 1546	N	-	[redacted]	Pleaded	18 USC 1001, 1546	Time served (2 1/2 months), deportation
297	[redacted]	PENTTBOM	WDOK	-	18/922	N	-	[redacted]	Pleaded 19 Dec 01	18 USC 922(g)(1)	15 Months, 3 yrs SR
298	[redacted]	PENTTBOM	EDPA	-	8/1325, 18/1325	N	-	[redacted]	Pleaded 9 Apr 02	8 USC 1325	Time served (4 1/2 months), 3 yrs SR
299	[redacted]	PENTTBOM	EDPA	-	18/1543, 1544, 1546	N	Deported	[redacted]	Pleaded 6 Jun 02	18 USC 1546, 1544, 1543	6 Months
300	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 26 Mar 02	18 USC 1028	3 Months Probation, $250
301	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 3 Mar 02	18 USC 1028	3 Years Probation
302	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 25 Mar 02	18 USC 1028	3 Years Probation

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
303	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 24 May 02	18 USC 1028	3 Years Probation, 100 hrs. comm. service
304	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 25 Mar 02	18 USC 1028	3 Years Probation
305	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 10 Apr 02	18 USC 1028	3 Years Probation, $250
306	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded	18 USC 1028	6 Months (concurrent w/ state sentence), 3 yrs SR
307	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 16 Apr 02	18 USC 1028	3 Years Probation, $250
308	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 18 Mar 02	18 USC 1028	1 Year Probation, $250
309	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Convicted 14 Feb 02	18 USC 1028	5 Years Probation, 100 hrs. comm. service
310	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 18 Mar 02	18 USC 1028	3 Years Probation
311	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 28 Mar 02	18 USC 1028	3 Years Probation
312	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 27 Mar 02	18 USC 1028	3 Years Probation, 100 hrs. comm. service
313	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 13 Mar 02	18 USC 1028	3 Years Probation
314	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 29 May 02	18 USC 1028	3 Years Probation, $250
315	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 13 Mar 02	18 USC 1028	3 Years Probation, 100 hrs. comm. service
316	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 15 Apr 02	18 USC 1028	1 Year Probation, $250
317	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded	18 USC 1028	3 Years Probation
318	[redacted]	PENTTBOM	WDPA	-	18/1028	N	-	[redacted]	Pleaded 14 Jan 02	18 USC 1028	3 Years Probation, $250

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
319	El Guarachi, Hassan	PENTTBOM	WDPA	-	18/1001	N	Deported	Y	Pleaded	18 USC 1001	Time served (5 weeks), deported
320	El Zahar, Salem Ibrahim	PENTTBOM	WDPA	-	49/46505	N	Deported	Y	Pleaded	49 USC 46505(b)(1)	Time served (6 weeks), deported
321	Fall, Mamadi	PENTTBOM	WDPA	-	18/1544	N	Deported	Y	Pleaded	18 USC 1544	3 Months
322	Farren, Tobias	PENTTBOM	WDPA	-	18/1028	N	Sentenced	Y	Pleaded 8 Feb 02	18 USC 1028	18 months, 3 yrs SR
323	Sirdahi, Hussein	PENTTBOM	WDPA	-	18/1028	N	-	Y	Pleaded 11 Mar 02	18 USC 1028	3 Years Probation
324	Haile, Yasir	PENTTBOM	DSC	-	18/1001, 1344, 1956, 1028	N	Deported	Y	Pleaded	18 USC 1001, 1344, 1956, 1028	Time served (14 months)
325	Abass, Sabir	PENTTBOM	EDVA	-	18/371, 1001, 1546	N	Vol. Departure	Y	Pleaded 3 Jan 02	18 USC 371, 1001, 1546	63 Days, 2 yrs probation
326	Abdi, Mohamed	PENTTBOM	EDVA	-	18/513	N	-	Y	Pleaded 13 Dec 01	18 USC 513	4 Months, 3 yrs SR
327	Al Dajani, Khalil	PENTTBOM	EDVA	-	18/911, 1546	N	Deported	Y	Pleaded 9 Nov 01	18 USC 911, 1546	4 Months, 3 yrs SR
328	Awad, Hani	PENTTBOM	EDVA	-	18/1544	N	-	Y	Pleaded 17 Dec 01	18 USC 1544	2 Years sup. probation, 6 mos. home confinement
329	Ingram, Aqil	PENTTBOM	EDVA	-	18/1028	N	Deported	Y	Pleaded 4 Mar 02	18 USC 1028	7 Months, 1 yr SR
330	Kaiser, Kenya	PENTTBOM	EDVA	-	18/1028, 2	N	-	Y	Pleaded 9 Nov 01	18 USC 1028	1 Year, 3 yrs sup. release
331	Kwok, Roxanne	PENTTBOM	EDVA	-	18/1546	N	Served Sentence	Y	Pleaded 12 Dec 01	18 USC 1546	50 Days
332	Lopez-Flores, Vicky	PENTTBOM	EDVA	-	18/1028, 2	N	Deported	Y	Pleaded 19 Nov 01	18 USC 2, 1028	27 Months, 3 yrs sup release
333	Martinez-Flores, Luis	PENTTBOM	EDVA	-	18/1028, 2	N	Sentenced	Y	Pleaded 6 Dec 01	18 USC 1028	21 Months, 2 yrs sup release
334	Villalobos, Rafael	PENTTBOM	EDVA	-	18/1028, 2	N	-	Y	Pleaded 6 Dec 01	18 USC 1028	4 Months, 2 yrs sup release

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
335	[redacted]	PENTTBOM	EDVA	-	18 USC 2332(b)	N	Sentenced	[redacted]	Pleaded 16 Jul 02	18 USC 2332(b)	20 Years
336	[redacted]	PENTTBOM	EDVA	-	18/1028, 2	N	-	[redacted]	Pleaded 17 Apr 02	18 USC 1028	6 Months
337	[redacted]	PENTTBOM	EDVA	-	18/1341, 1343, 371	N	Deported	[redacted]	Pleaded 30 Jul 02	18 USC 1341, 1343, 371	4 Months, 2 yrs sup release
338	[redacted]	PENTTBOM	EDVA	-	18/1546	N	Deported	[redacted]	Pleaded 30 Sept 02	18 USC 1546	Time served (3 weeks)
339	[redacted]	PENTTBOM	WDVA	-	18/922, 924	N	Sentenced	[redacted]	Convicted 2002	18 USC 922, 924	24 Months, 3 yrs sup release
340	[redacted]	PENTTBOM	WDVA	-	18/922	N	Sentenced	[redacted]	Convicted 2002	18 USC 922	15 Months, 2 yrs sup release
341	Al-Marri, Ali Saleh Kahlah	PENTTBOM	COIL	-	18/1028, 1014, 1001, 1029	N	Enemy Combatant (6/23/03)	-	Criminal charges dismissed w/ prejudice	N/A	declared enemy combatant
342	Moussaoui, Zacarias	PENTTBOM	EDVA	-	18/2332b, 2332a, 32, 1114, 1117, 844; 49/46502	N	Pretrial	-	Trial pending	-	-
343	Alawi, Fahd Muthana	PENTTBOM	WDAR	-	18/922	N	Deported	-	Case dismissed, deported	N/A	Deported
344	Raisi, Lotfi (aka Fabrice Vincent Algier)	PENTTBOM	DAZ	-	18/1001, 2	N	No	-	Extradition process failed; DOJ sent MLAT to Italy	N/A	-
345	Khan, Solomon Hamid	PENTTBOM	CDCA	-	18/1546	N	No	-	Case dismissed 9/02	N/A	-
346	Al-Bayoumi, Omar	PENTTBOM	SDCA	-	18/1546	N	*At large*	-	Fugitive in S. Arabia	N/A	-
347	Camci, Mustafa (aka Mustafa Camli)	PENTTBOM	DOE	-	18/1546	N	No	-	Case dismissed 5/02	N/A	-
348	Mohamed, Khalid Hamid	PENTTBOM	NDGA	-	18/1001	N	No	-	Case dismissed 12/01	N/A	-
349	Hussein, Liban M.	PENTTBOM	DMA	-	18/1960	N	*At large*	-	Fugitive in Canada	N/A	-
350	Ali-Haimoud, Farouk	PENTTBOM	EDMI	-	18/1546, 1028	N	No	-	Acquitted 6/03	N/A	-

No.	Defendant (non-corporate)	Case / FTO	Dist	Charged	Charges	Seal	Custody	Conv	Details	Conviction Charge(s)	Sentence
351	Al-Fatimi, Ali	PENTTBOM	EDNY	-	31/5316	N	No	-	Case dismissed	N/A	-
352	Nashal, Basam	PENTTBOM	EDNY	-	31/5316	N	No	-	Federal charges dismissed; in state custody on prior sentence	N/A	-
353	Gujar, Tariq	PENTTBOM	NDNY	-	31/5234	N	No	-	Case postponed to give defendant time to cooperate	N/A	-
354	Mahmood, Arshad	PENTTBOM	NDNY	-	18/1546	N	No	-	Case adjourned to allow for possible cooperation	N/A	-
355	Awadallah, Osama	PENTTBOM	SDNY	-	18/1001	N	No	-	Case dismissed on gov't appeal to the 2nd circuit	N/A	-
356	Higazy, Abdallah	PENTTBOM	SDNY	-	18/1001	N	No	-	Charges dismissed 1/02	N/A	-
357	Abdulrahman, Ali	PENTTBOM	WDNY	-	18/371, 1001; 8/1324	N	*At large*	-	Fugitive (possibly in Canada)	N/A	-
358	Murshed, Ahmed	PENTTBOM	WDNY	-	18/371, 1001; 8/1324	N	*At large*	-	Fugitive	N/A	-
359	Benmoumen, Elmeliani	PENTTBOM	WDPA	-	18/371	N	No	-	Case stalled b/c of failure to resolve state charges	N/A	-
360	Koshak, Abdurahman Khahil	PENTTBOM	WDPA	-	18/2252	N	No	-	-	N/A	-
361	Alatasi, Zafer	PENTTBOM	MDTN	-	42/408	N	No	-	Case removed from trial docket, pretrial diversion, posted bond	N/A	-
	SUBTOTAL (PENTTBOM-related cases)			***134***				***110***			
	TOTAL NUMBERS			361				192			
				Charged				Convicted			

Responses of the Federal Bureau of Investigation
Based Upon May 5, 2004 Hearing Before the
Senate Committee on the Judiciary
Re: Aiding Terrorists: An Examination of the Material Support Statute

Questions Posed by Senator Feingold

Prior to September 11th, various federal agencies maintained various criminal or terrorist watch lists, some of which were shared with other government agencies. After September 11th, the federal government has tried to consolidate those lists, and the FBI has recently been tasked with integrating the multiple databases so that it can be a useful tool for law enforcement. In March 2004, Homeland Security Secretary Tom Ridge testified before the House Appropriations Subcommittee on Homeland Security that there are currently approximately 50,000 names on a watch list maintained by the Homeland Security Department's Terrorist Screening Center. At another hearing later that month, the Director of the Terrorist Screening Center testified that the Terrorist Threat Integration Center (TTIC) managed by the FBI is the sole source of its information.

(a) Please explain how the FBI determines who is entered into the TTIC database and which names get passed along to the Department of Homeland Security's Terrorist Screening Center.

Response:

There were approximately 183,412 names in the consolidated terrorist database maintained by the Terrorist Screening Center (TSC) as of May 24, 2004. It is important to note that the Terrorist Threat Integration Center (TTIC) is managed by the Director of Central Intelligence (DCI). The TTIC provides information to the TSC regarding known or suspected international terrorists only, while the FBI provides information to the TSC regarding domestic terrorists. The TSC is administered by the FBI; the Director of the TSC reports directly to the Director of the FBI.

The FBI does not determine what records are entered into the TTIC database because TTIC is administered by the DCI. Homeland Security Presidential Directive 6 (HSPD-6) requires that federal agencies and departments provide the TTIC with terrorist information in their possession. The DCI, in turn, determines which records will be maintained in the TTIC database.

(b) Roughly what portion of these 50,000 people on the terrorist watch list are known, dangerous terrorists? Roughly what portion are people who may have

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tangential ties to someone who is the subject of a counter-intelligence or international terrorism investigation?

Response:

The TSC maintains a consolidated terrorist screening database at the unclassified level. This database is a subset of the data possessed by the TTIC regarding known or suspected international terrorists. The TSC does not possess any derogatory information regarding those included in its consolidated unclassified database. Therefore, questions regarding the names submitted by TTIC for inclusion in the TSC database would more appropriately be addressed to the TTIC.

(c) Roughly what portion of these 50,000 are U.S. citizens or legal permanent residents? How many of them do you believe are residing in the U.S.?

Response:

The TSC database contains only the names and limited identity information regarding known or suspected terrorists. The TTIC database contains additional information that the TSC cannot maintain in its unclassified database. HSPD-6 requires that the DCI implement procedures to ensure that the TTIC database does not contain information pertaining to United States persons. Consequently, this question would more appropriately be addressed to the TTIC.

(d) The Director of the Terrorist Screening Center also testified that the FBI is the sole source of its information about domestic terrorists. Please explain how you determine whether someone is a domestic terrorist or suspected domestic terrorist. Could someone who is simply exercising his or her First Amendment rights by, for example, organizing or speaking at a protest against the war in Iraq, be deemed a threat to national security or a "domestic terrorist" and be placed on the watch list?

Response:

The FBI complies with Attorney General Guidelines concerning the initiation, permissible scope, duration, subject matters, and objectives of FBI investigations. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations recognize that the duty of the government to protect the public against crimes "must be performed with care to protect individual rights and to insure that investigations are confined to matters of legitimate law enforcement interest." In order to ensure that FBI investigations are conducted consistent with this requirement, these guidelines contain several provisions that address the importance of honoring First Amendment protections.

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For example, the guidelines instruct that:

> [i]n its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States. When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these Guidelines may be warranted unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm.

Investigations of terrorism enterprises (one of two types of criminal intelligence investigations, the other being racketeering enterprise investigations), for example, may be initiated only when facts or circumstances reasonably indicate that two or more persons are committing the following criminal acts or attempting to do so:

> (1) furthering political or social goals wholly or in part through activities that involve force or violence and a federal crime,
>
> (2) engaging in terrorism as defined in 18 U.S.C. 2331(1) or (5) that involves a federal crime, or
>
> (3) committing any offense described in 18 U.S.C. 2332b(g)(5)(B).

This requirement for "criminal acts" is also incorporated in the 18 U.S.C. 2331(5) definition of "domestic terrorism" as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended-
>
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnaping; and

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(C) occur primarily within the territorial jurisdiction of the United States.

Given these Guidelines and statutory constraints, an individual will be investigated as a "domestic terrorist" only based upon facts indicating criminal activity, and may not be investigated as a "domestic terrorist" merely based upon the exercise of First Amendment rights such as protests against U.S. government policies.

(e) Roughly what portion of the 50,000 on the watch list are suspected domestic terrorists?

Response:

As of May 24, 2004, there were approximately 1,770 names within the TSC's consolidated database associated with domestic terrorism.

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Professor David Cole's Response to Senator Leahy regarding the May 5, 2004 Senate Committee on the Judiciary Hearing on "Aiding Terrorists: An Examination of the Material Support Statute"

Question:
You have identified what you believe to be a number of constitutional problems with 18 USC 2339B. How would you rewrite that statute to address those perceived problems?

Answer:
In my view, the material support statute suffers from a number of constitutional infirmities, including vagueness, overbreadth, lack of due process, and the imposition of guilt by association (in violation of the First and Fifth Amendments). Many of these deficiencies stem from the fact that it imposes liability (at least as construed by the administration) on persons who have no intent to support terrorist activity, and whose support in fact does not further any terrorist activity. The vagueness, overbreadth, and guilt by association problems could be resolved by explicitly incorporating a "specific intent" standard, providing that persons are liable only if they provide material support to a designated terrorist organization "with intent to further its terrorist activities." The statute also has other problems, but this fix would resolve what is in my view its most significant constitutional infirmities.

SUBMISSIONS FOR THE RECORD

STATEMENT OF

GARY M. BALD

ASSISTANT DIRECTOR

COUNTERTERRORISM DIVISION

FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

May 5, 2004

Good morning, Chairman Hatch, Senator Leahy and distinguished members of the committee. Thank you for this opportunity to discuss the material support statutes as a vital component of the FBI's investigative mission. I will discuss the application of the statutes to our counterterrorism operations, including examples of our successes.

Since 9/11 the FBI's Counterterrorism program has made comprehensive changes to meet its primary mission of detecting, disrupting, and defeating terrorist operations before they occur. We have spent the past two and a half years transforming operations and realigning resources to meet the threats of the post-September 11th environment.

As part of this transformation, the FBI has undertaken a number of initiatives to improve information sharing and coordination with our national and international partners. We are committed to the interagency partnerships we have forged through our Joint Terrorism Task Forces (JTTFs). Likewise, the FBI is committed to fostering

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international partnerships, and recognizes the critical role they play in our ability to develop actionable intelligence. To be fully successful, however, these partnerships must have the legal tools necessary to investigate the entire range of terrorist activities, including the provision of material support.

U.S. Counterterrorism operations have been significantly enhanced by the enactment of the USA PATRIOT Act, which authorized increased information sharing between the intelligence and law enforcement communities not only internationally and domestically, but also within the FBI. The USA PATRIOT Act also authorized the use of existing investigative techniques that were previously not allowed in terrorism investigations. The Act expanded our ability to pursue those who provide material support or resources to terrorist organizations. These changes have allowed the FBI to be more proactive and strengthened our ability to fuse law enforcement and intelligence information, to better recognize and address terrorist threats.

To prevent terror attacks, we need the tools to address the full range of terrorist supporters, including those in more peripheral roles. By aggressively attacking the entire terrorist organization, we maximize our ability to disable the networks on which successful terrorist operations depend. To accomplish this goal, we need the means to neutralize all persons acting within the terrorist organizational structure. Terrorist networks rely on individuals and organizations that are proficient in fundraising, procurement, training, logistics and recruiting. It is this type of terrorist activity that is most prevalent in the United States.

Terrorist groups committed to furthering their ideological objectives through violence require both initial and continuing support. In this context, material support includes

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items related directly to terrorist attacks, such as the procurement of explosives and munitions, and the more distant support related to funding, recruitment, logistics and communication resources required to sustain a transnational terrorist network. For terrorists, a lack of finances can hinder or thwart short-term goals, and dismantle long-term agendas. Without funds, terrorist groups suffer disarray, defection and, ultimately, demise. The material support statutes, as broadened by the USA PATRIOT Act, are vital components of our investigative and preventative efforts targeting the support and resource needs of terrorist networks.

The material support statutes serve as the framework enabling a thorough and aggressive prosecution of the entire terrorist network—leaving the network without the necessary resources or personnel to conduct terrorist operations. These statutes, based upon a fundamentally simple concept, prohibit material support or resources to all individuals or entities that facilitate, plan, or engage in terrorism. By criminalizing the actions of those who provide, channel or direct resources to terrorists or a U.S. designated Foreign Terrorist Organization, the material support statutes provide an effective tool to intervene at the earliest possible stage of terrorist planning in order to arrest terrorists and their supporters well before their violent plans come to fruition.

Every person who participates in or helps facilitate terrorist activities should be subject to the material support statutes. These statutes have been applied to a wide variety of terrorist supporters. For example, the first material support case to be tried before a jury was a Charlotte, North Carolina investigation in which a group of Lebanese nationals repeatedly purchased large volumes of cigarettes in North Carolina, and shipped them to Michigan for resale. This smuggling scheme was extremely lucrative

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because of the high profit margin from the cigarette tax disparity between the two states. Some of the subjects were involved in providing a portion of the illicit proceeds to Hizballah affiliates and operatives in Lebanon. Others were involved in providing funds to purchase dual-purpose military equipment in aid of Hizballah. Several subjects were ultimately charged with violations of the material support statutes, and convicted of providing material support to a designated Foreign Terrorist Organization. The main subject was sentenced to 155 years in federal prison. As a result of this case, material support charges have been used in other similar cigarette smuggling cases in Detroit.

A recent drugs-for-weapons case demonstrates the need to investigate supporters of terrorism and, given the implications, underscores the urgency and priority material support investigations require. Between April and September 2002, a group allegedly negotiated with undercover law enforcement agents for the sale of 600 kilograms of heroin and five metric tons of hashish. The subjects also allegedly negotiated with undercover law enforcement for the purchase of four Stinger anti-aircraft missiles, which they indicated were to be sold to personnel in Afghanistan. The subjects were charged with conspiring to provide material support. Two of the subjects pled guilty to federal violations and one is awaiting trial.

Other examples of successful material support cases involve persons in the U.S. training for violence overseas. The FBI, through the Joint Terrorism Task Forces across the country, has disrupted and dismantled *jihad* terrorist cells in American cities including Seattle, Portland, Buffalo, and most recently in the D.C. suburbs of northern Virginia. Among other things, members of these cells have engaged in military style

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training exercises, acquired weapons, attended Al-Qaeda training camps, and attempted to travel to wage *jihad.*

Another material support investigation identified an Al-Qaeda facilitator in the U.S. who was conducting pre-operational surveillance of potential U.S. targets for Al-Qaeda. The subject is in custody and ultimately pled guilty to providing material support to Al-Qaeda. The subject admitted casing the Brooklyn Bridge and identifying other potential U.S. targets for Al-Qaeda operations. The material support statutes provided the authority to disrupt this terrorist plan while it was being conceived, well before it could come to fruition.

More challenging material support cases involve the funding of designated terrorist organizations through the cover of charitable front companies frequently referred to as Non-Governmental Organizations, or NGOs. An investigation involving the Executive Director of the Benevolence International Foundation (BIF) illustrates the usefulness of the material support statutes in these types of investigations. BIF was a Chicago, Illinois-based charity long recognized by the IRS as a non-profit organization. The group's purposely ambiguous objectives were, ostensibly, to provide humanitarian relief aid. However, the recipients of the "humanitarian aid" were ultimately revealed to be terrorist groups, including Al-Qaeda. The October 2002 indictment described a multi-national criminal enterprise that, for at least a decade, used charitable donations from unwitting Muslim-Americans, non-Muslims and corporations to covertly support Al-Qaeda, the Chechen Mujahideen, and armed violence in Bosnia. The indictment alleged that BIF was operated as a criminal enterprise that engaged in a pattern of racketeering activity. In addition to fund-raising, the group acted as a conduit through which other

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material support was provided to further the violent activities of the mujahideen and other terrorist organizations. The Executive Director ultimately pled guilty to a material support–based racketeering conspiracy violation and admitted that donors to BIF were misled into believing their donations would support peaceful causes when, in fact, funds were expended to support violence oversees.

It would be difficult to overstate the importance of the material support statutes to our ongoing counterterrorism efforts. The statutes are sufficiently broad to include terrorist financers and supporters who provide a variety of resources to terrorist networks. The statutes provide the investigative predicate which allows intervention at the earliest possible stage of terrorist planning to identify and arrest terrorists and supporters before a terrorist attack occurs. These statutes form a core aspect of the FBI's terrorism prevention strategy. It is readily apparent that terrorists open bank accounts, use the internet, communicate, recruit and train personnel, and procure equipment to support their objectives. Those who provide such support or resources are as culpable as those who actually carry out terrorist attacks. Having a statute directed at the support stage provides a crucial, early opportunity for prevention. Moreover, if the terrorist sources of support are not successfully targeted and prosecuted, those facilitators remain capable of supporting future terrorist activities.

Terrorist networks cannot exist or operate with a radical ideology as their sole asset; these networks need support and resources. From an intelligence perspective, the material support statutes are crucial to preventing attacks by limiting, if not denying, the necessary support and resources to these terrorist networks.

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Thank you for the opportunity to testify before you today and to highlight the FBI's investigative efforts and successes. It would be my pleasure to answer any questions you may have.

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Department of Justice

STATEMENT

OF

DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ISSUES REGARDING THE MATERIAL SUPPORT OF TERRORISM

PRESENTED ON

MAY 5, 2004

STATEMENT OF
DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

MATERIAL SUPPORT OF TERRORISM

MAY 5, 2004

Good morning, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you today to discuss recent court decisions concerning the material support to terrorists statutes and to offer some ideas for improving those critical statutes.

At the outset, it is important to recognize the vital role that the material support statutes have played in the Department of Justice's prosecution of the war against terrorism. Terrorists and terrorist organizations do not operate in isolation. Rather, they depend upon the support and assistance of those who sympathize with their cause. For this reason, a key element of the Department's strategy for winning the war against terrorism has been to use the material support statutes to prosecute aggressively those individuals who supply terrorists with the support and resources they need to survive.

The critical aspect of the Department's strategy for winning the war against

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terrorism is preventing and disrupting terrorist attacks before they occur. The Department seeks to identify and apprehend terrorists before they can carry out their plans, and the material support statutes are a valuable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction.

Since the attacks of September 11, 2001, the Department has brought charges under the material support statutes against individuals across the country, from Seattle and Portland in the West to Buffalo and Alexandria in the East, and because of these efforts, numerous individuals who have provided support and assistance to terrorists and terrorist organizations are currently behind bars and will stay there for many years to come.

As this Committee is well aware, there has been recent litigation involving certain provisions of the material support statutes. While there are limits to what I can say about this ongoing litigation, in my testimony today, I will review some concerns expressed by courts about various aspects of the material support statutes, concerns that unfortunately may interfere in the future with the Department's ability to prosecute those providing vital assistance to terrorists and terrorist organizations. I will then discuss the Department's response to these concerns, and some ways that Congress might consider addressing these concerns by amending the material support statutes. Finally, I will briefly suggest a couple of other ideas for improving the material support statutes.

18 U.S.C. § 2339A prohibits the provision of "material support or resources" to

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terrorists, while 18 U.S.C. § 2339B prohibits the provision of "material support or resources" to designated foreign terrorist organizations. The term "material support or resources" is defined, for purposes of the statutes, 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." 18 U.S.C. 2339A(b).

Some courts, however, have found key terms in this definition to be unconstitutionally vague, potentially undermining the Department's ability to prosecute those supplying assistance to terrorists or terrorist organizations. The United States Court of Appeals for the Ninth Circuit, for instance, has held that the terms "personnel" and "training" in the definition of "material support or resources" are "void for vagueness under the First and Fifth Amendments because they bring within their ambit constitutionally protected speech and advocacy." *Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382, 403 (9th Cir. 2003).

The Ninth Circuit has specifically expressed the concern that an individual who independently advocates the cause of a terrorist organization could be seen as supplying that organization with "personnel" and thus has concluded that the term "'personnel' could be construed to include unequivocally pure speech and advocacy protected by the First Amendment." *Id.* at 404. Likewise, the Ninth Circuit has asserted that the term "training" could be interpreted by reasonable people to encompass First Amendment

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protected activities, such as instructing members of foreign terrorist organizations on how to use humanitarian and international human rights laws to seek the peaceful resolution of conflicts. *See id.*

Applying this Ninth Circuit precedent, the United States District Court for the Central District of California recently also held the term "expert advice or assistance" in the definition of "material support or resources" to be impermissibly vague. *See Humanitarian Law Project v. Ashcroft*, 2004 WL 547534 (C.D. Cal. Mar. 17, 2004). The court reasoned that "just like the terms 'personnel' and 'training,' 'expert advice or assistance' 'could be construed to include unequivocally pure speech and advocacy protected by the First Amendment' or 'to encompass First Amendment protected activities.'" Notably, however, the district court refused to hold the term "expert advice or assistance" as overbroad under the First Amendment.

The Department of Justice respectfully disagrees with these decisions holding key terms in the definition of "material support or resources" to be unconstitutionally vague and is either pursuing or considering whether to pursue further judicial review in these cases. In the case of *Humanitarian Law Project v. United States Dep't of Justice*, for example, the Department has filed a petition for rehearing *en banc* with the Ninth Circuit, asking that court to reconsider the decision of the three-judge panel finding the terms "personnel" and "training" to be unconstitutionally vague. In its petition, the Department has argued that the meaning of these two terms is sufficiently clear and provides individuals with fair warning as to the range of conduct proscribed by the material

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support statutes.

The Department has pointed out that the term "personnel" has a discernible and specific meaning, one found in basic dictionary definitions of the word: it describes those working under the direction or a control of a specific entity. Thus, as the Department has explained in its United States Attorney's Manual, the ban on providing "personnel" to foreign terrorists or terrorist organizations contained in the material support statutes covers situations in which individuals have submitted themselves to the direction or control of a foreign terrorist organization. Independent advocacy of a designated foreign terrorist organization's interests or agenda falls outside the scope of the statutes' coverage. It is for this reason that, contrary to the concerns expressed by the Ninth Circuit, independent speech or advocacy by an individual in favor, or on behalf of, a foreign terrorist organization is not prohibited by the statutes. Just as one independently extolling the virtues of McDonald's hamburgers is not supplying "personnel" to the restaurant chain, neither is one independently advocating on behalf of a foreign terrorist organization supplying "personnel" to that organization. But when one works under the direction or control of the organization, one does provide "personnel."

Likewise, the Department has argued in its petition for rehearing *en banc* in *Humanitarian Law Project* that the term "training" is not unconstitutionally vague. The material support statutes unequivocally prohibit persons within the United States or subject to its jurisdiction from providing any form of "training" to terrorists or to designated foreign terrorist organizations, and, again, the word "training" is a common

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term in the English language, a clear definition of which can be found in any dictionary. With respect to the Ninth Circuit's concern that prohibiting individuals from instructing foreign terrorist organizations in peaceful conflict resolution might raise First Amendment concerns, the Department has argued that it is doubtful that the statutory ban on "training" foreign terrorist organizations would be unconstitutional as applied to those activities. This is because, as with the provision of cash or goods, support of a terrorist organization through "training," even of a foreign terrorist organization's seemingly innocuous activities, may have the effect of making other resources available for violent acts, or gaining time for a terrorist campaign while the terrorist organization pretends to negotiate peacefully.

The Department is also currently considering whether to appeal to the Ninth Circuit the Central District of California's decision holding the term "expert advice or assistance" in the definition of "material support or resources" to be impermissibly vague. As the Department argued in the district court in that case, the Department does not believe that the meaning of the term "expert advice or assistance" is insufficiently clear. Expertise is a familiar concept both in the law and to those outside of the legal profession. Rule 702 of the Federal Rules of Evidence, for example, defines "expert" testimony to be testimony based on "scientific, technical, or other specialized knowledge." Likewise, the terms "advice" and "assistance" are commonly understood terms defined in any dictionary.

To be absolutely clear, the Department believes that the terms "personnel,"

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"training," and "expert advice or assistance," as they are used in the material support statutes, are not unconstitutionally vague and should not need further clarification in order to withstand constitutional scrutiny. Even so, given the court decisions reviewed above, which, if not overturned, threaten to hamper the Department's ability to prosecute those who provide personnel, training, or expert advice or assistance to to terrorists or to foreign terrorist organizations, Congress may wish to consider amending the material support statute to provide more specific definitions of "personnel," "training," and "expert advice or assistance." The Department would not oppose amending the material support statute to include such definitions and would be happy to work with Congress to do so in a manner that addresses the vagueness concerns that have been raised by some courts and at the same time maintains the efficacy of the statutes. Similarly, in light of the reservations expressed by some courts that the material support statutes could be interpreted to prohibit activities protected under the First Amendment, Congress may wish to consider amending the statute to make it absolutely clear that the statute should not be construed so as to abridge the exercise of rights guaranteed under the First Amendment. Such a provision would have no effect on current prosecution policy, which does not target conduct protected by the First Amendment, but would help to allay concerns that the material support or resources statutes pose a threat to the exercise of First Amendment rights.

In addition to issues related to terms used in the definition of "material support or resources," another recent aspect of the Ninth Circuit's decision in the*Humanitarian Law*

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Project case also deserves mention. Recently, in the same decision in which it held the terms "personnel" and "training" to be unconstitutionally vague, the Ninth Circuit also held that an individual, to violate the material support statute, either must have knowledge of an organization's designation as a foreign terrorist organization or have "knowledge of the unlawful activities that caused the organization to be so designated." *Humanitarian Law Project*, 352 F.3d at 400. Unfortunately, one could interpret the latter part of this requirement to mean that a defendant must have knowledge of the facts contained in the generally classified, internal State Department documents, which form the basis for the Secretary of State's decision to designate an organization as a foreign terrorist organization. The Department believes that such a burdensome scienter requirement is not compelled by 18 U.S.C. § 2339B and that it would dramatically reduce the utility of that statute. The Department assumes that the Ninth Circuit did not intend to impose such a requirement on prosecutors and has asked in its petition for rehearing*en banc* that this portion of the panel's opinion be clarified. Specifically, the Department has requested that the Ninth Circuit amend its opinion to make clear that the material support statute (18 U.S.C. § 2339B) requires only knowledge by the defendant of either the "foreign terrorist organization" designation, or that the organization engages in terrorist activity, as defined by relevant provisions of federal law.

While the Department does not believe that further clarification of the material support statute's scienter requirement is necessary, Congress may wish to provide such clarification in light of the Ninth Circuit's recent decision on this issue. And if Congress

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were interested in developing such a clarification, the Department would be happy to work with Congress on this issue.

In addition, if Congress were to revise the material support statutes to respond to the recent court decisions mentioned above, there are at least two deficiencies with the current statutory language that Congress should also consider addressing. First, at present, the material support statutes reach only a limited number of situations where material support or resources are provided to facilitate the commission of international or domestic terrorism. 18 U.S.C. § 2339A currently forbids the provision of material support or resources for only certain federal crimes likely to be committed by terrorists, such as biological weapons offenses or chemical weapons offenses. This list of predicate offenses contained in 18 U.S.C. § 2339A is too narrow. For example, it does not even encompass all federal crimes of terrorism identified in 18 U.S.C. § 2332b(g)(5), let alone other violent acts that constitute international or domestic terrorism under 18 U.S.C. § 2331.

The current limited scope of the material support statutes' coverage simply does not make sense. Because the acts of violence and destruction perpetrated by terrorists are not limited to those federal crimes currently listed in 18 U.S.C. § 2339A, there is no reason why the scope of that statute's coverage should be restricted in this manner. Consequently, the Department would support broadening the scope of the statute in this regard and would be happy to work with Congress to do so in a manner that would both increase the statute's efficacy and respect relevant constitutional constraints.

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In addition, Congress may wish to consider revising the definition of "material support or resources" in the current material support statute. At the moment, as noted above, that term is defined 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 or religious materials." 18 U.S.C. § 2339A(b).

The types of property and services specifically enumerated in this definition, however, may not potentially include all of the possible types and forms of support that could be given to terrorists or to foreign terrorist organizations. This could be problematic because any type of material support given to entities designated as foreign terrorists or foreign terrorist organizations furthers the violent aims and goals of the organization and threatens the vital interests and national security of the United States. Material support or resources of any kind are troublesome and, when support of a non-lethal nature is donated to a foreign terrorist or terrorist organization, such support frees up resources that may then be used to promote violence.

For this reason, the Department would support refining the definition of "material support or resources" to encompass any tangible or intangible property or service, while at the same time maintaining the current statutory exemptions for medicine and religious materials. Such a refinement would heighten the efficacy of the material support statutes and make it less likely that an individual prosecuted in the future for providing property

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or services to a terrorist or to a foreign terrorist organization would be able to take advantage of a loophole in the statutes. If such a change were to be made, the Department would support retaining the list of types of property and services currently set forth in the definition of "material support or resources" in order to illustrate forms of support clearly prohibited by the statute.

In conclusion, I would like to thank the Committee for holding today's hearing on such an important topic. The material support statutes are vital tools that are being used on a regular basis by the Department in the war against terrorism. While some courts have complained that certain terms in the statutes lack clarity, the Department respectfully disagrees with those contentions and is actively working to reverse these unfavorable court rulings. Should Congress, however, seek to revise the material support or resources statutes to respond to the concerns expressed by some courts, the Department would be happy to work with Congress to improve these vital laws. Thank you once again for allowing me to appear before you today, and I look forward to the opportunity to respond to any questions that you might have.

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TESTIMONY OF

Robert M. Chesney
Assistant Professor of Law
Wake Forest University School of Law

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

REGARDING

OVERSIGHT HEARING: AIDING TERRORISTS – AN EXAMINATION OF THE MATERIAL SUPPORT STATUTE

5 MAY 2004

Dear Chairman Hatch, Senator Leahy, and the Honorable members of the committee,

I write in connection with the Judiciary Committee's upcoming oversight hearing "Aiding Terrorists – An Examination of the Material Support Statute," and request that the following testimony be admitted into the Congressional Record.

Over the past two-and-a-half years, the material support statute – 18 U.S.C. § 2339B – has become the most significant prosecutorial tool in the Justice Department's effort to prevent future terrorist attacks. A number of courts and commentators, however, have questioned its constitutionality on various grounds. These criticisms – particularly as embodied in recent holdings by the Ninth Circuit Court of Appeals and federal district courts in New York and Florida – are for the most part overstated, but in some limited respects do warrant attention by Congress.

In the pages that follow, I hope to place these issues in context first by reviewing the origins of the material support law and then by describing the extent to which federal courts have divided on the constitutionality of the statute. I conclude with a brief assessment of the merits of the arguments on which these courts have focused.[1]

[1] For a lengthier discussion of my views on the constitutionality of § 2339B, see Robert M. Chesney, "Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique," 101 MICH. L. REV. 1408 (2003) (concluding, in the course of reviewing two recent books by Professor David Cole, that § 2339B on its face does not involve unconstitutional "guilt by association", but also noting that a specific intent requirement would have to be read into the law in the limited circumstance where the government proposed to apply the statute solely on the basis that the defendant provided himself or herself as "personnel" to a designated organization).

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I. Origins of the Material Support Law

A review of the origins of the material support law indicates that the law was at least twelve years in the making, and the product of a bipartisan effort to empower the Executive Branch to embargo foreign sub-state organizations in much the same manner that it traditionally has been empowered to embargo hostile foreign states.

The first proposal to criminalize the provision of assistance to terrorists or terrorist organizations seems to have arisen in 1982 in the wake of revelations about a former CIA employee, Edwin Wilson, involved in exporting explosives and equipment to Libya. The "Antiterrorism and Foreign Mercenaries Act" would have criminalized the provision of military or intelligence assistance not only to the government of Libya but also to any other foreign government or sub-state terrorist organization designated by the President.[2] The bill died in committee, but the concept reemerged two years later in the proposed "Prohibition Against the Training or Support of Terrorist Organizations Act." This bill would have made it a crime punishable by up to ten years' imprisonment to provide support, training, or services to the "armed forces" or "intelligence agencies" of any group or government identified by the Secretary of State as engaging in or supporting international terrorism threatening U.S. national security. A section-by-section analysis of the proposal explained that the support provision was intended to address "the problems of United States nationals or business entities providing the technology of terrorism for use abroad and of the United States being used by foreigners for such a purpose."[3]

The proposal met considerable resistance. When Secretary of State George Shultz testified in Congress in June 1984, for example, representatives "peppered Shultz with problematic cases. . . . What definitions would distinguish between Afghan rebels and Nicaraguan contras on one hand, and Salvadoran rebels on the other?"[4] The Washington Post editorialized against the support provision on several occasions, raising concerns that the definition of forbidden support was too vague and that the provision vested too much discretion in the Secretary of State:

> "If – use your imagination – a President Mondale were to appoint a Jesse Jackson secretary of state, is it not possible that the Nicaraguan rebels might be designated terrorists? Wouldn't it be reasonable to conclude that supplying food and military uniforms is a service in support of those terrorists? Such acts are not now criminal, but they might be if the administration's own anti-terrorism bill becomes law without amendment."[5]

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[2] S. 2255 (1982).

[3] H. Doc. 211, 98th Cong., 2d Sess. 1-4 (1984), 20 WEEKLY COMP. PRES. DOC. 590, 591-94 (Apr. 30, 1984) (quoted in Marian Nash Leich, "Four Bills Proposed by President Reagan to Counter Terrorism", 78 AM. J. INT'L L. 915 (Oct. 1984). *See also* S. 2626/H.R. 5613, 98th Cong., 2nd Sess. (1984); President Ronald Reagan, "Message to the Congress Transmitting Proposed Legislation to Combat International Terrorism," Apr. 26, 1984 (available at www.reagan.utexas.edu/resource/speeches/1984/42684a.htm).

[4] "A Question of Definition", TIME, June 25, 1984, at 19. The implicitly positive reference to Afghan rebels is, of course, quite ironic.

[5] "One Man's Freedom Fighter . . .," WASH. POST, July 20, 1984.

Congress eventually passed the other aspects of President Reagan's 1984 antiterrorism initiatives, but the support provision died in committee.[6] One of the bill's original Senate sponsors, Jeremiah Denton of Alabama, had come to the conclusion that the bill was "too loosely written" in that it "seemed to include even speech if you advocated support of, say, the PLO . . . or the IRA." Nonetheless, Senator Denton revived the proposal the next year when he introduced substantially identical language in the "International Terrorism Control Act."[7] With less fanfare, the proposal again died in committee.

Several years later, the support for terrorism concept reemerged in the context of immigration law. Section 212 of the Immigration and Nationality Act (8 U.S.C. § 1182) already provided for exclusion from the United States of aliens who had engaged in terrorist activity, but legislation in 1989 expanded the meaning of "engage in terrorist activity" to include activity which the alien knew or reasonably should known would provide "material support" to a person, group, or government engaged in terrorist activity. "Material support" in turn was defined to include not only lethal items such as weapons and explosives, but also the provision of safe houses, transportation, communication, funds, false identification, and training. Additionally, material support was defined to include efforts to solicit funds or other valuables on behalf of organizations engaged in terrorist activity. The next year, the Immigration Act of 1990 expanded the definition of material support to include the solicitation of membership in a terrorist group.

In January 1991, with bipartisan support, Senator Joseph Biden proposed legislation (the "Comprehensive Counter-Terrorism Act of 1991") in a renewed attempt to criminalize activities supporting terrorist groups. The proposal would have made it a felony to provide material support – defined to include money, weapons, equipment, and personnel – *with knowledge* that the recipient intended to use the support in connection with terrorism. The bill received considerable backing from the State Department,[8] and eventually became folded into the omnibus crime bill proposal for 1991. Commenting on the house version of the proposal, one representative explained that the new law was

> "necessary because of increased concern about the nature of assistance being given to terrorists. Fortunately, fewer governments are providing assistance to terrorist groups, but unfortunately, front organizations and individuals are stepping in to provide support to terrorists. The problem became evident when investigators uncovered front companies helping the Abu Nidal Organization. Those companies have been shut down, and I hope that by establishing a criminal offense for such activities in the United States we can deter terrorists and their sympathizers before they set up new operations, either here or abroad."[9]

Notwithstanding considerable support for the measure, however, it did not become law at that time.

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[6] "A Crime to Aid the Contras?", WASH. POST, Dec. 18, 1984; Larry Margasak, "Denton To Push for Law Against Americans Helping Terrorists", Associated Press, May 19, 1995 (1985 WL 2861924).
[7] S. 1940, 131 Cong. Rec. S17604-04, 99th Cong., 1st Sess., Dec. 13, 1985.
[8] *See* Letter from Wendy R. Sherman, Assistant Secretary of State for Legislative Affairs, to Rep. Lee Hamilton, Chairman, Committee on Foreign Affairs, House of Representatives, May 16, 1994, *reprinted at* 139 Cong. Rec. E1519-01 (describing State Department involvement with the 1991 bill).
[9] 137 Congressional Record H7995-03 (October 17, 1991) (1991 WL 208635)

Not long after the attempted destruction of the World Trade Center in 1993, Congress once more took up the issue of criminalizing material support. This time the proposal became law. In 1994 Congress enacted 18 U.S.C. § 2339A, making it a crime to provide "material support or resources," or to conceal or disguise the same, "*knowing or intending* that they are to be used in preparation for, or in carrying out, a violation" of any of more than two dozen specific crimes of violence specified in the statute. 18 U.S.C. § 2339A(a) (italics added). As amended since 1994, the statute defines "material support or resources" to include the provision of a comprehensive array of items and services that may be grouped into four categories:

(1) funding (currency, monetary instruments, financial securities, and financial services)

(2) tangible equipment (weapons, lethal substances, explosives, false documentation or identification, communications equipment, and other physical assets, except medicine or religious materials)

(3) logistical support (lodging, expert advice or assistance, safehouses, facilities, training and transportation); and

(4) personnel.

See 18 U.S.C. § 2339A(b).

Critics of the new law argued that it was of little use in preventing the flow of support to terrorist organizations in situations in which the government could not prove the donor intended or knew the aid would facilitate the commission of a particular crime.[10] Two years later – perhaps reflecting these criticisms, and certainly reflecting the impact of the 1995 Oklahoma City bombing – Congress enacted a companion material support law, 18 U.S.C. § 2339B.

The new law employed the same definition of "material support or resources" as § 2339A, but otherwise differed substantially. In one sense, the new law was narrower than the old: Whereas § 2339A permitted punishment irrespective of the identity of the recipient of the support, § 2339B applied only to support given to "foreign terrorist organizations" formally designated as such by the Secretary of State. But in other ways, the new law was broader. Most notably, the new law did not require the government to prove the donor knew or intended to facilitate any particular crime. On the contrary, § 2339B required proof only that the donor provided the support "knowingly" to a designated organization. *See* 18 U.S.C. § 2339B(a)(1).

II. Section 2339B in the Courts

A number of courts have had occasion over the past few years to address the constitutionality of § 2339B. These decisions have focused on five arguments in particular: (1) whether the statute unconstitutionally imposes "guilt by association; (2) whether the statute otherwise infringes freedom of expression; (3) whether the statute is overbroad; (4) whether the

[10] *See, e.g.*, Todd Gillman, *FBI Looks Into Islamic Fund Raising: Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A (citing unnamed diplomatic and law enforcement sources).

definition of "material support or resources" is vague; and (5) whether due process requires that some form of specific intent mens rea requirement be read into the statute. As described below in more detail, courts have uniformly rejected arguments under the first three headings, but have split sharply on the last two.

A. *Humanitarian Law Project v. Reno*

The first significant decision was rendered by a panel of the Ninth Circuit in March 2000. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130. The appeal arose out of a declaratory judgment action brought by a group of organizations and individuals interested in rendering humanitarian and political services to two designated foreign terrorist organizations – the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). The panel opinion, authored by Judge Kozinski, rejected several First Amendment challenges asserted by the plaintiffs. First, the court concluded that the law did not amount to "guilt by association" because it did not punish mere membership in a designated organization. *Id.* at 1133. Likewise, the court concluded, the law did not punish advocacy on behalf of the organization and therefore was not unconstitutional for lack of a mens rea element requiring the government to prove a defendant's intent to facilitate the organization's illegal activities. *Id.* at 1133-34. The court noted that "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of the donor's intent. Once the support is given, the donor has no control over how it is used." *Id.* at 1134. The court also rejected an analogy to *Buckley v. Valeo*, 424 U.S. 1 (1976), recognizing that § 2339B is content-neutral with respect to any expressive elements involved in providing a designated group with "material support or resources" and accordingly refusing to apply strict scrutiny in its review of the law. *See* 205 F.3d at 1134-36. The court expressly noted that in passing § 2339B, Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution given to such organizations aids their unlawful goals," and "that Congress has the fact-finding resources to properly come to such a conclusion." *Id.* at 1136 (internal quotation marks and citation omitted).

Humanitarian Law Project was not a complete victory for the government, however. The court went on to uphold the plaintiffs' vagueness challenge to the terms "training" and "personnel" in the definition of "material support or resources." *Id.* at 1137-38. Citing the well-established standard for a vagueness challenge – that the law must be "sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited" – the court concluded that such a person reasonably but incorrectly might conclude that the "personnel" prohibition would encompass the clearly-protected act of advocacy. *Id.* at 1137. The court declined to adopt a narrowing construction offered by the government (restricting the "personnel" term to persons subject to the "direction or control" of the group), and in fact extended a similar analysis to the term "training." *Id.* at 1138.

B. *United States v. Lindh; United States v. Goba; Boim v. Quranic Literacy Institute; United States v. Sattar*

The next occasion for a court to consider First Amendment challenges to the material support law did not arise until after 9/11. The prosecution of John Walker Lindh presented the

first such opportunity. In a lengthy decision denying Lindh's motion to dismiss the indictment on a variety of grounds, Judge Ellis addressed substantially the same arguments that had arisen in the Ninth Circuit's *Humanitarian Law Project* decision. *See United States v. Lindh*, 212 F.Supp.2d 541, 568-74 (E.D.Va. 2002). In the course of rejecting Lindh's freedom of association argument, the court expressly noted the analogy between the material support law and the more familiar practice of placing embargoes on foreign states. *Id.* at 570. As the court observed, "there is no principled reason for according different constitutional treatment to restrictions on supplying goods or services to a foreign entity depending on whether the entity is a hostile foreign nation or an international terrorist organization and its host state. If the First Amendment is not offended in one case, it is similarly not offended in the other." *Id.* at 571. The court went on to reject the argument that § 2339B is overbroad, judging that any potential overbreadth was small in relation to the statute's plainly legitimate scope. *Id.* at 572-73. Finally, the court broke with *Humanitarian Law Project*, finding the definition of "personnel" and "training" to be sufficiently clear on their face that a reasonable person would not conclude that the terms encompassed protected advocacy. *Id.* at 574.

The *Lindh* approach was followed by Magistrate Judge Schroeder on the government's motion for pretrial detention in the case of the so-called "Lackawanna Six." *See United States v. Goba*, 220 F.Supp.2d 182, 193-94 (2002) (following the vagueness holding in *Lindh* rather than *Humanitarian Law Project*). Near the same time, the Seventh Circuit echoed the Ninth Circuit's conclusion that § 2339B's impact on First Amendment rights is incidental, triggering review under the intermediate standard set forth in *Buckley* rather than strict scrutiny. *See Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1025-27 (7th Cir. 2002) (upholding the material support law in the context of a civil suit premised on a violation of § 2339B).

Finally, in the summer of 2003, Judge Koeltl of the Southern District of New York rendered a decision on the constitutionality of § 2339B closely paralleling that of the Ninth Circuit in *Humanitarian Law Project*. *See United States v. Sattar*, 272 F.Supp.2d 348 (S.D.N.Y. 2003) (granting in part and denying in part the motion to dismiss the indictment in the "Lynne Stewart" case). Following the Ninth Circuit, the court agreed that the "personnel" term in the statute was unconstitutionally vague, and it extended this analysis to the portion of the definition dealing with "communications equipment" as well. *Id.* at 360. On the other hand, Judge Koeltl joined the *Lindh* court in rejecting an overbreadth challenge and all the prior decisions in rejecting the defendants' freedom of association challenge. *Id.* at 368.[11]

C. *Humanitarian Law Project II; United States v. al-Arian*

The next major development in the judicial assessment of § 2339B occurred in December 2003, when another Ninth Circuit panel had occasion to address the plaintiffs' constitutional arguments against § 2339B in *Humanitarian Law Project*. *See Humanitarian Law Project v.*

[11] In the aftermath of this decision, the government obtained a superseding indictment bringing charges against the defendants under the narrower, earlier material support law, 18 U.S.C. § 2339A. The court recently rejected the defendants' constitutional challenge to that provision. *See United States v. Sattar*, __ F.Supp.2d __, 2004 WL 856320 (S.D.N.Y. Apr. 20, 2004).

Department of Justice, 352 F.3d 382 (9th Cir. 2003).[12] The opinion by Judge Pregerson reaffirmed the prior panel's vagueness holding, but this was not the most notable aspect of the opinion. More significantly, the panel majority - over a dissent by Judge Rawlinson - interpreted § 2339B to require proof that the defendant not only knew the identity of the organization to which aid was provided, but also that he or she knew the organization had been designated a foreign terrorist organization or else "knew of the unlawful activities that caused it to be so designated". *Id.* at 400. According to the court, anything less by way of a mens rea requirement would violate due process by imposing guilt on the defendant without a sufficient showing of intent. *Id.* at 394-403.

A few months later, Judge Moody in *United States v. al-Arian* upped the ante a bit further. 2004 WL 516571 (M.D. Fla. Mar. 12, 2004). According to the court in that case, the Ninth Circuit's "curative" interpretation of the § 2339B mens rea requirement did not suffice to preserve the statute from a due process challenge. The court explained that the Ninth Circuit's narrowing interpretation applied only to the defendant's knowledge of the recipient organization's unlawful purposes; in Judge Moody's view, a significant problem remained in light of the fact that the sweeping material support definition still precluded a range of supposedly innocuous conduct provided to such organizations. *Id.* at * 9-10. Accordingly, the court implied an additional and highly specific mens rea requirement: "the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a [designated organization]." *Id.* at 10.

D. *United States v. Khan; Humanitarian Law Project v. Ashcroft*

Subsequent decisions – there were two more district court rulings on § 2339B in March 2004, in addition to the *al-Arian* decision – have reinforced the divisions described above. In *United States v. Khan* (the so-called "Virginia jihad" case), Judge Brinkema in her bench opinion rejected the argument that the term "personnel" was unconstitutionally vague with respect to defendants who not only received training but who "serve[d] that organization as soldiers, recruiters, and procurers of supplies." __ F.Supp.2d __, 2004 WL 406338, at *27 (E.D. Va. Mar. 4, 2004). On the other hand, the district judge handling the latest phase of the *Humanitarian Law Project* litigation recently issued an opinion extending the Ninth Circuit's prior vagueness determinations to the portion of the material support definition concerning "expert advice or assistance," while at the same time continuing to reject overbreadth challenges to the law itself. __ F.Supp.2d __, 2004 WL 547534, at *13-15 (C.D. Cal. Mar. 17, 2004).

III. Conclusions & Recommendations

As the foregoing survey suggests, the material support law has experienced mixed results in the face of constitutional challenges.

No court, for example, has accepted the argument that the statute on its face is unconstitutionally overbroad. Any questions that might surround the law on its margins are small relative to its plainly constitutional scope of application. Similarly, no court has accepted

[12] The first *HLP* decision reached the Ninth Circuit on appeal from a motion for a preliminary injunction, while this one arose after the permanent injunction was issued.

the argument that the law unconstitutionally infringes defendants' rights of expression or association. On its face, the material support statute impacts these rights only incidentally to its purpose of suppressing the ability of foreign terrorist organizations to sustain their operations through support from persons subject to U.S. jurisdiction. As I have written elsewhere, an exception to this conclusion would arise in the event that the law was to be applied to punish a defendant for nothing other than "providing" *himself or herself* as a member of a designated organization.[13] That circumstance would amount to direct punishment of membership standing alone, and as such would require courts to read into the statute a specific intent requirement along the lines described by the Supreme Court in *Scales v. United States*, 367 U.S. 203 (1961) (reading a specific intent requirement into the membership provision of the Smith Act in order to preserve the statute against constitutional challenge).

Courts have, on the other hand, divided sharply on the issue of vagueness with respect to several aspects of the material support definition. The confusion in this area seems to flow from the concern expressed by some courts with the intentionally broad phrasing of these definitional terms. That broad sweep is not accidental, as the legislative history described above suggests; the goal of Congress in crafting the material support law was, in substance, to impose a comprehensive embargo on designated organizations in much the same way that the government might embargo a hostile foreign state. Seen from this perspective, the definitions are not particularly vague. Rather, they are broad – uncomfortably broad to some. The pertinent question, then, is whether the definitions are too sweeping in the sense that they might encompass too much conduct which the government cannot constitutionally punish. This, of course, is a question governed not be the vagueness doctrine but, instead, by the concept of overbreadth. As noted above, however, the relatively forgiving nature of overbreadth analysis has led courts uniformly to reject that form of challenge.

Finally, the most vexing question concerns the interpretation of the mens rea requirement of § 2339B. The Ninth Circuit's formulation (requiring proof not only (a) that the defendant knew the identify of the donee organization but also (b) that the defendant either was aware either that the organization had been designated by the Secretary of State or that the defendant knew the basis for such a designation) is at odds with the manifest congressional intent to foreclose aid to designated groups irrespective of the donor's possibly innocent intentions. These additional requirements – particularly the last option – may not as a practical matter impose undue burdens on prosecutors. The further demands imposed by the Florida court in *al-Arian*, however, are troubling. By interpreting the statute to require proof of specific intent to further the illegal ends of the recipient organization in all its applications, the district court in effect rejected the Congressional determination that all forms of support for a foreign terrorist organization, however well-intentioned, enhance the overall capacity of the organization to engage in activities harmful to U.S. national security and foreign policy interests. Taken to its logical conclusion, this reasoning would equally undermine the capacity of the government to impose complete economic embargoes on foreign states. In neither case is such a result mandated by considerations of individual constitutional rights, so long as the laws in question do not target membership or advocacy as such.

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[13] *See supra* note 1.

In light of the foregoing, Congress should give serious considerations to the following options:

• **Mens Rea** – In order to address due process considerations without unduly hampering the ability of the Executive to embargo foreign terrorist organizations in all respects, Congress should considering clarifying § 2339B's knowledge requirement in a manner that would require proof either that the defendant knew or should have known of the organization's designation, or that the defendant knew or should have known of the organization's violent activities.

• **Application to Membership** – The statute should be amended to address specifically the scenario in which a defendant provides himself or herself as "personnel" subject to the direction or control of a designated organization. Due process in that limited context requires proof that the defendant intended to facilitate the harmful ends of the organization. Were such a law on the books today, for example, it could be brought to bear effectively against individuals such as Zacarias Moussaoui, who notoriously declared in open court his affiliation with and desire to further the goals of al Qaeda.

• **Overbreadth and Vagueness** – Courts have not been inclined to strike down aspects of the material support definition on overbreadth grounds, but their manifest concern with the broad scope of the definition seems to have found an outlet nonetheless in the vagueness doctrine. As described above, there is some cause for concern with this development, and Congress may wish to consider amending the definition of material support in an effort to preclude the potential for application of the statute in outlandish or remote circumstances (such as prosecution of a person for sending a children's book to a Hamas-run day-care center) that, as a matter of prosecutorial discretion, would not actually be brought. At the least, Congress should consider adding language to the statute expressly precluding the possibility of prosecution under the material support law for pure advocacy in a situation not complying with the *Brandenburg* standard of incitement to illegal conduct. In the meantime, further judicial development of these issues can be expected.

Thank you for your consideration of and attention to these important issues.

Robert M. Chesney
Assistant Professor of Law

Testimony of David Cole Before the
United States Senate Committee on the Judiciary
on Constitutional Implications of Statutes Penalizing Support to Terrorist Organizations
May 5, 2004

INTRODUCTION

Thank you for inviting me to testify on the issue of federal government regulation of material support to terrorism. I am a professor of constitutional law at Georgetown University Law Center, and a volunteer attorney with the Center for Constitutional Rights. In the latter capacity, I have litigated several cases concerning material support to terrorist groups. In my view, while cutting off funding for terrorist activity is undoubtedly an extremely important objective, Congress and the Executive have pursued that objective through unnecessarily broad and unconstitutional means. The current legal framework for regulating material support to terrorist groups raises serious constitutional questions under the First Amendment rights to speech and association, and under the Fifth Amendment Due Process Clause. The basic problem is that Congress has legislated far too broadly, and has thereby given the Executive sweeping and largely unchecked authority to blacklist disfavored organizations and criminalize all support provided to them, without requiring any showing that the support is in fact connected to furthering terrorist activity. Indeed, in the USA Patriot Act, Congress went so far as to criminalize pure speech ("expert advice or assistance"), even where that speech is intended to further, and in fact furthers, only fully lawful, nonviolent human rights advocacy. Because of these constitutional concerns, federal courts have already declared unconstitutional significant aspects of the 18 U.S.C. §2339B, one of three federal statutes barring material support to terrorist organizations.

While the focus of this hearing, and of my testimony, will be on Section 2339B, it is important to note that there are in fact two other statutes that also prohibit material support to groups labeled "terrorist" by the Executive. Presidents Clinton and Bush have used the International Emergency Economic Powers Act (IEEPA) to label hundreds of individuals and organizations as "specially designated terrorists" and "specially designated global terrorists" – terms that literally have *no definition whatsoever* in statute or regulation. Support to any of these groups is a crime, again regardless of whether the support in fact furthers any terrorist activity. And the USA Patriot Act amended the Immigration and Nationality Act to authorize deportation of foreign nationals for supporting any group – domestic or foreign – that the Secretary of State and Attorney General decide to label a "terrorist organization," a term defined so broadly by the Patriot Act that it could literally encompass the Department of Homeland Security.

Examples of how far these statutes can go are already legion. President Clinton used IEEPA to label a U.S. citizen a "specially designated terrorist" without hearing, notice, or trial, and then to subject him to a kind of internal banishment, in which it is a crime for anyone else in

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the United States to provide him with anything of value. The government has taken the position that 18 U.S.C. §2339B applies to a lawyer providing legal advice to a designated "terrorist organization," even if that advice concerns a legal challenge to the designation itself. The government has stated that Section 2339B bans all provision of training and "expert advice" to designated groups, even where, as in one of the cases I am litigating, a human rights group seeks to provide training and advice in human rights advocacy, precisely to *discourage* the recipient organization from terrorism and to encourage it to pursue its goals through peaceful, lawful, and nonviolent means. And the first person convicted for violating Section 2339B after a jury trial was sentenced to 155 years in prison for smuggling cigarettes across state lines and donating $3500 to Hezbollah.[1] (His compatriots, who engaged in the same smuggling but did not make a donation, received sentences of about five years each). Finally, the government has recently invoked the immigration version of the "material support" statute, part of the USA Patriot Act, to seek the deportation today of two longtime lawful permanent residents for having distributed magazines of a PLO group in the 1980s, when it was perfectly lawful to do so.[2]

In this testimony, I will briefly set forth the three federal legal regimes that penalize "material support" to "terrorist organizations," and then discuss the principal constitutional objections that they raise. In summary, the constitutional problems raised by these schemes are threefold.

- First, all of these statutes impose guilt by association, in violation of both the First and Fifth Amendments, because they hold individuals responsible not for their own terrorist conduct, not even for support of terrorist conduct, but for support of groups that in turn have engaged in terrorist conduct.

- Second, 18 U.S.C. §2339B, as amended by the USA Patriot Act, is unconstitutionally vague and infringes on constitutionally protected speech, because it penalizes pure speech, without requiring any showing that the speech is intended and likely to produce imminent lawless action, as required by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969).

- Third, all of these statutes infringe on basic due process protections, because they grant the Executive virtually unfettered discretion to blacklist disfavored organizations and individuals, without affording them any adequate process to challenge their designation.

1. THE LEGAL REGIMES THAT REGULATE SUPPORT TO "TERRORIST ORGANIZATIONS"

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[1] United States v. Hammoud, C.A. No. 03-4253 (4th Cir. appeal pending 2004).

[2] Matter of Hamide and Shehadeh, Nos. A 30 660 528, A 19 262 560 (Imm. Ct. Los Angeles, CA, pending 2004).

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Three different federal statutes authorize executive officials to designate "terrorist organizations" and punish "material support" provided to them. All three statutes share a common attribute – they penalize support of designated groups without regard to whether the individual who provided support did so to discourage or encourage violence, and without regard to the effect of the support in question. In addition, all three statutes afford the executive branch a virtual blank check in blacklisting disfavored groups.

A. 18 U.S.C. §2339B and 8 U.S.C. §1189

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act (AEDPA) codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, and amended by the USA Patriot Act, authorize the Secretary of State to designate "foreign terrorist organizations," and make it a crime for anyone to support even the wholly lawful, nonviolent activities of designated organizations.

Under 8 U.S.C. § 1189(a)(1), "[t]he Secretary is authorized to designate an organization as a foreign terrorist organization . . . if the Secretary finds that -- (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined at [8 U.S.C. § 1182(a)(3)(B)]); and ©) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." Id. The term "terrorist activity" is broadly defined in 8 U.S.C. § 1182(a)(3)(B) far beyond its commonly understood meaning to include virtually any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain. "National security" is also broadly defined in 8 U.S.C. § 1189©)(2) to mean "national defense, foreign relations, or economic interests of the United States." The Secretary's determination that a group's activities threaten our "national security" under the statute is judicially unreviewable. People's Mojahedin Org. of Iran v. U.S. Sec. of State, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). Thus, this statute is not limited to terrorist organizations as they are commonly understood, nor to national security as it is commonly understood, but broadly empowers the Secretary to criminalize support of any foreign group that has used or threatened to use a weapon and whose activities are deemed contrary to our *economic* interest.

Once the Secretary designates an organization and publishes the designation in the Federal Register, it becomes a crime, punishable by up to fifteen years of imprisonment and a substantial fine, to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so." 18 U.S.C. § 2339B(a). "Material support or resources" is defined 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 or religious materials.

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18 U.S.C. § 2339A(b).[3]

Unlike other federal statutes criminalizing support for terrorist activity, *see, e.g.*, 18 U.S.C. §2339A, AEDPA does not require any showing that the defendant intended that his donation be used for any illicit purpose. Congress simply adopted an irrebuttable presumption -- based on no factual predicate -- that *all* support to such organizations furthers their terrorist ends. AEDPA, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996). At the same time, and directly contrary to this presumption, the statute permits the donation of unlimited amounts of medicine and religious materials to designated organizations. 18 U.S.C. §2339A(b). Thus, the statute expressly discriminates between religious and political aid, permitting unlimited amounts of religious aid (*even if it is intended to further terrorist activity*),[4] while barring all political aid, even if it counters terrorism and promotes peace.

B. 8 U.S.C. §1182

Section 411 of the USA PATRIOT Act, codified at 8 U.S.C. §§1182 and 1227, makes it an excludable and deportable offense to have provided any material support to any organization designated by the Secretary of State. However, this statute defines "terrorist organization" even more expansively than 8 U.S.C. §1189, discussed above. Under 8 U.S.C. §1182(a)(3)(B)(vi), the Secretary of State, in consultation with the Attorney General, may designate as a "terrorist organization" any group that has ever planned "terrorist activity," defined to include any virtually any use of a weapon against person or property. He may also designate any entity that has gathered information on a target for "terrorist activity." Unlike 8 U.S.C. §1189, the organization need not be foreign, but may be domestic, and its activities need not be determined to be contrary to our "foreign policy, national defense, or economic interests." Indeed, this definition of "terrorist organization" is so broad that the Secretary of State could literally designate the Department of Homeland Security as a "terrorist organization," for one of its tasks is surely to gather information about potential targets for terrorist activity. Of course, such a designation would never occur, but the example illustrates how broadly the statute defines "terrorist organization." Certainly any domestic right-wing militia group, and several anti-abortion groups, could easily be designated.

Unlike 8 U.S.C. §1189, this provision provides no opportunity for review of the

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[3] These terms appear in 18 U.S.C. §2339A(b), but are incorporated by reference in 18 U.S.C. §2339B(g)(4) (2002). The USA Patriot Act expanded the definition of "material support" by adding "expert advice or assistance." Pub. L. No. 107-56, §805(a)(2), 115 Sat. 272 (2001).

[4] 18 U.S.C. § 2339A prohibits the provision of "material support or resources" for the purpose of furthering specified terrorist activities, but then exempts the provision of "medicine and religious articles" from the definition of "material support." Accordingly, even if an individual donated medicine *for the purpose of furthering terrorist activity*, his action would not be prohibited by the "material support" provisions, 18 U.S.C. §§ 2339A and 2339B.

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designation whatsoever. The group designated has no opportunity to challenge its designation, nor is there any requirement that the group be given any notice or opportunity to be heard by the Secretary of State in the designation process.

If a foreign national provides material support to one of these designated groups, he or she is automatically deportable, apparently without regard to whether his support was intended to further, or in fact furthered, any terrorist activity. Thus, a foreign national who offered peacemaking assistance to a designated group would be automatically deportable, and would have no defense on the ground that his support in fact convinced the group to abandon violence for peaceful means of furthering their ends.

In a case I am handling, the government has invoked these Patriot Act provisions recently to seek the deportation of two long-time lawful permanent residents, Khader Hamide and Michel Shehadeh, for allegedly having provided "material support" to a "terrorist organization" by distributing PLO magazines in the 1980s, when it was fully lawful to do so. (The magazines were then and are still available in libraries across the nation). The government has never alleged that Hamide or Shehadeh sought to further any illegal activities of the PLO group they are alleged to have supported.

C. International Emergency Economic Powers Act

The third statute authorizing designation of "terrorists" is the International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (2000). This statute was originally enacted to empower the President during emergencies to impose economic embargoes on foreign nations. It was used exclusively for that purpose until 1995, when President Clinton first used it to target not nations but disfavored political groups. He named ten Palestinian organizations and two Jewish groups as "specially designated terrorists," which had the effect of freezing their assets and making it a crime for anyone in the United States to provide the groups with any support, again regardless of the purpose and effect of the support in question. After the attacks of September 11, President Bush invoked the same authority to name "specially designated global terrorists." At the same time, he authorized the Secretary of the Treasury to designate anyone "associated with" a "specially designated global terrorist."

Remarkably, there is no legal definition anywhere – not in statutes or regulations – of a "specially designated terrorist" or a "specially designated global terrorist." Thus, the President and the Secretary of Treasury can apply this label to literally anyone or any group that can conceivably be reached under IEEPA. The only limitation IEEPA places is that there must be some "foreign interest" in the entity or person designated. But the statute has been used to designate even a United States citizen. Mohammed Salah, a U.S. citizen living in Chicago, has been labeled – without notice, trial, or hearing of any kind – a "specially designated terrorist." Under the terms of IEEPA, it is thereby a crime to provide Mr. Salah with any thing of value, or even to make a donation to him. Literally applied and enforced, the designation would lead to Mr. Salah starving to death, since it would be a crime for anyone even to sell him a loaf of bread.

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Yet this penalty was imposed without any jury, without any notice, without any hearing, and without any definition of the label imposed.

II. THESE STATUTES IMPOSE GUILT BY ASSOCIATION, IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS

The statutes described above prohibit virtually all associational support to selected political organizations, while granting executive branch officials effectively unreviewable discretion to target disfavored groups. These laws make it a crime to write an op-ed, provide legal advice, volunteer one's time, or distribute a magazine for any "designated" group, even if there is no connection whatsoever between the individual's support and any illegal activity of the proscribed group.

Under these statutes, an American citizen who sends a treatise on nonviolence to the Kurdistan Workers' Party to encourage it to forgo violence for peace can be sent to prison for fifteen years. This is so even if he proves that he intended the treatise to be used only for peaceful ends, and that it was in fact used solely for that purpose. Such a moral innocent can be said to be "guilty" only by association.

The Supreme Court has declared guilt by association "alien to the traditions of a free society and the First Amendment itself." NAACP v. Claiborne Hardware, 458 U.S. 886, 932 (1982). It violates both the Fifth Amendment principle that guilt must be personal, and the First Amendment right of association.

These statutes are materially indistinguishable from the McCarthy era laws that penalized association with the Communist Party. Congress specifically found that the Communist Party was a foreign-dominated group engaged in terrorism for the purpose of overthrowing the United States,[5] yet the Supreme Court consistently held that individuals could not be penalized for their Communist Party associations absent proof of "specific intent" to further the group's illegal ends.[6]

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[5]50 U.S.C. § 781 (West 1991) (repealed 1993).

[6]*See, e.g.*, United States v. Robel, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); Noto v. United States, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate

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These statutes require no "specific intent," and punish people solely for their associational support of specified groups. The Ninth Circuit in Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001), nonetheless concluded that 18 U.S.C. §2339B is valid because it does not penalize membership as such, but only "material support." But that distinction, if accepted, would make the prohibition on guilt by association a meaningless formality; instead of criminalizing membership in disfavored groups, legislatures could simply criminalize the payment of dues or volunteering of services to those groups. Since associations cannot exist without the material support of their members, the district court's reasoning eviscerates the right of association.[7]

The notion that material support can be penalized even if membership cannot is directly contrary to Supreme Court precedent. In NAACP v. Claiborne Hardware, for example, the Supreme Court unanimously held that the NAACP's leaders and members could not be held liable for injuries sustained during an NAACP-led economic boycott absent proof that "the individual[s] held a specific intent to further [the boycott's] illegal aims." 458 U.S. at 920. But on the Ninth Circuit's reasoning, the NAACP's thousands of individual *donors* could have been held liable without any showing of specific intent.

The asserted distinction between support and membership also cannot be squared with the Fifth Amendment requirement that the government prove *personal* guilt. In Scales v. United States, 367 U.S. 203 (1961), the case that established the "specific intent" standard, the Supreme Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status *or on conduct* can only be justified by reference to the relationship of that

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aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

[7] As the Supreme Court has said, "[t]he right to join together 'for the advancement of beliefs and ideas' . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" Buckley v. Valeo, 424 U.S. 1, 65-66 (1976) (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)). Monetary contributions to political organizations are a protected form of association and expression. *Id.* at 16-17, 24-25; Roberts v. United States Jaycees, 468 U.S. 609 (1984) (First Amendment protects nonprofit group's right to solicit funds); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295-96 (1981) (monetary contributions to a group are a form of "collective expression" protected by the right of association); Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1316 (9th Cir.) ("contributing money is an act of political association that is protected by the First Amendment"), *cert. denied,* 505 U.S. 1230 (1992); In re Asbestos Litig., 46 F.3d 1284, 1290 (3d Cir. 1994) (contributions to political organization are constitutionally protected absent specific intent to further the group's illegal ends).

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> status *or conduct* to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25 (emphasis added). In other words, the Fifth Amendment forbids holding a moral innocent culpable for the acts of others. Guilt by association is not limited to penalties based on membership alone: it encompasses any punishment of "status *or conduct*" that "can only be justified by reference to the relationship of that status *or conduct* to other concededly criminal activity." That is precisely the case here -- these statutes' prohibition on material support to specified groups is explicitly "justified by reference to the relationship of that ... conduct to other concededly criminal activity," namely the group's "terrorist activity."

There are many more precisely calibrated ways to stem the flow of funds for terrorist activity. Congress can and has made it a crime to provide material support to a wide range of terrorist crimes. 18 U.S.C. §2339A(a) (criminalizing aid to a long list of specific terrorist acts). Conspiracy and "aiding and abetting" statutes allow Congress to penalize not only those who actually commit acts of violence, but also those who engage in overt acts in furtherance of such conduct.[8] Money laundering statutes, recently strengthened by the USA PATRIOT Act, expressly prohibit the transmission of money or funds with the intent of promoting terrorist activity. 18 U.S.C. §1956.[9] And the Racketeering Influenced and Corrupt Organizations Act, or RICO, permits the government to target ostensibly legitimate activities when they are a front for illegal conduct.[10] Thus, the constitutional prohibition on guilt by association does not leave the government without resources for targeting the financing of terrorism. It simply requires them to target terrorism rather than association.

The government has argued that broadly criminalizing support even of groups' otherwise

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[8] Sheikh Omar Abdel Rahman, for example, was convicted of seditious conspiracy for his part in encouraging a plan to bomb various tunnels and bridges in New York City, even though he did not undertake any violent act himself. United States v. Rahman, 189 F.3d 88 (2d Cir. 1999), *cert. denied,* 528 U.S. 1094 (2000).

[9] The Money Laundering Control Act makes it a crime, among other things, to transmit funds "with the intent to promote the carrying on of specified unlawful activity," including terrorism. 18 U.S.C. §1956(a)(2)(A). The USA PATRIOT Act added extensive new money laundering provisions designed to facilitate the investigation, prevention, and prosecution of money laundering related to terrorism. USA PATRIOT Act, §§ 301-376.

[10] 18 U.S.C. §§ 1961-68. RICO prohibits the acquisition or maintenance of any enterprise through a pattern of racketeering, or with income derived from a pattern of racketeering. 18 U.S.C. § 1962. A wide range of terrorist activity and fundraising for terrorist activity is included within the definition of racketeering activity. *See* 18 U.S.C. § 1961(1) and 18 U.S.C. § 2332b(g)(5).

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lawful activities is necessary because money is fungible, and therefore any support, even to legitimate activities, frees up resources that can be used to support a group's illegal activities. That argument fails for three reasons. First, as a matter of logic it proves too much, for it would render nugatory the First Amendment's ban on guilt by association. That principle holds that the fact that a group engages in illegal activities -- even illegal activities that threaten national security -- does not permit the government to prohibit association with the group's legal activities. Yet on the government's view, because *all* support of a group frees up resources that could be used for illegal activities, *all* support to any group that engages in illegal activities could be criminalized. On this theory, the fact that the Democratic and Republican Parties violate campaign finance laws would authorize a prohibition on all support of those parties. The United States made just such a broad "freeing up" argument to the Supreme Court in United States v.Scales as a reason for rejecting the specific intent test, without success.[11] It should be similarly rejected here.

Second, neither these statutes nor the Executive's enforcement of them is consistent with the freeing-up theory. The criminal material support statute itself permits unlimited donations of "medicine and religious articles" to terrorist groups. 18 U.S.C. § 2339A(b). Yet donations of medicine and religious articles are just as capable of freeing up resources as the prohibited donations. The government has granted licenses to attorneys providing valuable services to "terrorist organizations." Moreover, the government has taken the position in litigation that the provision of services to a terrorist organization need not be prosecuted unless they are provided under the group's direction and control. But as the Ninth Circuit noted, whether or not services are provided under a group's direction and control, they have the same freeing-up effects.

III. 18 U.S.C. §2339B VIOLATES DUE PROCESS AND THE FIRST AMENDMENT BECAUSE IT CRIMINALIZES A BROAD RANGE OF PURE SPEECH AND OTHER INNOCENT ACTIVITY

Criminal statutes that threaten to chill speech and associational rights are subject to the most stringent vagueness scrutiny. *See, e.g.,* Reno v. American Civil Liberties Union, 521 U.S. 844, 871-72 (1997); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Section 2339B's prohibitions on the provision of "personnel," "training," and "expert advice or assistance" to designated organizations have the apparent effect of criminalizing virtually all human activity on behalf of such organizations, including a substantial amount of core political speech and advocacy entitled to First Amendment protection. Thus, in cases I have handled with the Center for Constitutional Rights, two unanimous panels of the Ninth Circuit have declared the ban on providing "personnel" and "training" unconstitutionally vague, and a district court has similarly declared the Patriot Act's ban on providing "expert advice or assistance" unconstitutionally

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[11] Brief for the United States on Reargument at 8, Scales v. United States, 367 U.S. 203 (arguing that "specific intent" showing is unnecessary "on the principle that knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself").

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vague. Humanitarian Law Project v. Ashcroft, 352 F.3d 382 (9th Cir. 2003); Humanitarian Law Project v. Reno, 205 F.3d 1130 (ith Cir. 2000), *cert. denied*, 532 U.S. 904 (2001); Humanitarian Law Project v. Ashcroft, No. CV-03-6107 , 2004 U.S. Dist. LEXIS 926 (C.D. Cal. Jan. 22, 2004); *see also* United States v. Sattar, 272 F. Supp.2d 348, 360 (S.D.N.Y. 2003) (also declaring ban on providing "personnel" unconstitutionally vague).

A. Personnel

The prohibition on providing "personnel" is virtually unlimited, and conceivably covers any personal services whatsoever, including a large number of core political activities. For example, it threatens to criminalize the Humanitarian Law Project ("HLP") and Judge Ralph Fertig for advocating on the PKK's behalf before the United Nations Commission on Human Rights and the United States Congress, for writing and distributing publications supportive of the PKK, and for working with PKK members at peace conferences and other meetings to further peace and justice for the Kurds.

The government has argued that "personnel" might be narrowly construed to be limited to "employees or others working under the direction or control of a specific entity." It has adopted that interpretation in its United States Attorneys' Manual, although that Manual is not binding on any U.S. Attorney, and creates no legally enforceable rights in criminal defendants. The courts have rejected that interpretation as unsupported by the statutory language. 205 F.3d at 1137-38.

In any event, the government's interpretation of the term "personnel" as work performed "under the direction or control of a specific entity" would not save the statute. Activities such as writing, speaking, and distributing literature are still protected under the First Amendment even when done under the direction or control of another entity. The constitutional limits on libel actions, for example, apply equally to the reporter who writes an allegedly libelous story for her newspaper, and to the newspaper that publishes it. And as a matter of American constitutional law, the First Amendment constraints apply equally to a journalist employed here on behalf of Newsweek and one employed by the Economist.

Moreover, the "construction" offered contradicts the asserted rationale for the statute -- that all support must be prohibited because any support may free up resources for terrorist activity. Action independently taken on a group's behalf but not under its control would have the same freeing up effects as action taken under its direction. As Judge Alex Kozinski explained for the Ninth Circuit,

> Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits within the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment.

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205 F.3d at 1137.

B. Training

The prohibition on providing "training" is also unconstitutionally vague. This ban would appear to encompass literally any kind of teaching at all, no matter what the subject, from human rights to yoga. The government has argued that because some forms of "training" -- such as "training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds" (Pet. Rhg. In Humanitarian Law Project at 15) -- could be constitutionally proscribed, the statute's unlimited prohibition on all "training" is not vague. This is a non sequitur. The fact that the government could more clearly define the prohibited activities, as Judge Kozinski suggested, simply illustrates that national security does not require a overbroad ban. The fact that training in bomb-building is not protected by the First Amendment does not justify the criminalization of training in human rights advocacy, peacemaking, kindergarten teaching, health services, or daycare provision. Moreover, the panel's invalidation of the bans on providing "training" and "personnel" does not bar the government from prosecuting the kind of training and personnel that is of justifiable concern. Any training or personal services offered to further terrorist activity is a crime under 18 U.S.C. §2339A, a provision not challenged here

C. Expert Advice or Assistance

The ban on providing "expert advice or assistance," added by the Patriot Act, is unconstitutional for the same reasons that the bans on "personnel" and "training" are unconstitutional. It is virtually a synonym for "training," and certainly no less vague, as a federal district court has held. It conceivably applies to legal advice, economic advice, advice on human rights advocacy and peacemaking, and medical advice. As a result, it criminalizes a wide range of clearly protected speech. As with "training," Congress could prohibit "expert advice or assistance" in furtherance of specific terrorist activity, but it cannot broadly prohibit expert advice having no connection to terrorism whatsoever.

The vagueness and overbreadth of the prohibition on "expert advice and assistance" appear to stem in part from Congress's failure to consider the consequences of applying this prohibition to 18 U.S.C. § 2339B, the "material support" statute at issue in this case. While sections § 2339A(a) and § 2339B(a) share the definition of material support in 18 U.S.C. § 2339A(b), Congress did not consider that interaction when adding the prohibition on "expert advice and assistance" in the USA PATRIOT Act. The legislative history of the USA PATRIOT Act, and its predecessor resolutions, suggests that Congress thought it was barring the provision of "expert advice and assistance" *only* to specified terrorist *activities*, as proscribed by § 2339A, and not to designated terrorist *organizations*, without regard to connection to terrorist activity, as is proscribed by the much broader § 2339B.

The House Committee on the Judiciary reported that, "The definition of providing material support to terrorists in title 18 is expanded to include providing 'expert advice or

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assistance.' *This will only be a crime if it is provided 'knowing or intending that [the expert advice or assistance] be used in preparation for, or in carrying out,' any 'Federal terrorism offense.* " H.R. Rep. No. 107-236(I) at 71 (2001) (emphasis added, quoting the text of the prohibition in § 2339A). Similarly, the Section-by-Section Analysis of the USA PATRIOT Act presented to the Senate stated that the amendment to the definition of material support would "prohibit[] providing terrorists with 'expert advice or assistance,' such as flight training, *knowing or intending that it will be used to prepare for or carry out an act of terrorism.*" 147 Cong. Rec. S10990-02, *S11013 (2001) (emphasis added). Congress apparently mistakenly thought that the prohibition on "expert advice and assistance" would incorporate the scienter requirement found in § 2339A, which requires intent to further specified terrorist activity. But as written, the prohibition also encompasses any "expert advice and assistance" provided to a designated group, which is punishable under § 2339B without regard to any connection between the advice or assistance and any terrorist activity of the recipient group.

Indeed, because the "expert advice or assistance" ban criminalizes pure speech, it also violates the First Amendment right of free speech. It criminalizes speech simply because it is offered to a group that has been proscribed by the Secretary of State. The statute requires no showing that the speech is connected to lawless or violent activity at all. As such, it violates the Supreme Court's ruling in Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969). In Brandenburg, the Court held that the government may not penalize advocacy unless it meets the high bar of proving that it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447-48. The USA PATRIOT Act prohibition contains no Brandenburg limitation, but penalizes *all* "expert advice and assistance," without regard to whether it has anything to do with lawless activity, much less whether it is intended and likely to produce imminent illegal conduct. Accordingly, under Brandenburg and McCoy, this statute cannot constitutionally be applied to plaintiffs' intended support, and plaintiffs are entitled to an injunction to protect their First Amendment rights.

IV. THE MATERIAL SUPPORT STATUTES VIOLATE THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE BECAUSE THEY AFFORD THE EXECUTIVE UNFETTERED DISCRETION IN PROSCRIBING POLITICAL GROUPS, WITHOUT A MEANINGFUL OPPORTUNITY TO CHALLENGE THE DESIGNATION

In addition to raising serious First and Fifth Amendment concerns because of their vagueness, overbreadth, and criminalization of pure speech and association, the material support statutes also raise significant constitutional issues because of the virtually unchecked discretion that they afford to executive officials to license First Amendment activity, and because of the failure to provide meaningful opportunities to challenge the designation of proscribed groups and individuals.

18 U.S.C. §2339B and 8 U.S.C. §1189 allow the Secretary of State to proscribe support of virtually any foreign organization that has engaged in or threatened to engage in an act of

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violence. The Secretary must find that the group's activities threaten our national defense, foreign policy, or economic interests, but that determination is not subject to judicial review. . People's Mojahedin Org. of Iran v. U.S. Sec. of State, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). Thus, the critical determining factor in who gets designated is left entirely to executive discretion.

The only judicial check on the process arises if a designated group challenges its designation in the D.C. Circuit within 30 days of its publication in the Federal Register. The review process does not permit the group to submit evidence to the court, but rests solely on the administrative record. The government may submit its evidence in camera and ex parte, denying the designated group any opportunity to challenge the evidence upon which the designation was based. Not surprisingly, few designation challenges have been filed, and in no case has the D.C. Circuit ruled that the designation was unfounded.

The person who is prosecuted for providing material support to a designated group has no right to challenge the propriety of the designation. Thus, if the Secretary of State were to improperly designate a foreign group that had never engaged in terrorism, but the designated group failed to file a challenge within the requisite 30 days, a criminal defendant subsequently charged with having provided that group with assistance could not defend by maintaining that the group never engaged in terrorism. This prohibition raises serious due process and First Amendment concerns, as a criminal defendant prosecuted for an act of association certainly should have the right to make the case that his activity was constitutionally protected. McKinney v. Alabama, 424 U.S. 669 (1976). Yet the statute precludes just such a defense.

The two other designation schemes – under IEEPA and the Immigration and Nationality Act – also provide inadequate review. Under IEEPA, a group whose assets have been frozen may challenge the designation and freezing order in court, but the courts have not permitted the entity to provide additional evidence in court, and the government may defend its designation using secret evidence submitted ex parte and in camera. Holy Land Foundation v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003). Most significantly, because there is no substantive definition of "specially designated terrorist" or "specially designated global terrorist," there is literally no substantive standard to assess the government's designation against. Thus, if the government were to label Amnesty International a "specially designated terrorist," there would be no basis for a court to challenge that finding; without a legal definition of the term, a court cannot assess whether the facts asserted meet the characteristics of a "specially designated terrorist."

The immigration statute provides no explicit procedure whatsoever for challenging the designation of a group as a terrorist organization under 8 U.S.C. §1182(a)(3)(B)(vi).

Thus, these statutes essentially empower executive branch officials to license core First Amendment activity – speech and association – by exercising virtually unfettered discretion in proscribing political groups, subject to minimal or no judicial review. They hinge substantial penalties – deportation, fines, criminal sentences – on any support provided to such groups, even

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if the support is indisputably shown to have *discouraged* rather than encouraged terrorist activity on the part of the recipient.

CONCLUSION

Cutting off financial support to terrorist activity is undoubtedly an important objective. But the material support statutes adopt constitutionally objectionable means in seeking to further that goal. They impose guilt by association, vaguely proscribe a wide range of pure speech and innocent associational activity, and grant executive officials unchecked licensing power over support to political groups. In short, in our zeal to further a legitimate goal, we have resurrected the unwise and unconstitutional tactics of the McCarthy era, giving government officials broad discretion to punish individuals not for their own culpable conduct, but for their speech and association.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, DC 20530*

May 5, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter dated April 13, 2004. In preparation for the Judiciary Committee's upcoming hearing on the terrorism "material support" statutes, we are pleased to provide you with the following information regarding the Justice Department's use of 18 U.S.C. § 2339A and § 2339B. These "material support" prosecutions also frequently involve another similar statute, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705, which we use to complement other charges or in plea negotiations. As a result, we are including terrorism-related IEEPA charges and dispositions in the following information.

Section 2339A was enacted on September 13, 1994. Although § 2339B was enacted in April 1996, it did not become operational until the Secretary of State designated the first set of 30 Foreign Terrorist Organizations (FTOs) on October 7, 1997. IEEPA became effective on January 23, 1995, the date of the first terrorism-related Executive Order (E.O. 12947).

Prior to September 11, 2001, the Department brought § 2339A or § 2339B prosecutions in only a handful of cases. This was due in part to internal information-sharing rules, thought to be required by the Foreign Intelligence Surveillance Act (FISA, 18 U.S.C. § 1801, *et seq.*), which limited access to FBI-collected intelligence to those personnel involved in non-law enforcement functions. Changes to these rules, made possible by the USA PATRIOT Act, combined with training we have conducted for prosecutors and investigators around the country, have led to a much higher number of material support cases. The following list reflects the § 2339A, § 2339B, and terrorism-related IEEPA charges brought so far, the date on which the original charges were brought, and the nature of the final disposition, if any. Per your request, we have denoted the cases involving "personnel," or "training" with an asterisk (*), and those involving "expert advice and assistance" with two asterisks (**):

1. *U.S. v. Fawzi Assi*; 2339B; 8/4/98; granted pretrial release and fled to Lebanon
2. *U.S. v. Bahram Tabatabai*; 2339B; 3/16/99; pleaded guilty and sentenced to 24 months imprisonment, with 1 sentenced to 155 years imprisonment in total

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3. *U.S. v. Connor Claxton, et al.*; 2339A; 7/28/99; 3 were convicted on weapons trafficking crimes and sentenced to less than 56 months imprisonment each
4. *U.S. v. Mohammed Hammoud, et al.*, 2339B; 7/31/00; 2 were convicted of material support
5. *U.S. v. Roya Rahmani, et al.*; 2339B; 3/13/01; case was dismissed on constitutional grounds by the District Court, and is now on appeal to the Ninth Circuit
6. *U.S. v. Karim Koubriti et al.*; 2339A; 9/27/01; 1 acquitted, 3 convicted at trial
7. **U.S. v. Ahmed Abdel Sattar, et al.*; 2339A; 4/8/02; trial to begin 5/3/04 (2339B charge dismissed)
8. **U.S. v. John Phillip Walker Lindh*; 2339B, IEEPA; 2/5/02; pleaded guilty (IEEPA) and sentenced to 240 months imprisonment
9. **U.S. v. Earnest James Ujaama*; 2339A, IEEPA; 8/28/02; pleaded guilty (IEEPA) and sentenced to 24 months imprisonment
10. **U.S. v. Jeffrey Leon Battle, et al.*; 2339B, IEEPA; 10/3/02; 6 defendants pleaded guilty (3 to IEEPA)
11. *U.S. v. Enaam Arnaout*; 2339A; 10/9/02; pleaded guilty to RICO Conspiracy and sentenced to 136 months imprisonment
12. **U.S. v. Yahya Goba, et al.*; 2339B; 10/21/02; all 6 pleaded guilty (one to IEEPA) and were sentenced to 7 to 10 years imprisonment
13. *U.S. v. Syed Shah, et al.*; 2339B; 10/30/02; 2 pleaded guilty; 1 pending trial
14. *U.S. v. Carlos Ali Romero Varela, et al.*; 2339B; 12/4/02; 4 pleaded guilty
15. *U.S. v. Bayan Elashi, et al.*; IEEPA; 12/17/02
16. *U.S. v. Hassan Moussa Makki*; 2339B; 1/23/03; pleaded guilty and sentenced to 57 months imprisonment
17. *U.S. v. Rafil Dhafir, et al.*; IEEPA; 2/18/03; 2 pleaded guilty
18. *U.S. v. Sami Amin Al-Arian, et al.*; 2339B; 2/19/03
19. ***U.S. v. Sami Omar Al-Hussayen;* 2339A, 2339B; 2/26/03; in trial
20. **U.S. v. Iyman Faris*; 2339B; 3/1/03; pleaded guilty and sentenced to 240 months imprisonment
21. *U.S. v. Tomas Molina Caracas, et al.*; 2339B; 3/25/03; 2 are in custody and on trial in Peru and are pending extradition to the U.S., 1 is still at large
22. **U.S. v. Randall Todd Royer, et al.*; 2339A, 2339B, IEEPA; 6/25/03; 2 acquitted at trial, 3 convicted of 2339A and IEEPA, and 6 pleaded guilty to weapons-related charges, 3 of whom have been sentenced
23. *U.S. v. Uzair Paracha*; 2339B; 10/8/03
24. *U.S. v. Abdurahman al-Amoudi*; IEEPA; 10/23/03
25. *U.S. v. Mahmoud Youssef Kourani*; 2339B; 11/19/03
26. *U.S. v. Mohammed Ali Hasan Al-Moayad, et al.*; 2339B; 12/15/03
27. *U.S. v. Hemant Lakhani, et al.*; 2339A; 12/18/03
28. *U.S. v. Yaudat Mustafa Talyi*; IEEPA; 1/9/04; convicted and sentenced to 10 months imprisonment
29. **U.S. v. Mohammed Abdullah Warsame*; 2339; 1/20/04

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The Honorable Orrin G. Hatch
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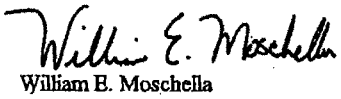
We hope that this information is useful to you. Assistant Attorneys General Wray and Bryant and Assistant Director Bald are looking forward to discussing the material support statutes with you and your colleagues. If we can be of further assistance on this or any other matter, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

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Statement of Chairman Orrin G. Hatch
Before the United States Senate Judiciary Committee
Hearing on
"Oversight Hearing: Aiding Terrorists –
An Examination of the Material Support Statute"

I think every American would agree that our government continues to face an unprecedented challenge. On September 11, 2001, we suffered a devastating attack on American soil that resulted in the unprovoked and tragic death of over 3000 of our fellow citizens. The Bush administration responded in a decisive and careful manner as we did here in Congress. One of the key actions this Committee took was to write, pass, and oversee the PATRIOT Act and other laws that provide the tools, information, and resources necessary to combat terrorist threats. As equally important, this Committee undertook the responsibility of overseeing the application of these laws.

This is part of our continuing bipartisan series of hearings examining the effectiveness of current laws aimed at protecting America from terrorism. One of this Committee's challenges is to ask whether additional tools and oversight are needed as we evaluate the adequacy of current laws, including the PATRIOT Act's impact on our security, privacy and civil liberties. I would like to thank my colleague, Senator Leahy, as well as the other Members of this Committee, for their cooperation in conducting these important hearings. I also want to express my appreciation for the men and women in the Justice Department who are leading this nation's vital efforts to prevent terrorism. I look forward to hearing the Department's views today.

Two of the Justice Department's most respected prosecutors recently represented the Department of Justice at a Judiciary Committee field hearing in my home state of Utah. Deputy Attorney General James Comey and Utah's U.S. Attorney Paul Warner provided thoughtful testimony on how the anti-terrorism statutes are being implemented.

Prior to enactment of the 2001 law, uncertainty existed as to whether the ban on giving material support to terrorists by U.S. citizens, including expert advice and assistance, applied to acts occurring outside the United States. We fixed that uncertainty with Section 805, which also strengthened the prior material support ban by (1) adding to the list of underlying terrorism crimes; (2) making it clear that material support includes all types of monetary instruments and activities, and (3) enhancing penalties for those convicted of providing material support to terrorists.

This law has enabled prosecutors to stop a number of terrorist plots. This law has facilitated the prosecution and conviction of several terrorist cells and many individuals throughout our country. In one of the first cases using this new provision, six U.S. citizens who lived near Buffalo, New York were convicted for providing support or resources to terrorists by participating in weapons training at an Al Qaeda terrorist training camp in Afghanistan. In March, Section 805 enabled the successful convictions of terrorists in Virginia who aided the Taliban. And currently, Section 805 is allowing the prosecution of a graduate student in Idaho charged with aiding terrorist groups devoted to

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waging jihad against Russia and Israel. I think this Committee can be justifiably proud of writing and passing Section 805.

Of course, I am aware that some people are concerned that, at some point in the future, one of the as-yet-unused material support provisions might be misused. I am as opposed to that as anyone.

I am also mindful that on two separate occasions, once in the Ninth Circuit and most recently in a California district court, this statute has been found to be vague. It is unfortunately the case, that courts in the Ninth Circuit are often not the best barometer of constitutionality. I look forward to learning more about this litigation today and was pleased to read that the Department is open to making any necessary refinements or additions to this particular section of the statute.

I hope this hearing will both bring to light the very real successes stemming from the PATRIOT Act's terror-fighting tools, as well as provide on opportunity to share constructive suggestions for clarifying the Act if necessary.

I know that everyone on this Committee shares the common goal of protecting our country from additional terrorist attacks. And I believe we are all committed to achieving that goal with complete respect for the fundamental freedoms of the American people. This Committee has a historical tradition of examining, debating, and resolving some of the most important legal and policy issues that have been presented to Congress. We are once again faced with an important task that will have a profound impact on our country's security and liberty. I know that we are up to the task.

# # #

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
"Oversight Hearing: Aiding Terrorists – An Examination of the Material Support Statute"
May 5, 2004

Today's hearing marks the long-awaited continuation of a series of oversight hearings we began last year on the USA PATRIOT Act. In fact, it is the first oversight hearing of any kind that we have held all year. I welcome it, and I welcome our distinguished witnesses.

I thank the Chairman for scheduling this hearing at a time that works for all of our witnesses so that we can hear different points of view rather than the echo chamber most often favored by the Administration. The entire Committee, and indeed, the entire Senate, benefits when we can hear from the leading authorities on both sides of an issue, as we will do today.

We are still waiting for Attorney General Ashcroft to appear before this Committee. It has been well over a year since the Attorney General's last, brief appearance on March 4, 2003. He returned to work nearly two months ago, after being briefly hospitalized for a medical condition, and there is no apparent reason for his continued delay in scheduling a time to testify and to answer the many oversight questions that have been piling up since his last appearance. I noticed he appeared last month before the 9/11 Commission.

We are also working with the Chairman to schedule an oversight hearing with FBI Director Mueller. I understand that the Director was available to testify next Wednesday, but we are not holding the hearing on that day because Secretary Ridge was not available, and the Chairman wanted him to testify at the same hearing. That is, of course, the Chairman's right. But if the Director is available to us next week, we should take advantage of that opportunity. I know we all have questions for him, and I see no reason why we should have to wait for his answers until Secretary Ridge can be here. Instead of an FBI oversight hearing with Director Mueller, the Committee will apparently take the day off next Wednesday – there has been no notice of any full Committee hearing for that day.

If we will not hear from the FBI Director next week, there is other oversight that we can and should do. I have long urged the Chairman to hold a hearing on the Administration's claim that it can designate U.S. citizens as "enemy combatants" and hold them incommunicado without charges. It is appalling to me that the Hamdi and Padilla cases have worked themselves all the way up to the Supreme Court – and will likely be decided by that Court – before this Committee has ever weighed in on this issue.

I have also asked the Chairman to hold a hearing on the reported abuse of prisoners by Americans in Iraq. Given the wide-ranging jurisdiction of this Committee over civil liberties and prisons, the reported role of civilian contractors, our role in enactment of the Military Extraterritorial Jurisdiction Act, and the lack of other congressional oversight,

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we need to act. I sent the Chairman a letter on Monday, following the revelations over the weekend.

At this morning's hearing we will focus on two criminal statutes that have come under some fire in the federal courts. Sections 2339A and 2339B of title 18 prohibit the provision of "material support" to terrorists and to designated foreign terrorist organizations. Since the 9/11 attacks, these statutes have become the weapon of choice for domestic anti-terrorism prosecution efforts. But with the increased use of these statutes, some problems have come into focus.

What Constitutes "Material Support"

First, the key term in the statutes – "material support" – is defined by reference to a laundry list of broad terms, all of them undefined. These include, for example, "currency or other financial securities"; "weapons"; "explosives"; "false documentation or identification"; "transportation"; "lodging"; "facilities"; "communications equipment"; "personnel"; "training"; and "expert advice or assistance."

While few of these terms are models of clarity, most are clear enough. For example, we all know what "currency" and "explosives" are. But some of the terms included in the "material support" definition are considerably less clear.

Does a person provide "personnel" merely by providing her own services, as the Government has argued in several cases? Is using the conference call feature on one's telephone enough to satisfy the prohibition on providing "communications equipment," as the Government has also argued? Would teaching international law or some other innocuous subject to the members of a designated terrorist organization qualify as "training"?

And what does it mean to provide "expert advice or assistance"? We added that term in the USA PATRIOT Act, at the request of the Administration, but in the rush to pass anti-terrorism legislation after the 9/11 attacks, there was little discussion of what was meant by the term, and important clarifications did not occur.

Then there is the meaning of the concept of materiality, itself. When Congress criminalized "material support," it intended there to be significance to the support, not just incidental contact with what is suspected to be a suspicious group.

Multiple courts have found parts of the "material support" definition to be unconstitutionally vague. Vague statutes raise concerns because they can punish people for behavior they did not know was illegal, lead to arbitrary and discriminatory enforcement by government officers, and chill protected activity.

The chilling effect of our "material support" laws is not hypothetical, but real. In 2002, for example, officials of the University of California at San Diego directed two student groups to remove links from their Web sites to the Web sites of groups that the U.S. State

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Department had identified as "terrorist organizations." The American Association of University Professors (AAUP) and others petitioned the school to reverse course, arguing that its construction of the term "material support" was overbroad and would prevent any professor, student, or campus news organization from using links for scholarly and reportorial purposes. As AAUP wrote to the University, "Americans have a right to inform themselves about any group, no matter how abhorrent its positions. Acts in furtherance of terrorism are prohibited; speech about it is not."

In February -- nearly three months ago -- I wrote to the Attorney General to ask how the Department interprets some of the terms included in the "material support" definition. I have yet to receive a response from the Attorney General. I hope to get some answers from our witnesses today.

Specific Intent Requirement

A second problem that courts have identified in this area relates to the level of intent required for conviction. As we all know, intent – or mens rea -- is a crucial component of our criminal justice system.

The first material support statute, section 2339A, is straightforward on the issue of intent. It prohibits providing material support or resources, "knowing or intending that they are to be used in preparation for, or in carrying out, [a terrorist act]."

By contrast, section 2339B appears to criminalize the provision of material support to a designated terrorist organization, regardless of whether the defendant had a specific intent to further the organization's unlawful ends. In prosecuting cases under this statute, the Government has argued that a defendant may be convicted for providing support to an organization even if he did not know the organization had been designated as a "terrorist organization," and even if his sole intent was to further the organization's lawful humanitarian goals.

Courts have resisted this interpretation, and for good reason. Otherwise, as one court noted, a woman who buys cookies from a bake sale outside of her grocery store to help displaced Kurdish refugees find new homes could be held liable so long as the bake sale had a sign that said the sale was sponsored by the Kurdistan Workers' Party, or "PKK", without regard to her knowledge of the organization's designation or other activities.

Or to take another example, Pentagon advisor Richard Perle could perhaps be considered to have violated the material support law earlier this year, when he spoke at a charity event sponsored by at least three organizations with ties to a designated terrorist organization. Mr. Perle believed he was assisting the Iran earthquake victims when he delivered the paid speech.

Designation of Terrorist Organizations

A third concern about section 2339B, also being challenged in the courts, relates to the

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process for designating organizations as "terrorist organizations." In a criminal prosecution under section 2339B, may the defendant challenge the State Department's designation of the organization he is alleged to have supported? Courts have gone both ways on this question.

Conclusion

I have noted a few areas in which the material support laws need work. There may be others. I hope we can make some progress this morning.

One of the dangers with vague statutes that accord maximum discretion to prosecutors is that we prosecutors have to be cognizant of our power and make judgments. When prosecutors overreach, overuse a provision, or overcharge, it puts pressure on the courts to rein them in and on the construction of the statute itself. Sometimes Congress is called upon to revisit an area and clarify the law to do what is intended.

Former Assistant Attorney General Viet Dinh, who has been a staunch defender of the USA PATRIOT Act, has recognized the need to clarify the material support laws to avoid government overreaching. In January 2004, he said: "I think we can all agree that there are certain core activities that constitute material support for terrorists, which should be prohibited, and others which would not be prohibited. Congress needs to take a hard look and draw the lines very clearly to make sure that we do not throw out the baby with the bath water."

Today's hearing gives us an opportunity to discuss where those lines should be drawn.

# # # # #

TESTIMONY OF

PAUL ROSENZWEIG

SENIOR LEGAL RESEARCH FELLOW
CENTER FOR LEGAL AND JUDICIAL STUDIES

THE HERITAGE FOUNDATION*

214 MASSACHUSETTS AVENUE, NE
WASHINGTON, DC 20002

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

REGARDING

OVERSIGHT HEARING: AIDING TERRORISTS – AN EXAMINATION OF THE MATERIAL SUPPORT STATUTE

5 MAY 2004

* The Heritage Foundation is a public policy, research, and educational organization operating under Section 501(C)(3). It is privately supported, and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2003, it had more than 200,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2003 income came from the following sources: Individuals 52%; Foundations 19%; Corporations 8%; Investment Income 18%; Publication Sales and Other 3%. The top five corporate givers provided The Heritage Foundation with 5% of its 2003 income. The national accounting firm of Deloitte & Touche audits the Heritage Foundation's books annually. A list of major donors is available from The Heritage Foundation upon request. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

Good morning Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify before you today on the challenge of maintaining the balance between security and constitutionally protected freedoms inherent in responding to the threat of terror, especially in the context of government investigations of terrorist organizations.

For the record, I am a Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am also an Adjunct Professor of Law at George Mason University where I teach Criminal Procedure and an advanced seminar on White Collar and Corporate Crime. I am a graduate of the University of Chicago Law School and a former law clerk to Judge R. Lanier Anderson of the U.S. Court of Appeals for the Eleventh Circuit. For much of the first 13 years of my career I served as a prosecutor in the Department of Justice and elsewhere, prosecuting white-collar offenses, and as an investigative counsel in Congress. During the two years immediately prior to joining The Heritage Foundation, I was in private practice representing principally white-collar criminal defendants and I continue to retain a private practice in this area. I have been a Senior Fellow at The Heritage Foundation since April 2002.

My perspective on this matter, then, is that of a lawyer and a prosecutor with a law enforcement background, not that of a technologist or an intelligence officer/analyst. I should hasten to add that much of my testimony today is based upon a series of papers I have written on various aspects of this topic and testimony I have given before other bodies in Congress, all of which are available at The Heritage Foundation website (www.heritage.org). More particularly, a significant portion of my testimony today will be published in an article in the Spring 2004 volume of the Duquesne Law Review, entitled "Civil Liberty and the Response to Terrorism" and I thank the Law Review for permission to republish it here. Other portions of my testimony are derived from the legal analysis contained in publicly available filings in the *Humanitarian Law Project* case that lies at the heart of today's hearing. For any who might have read my earlier work, I apologize for the familiarity that will attend this testimony. Repeating myself does have the virtue of maintaining consistency -- I can only hope that any familiarity with my earlier work on the subject does not breed contempt.

* * * * *

It is a commonplace for those called to testify before Congress to commend the Representatives or Senators before whom they appear for their wisdom in recognizing the importance of whatever topic is to be discussed – so much so that the platitude is often disregarded as mere puffery. Today, however, when I commend this Committee for its attention to the topic at hand – the difficulty of both protecting individual liberty and enabling our intelligence and law enforcement organizations to combat terror – it is no puffery, but rather a heartfelt view. I have said often since September 11 that the civil liberty/national security question is *the* single most significant domestic legal issue facing America today, bar none. And, as is reflected in my testimony today, in my judgment one of the most important components of a responsible governmental policy addressing this difficult question will be the sustained, thoughtful, non-partisan attention of America's

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elected leaders in Congress. Nothing is more likely, in my judgment, to allow America to find the appropriate balance than your engagement in this issue.

What I would like to do today is assist your consideration of this question by sharing with you some thoughts on a general framework for considering law enforcement issues in the post-9/11 world. I'd then like to apply that framework to the particular question facing this Committee -- the material support provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the USA Patriot Act.

A Framework for Analysis

Expansion of Executive Power and Oversight -- The over-arching theme that animates discussion of our anti-terrorism efforts is the expansion of executive authority. Supporters argue that in a post-9/11 world, the executive requires broader powers to combat the threat of terrorism. Critics, generically, equate the potential for abuse of Executive Branch authority with the existence of actual abuse. They argue, either implicitly or explicitly, that the growth in executive power is a threat, whether or not the power has, in fact, been misused in the days since the anti-terrorism campaign began. In essence, these critics come from a long tradition of limited government that fears any expansion of executive authority, notwithstanding the potential for benign and beneficial results, because they judge the potential for the abuse of power to outweigh the benefits gained.

This criticism of the Patriot Act (and related executive actions), however, sometimes misapprehends important distinctions: First, the criticism often blurs potential and actuality. To be sure, many aspects of the Patriot Act (and other governmental responses) do expand the power of the government to act. And Americans should be cautious about any expansion of government power, for assuredly such expansion admits of the *potential* for abuse. But by and large, the potential for abuse of new Executive powers has proven to be far less than critics of the Patriot Act have presumed it would be.[1]

Second, much of the belief in the potential for abuse stems from a misunderstanding to the true nature of the new powers that government has deployed to combat those threats. To a surprising degree, opposition to the executive response to terror is premised on a mistaken, and sometimes overly apocalyptic, depiction of the powers that have accrued to

[1] The Inspector General for the Department of Justice has reported that there have been no instances in which the Patriot Act has been invoked to infringe on civil rights or civil liberties. *See* Report to Congress on Implementation of Section 1001 of the USA Patriot Act (Jan 27, 2004); *see also* 'Report Finds No Abuses of Patriot Act," Wa. Post at A2 (Jan. 28, 2004). This is consistent with the conclusions of others. For example, at an earlier hearing conducted by this Committee on the Patriot Act Senator Joseph Biden (D-DE) said that "some measure of the criticism [of the Patriot Act] is both misinformed and overblown." His colleague, Senator Dianne Feinstein (D-CA) said: "I have never had a single abuse of the Patriot Act reported to me. My staff . . . asked [the ACLU] for instances of actual abuses. They . . . said they had none." Even the lone Senator to vote against the Patriot Act, Senator Russ Feingold (D-WI) said that he "supported 90 percent of the Patriot Act" and that there is "too much confusion and misinformation" about the Act. *See* Senate Jud. Comm. Hrg. 108th Cong, 1st Sess. (Oct. 21, 2003). These views -- from Senators outside the Administration and an internal watchdog -- are at odds with the fears often expressed by the public.

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the government. Our discussion of the "material support" provisions of the law (which, as you know, originated earlier than the Patriot Act) sometimes risks veering in this direction.

More fundamentally, those who fear the expansion of executive power in the war on terrorism offer a mistaken solution – prohibition. While we could afford that solution in the face of traditional criminal conduct we cannot afford that answer in combating the threat of terror. In the context of current circumstances, vigilance and oversight, enforced through legal, organizational and technical means, are the answer to potential abuse – not prohibition. We must keep a watchful eye to control for the risk of excessive encroachment, but if we do the likelihood of erosion of civil liberties can be substantially reduced. As I will outline in my testimony, I believe that much of the ongoing discussion about the scope of "material support" provisions fits comfortably within this oversight paradigm. Where others see an apocalyptic threat to civil liberty, I see a useful ongoing discussion about the contours of law enforcement in the age of terrorism.

Type I and Type II Errors -- And how are we, substantively, to judge those contours? In my view, we must recognize that September 11 changes the paradigm for analysis from that of traditional law enforcement/civil liberties questions. In part, this is because the full extent of the terrorist threat to America cannot be fully known. Yet, we do know that terrorism remains a real, imminent, potent threat to national and international security.

The U.S. State Department has a list of over 100,000 names worldwide of suspected terrorists or people with contact with terrorists.[2] Before their camps in Afghanistan were shut down, Al Qaeda trained at least 70,000 people and possibly tens of thousands more.[3] Al Qaeda linked Jemaah Islamiyah in Indonesia is estimated to have 3,000 members across Southeast Asia and is still growing larger.[4] Although the estimates of the number of al-Qaeda terrorists in the United States have varied since the initial attack on September 11, the figure provided by the government in recent, supposedly confidential briefings to policymakers is 5,000.[5] This 5,000-person estimate may include many who are engaged in fundraising for terrorist organizations or other material support activities – precisely the activities at issue in this hearing. It may also include "personnel" who were trained in some fashion to engage in jihad, whether or not they are actively engaged in a terrorist cell at this time. We cannot, of course, be precise. But these and other publicly available statistics support two conclusions: (1) no one can say with much certainty how many terrorists are living in the United States, and (2) some who are here may wish to act in the foreseeable future.

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[2] Lichtblau, Eric. "Administration Creates Center for Master Terror 'Watch List'." *New York Times*, Sept. 17, 2003.

[3] In an interview on NBC's "Meet the Press," Senator Bob Graham was quoted as saying, "...al-Qaeda has trained between 70,000 and 120,000 persons in the skills and arts of terrorism." July 13, 2003.

[4] Hunt, Terence. "Bush shows resolve by visiting Bali." *Chicago Sun-Times*, Oct. 22, 2003, p. 36.

[5] Bill Gertz, "5,000 in U.S. Suspected of Ties to al Qaeda." *The Washington Times*. July 11, 2002.

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The danger to America posed by the acts of terrorists arises from the new and unique nature of potential acts of war. Virtually every terrorism expert in and out of government believes there is a significant risk of another attack. Unlike during the Cold War, the threat of such an attack is asymmetric. In the Cold War era, U.S. analysts assessed Soviet capabilities, thinking that their limitations bounded the nature of the threat the Soviets posed. Because of the terrorists' skillful use of low-tech capabilities (e.g. box cutters) their capacity for harm is essentially limitless. The United States therefore faces the far more difficult task of discerning their intentions. Where the Soviets created "things" that could be observed, the terrorists create only transactions that can be sifted from the noise of everyday activity only with great difficulty. It is a problem of unprecedented scope, and one whose solution is imperative if American lives are to be saved.

As should be clear from the outline of the scope of the problem, the suppression of terrorism will not be accomplished by military means alone. Rather, effective law enforcement and/or intelligence gathering activity are the key to avoiding new terrorist acts. Recent history supports this conclusion.[6] In fact, police have arrested more terrorists than military operations have captured or killed. Police in more than 100 countries have arrested more than 3000 Al Qaeda linked suspects,[7] while the military captured some 650 enemy combatants.[8] Equally important, it is policing of a different form – preventative rather than reactive, since there is less value in punishing terrorists after the fact when, in some instances, they are willing to perish in the attack.

The foregoing understanding of the nature of the threat from terrorism helps to explain why the traditional law enforcement paradigm needs to be modified in the context of terrorism investigations. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. All lawyers have heard one or another form of the maxim that "it is better that 10 guilty go free than that 1 innocent be mistakenly punished."[9] This embodies a fundamentally moral judgment that when it comes to enforcing criminal law American society, in effect, prefers to have many more Type II errors (false negatives) than it does Type I errors (false positives).[10] That preference arises from two interrelated grounds: one is the historical distrust of government that, as already noted, animates many critics of the Patriot Act. But the other is, at least implicitly, a comparative valuation of the social costs attending the two types of error. We value liberty sufficiently highly that we see a great cost in any Type I error. And, though we realize that Type II errors free the guilty to

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[6] *See, e.g.* Dana Dillon, *War on Terrorism in Southeast Asia: Developing Law Enforcement*, Backgrounder No. 1720 (Heritage Foundation Jan. 22, 2004).

[7] Slevin, Peter. "U.S. Pledges Not to Torture Terror Suspects." *The Washington Post*, June 27, 2003, p. A01

[8] Taylor, Francis. "Transcript: State Dept Official Says War Against Terrorism Continues." June 9, 2003, available at http://usembassy.state.gov/tokyo/wwwh20030611a6.html

[9] *E.g. Furman v. Georgia*, 408 U.S. 238, 367 n. 158 (1972) (Marshall, J., concurring). The aphorism has its source in 4 Blackstone, Commentaries, ch. 27 at 358 (Wait & Co. 1907).

[10] "In a criminal case ... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty .... [T]he reasonable doubt standard is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re: Winship*, 397 U.S. 357, 372 (1970) (Harlan, J., concurring).

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return to the general population, thereby imposing additional social costs on society, we have a common sense understanding that those costs, while significant, are not so substantial that they threaten large numbers of citizens or core structural aspects of the American polity.

The post-September 11 world changes this calculus in two ways. First, and most obviously, it changes is the cost of the Type II errors. Whatever the cost of freeing John Gotti or John Mohammed might be, they are substantially less then the potentially horrific costs of failing to stop the next al-Qaeda assault. Thus, the theoretical rights-protective construct under which our law enforcement system operates must, of necessity, be modified to meet the new reality. We simply cannot afford a rule that "better 10 terrorists go undetected than that the conduct of 1 innocent be mistakenly examined."[11]

Second, and less obviously, it changes the nature of the Type I errors that must be considered. In the traditional law enforcement paradigm the liberty interests at stake is personal liberty – that is, freedom from the unjustified application of governmental force. We have as a model, the concept of an arrest, the seizure of physical evidence, or the search of a tangible place. As we move into the information age, and deploy new technology to assist in tracking terrorists, that model is no longer wholly valid.

Rather, we now add related, but distinct conception of liberty to the equation – the liberty that comes from anonymity.[12] Anonymity is a different, and possibly weaker, form of liberty: The American understanding of liberty interests necessarily acknowledges that the personal data of those who have not committed any criminal offense can be collected for legitimate governmental purposes. Typically, outside the criminal context, such collection is done in the aggregate and under a general promise that uniquely identifying individual information will not be disclosed. Think, for example, of the Census data collected in the aggregate and never disclosed, or of the IRS tax data collected on an individual basis, reported publicly in the aggregate, and only disclosed outside of the IRS with the approval of a federal judge based upon a showing of need.[13]

What these examples demonstrate is not so much that our conception of liberty is based upon absolute privacy expectations,[14] but rather that government impingement on our liberty will occur only with good cause. In the context of a criminal or terror investigation,

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[11] The closely related point, of course, is that we must guard against "mission creep." Since the justification for altering the traditional assessment of comparative risks is in part based upon the altered nature of the terrorist threat, we cannot alter that assessment and then apply it in the traditional contexts. *See* Paul Rosenzweig and Michael Scardaville, The Need to Protect Civil Liberties While Combating Terrorism: Legal Principles and the Total Information Awareness Program, Legal Memorandum No. 6, at 10-11 (The Heritage Foundation February 2003) (arguing for use of new technology only to combat terrorism); William Stuntz, "Local Policing After the Terror," 111 Yale L. J. 2137, 2183-84 (2002) (arguing for use of information sharing only to combat most serious offenses).

[12] *See* Phillip Kurland, "The private I," *The University of Chicago Magazine*, Autumn 1976, p. 8 (characterizing three facets of privacy, broadly characterized as anonymity, secrecy, and autonomy), *quoted in Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977).

[13] *E.g.* 26 U.S.C. § 7213 (prohibiting disclosure of tax information except as authorized for criminal or civil investigations).

[14] *But cf. Lawrence v. Texas*, -- U.S. --. 123 S.Ct. 2472 (2003) (recognizing that certain intrusions into individual privacy are beyond governmental power).

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we expect that the spotlight of scrutiny will not turn upon us individually without some very good reason.

Finally, it bears noting that not all solutions necessarily trade off Type I and Type II errors, and certainly not in equal measure. Some novel approaches to combating terrorism might, through technology, actually reduce the incidence of both types of error.[15] More commonly, we will alter both values but the comparative changes will be the important factor. Where many critics of the Patriot Act and other governmental initiatives go wrong is, it seems to me, in their absolutism – they refuse to admit of the possibility that we might need to accept an increase in the number of Type I errors. But that simply cannot be right – liberty is not an absolute value, it depends on security (both personal and national) for its exercise. As Thomas Powers has written: "In a liberal republic, liberty presupposes security; the point of security is liberty."[16] The growth in danger from Type II errors necessitates altering our tolerance for Type I errors. More fundamentally, our goal should be to minimize both sorts of errors.

"Material Support" for Terrorist Organizations

As you may gather from the foregoing general principles, my analysis of the "material support" provisions of the Patriot Act is a mixed verdict. I begin from the premise that, in this context (unlike, I hasten to add, most other aspects of the Patriot Act) the Executive response to terror has directly raised the specter of a potential threat to core First Amendment advocacy – opposition, for example, to the Administration's policy regarding Iraq, or globalization of the economy. Unlike other aspects of the Patriot Act (for example, the much-derided but absolutely necessary delayed notification provisions of Section 213) where the costs of Type II errors are high, and the relative costs of Type I errors minimal, in the context of investigating organizations that are both potential terrorist groups and potential political organizations the possible costs of a Type I error are higher. The fundamental right to openly criticize the government is a broad public right, held by all in common. As such we should be especially careful before allowing new policies to trench upon that right.

The Patriot Act might be seen to impinge on First Amendment freedoms in its prohibition against providing material support to terrorist organizations. Some organizations have humanitarian aspects to their work and say that their humanitarian efforts are distinct from the allegedly terrorist acts of related organizations. They thus argue that it impinges on First Amendment freedoms of speech and association for supporters to be criminally prosecuted when all they are doing is providing material support to the humanitarian aspects of the organization. The Executive responds, not unreasonably, that money is fungible and that contributions to the humanitarian aspects of the organization are readily "passed through" to the terrorist arms of related organizations.[17] We thus face the

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[15] *See* K. A. Taipale, "Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data," 5 Colum. Sci. & Tech. L. Rev. 2, 31 (December 2003) (discussing use of ensemble classifiers to reduce error rates) (available at http://www.stlr.org/cite.cgi?volume=5&article=2).

[16] Thomas Powers, "Can We Be Secure and Free?" *The Public Interest* (Spring 2003)

[17] Nor is the concern limited to the Executive Branch. The Senate Finance Committee has begun an investigation of certain charities, believing them to be fronts for Al-Qaeda fundraising. *See* Dan Eggen and John Mintz, "Muslim Groups' IRS Files Sought," Wa. Post, at A1 (Jan. 14, 2004).

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difficult conundrum of distinguishing between conduct aimed to support legitimate political and humanitarian groups and conduct that is a mere subterfuge for supporting terrorist organizations.

It must, first, be acknowledged that much of the ambiguity in the statute pre-dates the Patriot Act itself. It was an earlier statute, the Anti-Terrorism and Effective Death Penalty Act of 1996, (AEDPA) that gave the Secretary of the Treasury the authority to designate terrorist organizations, and made it a crime to provide material support to organizations so designated.[18] The Patriot Act, in section 810 enhanced the criminal penalties and also, in section 805, expanded the scope of the statute – making clear that it applied to those who provided expert assistance to terrorist organizations and applied to acts outside the United States. Section 805 also expanded the list of terrorism crimes for which it is illegal to provide material support and clarified that material support includes all types of monetary instruments. But the core concept – that providing support to terrorist organizations is wrong – predates September 11.

It must also be understood that Congress was cognizant of the First Amendment concerns of trenching on protected political advocacy when it enacted AEDPA, yet chose to act anyway – largely because of the felt necessity: "Several terrorist groups have established footholds within ethnic or resident alien communities in the United States," and "[m]any of these organizations operate under the cloak of a humanitarian or charitable exercise . . . and thus operate largely without fear of recrimination." Thus, Congress determined that the prohibition on material support was the only option available: "There is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further their terrorist activities abroad." As a consequence, Congress saw a prohibition on material support for terrorist organizations as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat."

Lest it be accused of excess, before passing AEDPA Congress also examined various constitutional issues raised by a ban on material support. The House of Representatives report acknowledged that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities." That report emphasized that the contemplated ban on material support "does not attempt to restrict a person's right to join an organization. Rather, the restriction only affects one's contribution of financial or material resources to a foreign organization that has been designated as a threat to the national security of the United States."[19] In short, even before September 11, Congress attempted to carefully construct a balanced and nuanced approach that both recognized the liberty interests at stake AND understood the necessity of enhanced investigative authority.

Vagueness -- Some nonetheless, challenge the application of these provisions – they think Congress got the balance wrong. Their principal avenue of challenge is to say that

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[18] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-31, 110 Stat 1214, § 302, 303 (codified at 8 USC § 1189 and 18 USC § 2339).

[19] *See* H.R. Rep. No. 104-383, at 43-45 (1995); *see id.* at 45 ("The ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups, overseas.").

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these provisions are vague – a contention with which I disagree. Nonetheless, as the Committee is no doubt aware, at least one appellate Court has held that the terms "personnel" and "training" as used in the material support provisions of AEDPA are impermissibly vague.[20] A district court likewise has held that the phrase "expert advice" – added to the law by the Patriot Act -- is impermissibly vague.[21]

Unlike the conclusions regarding the intent of the Patriot Act (to which I turn my attention in a moment), these decisions (which purport to find vagueness in words of common usage) are highly suspect. More significantly, because the construction given to the *scienter* requirement sufficiently limits potential abuse, the vagueness challenges to Section 2339 are unnecessary.[22]

Fair Notice and Language -- As a basic principle of due process, criminal prohibitions must give a person of ordinary intelligence "fair warning" of criminality.[23] The law does not need to define an offense with mathematical certainty, but must provide "relatively clear guidelines as to prohibited conduct."[24] This doctrine recognizes that some exercise of prosecutorial discretion in choosing cases is inevitable – all that the Constitution requires is that Congress, through the text of the statutes "establish[es] minimal guidelines to govern law enforcement."[25] To prove that a statute is unconstitutionally vague on its face, a defendant must "at least demonstrate[] implication of 'a substantial amount of constitutionally protected conduct.'"[26] Most importantly, if a class of offenses can be made constitutionally definite by a reasonable construction of the statute, the courts are under a "duty to give the statute that construction."[27] In my judgment, the Ninth Circuit panel failed to exercise that "duty," – one that could readily have been accomplished by consulting dictionary definitions of the words chosen by Congress.

The terms chosen by Congress – "personnel," "training," and "expert advice" – are sufficiently clear in their meaning to provide fair warning to a person of reasonable intelligence as to the potential that his or her conduct falls within the statutory prohibition. The term "personnel," for example, generally describes employees or others working affiliated with a particular organization and working under that organization's direction or control. The Oxford English Dictionary defines it as: "The body of persons engaged in any service or employment, esp. in a public institution, as an army, navy, hospital, etc.; the human as distinct from the *material* or material equipment (*of* an institution, undertaking,

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[20] *Humanitarian Law Project v. Department of Justice*, 352 F.3d 382, 403-05 (9th Cir. 2003).

[21] *See Humanitarian Law Project v. Ashcroft*, -- F.Supp.2d –, 2004 WL 547534 (C.D. Cal. Jan. 22, 2004); *see also* Eric Lichtblau, "Citing Free Speech, Judge Voids Part of Antiterror Act," NY Times at A1 (Jan. 27, 2004)).

[22] As I noted at the outset, portions of the legal analysis I discuss here were first advanced in filings by the Department of Justice in the *Humanitarian Law Project* case.

[23] *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

[24] *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

[25] *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

[26] *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348 (9th Cir. 1984).

[27] *United States v. Harriss*, 347 U.S. 612, 618 (1954).

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etc."[28] Thus, "personnel" has a discernible and specific meaning, familiar to members of the working world who act in organizations.

The word "personnel" is also used in numerous other places in the criminal code. For example, the code refers to: "United States personnel" assigned to a foreign mission or entities (18 U.S.C. 7(9)(B)); "ground personnel" preparing an aircraft for flight (18 U.S.C. 31(5)(A)); "senior personnel" of Executive Branch and independent agencies (18 U.S.C. 207(c)); civilian law enforcement "personnel," and "personnel" of the Department of Defense (18 U.S.C. 831(d) & (e)(2)(B)(ii)); and "personnel" of the Armed Forces (18 U.S.C. 2277(b)). If the term "personnel" is vague in as employed in AEDPA, then it is equally vague in these other contexts – yet no one would seriously offer that argument.[29]

Similarly, the ban against providing "training" to designated foreign terrorist organizations is not unconstitutionally vague. The verb "train" is commonly understood to mean: "To subject to discipline and instruction for the purpose of forming the character and developing the powers of, or of making proficient in some occupation." More particularly, to train is "[t]o instruct and discipline in or for some particular art, profession, occupation or practice; to make proficient by such instruction and practice."[30] It boggles the mind to suggest that Congress cannot proscribe teaching foreign terrorists how to become better terrorists – yet if the logic of the vagueness argument is followed, that would be the result. The statutory ban rightly can be read to preclude the training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds – and that's a good thing.

And, finally, "expert assistance" is not in any way vague. It is a common concept in the law -- for example, Rule 702 of the Federal Rules of Evidence defines "expert" testimony to be based on "scientific, technical, or other specialized knowledge." The Oxford English Dictionary offers a similar definition: "One whose special knowledge or skill causes him to be regarded as an authority; a specialist."[31] In turn, "advice" is an equally familiar term, meaning: "Opinion given or offered as to action; counsel." [32] I have no doubt whatsoever that I was called upon today to offer you my opinion because some member of the Committee staff thought I was an expert whose advice would be of value to you. To deny that those words clearly include my conduct today is, with respect, to deny that words have meaning.

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[28] *See Oxford English Dictionary* (1999 ed.) (CD-ROM Ver. 2.0) (emphasis in original) [hereinafter *OED* (1999 ed.)]; *see also Webster's Third New International Dictionary* (defining "personnel" as "a body of persons employed in some active service (as the army or navy, a factory, office, airplane)").

[29] To the extent greater clarity is necessary, it is added by the use of the word "provide" which precedes personnel in the statute and the word "to" that follows it. To "provide personnel to" an organization is to act as an employee of the organization under its direction and control – not, as some would posit, to act independently of that organization.

[30] *See OED* (1999 ed.).

[31] *See OED* (1999 ed.); *see also* (defining expert as "possessing special skill or knowledge").

[32] *See OED* (1999 ed.); *see also* Random House Dictionary 29 (2d ed. 1987) (" an opinion or recommendation offered as a guide to action, conduct, etc.").

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Indeed, with respect to all of these terms, one might reasonably ask opponents of the provision what language they would suggest to clarify the alleged vagueness. They can offer none, because, at bottom, their argument is the solipsistic one of Sartre.

Standing and Overbreath -- Nevertheless, the Ninth Circuit held that two of these phrases – "training" and "personnel" were vague, and a district court has determined that "expert assistance" is vague, as well. Looking closely at the reasoning of these two courts demonstrates how badly astray they have gone in their analysis.

The Ninth Circuit offered two examples of training that might raise First Amendment concerns: instructing a designated terrorist organization on how to petition the United Nations, and teaching conflict resolution to such an organization.[33] In some instances, the district court was concerned that similar actions could be construed as the provision of "expert assistance." But the possibility of such applications does not mean the statutes are vague and does not justify invalidating the provisions in their entirety on a facial challenge.

Indeed, settled law is to the contrary. An individual who asserts that a statute is vague must establish its vagueness as to his own conduct. The hypothetical "expert political advocate" who might be caught in the alleged vagueness of the words "training" and "expert assistance" is not a ground for facially invalidating the statute. Rather, the proper course is an as applied challenge to the law on vagueness grounds as cases and circumstances warrant. For this reason, as the Supreme Court has said, where an individual had fair notice from the language of the statute that his own conduct is prohibited, he has no standing to assert that the statute was vague as it might hypothetically be applied to others.[34]

What is really at issue here is not, with all respect to the Ninth Circuit, vagueness. The real question is one of alleged overbreadth. In other words, in my view the language of the statute is clear. But it is also clear that an ill-minded government could seek to apply these clear words to protected First Amendment conduct. Thus, the concern is a potentially over broad application of the law – beyond the core areas of concern that everyone concedes are constitutionally proscribable to areas of expressive conduct where the government should not tread. The Ninth Circuit, by ignoring the correct issue, missed the right analysis.

But even if it had asked the right question, the result -- voiding the statute -- would (as the district court recognized) be wrong. As the Supreme Court said, just this past year, "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'"[35] The Court went on to explain:

> [T]here are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' we

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[33] 352 F.3d at 404.

[34] *See Parker v. Levy*, 417 U.S. 733, 755 (1974).

[35] *Virginia v. Hicks*, 123 S. Ct. 2191, 2197 (2003).

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> have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, . . . before applying the 'strong medicine' of overbreadth invalidation.[36]

Thus, "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists."[37]

And this, at the core, demonstrates why the overbreadth challenge should fail. As already discussed, the text of the law does not suffer from unreasonable scope. And, as I noted at the outset, there are no "actual facts" of abuse that have been reported – no public advocates criminalized for their political speech. And the social costs of declaring these laws overbroad is potentially catastrophic. The United States has a "legitimate state interest" in controlling the "constitutionally unprotected conduct" of providing material support for terrorism – teaching a terrorist how to build a bomb is not protected free speech. Courts that rule otherwise fail to recognize that the paradigm of pure law enforcement can no longer be applied. The cost of the Type II errors is simply too great. And thus, as the Supreme Court said in a far more benign context in *Hicks*, the social costs of striking the entire law as overly broad counsel strongly against that result.

Nor is my view mere speculation. Already, these laws (AEDPA, (as codified in 18 U.S.C. § 2339, and Section 805 of the Patriot Act) have been used in a number of cases to prosecute potential terrorist activities. For example, John Walker Lindh was charged with providing "personnel" to al Qaeda based on acts of attending its terrorist training camp, swearing allegiance in *jihad*, and volunteering for military service in its forces. These charges were then upheld against vagueness and overbreadth attacks (demonstrating, by the way that the decisions that have been handed down by the courts on the West Coast are by no means ineluctable).[38] A half dozen other cases can also be identified.[39] To accept the reasoning of the courts on vagueness or overbreadth grounds is to despair of any real ability to address this conduct – and that is, regretfully, a result we simply cannot afford.

It is also, in my judgment, a result that is unnecessary. Rather than distorting the doctrines of vagueness and overbreadth to protect hypothetical innocent First Amendment actors, a far more direct and appropriate method (already adopted by the Ninth Circuit)

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[36] *Id.* (citations omitted; emphasis in original)

[37] *Id.* at 2198.

[38] See *United States v. Lindh*, 212 F. Supp.2d 541, 572-74 (E.D.Va. 2002).

[39] Other cases involving these provisions include *United States v. Battle*, (D. Oregon October 2, 2002) (defendants are charged with providing "personnel" by conspiring to travel to Taliban-controlled Afghanistan after September 11, 2001, to join al Qaeda forces fighting *jihad*, and to take up arms against the United States and its allied military forces serving in Afghanistan); *United States v. Goba*, (W.D.N.Y October 21, 2002) (defendants are charged with providing "personnel" by traveling to Afghanistan to engage in *jihad* training); *United States v. Stewart*, (S.D.N.Y., Sept. 2002) (defendants supplied "personnel" by providing themselves to the Islamic Group by facilitating communication to it by its imprisoned leader); *United States v. Ujamma*, (W.D. Wash. August 28, 2002) (defendants are charged with violating the "personnel" provision by conspiring to recruit persons interested in violent *jihad* and jihad training, and to sponsor partially trained persons for operations coordinated by al Qaeda).

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exists to limit the potential for abuse – construing the *scienter* requirements in a manner that protects innocent actors. To that issue, I now turn.

Material Support and Scienter -- The Ninth Circuit has interpreted the intent requirements of Section 2399B. In my view, in this aspect of interpretation the Ninth Circuit got it more or less right.

What must the government prove the supporter knew in order for the supporter to violate the criminal prohibition? The statute says that "Whoever . .. knowingly provides material support to a foreign terrorist organization" is guilty of a crime.[40] Does it suffice to show that the supporter purposefully did the act which constitutes the offense – i.e. that he provided material support by donating money to the organization, or must government also show that the supporter knew of the organization's designation as a terrorist organization or of the unlawful activities that caused it to be so designated.[41]

Here, the Government's position – that it need not prove knowledge of the designation -- goes too far and risks trenching on First Amendment freedoms of speech and association.[42] The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[43]

Though the text of section 2339B requires that the supporters have acted "knowingly" — a seeming protection from the imposition of unwarranted liability — if interpreted as the government suggest, that requirement would be but a parchment barrier to what is, in effect, the imposition of absolute liability. The government's interpretation would presume that all supporters are charged with knowing all of the intricate regulatory arcana that govern the designation by the Secretary of terrorist organizations – a presumption that generally applies (and perhaps misapplies) in the context of a closely regulated industry.[44] As

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[40] 18 USC § 2339B.

[41] *Humanitarian Law Project v. Department of Justice*, 352 F.3d 382 (9th Cir. 2003).

[42] For a general discussion of the problem of overly broad criminal laws and the increased criminalization of otherwise innocent conduct, *see* Paul Rosenzweig, The Over-Criminalization of Social and Economic Conduct, Legal Memorandum No. 7 (The Heritage Foundation April 2003).

[43] *Morrisette*, 342 U.S. at 250-51.

[44] *E.g. United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) ("[W]here . . . dangerous or deleterious materials are involved, the probability of regulation is so great

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a consequence, under the Government's interpretation, the only requirement imposed by requiring proof that one has acted "knowingly" is that the government must demonstrate that the defendant has purposefully done the act constituting the offense — and in the context of a charitable donation that showing is trivial. Nobody donates money (or provides advice) by mistake or accident. As Justice Potter Stewart noted: "As a practical matter, therefore, they [would be] under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement."[45]

What is particularly disturbing about the Government's argument is that it works in tandem with the statutory amendment authorizing significantly harsher penalties. Historically, when the courts first considered laws containing reduced intent requirements, the laws almost uniformly provided for very light penalties such as a fine or a short jail term, not imprisonment in a penitentiary.[46] As commentators noted, modest penalties are a logical complement to crimes that do not require specific intent.[47] Indeed, some courts questioned whether any imprisonment at all could be imposed in the absence of intent and culpability.[48] This historical view has, of course, been lost: laws with reduced *mens rea* requirements are often now felonies.[49] And even misdemeanor offenses can, through the stacking of sentences, result in substantial terms of incarceration.[50]

But this should not be the uniform case – especially where, as here, much innocent conduct, otherwise protected by the First Amendment, would be swept up in the broader definition. We should not lose sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary."[51] Or as the drafters of the Model Penal Code said:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if

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that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

[45] *International Minerals & Chemical Corp.*, 402 U.S. at 569 (Stewart, J., dissenting).

[46] *See Staples v. United States*, 511 U.S. 600, 616 (1994) (citing *e.g. Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or 6 months in jail); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine only); *People v. Snowburger*, 113 Mich. 86, 71 N.W. 497 (1897) (fine up to $500 or incarceration in county jail).

[47] *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 70 (1933); *see also Morissette v. United States*, 342 U.S. 256, 256 (1952) ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation").

[48] *E.g. People ex rel. Price v. Sheffield Farms-Slawson-Decker, Co.*, 225 N.Y. 25, 32–33, 121 NE 474, 477 (1918) (Cardozo, J.); *id.* at 35, 121 N.E. at 478 (Crane, J., concurring) (imprisonment for crime that requires no *mens rea* stretches law of regulatory offenses beyond its limitations).

[49] *E.g. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (felony violation of Clean Water Act— no knowledge of regulations necessary).

[50] *E.g. United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (misdemeanor convictions stacked for 3 year sentence).

[51] *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

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> practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.[52]

The broad statutory language, which does not make clear what intent must be proven has, fortunately, begun to be interpreted by the courts in a restrictive manner.[53] And that's a good thing – it demonstrates that we can grant the government additional powers to combat terrorism while reasonably anticipating that the checking mechanisms in place will restrain to excessive a use of those powers.

And, lest one think that I, too, have fallen into the trap of exalting liberty over security, let me hasten to add two important points:

First, we should have every confidence that by and large Executive authorities are already screening cases for these very criteria. There is little (indeed no) reason to suspect that the Executive branch is using Section 805 as a means of condemning wholly innocent behavior. Thus, the imposition of *scienter* requirement, while perhaps allowing some guilty to escape at the margins, will have little effect in the run-of-the-mine cases. In short, it substantially lowers the risks of Type II errors while not appreciably enhancing the probability of Type I errors.

Second, and equally important, the addition of a *scienter* requirement will not eliminate the ability of the government to rely on other standard doctrines of criminal law, such as willful blindness, with which faux claims of innocence may be rebutted. Frankly, reviewing the *Humanitarian Law Project* case we've been discussing, I think the public record of the Tamil Tigers as a terrorist organization is so widely known that claims of innocence in affiliating with the group are unlikely to prove availing. Defendants will not be able to avoid penalties by maintaining a willful blindness to the true nature of the organization. Our collective American experience is that juries are quite good at sorting the sham claims of innocence from the legitimate ones.

Lessons Learned

Finally, I want to step back and ask what we can learn from the foregoing analysis and our experience with the court's construction of Section 2339B. Frankly, it leaves me very optimistic.

I disagree with portions of the Ninth Circuit's opinion – profoundly. Other portions, I find commendable. But what I find most commendable of all is that the judicial review function is working. And review – both by the Courts, and by this Congress – is essential. For oversight – in its varying forms -- enables us to limit the executive exercise of authority. Paradoxically, however, it also allows us to empower the executive; if we enhance transparency appropriately, we can also comfortably expand governmental authority, confident that our review of the use of that authority can prevent abuse. While accommodating the necessity of granting greater authority to the Executive branch, we must also demand that the executive accept greater review of its activities.

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[52] American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).

[53] *Humanitarian Law Project*, 352 F.3d at 394-403.

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So, I see the cases you are reviewing, and the conduct of this hearing, as a success story. It is part of an ongoing dialogue about civil liberty and security – a dialogue that is just beginning. When the Cold War began it was more than 10 years before the legal and structural systems that would sustain us through the 50-year struggle were put in place. We cannot, and should not, expect that at the start of this long struggle we will get it right the first time.

As Michael Chertoff the former Assistant Attorney General for the Criminal Division has written:

> The balance [between liberty and the response to terror] was struck in the first flush of emergency. If history shows anything, however, it shows that we must be prepared to review and if necessary recalibrate that balance. We should get about doing so, in light of the experience of our forbearers and the experience of our own time.[54]

Others have echoed that call.[55]

Right now, the judicial debate will continue. If the views of the Ninth Circuit prevail (contrary to my own views) then Congress will be well positioned to fix the problem with additional language. If, by contrast, my views are ultimately persuasive, then the courts (through as applied challenges) and Congress will nonetheless remain ready to police the boundaries of executive authority and insure against abuse.

And that is exactly as it should be. John Locke, the seventeenth-century philosopher who greatly influenced the Founding Fathers, was equally right when he wrote: "In all states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from the restraint and violence from others; which cannot be where there is no law; and is not, as we are told, a liberty for every man to do what he lists."[56] Thus, the obligation of the government is a dual one: to protect civil safety and security against violence *and* to preserve civil liberty.

And so, I return to where I began – commending this Committee for its thoughtful consideration of the issues. So long as we keep a vigilant eye on police authority, so long as the federal courts remain open, and so long as the debate about governmental conduct is a vibrant part of the American dialogue, the risk of excessive encroachment on our fundamental liberties is remote. The only real danger lies in silence and leaving policies unexamined.

Mr. Chairman, thank you for the opportunity to testify before the Committee. I look forward to answering any questions you might have.

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[54] Michael Chertoff, "Law, Loyalty, and Terror," The Weekly Standard 15, 17 (Dec. 1, 2003).

[55] *E.g.* Susan Schmidt, "Bipartisan Debate on Patriot Act is Urged," Wa. Post (Nov. 14, 2003) (former Deputy Attorney General Thompson proposes bipartisan commission to debate "the legal tools that should be employed in combating terrorism").

[56] John Locke, *Two Treatises of* Government, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 305.

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STATEMENT OF
CHRISTOPHER A. WRAY
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

PRESENTED ON

MAY 5, 2004

Mr. Chairman, members of the Committee, thank you for asking us here today. I am pleased to be able to discuss with you the Justice Department's efforts in the investigation and prosecution of terrorists, and in the protection of the American people from future terrorist attacks. I am also pleased to discuss how the material support statutes have been crucial to those efforts.

We have made significant progress and scored key victories in the war on terror. Since September 11, we have charged 310 defendants with criminal offenses as a result of terrorism investigations. 179 have already been convicted. We have broken up terrorist cells in Buffalo, Charlotte, Portland, and northern Virginia. Through interagency and international cooperation, nearly two-thirds of Al Qaeda's leadership worldwide has been captured or killed. We are dismantling the terrorist

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financial network: $136 million in assets have been frozen in 660 accounts around the world.

The recent tragedy in Madrid, however, has been yet another grim reminder that our enemies continue to plot such catastrophic attacks and will not willingly stop trying to strike us at home. The United States and its allies have been subject to deadly terrorist attacks tied to Al Qaeda throughout the world. Several weeks after the Madrid train bombings, British authorities arrested nine terrorist suspects and seized half a ton of ammonium nitrate fertilizer, a chemical used to make bombs, in a storage garage near London=s Heathrow Airport. Two weeks ago, a car bomb in Riyadh, Saudi Arabia killed five people and wounded 147 others; at the time, Saudi officials reported that they had defused five other bombs in and around Riyadh *that week*. And just a few weeks ago, Usama bin Laden called on Al Qaeda and its supporters to continue their terrorist holy war, or *jihad*, against the United States, and tried to drive a wedge between coalition partners with threats of violence.

The Attorney General has made it clear that the Justice Department's top priority is to prevent terrorist attacks before they occur. All of us in the Department have placed a premium on finding creative ways to disrupt terrorist planning and operations before disaster strikes. Pursuing and prosecuting terrorists

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after an attack is part of our mission, but it is not the focus of our efforts.

Old models of law enforcement and deterrence are ineffective against adversaries who not only accept, but glorify, killing themselves in the course of attacking innocent people. We cannot and will not limit our role to a reactive one, simply picking up the pieces after terrorist attacks. In other words, we are playing strong offense, not just defense, through aggressive investigation, comprehensive intelligence gathering, and real-time analysis of data.

Our offensive strategy targets both the perpetrators of violence and those who give them material support. The chronology of a terrorist plot is a continuum from idea, to planning, to preparation, to execution and attack. The material support statutes help us strike earlier on that continuum -- we would much rather catch terrorists with their hands on a check than on a bomb. By dismantling the entire terrorist network, from the front-line killers, to those training to kill, to the fundraisers and facilitators, we maximize our chances of neutralizing terrorist activity. The more difficult it is for a terrorist to reach our shores, or communicate with co-conspirators, or buy a bomb, or learn how to build one, the less likely it is that a bomb will explode in one of our cities and kill innocent Americans.

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The material support statutes -- 18 U.S.C. §§ 2339A and 2339B -- and related offenses like the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, and seditious conspiracy, 18 U.S.C. § 2384, have been a crucial part of our prevention strategy. Their scope, which properly extends not only to violent terrorists but also to their supporters, gives our investigators and prosecutors an invaluable tool with which to pursue, disrupt, incapacitate, and punish those who would do us harm.

The statutory definition of "material support" illustrates the breadth of resources that terrorists may need to carry out a successful attack, and the many ways in which their supporters can contribute to the spread of violence. For example, terrorists need not only weapons, but also the training to use them, the money to buy them, and the personnel to wield them. Furthermore, while planning and preparing for their attacks, terrorists need safe places to stay, expert advice on targets and methods of attack, communications equipment to keep in touch with each other, means of transportation, and identity documents to cross borders.

In implementing our proactive strategy of prevention, we have put the material support statutes to good use. Only a handful of material support prosecutions were initiated before September 11, but since then, the Department has

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charged over 50 defendants with such offenses in 17 different judicial districts. The following examples of these cases illustrate the breadth of terrorist activity that the material support statutes allow us to disrupt and punish.

The most obvious category of material support cases involves defendants who actually volunteer to commit violence on behalf of terrorists and foreign terrorist organizations. In our view, prosecutors may use the material support statutes to prosecute these individuals because the definition of "material support" includes "personnel," in the form of one's own personal services. Using the material support statutes, we have broken up violent *jihad* cells across the country:

Members of a terrorist cell in Lackawanna, New York traveled to Afghanistan and attended an Al Qaeda-affiliated training camp there before the September 11 attacks. They pleaded guilty to material support charges, agreed to cooperate, and are now serving prison terms ranging from eight to ten years.

Members of another terrorist cell in Portland, Oregon attempted to travel to Afghanistan after September 11 to fight on behalf of the Taliban. After being charged with conspiring to provide material support to Al Qaeda and the Taliban,

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they pleaded guilty to seditious conspiracy and IEEPA violations and were sentenced to prison terms ranging from seven to 18 years.

In March, several members of another cell in northern Virginia were convicted of material support offenses after training in the United States to fight *jihad* in Afghanistan and Kashmir. Two defendants also traveled to Pakistan after September 11 to train further in a terrorist camp there. The defendants will be sentenced in June and face up to life in prison.

When persons like these actually learn how to wage violent *jihad* from groups such as Al Qaeda, and then return to the United States, they pose a clear and serious threat to the safety of the American people. Tens of thousands have attended training camps where they have been schooled in terrorist tradecraft, learning skills like bomb-making and covert communications. It is very difficult to know exactly when these sleeper agents may go operational, and what manner of violence they may visit upon innocent citizens. Nor should we wait to find out. The material support statutes enable prosecutors to take such persons off the streets and into court, where they face stiff penalties that match the threat they pose. Moreover, the sentences available under the statutes often produce cooperation with the government, and thereby lead to valuable intelligence about terrorist networks.

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Without the material support statutes, prosecutors may still pursue these terrorists through other avenues -- for example, by seeking to deport them for violating immigration laws -- but these alternatives are not always available and often lack the same potential for incapacitation and intelligence-gathering.

The material support statutes also allow us to strike at earlier stages of terrorist operations by pursuing those who provide a wide array of support to the front-line killers. For example, Iyman Faris, a naturalized citizen working as a truck driver in Ohio, helped Al Qaeda by researching the capabilities of ultralight airplanes, extending the airline tickets of several Al Qaeda members, and surveying a potential target and reporting his assessment by coded message. Upon pleading guilty to material support charges, he was sentenced to twenty years in prison.

Last August, the FBI arrested Hemant Lakhani in New Jersey for allegedly attempting to sell a shoulder-fired surface-to-air missile to an FBI cooperating witness for the purpose of downing a U.S. civilian airliner. Lakhani was charged with offenses including attempting to provide material support to terrorists and faces up to 25 years in prison.

In March, in San Diego, California, two men pleaded guilty to providing

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material support to Al Qaeda. They had negotiated with undercover agents to buy four Stinger anti-aircraft missiles, which the defendants stated would be sold to associates of the Taliban and Al Qaeda in Afghanistan. Each faces up to fifteen years in prison for this offense.

Of course, in addition to these specific types of assistance, supporters of terrorism can also provide money itself, which every terrorist group needs to survive. In some cases, terrorist supporters in the U.S. engage in crimes within our borders to support violence overseas. For example, we uncovered a group of Lebanese nationals in Charlotte, North Carolina, who were using the proceeds of credit-card fraud and cigarette smuggling to fund Hizballah operatives in Beirut. The lead defendant in this case was convicted of sixteen separate counts that included providing material support to Hizballah, and was ultimately sentenced to the maximum penalty of 155 years in prison. Similarly, another group in Detroit sent the proceeds of their own cigarette-smuggling ring to Hizballah. The lead defendant in this case pleaded guilty to providing material support to Hizballah and was sentenced to almost five years in prison.

Terrorist financiers also conceal their funding of terrorist organizations by using charitable front organizations. For example, Sami Al-Arian, a former

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university professor in Tampa, Florida, has been charged with material support and related offenses for allegedly operating secretly as the North American leader for the Palestinian Islamic Jihad, one of the world's most lethal terrorist organizations. Al-Arian allegedly helped operate and fund an organization that has killed over a hundred people, including U.S. citizens.

Terrorists know that money is their lifeblood and have voiced frustration at the success of our efforts to clamp down on terrorist financing. Take, for example, the complaints of Jeffrey Battle, a member of the terrorist cell broken up in Portland. In a recorded conversation with an FBI informant, Battle explained why his enterprise was not as organized as he thought it should have been (quote):

> "[B]ecause we don't have support. Everybody's scared to give up any money to help us. . . . Because that law that Bush wrote about . . . Everybody's scared . . . He made a law that says for instance I left out of the country and I fought, right, but I wasn't able to afford a ticket but you bought my plane ticket, you gave me the money to do it . . . By me going and me fighting, by this new law, they can come and take you and put you in jail."

Battle was right. His ex-wife, who knowingly helped fund his travel toward Afghanistan, was prosecuted, pleaded guilty, and is now in prison, like Battle

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himself.

We have also learned that our pursuit of terrorist financiers can lead to the apprehension not only of those who write checks to terrorists, but also of the dangerous and violent terrorists themselves. In a case I mentioned earlier, members of a terrorist cell in northern Virginia were convicted of providing, and conspiring to provide, material support to terrorist groups. In her opinion, District Judge Leonie Brinkema quoted a report introduced into evidence against the Virginia cell members. The report was written by a fundraiser for Benevolence International Foundation (BIF), an Islamic charity headquartered in Chicago. The fundraiser had been invited to observe the Virginia cell's military-style paintball training exercises, and praised the fervor of the cell members and the rigor of their training sessions.

The report first came to the attention of investigators and federal prosecutors in Chicago who suspected BIF's executive director of diverting charitable contributions to terrorist organizations around the world. They sent the report to the Justice Department's Counterterrorism Section, which in turn forwarded it to federal prosecutors in Virginia. The result: In Chicago, BIF's executive director pleaded guilty to a racketeering conspiracy, admitting that BIF donors were misled

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into believing that their donations would support peaceful causes when in fact funds were spent to support violence overseas. He was sentenced last August to over eleven years in prison. In northern Virginia, nine of eleven defendants have been convicted or have pleaded guilty to offenses arising out of the cell's preparations for *jihad*. The relationship between these two investigations illustrates the coordination and the proactive and preventive strategy that we must employ to win the war on terror.

Before I finish, I should address one important issue. Some people have expressed concerns about potential First Amendment implications of the material support statutes. But the material support statutes do not, and should not, prohibit people from believing what they want, however misguided, advocating what they believe in, and acting independently and nonviolently based on their beliefs. It is only when someone crosses the line between advocacy and action on behalf of terrorists or a designated foreign terrorist group that they can and should be prosecuted. As Judge William Skretny told Shafal Mosed, one of the Lackawanna Six, when sentencing him to eight years in prison, the material support offense "is not a thought crime," and that "[i]f you had supported Al Qaeda in your heart only, you would not be here today." Rather, Judge Skretny said, he was being punished because he "made a decision to take action." In short, neither the statutes nor our

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enforcement of them infringes First Amendment rights.

Mr. Chairman, I thank you again for inviting us here and giving us the opportunity to discuss how the material support statutes are being used in the field to fight terrorism. I would also like to thank this Committee for its continued leadership and support. Together, we will continue to make great strides in our battle to defeat those who would do this country harm.

After you hear from my colleagues, Mr. Bryant and Mr. Bald, I will be happy to respond to any questions you may have.

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