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A REVIEW OF THE MATERIAL SUPPORT TO TERRORISM PROHIBITION IMPROVEMENTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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A REVIEW OF THE MATERIAL SUPPORT TO TERRORISM PROHIBITION IMPROVEMENTS ACT

WEDNESDAY, APRIL 20, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY, OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:28 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl, Chairman of the Subcommittee, presiding.

Present: Senators Kyl and Feingold.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Chairman KYL. Good afternoon. This hearing of the Judiciary Subcommittee on Terrorism, Technology and Homeland Security will come to order. We are going to get started a couple of minutes early because I think the reality is we are not likely to get very many of the other Committee members here this afternoon. There is a bankruptcy bill signing ceremony down at the White House and at least one other conflict of which I am aware. So I don't think it would do as much good to wait for other members to attend the hearing.

I do appreciate all of the witnesses being here. Because there was one witness that could not attend and some of the members won't be here, we will leave the record open for additional statements or for questions to be submitted to the witnesses.

This hearing this afternoon is going to focus on Senate bill 873, which is the Material Support to Terrorism Prohibition Improvements Act of 2005, a bill which I recently introduced with Senators Cornyn, Coburn and Sessions. With this hearing today, I hope that we can give this legislation a public airing and prepare for marking the bill up in the Committee.

I am pleased to introduce the witnesses who are going to testify today. Barry Sabin is the Chief of the Counterterrorism Section of the Justice Department's Criminal Division. He previously served nearly a dozen years in the U.S. Attorney's office in Miami, Florida, where he held the positions of Chief of the Criminal Division, Chief of the Major Prosecutions and Violent Crime Section and Deputy Chief of the Economics Crime Section. His most recent position in that office was First Assistant United States Attorney.

Also with us today is Daniel Meron. He is the Principal Deputy Assistant Attorney General of the Civil Division of the Department of Justice. Mr. Meron brings a wealth of experience to the legal and constitutional issues presented by the legislation we are reviewing today.

Finally, I am pleased to introduce Mr. Andrew McCarthy, who is a Senior Fellow at the Foundation for the Defense of Democracies. Mr. McCarthy is a former Federal prosecutor who led the prosecution of the case of Omar Abdel Rahman, the so-called blink sheik, in connection with the 1993 World Trade Center bombing. He has worked on a large number of other counterterrorism prosecutions as well.

I thank all of you for being here today and would suggest that if you want to submit a statement in full, we will accept that. If you would like to summarize that statement, that would be fine. It may be that I am the only one asking oral questions, but as I said, if there are members of the Committee that have other questions, if you would be so kind, we could submit those to you and perhaps you could get answers to us for the record.

So with that, let me start, Mr. Sabin, with you. Why don't I simply ask each of you to make your presentations and then we will have a little questioning session after that? Thank you.

STATEMENT OF BARRY SABIN, CHIEF, COUNTERTERRORISM SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. SABIN. Mr. Chairman, thank you for the opportunity to testify at this important hearing. I will focus on our use of the material support statutes, 18 U.S.C. Sections 2339A and 2339B, which are at the heart of the Justice Department's prosecutive efforts.

The material support statutes, as enhanced and clarified by the USA PATRIOT Act in 2001 and the Intelligence Reform and Terrorism Prevention Act just a few months ago, are critical features of the law enforcement approach to counterterrorism. These statutes recognize that there are important components of the terrorist infrastructure that stop short of actual attacks.

We know from experience that terrorists need funding and logistical support to operate. They need to raise funds, open and use bank accounts to transfer money, and to communicate by phone and the Internet. They need travel documents. They need to train and recruit new operatives and procure equipment for their attacks.

Thanks to Congress, the material support laws contain the inchoate offenses of attempting conspiracy which allow law enforcement the legal basis to intervene at the very early stages of terrorist planning several steps removed from the execution of particular attacks. This capability is crucial to the prosecution of terrorist supporters.

A number of victories in recent months illustrate these powerful law enforcement tools and how they operate in practice. On March 10, 2005, after a five-week trial, a jury in Brooklyn, New York, convicted two Yemeni citizens of, among other charges, conspiring to provide material support to Al Qaeda and Hamas pursuant to 18 U.S.C. Section 2339B.

This case clearly demonstrates two important principles. First, United States prosecutors and investigators, like our colleagues in the intelligence community and the military, must rely upon our international partners to be successful. The defendants could not have been brought to justice without the assistance of our German colleagues, who worked alongside the FBI in the sting operation and made the arrest that ultimately culminated in the extradition of the defendants to the United States from Germany. German officials testified about their actions in Federal court in Brooklyn.

Second, successful indictments and prosecutions often lead to further successes in combatting terror. We are able to leverage the intelligence collected from cooperators in our criminal cases to discover and track down new leads and evidence. In the Al-Moayad trial, prosecutors presented the testimony of Yaya Goba, one of the convicted defendants in the Lackawanna case; namely, successful prosecutions beget more prosecutions.

On February 10, 2005, a Manhattan jury in United States v. Sattar found all defendants guilty on all counts, which also involved material support charges. In February of this year, prosecutors in Detroit obtained a guilty plea from a Hizballah financier. The defendant, whose brother is the organization's chief of military security in southern Lebanon, admitted that he helped others raise money for Hizballah. Last year, we obtained a guilty plea to violations of both Sections 2339A and B, among other charges, from a Pakistani American involved in procurement, training and recruitment of a foreign terrorist organization.

The operation of the material support statutes is also illustrated by a number of pending prosecutions. Last week, the Justice Department announced the unsealing of an indictment that made important use of Section 2339A to charge three individuals for their alleged participation in terrorist plots to attack the financial sectors in New York, New Jersey and the District of Columbia.

Meanwhile, prosecutors in Miami superseded another indictment charging a Section 2339A violation adding Kihah Jayyoussi as a defendant. According to the superseding indictment, Jayyoussi and two co-defendants conspired to fund and support violent jihad abroad.

Another Section 2339 case involves Babar Ahmad and Azzam Publications charged in Connecticut in October of 2004. Ahmad, a resident of the United Kingdom, allegedly operated and directed Azzam Publications and its family of Internet websites to recruit and assist the Chechen Mujahadeen and the Taliban, and to raise funds for violent jihad abroad.

In Florida, the trial of four of the defendants in the Sami Al-Arian case is scheduled to begin next month on May 16. In a 53-count indictment, Sami Al-Arian and eight other defendants, including Ramadan Shalla, the acknowledged worldwide leader of the Palestinian Islamic jihad, have been charged with using facilities in the United States, including the University of South Florida, as a North American base for the Palestinian Islamic jihad.

In August of 2004, a Chicago grand jury indicted three defendants for participating in a 15-year racketeering conspiracy in the United States and abroad to illegally finance Hamas's activities in Israel, the West Bank and Gaza Strip, including providing money

for the purchase of weapons and the inclusion of material support charges.

These cases, plus other matters that have already resulted in convictions, demonstrate the manner in which we have come to rely upon the material support statutes. Looking to the future, we are confident that the amendments to the material support statutes passed by Congress and signed by the President in December will significantly enhance the capabilities of prosecutors to eradicate terrorist activity at every stage.

Significantly, the definition of material support or resources was expanded to encompass all property, whether tangible or intangible, and all services, except for medicine and religious materials. The amendments also clarify the meaning of the terms "personnel," "training" and "expert advice or assistance," as used in the definition of material support or resources.

Two other changes to the material support statutes are also significant. First, the recent amendments expand the jurisdictional basis for material support charges. Second, the amendments also clarify the knowledge requirement of Section 2339B. That section now expressly says that the defendant must either know that the organization is a designated foreign terrorist organization or that it engages in certain terrorist conduct.

The Intelligence Reform Act also created a new material support offense, Title 18 United States Code, Section 2339D, that explicitly criminalizes the receipt of military-type training from a foreign terrorist organization.

The amendments to the material support statutes contained in the Intelligence Reform and Prevention Act of 2004 are currently scheduled to sunset at the end of 2006. These amendments are critical to maintaining the efficacy of the material support statutes as a potent prosecutorial tool in combatting terrorism. The Department therefore supports making these revisions to the material support statutes permanent, and we commend you for introducing the Material Support to Terrorism Prohibition Improvements Act, which would do just that.

The proposed legislation also contains another important provision which the Department strongly supports. Under current law, those aliens who have received military-type training from or on behalf of a terrorist organization may be deported from this country. Such aliens, however, are not inadmissible. This anomaly in the law does not make any sense and the proposed legislation would fix this problem by rendering inadmissible those aliens who have received military-type training from or on behalf of a terrorist organization. The proposed legislation also contains other worthwhile provisions, and the Department looks forward to working with you and other Committee members on this important piece of legislation.

The changes recently enacted in the Intelligence Reform Act have built upon and enhanced the work of prior Congresses. Together, this legislation has provided law enforcement and prosecutors with a solid framework within which to pursue the goal of prevention, disruption and eventual eradication of terrorism within our borders and beyond.

We as prosecutors in the Justice Department have more work to do to eliminate this deadly threat, and we urge you in Congress to continue to build upon and enhance the legal tools needed to accomplish our mutual goals.

Mr. Chairman, 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. Together, we will continue our efforts to defeat those who would harm this country.

Chairman KYL. Well, Mr. Sabin, I appreciate that statement very much. Thank you.

Dan Meron.

STATEMENT OF DANIEL MERON, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. MERON. Thank you, Mr. Chairman. Thank you very much for inviting me here today to testify on the subject of the Material Support Terrorism Prohibition Improvements Act that you recently introduced.

The material support to terrorism prohibitions that are codified in 18 U.S.C. Sections 2339A and 2339B are the product of a strong bipartisan consensus that in order effectively to fight the war against terrorism, you have to attack terrorism at its source. These provisions do that by preventing groups from raising money and obtaining the property, personnel and expertise necessary to commit their terrorist acts.

As you know, Mr. Chairman, Section 2339B, which prohibits the provision of material support or resources to designated foreign terrorist organizations, was signed into law by President Clinton in 1996, and the constitutionality of this provision in its original form was vigorously defended by the Department of Justice under Attorney General Janet Reno.

In 2000, the United States Court of Appeals for the Ninth Circuit broadly upheld the constitutionality of this provision against a series of legal challenges. The Ninth Circuit squarely rejected the claim that the statute impermissibly imposed guilt by association, and likewise held that the Constitution did not require proof that the accused had the specific intent of aiding the terrorist organization's unlawful purposes.

As the Ninth Circuit explained, this provision prohibits the act of giving material support, not speech, and there is no constitutional right to facilitate terrorism. Any incidental burdens on speech, the Ninth Circuit held, were not necessary to achieve Congress's purposes. In December of last year, the en banc court reaffirmed those critical holdings.

In separate decisions in 2000 and 2003, however, the Ninth Circuit held that the terms "personnel" and "training" in the Act's definition of material support or resources, which were not at the time defined in the Act, were unconstitutionally vague. Although the Department of Justice had given those terms narrowing constructions that we believed addressed any constitutional vagueness problems, those narrowing constructions were not contained in the statute and were not legally binding on the Department.

As you know, Mr. Chairman, in the Intelligence Reform and Terrorism Prevention Act of 2004, Congress directly addressed the Ninth Circuit's concerns with the potential vagueness of the provision. Specifically, in Section 6603 of that Act, Congress provided specific definitions for the terms "training" and "expert advice and assistance." Congress also adopted a proviso that made clear that no individual could be convicted of providing personnel to a terrorist organization unless that person knowingly provided one or more individuals, including himself, to work under the organization's direction and control.

Congress's action providing these definitions was a responsible and considered response to the judicial branch's constitutional rulings and reflects a highly productive cooperation between the executive and legislative branches on this matter.

Those amendments had an immediate beneficial effect. In light of those provisions, last December the en banc Ninth Circuit Court vacated the injunction that had previously been in place regarding the terms "personnel" and "training," and more recently on April 1 of this year vacated the district court's injunction regarding "expert advice and assistance." The sufficiency of these definitions are now before the district court for a fresh look in light of Congress's amendments, and we are confident in the strength of our position that these provisions are constitutional.

Unfortunately, as you also know, Senator Kyl, Section 6603 of the 2004 Act is set to sunset at the end of this calendar year. Allowing those provisions to sunset would, we believe, be a grave mistake because the language in the Act would then revert to the language that the Ninth Circuit had held was unconstitutionally vague. Indeed, even before that point, the very existence of a sunset provision undermines the beneficial impact of these definitions on the certainty and clarity of these legal prohibitions.

For these reasons, the Department of Justice strongly supports the provision in Senate bill 783 that would make permanent the amendments contained in Section 6004 of the Intelligence Reform Act.

Once again, Mr. Chairman, I thank you for inviting me to be here today and I look forward to answering any questions that you may have with regard to the constitutional challenges that have arisen with respect to these provisions.

[The joint prepared statement of Messrs. Sabin and Meron appears as a submission for the record.]

Chairman KYL. Thank you, Mr. Meron. That is very helpful.

Mr. McCarthy.

STATEMENT OF ANDREW C. MCCARTHY, SENIOR FELLOW, FOUNDATION FOR THE DEFENSE OF DEMOCRACIES, WASHINGTON, D.C.

Mr. MCCARTHY. Thank you, Mr. Chairman. Thank you for inviting me here this afternoon. It is an honor to testify here in connection with a matter of such importance to our national security.

From a time shortly after the World Trade Center was bombed in February of 1993 through early 1996, I was privileged to lead the prosecution against Sheik Omar Abdel Rahman and 11 others for conducting against the United States a war of urban terrorism

that included, among other things, the World Trade Center bombing and a conspiracy to carry out what was called a day of terror, a plan for simultaneous bombings of New York City landmarks that was thwarted by the dedicated work of the FBI and the New York Joint Terrorism Task Force.

I also worked on some of our office's other major terrorism prosecutions and helped run the command post near Ground Zero in lower Manhattan in the wake of the 9/11 attacks. So while I have not been in the trenches for a few years, it is from the trenches that I come. And it is from that perspective that I thank this Committee and you, Mr. Chairman, and Congress for its tradition of strong bipartisan support in ensuring that law enforcement has the tools it needs to protect our national security.

It was in that tradition in 1996 that we first received the desperately needed material support statutes that the Committee is considering today. And it is in honoring that tradition that I respectfully and enthusiastically urge the Committee to support the proposed bill, the Material Support to Terrorism Prohibition Improvements Act of 2005.

The proposed bill focuses on what are two of the most critical aspects of our national struggle to defeat the network of Islamic militants that is waging war against us: first, the need to beef up the statutory arsenal that enables law enforcement to stop attacks at an early stage before they endanger Americans, and, second, the need to recognize that threat posed by para-military training.

Where terrorism is concerned, the object for law enforcement and for the rest of Government must always be to prevent attacks from happening rather than simply bringing terrorists to justice only after mass murder has occurred. This is a lesson we have learned gradually and painfully in the years of terrorist attacks between the World Trade Center bombing and the 9/11 atrocities eight years later.

Early on, Federal law was just not up to the task of a mission aimed at anticipatory prevention and disruption rather than post-incident investigation and prosecution. While the law severely punished completed acts of terrorism, especially if the loss of life resulted, it also featured gaps in enforcement and grossly insufficient penalties, severely challenging law enforcement's ability to strangle plots in the cradle and cut off the supply lines on which terror networks thrive.

The 1996 legislation, including the material support statutes this Subcommittee is again considering today, both ratcheted up the penalties for terrorism-related crimes and, perhaps more significantly, gave prosecutors urgently needed tools designed to root out terrorist plots at an early stage, shut down funding channels and place a premium on preventing terrorist acts rather than simply prosecuting them afterwards.

While it is true that the greatest threats we face come from the front-line operatives who are actually willing to carry out terrorist attacks, we have learned the hard way that those terrorists cannot succeed without support networks—people and entities willing to fund them, to train them, to provide them with fraudulent documents to facilitate their travel, and to provide them with other assets that they need to carry out their savagery.

It is not surprising then that the material support laws have become the backbone of the Justice Department's prevention strategy, which I believe is one of the critical reasons why we have not had a domestic terror attack in the United States since September 11, 2001.

Some court decisions which cast doubt on the constitutionality of the statutes threaten to dilute the effectiveness of material support laws in protecting public safety. This Congress promptly responded last year with needed action to cure the alleged defects, particularly clarifying statutory terms that some courts had found void for vagueness.

That legislation promoted national security and due process, the former by maintaining material support as a powerful tool, and the latter by ensuring that we are clear on exactly what conduct is prohibited. But these improvements were sunsetted and if they are allowed to lapse, both national security and due process would be compromised. Sunsets also create a climate of uncertainty which could hamper current enforcement.

The proposed bill would make the 2004 improvements permanent, and for that reason alone I respectfully suggest that it would merit the Committee's support. But the bill also has other beneficial features. In my mind, the most important is a clear-eyed recognition of the dangers posed by para-military training. This is a much under-appreciated aspect of the terrorist threat. It runs like a thread through every attack we have faced. It is the reason basis for fearing sleeper cells inside our country.

Current expert estimates suggest that as many as 70,000 people may have undergone Training in the Al Qaeda camps. This training is known to include commando attacks, the use of small and large firearms, the construction of explosives, techniques for neutralizing sentries and various other maneuvers necessary for carrying out bombings, hijackings and other varieties of attack. The bill addresses this serious problem by proposing to tighten up our immigration laws and enhancing criminal penalties to protect the American people from what we know to be the perils of this threat.

I thank the Committee again for inviting me here. I thank you, Mr. Chairman, and I thank you and the Congress for taking the time to consider this important legislation.

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

Chairman KYL. Well, thank you, Mr. McCarthy, and I thank all of you for being supportive of our efforts here to extend the material support statute. When I ask these questions, if any of you would like to comment, please feel free to do so, but I am going to direct a couple of them to specific individuals simply because you have made reference to certain items.

One of the points, Mr. McCarthy, you just made is, if I gather this correctly, that because cases take a while to develop and prosecute, you could end up with a situation where not only is there a climate of uncertainty, but you could actually have a break in the continuity of the applicable statute during the course of a particular prosecution.

How real are these dangers of lack of certainty? Some opponents say, well, it is premature; we don't need to extend these statutes

yet, we need to get more experience with them, and so on. That is kind of the argument that is made here. Address that argument, if you would, in the context of your testimony.

Mr. MCCARTHY. Yes, Senator. When I used to do what these gentlemen sitting beside me do for a living, two of the things that you really wanted to have when you indicted a case was evidentiary certainty—you wanted to make sure that the things you thought you could prove, you could actually prove—and the other thing is legal certainty.

In terms of enforcement efforts, the prosecutor wants to know, in many ways like the defendant wants to know, if the law at the time of charge, if the law at the time of indictment is going to be the same law that applies at the time of trial. Creating a climate of uncertainty around the charging decision, I think, is something that could seriously hamper enforcement efforts.

I also think that the comparison that I have seen some make between the record of what has gone on under the PATRIOT Act, where we have had three-and-a-half years to take a look at what happened there without considering the sunset provisions, is importantly different from the sunset provisions here.

With respect to the PATRIOT Act, the sunset provisions are about investigative techniques. As a law enforcement person, you are never comfortable in a situation where you don't know whether what you are doing today will still be considered legal a year from now or two years from now. But with investigative techniques, the problem is somewhat limited.

When you are talking about the substantive law that will actually apply to people, I think it is critically important for the Justice Department to know that the laws that it is making prosecutive decisions on today, the laws that it is charging people with, the substantive law that is going to apply to a case is the same at the time of indictment as it will be at the time that the case has to be tried.

Chairman KYL. Great point.

Now, Mr. Meron, I think this question is first addressed to you, but I think in view of the string of examples, Mr. Sabin, you gave to the Committee, you might want to relate to this as well.

Two parts, really, to the question, one related to your comments about the Ninth Circuit decision, in which you have got an injunction vacated now, the district court still to take a look, in view of the circuit's opinion, to see whether there is any further action to be taken. But what would sunset, as you point out, if we were not to extend the statute are these definitions which have been very useful in answering the court's original determination of unconstitutionality by providing the texture through definitions of what we really mean by these terms, "personnel" and "training."

The thought occurs to me, why wouldn't anybody want those definitions to continue if the court has, A, found them useful and constitutional; and, B, if you allowed the statute to sunset, you would be right back into a situation of unconstitutionality again.

And then part two: isn't it similar with respect to Section 2339B where you have got a particular terminology in the statute now saying that the activities covered by that should not be applied or construed so as to abridge the exercise of First Amendment rights, specifically saying you need to do this with reference to those con-

stitutional rights? If that is sunsetted, you wouldn't have that kind of important provision in the statute now protecting people's individual rights.

So in both of these two cases, it seems to me we have got, through court ruling and then subsequent action by Congress and the original language that we put in the statute, important protections that we want to maintain and that would ironically be eliminated if the sections were allowed to sunset.

Mr. MERON. Senator Kyl, I couldn't agree more. I think it is very strange to oppose making these provisions permanent in light of those judicial decisions. The one thing we know for sure is that the language that existed before these amendments had been declared unconstitutional by the court of appeals.

It is from our perspective very strange to have a law right now where, in the absence of further action by Congress, you are going to revert automatically to language that the courts have held to be unconstitutional. It doesn't seem right, it doesn't seem responsible.

We strongly believe that the language that was added in the amendments makes the language sufficiently specific and clear. It is clearly constitutional on its face, and the courts remain ready to consider any challenge by any particular defendant to the constitutionality of these provisions as they may or may not be applied in a particular case. So there are ample constitutional protections and safeguards.

As you said, the one thing we know for sure is that the impact of these definitions has been to move in the direction of making the terms more narrow and more circumscribed. And why you would object to making those permanent on the mere possibility that in the future a court might want you to go even further in that direction is somewhat beyond me.

Chairman KYL. Mr. Sabin, you identified a series of important cases in which the material support statute had been effective for law enforcement in helping to prosecute would-be terrorists. There are some organizations that argue that they are broad in their scope. I think of groups like Hamas and others who perhaps would argue that, well, there are dual purposes to these organizations and it is very difficult to differentiate the activities which are sought to be proscribed this legislation versus those that are humanitarian in purpose, and so on, and that you are not able to make those distinctions in the enforcement of the statute. Therefore, I don't know whether they would argue it is a vagueness issue in a constitutional sense or simply not a good idea as a matter of law enforcement to try to attack the problem at its source, as you have said.

How do you respond to those who use this argument that you are affecting the good behavior of some of these organizations with an overly broad attack on support for them?

Mr. SABIN. Congress has clearly and unequivocally spoken to that point, Mr. Chairman. In designing the regimen of 2339A and B, the material support statutes, the language of the statute and congressional intent has indicated that the entire logistical support network, not only the person that is seeking to be the bomb-thrower or the operational individual, but the person who is funding or recruiting or the like, should be equally responsible.

The idea that you can free up certain resources—because these material support items are fungible for purposes of Hamas's humanitarian mission for school or social services, it frees up those resources which are devoted to its military wing. Congress has been very clear. The international community has followed or is in the process of following Congress's leadership in that regard to say that we will not allow the purposes of the donors' intent to be a factor in the application of the material support statutes.

Otherwise, you would have an escape hatch in Section 2339B which would go directly against congressional intent. The idea that Congress has set forth a list under 2339B of 40 foreign terrorist organizations that are radioactive and to provide that support in whatever form of resources or services should not be countenanced—it is clear to the public so that the public can take knowing and transparent actions. It is clear in terms of how we apply that in the courts of law. And to inject uncertainty in that, springboarding on the other responses, I think is directly contrary to the effectiveness of those statutes and the viability of the material support statutes going forward.

Chairman KYL. Has any court ever determined the statute overly broad based upon that particular argument as far as you know?

Mr. SABIN. No, not that I am aware of. There is language out there regarding intent, and the Intelligence Reform Act clarified that specific intent is not the requirement, which would feed into that kind of escape hatch argument under 2339B. But I think the language in the Intelligence Reform Act specifically recognizes that it is knowing that the foreign terrorist organization has been listed, or the fact that they have been engaged in violent activity, rather than that activity would be used to further the particular goals and that would not inject a humanitarian argument in that regard.

Chairman KYL. Right. Those are the two specific knowledge requirements there, or alternative knowledge requirements.

Mr. SABIN. Yes, sir.

Chairman KYL. Either Mr. Meron or Mr. Sabin, could you quantify for the Committee the number of times that the Department of Justice has prosecuted for support of material terrorism or the number of convictions that have been obtained?

Mr. SABIN. Yes. My understanding is that there have been 96 material support prosecutions in 21 different districts. More broadly, relating to terrorist financing, which would include, for example, the International Emergency Economic Powers Act, the numbers go to 135 prosecutions and 70 convictions. To the extent that you require additional details or specificity in that regard, we would be happy to provide that to the Committee.

Mr. MERON. Senator Kyl, if I may add one thing to the answer to the prior question, in fact, on the issue of the breadth of the coverage of the provision, that is an issue on which the full Ninth Circuit en banc court unanimously ruled that there was no constitutional problem, that you did not have to have any requirement that the person intended to assist the unlawful purposes of the organization.

They adopted in full an earlier analysis of a panel which had made the very point that Mr. Sabin had made that goods are fun-

gible, money is fungible, and that Congress may constitutionally attack the problem adequately by covering all contributions.

Chairman KYL. I appreciate that. Now, I am trying to look at this from a broad perspective and Mr. McCarthy has already related to one aspect of this, but let me just ask all of you, if we fail to extend the provisions that we have been discussing here today and if we allow this Act to sunset, what kind of impediments is that going to place in the way of our investigation and prosecution of support for terrorists?

Mr. SABIN. I think it would have a dramatic effect, along with other key provisions of the PATRIOT Act, such as the information-sharing under Sections 203(b) and (d) and the like. These are critical to the manner not only in which we bring criminal prosecutions, but the ramifications of how we operate on a daily basis.

The idea that we have moved from reacting to a particular incident to a prevention mindset, the ability to work in a task force approach, the ability to have prosecutors involved earlier on in the investigatory process, the ability to have the flexibility to bring criminal and intelligence tools to bear on a particular matter, are all emanating from the fact that these and other provisions should not sunset.

Investigators have been relying upon it to work together to achieve the desired results of prevention. The material support statutes have been the key to that early detection and prevention aspect. In case after case, that has been our mandate and our mission, and I think it would be a significant deterrent effect to law enforcement and the national security officials' ability to effectively do what the American public expects and demands of us and it would have significant and negative dramatic effects.

Mr. MERON. And, Mr. Senator, what it would mean is within the entire geographic territory of the Ninth Circuit, which is a very large territory, as you know, the injunctions would then come back to life prohibiting enforcement of personnel, training, expert advice and assistance. So even the core type of conduct that I think everyone would recognize—training a terrorist in making a bomb, for example—would be enjoined. The enforcement of that provision would be enjoined.

Chairman KYL. One of the questions I have always had is how we deal with the financing, and especially this method of financing that has been involved coming from the Middle East in particular, the so-called hawallas.

Are there any other tools that any of you would deem useful in efforts to curb the illicit use of this method of transferring funds?

Mr. SABIN. Section 373 of the PATRIOT Act changed the intent standard relating to illegal money-transmitting devices. That has been extraordinarily helpful for us in bringing cases around the country from Massachusetts to Northern Virginia, last week in Detroit and elsewhere, the ability to use what is now codified as Title 18, Section 1960, to address the hawalla aspects.

I think that some provisions relating to obtaining tax return information, and talking to our colleagues in the joint terrorist task force about the ability to obtain expeditiously and appropriately taxpayer return information, are some areas which we can improve the ability for investigators to understand the information and

bring terrorist financing cases to bear. So we can work with the Congress in that regard to get specific recommended legislative initiatives.

Chairman KYL. I have always wondered how we deal better with that particular problem. Let me just say that your answer prompts me to suggest that if there are ideas that any of you have or you become aware of that you think would be useful in the preparation of additional legislation, it is important that we receive those ideas because, clearly, the terrorist organizations are very good at adapting to our techniques. And whatever we are able to do to investigate and prosecute today's terrorists, tomorrow terrorists are going to figure out a way around. So as there is adaptation or unique methods of operating here, it is useful for us to be able to continue to allow the law to evolve as well.

One of the statements in the written testimony of law professor David Cole, who couldn't be here today, is—and I will just quote it; it is on page 6 of his statement. "Section 3 of the bill would deny entry to any foreign national who is a member of an undesignated terrorist organization, subject only to a largely meaningless defense."

Was it you, Mr. Sabin, that was addressing the asylum and entry provisions?

Mr. SABIN. Yes.

Chairman KYL. Is this too broad? He uses the example of a member of the Israeli army as an example of somebody that might be denied entry under this particular provision. Do you think that is true, and if not, why not?

Mr. SABIN. I think the anomaly that exists that individuals who are here and can be removed from the country can somehow have the opportunity to enter into the United States is a disconnect and that we should seek to address it.

In terms of having focused and constitutionally appropriate language, we are willing to work with the Committee in order to address that important goal. But the national security imperative that individuals are able to come across our border when we know that they have trained in terrorist military-style training camps, I believe, is an important issue that should be addressed through our immigration laws.

I think that the proposed legislation as to both designated and undesignated groups is also an important aspect because the administrative process to get certain groups that are emerging and quickly identify them to be labeled in terms of a list approach takes time.

We can provide some examples to the Committee by which individuals went to a military-style training camp that we understood to be, in retrospect, military training, but was not designated at the time, but ultimately became designated. That is a gap that should not exist in the law.

So in direct answer, I think it is an important legislative initiative. We would support clarifying language—I haven't read Professor Cole's testimony, but to address those concerns, but to make sure that that gap is closed.

Chairman KYL. Mr. McCarthy.

Mr. MCCARTHY. Just to echo what Mr. Sabin said, two things, and I tried to describe this in more detail in the statement I submitted to the Committee. The bombers of the World Trade Center in 1993 trained right here in the United States in 1988 and 1989. They didn't have a designation. They weren't members of a particular organization. It was an ad hoc group that was training in the United States.

The same is true of the group that sought to carry out what I referred to as the day of terror plot. They trained in western Pennsylvania and in a public park in New Jersey. It is absolutely essential that we fashion a provision such as what is fashioned in the proposed bill that captures those sleeper cells because they are the ones that not only do we need to figure in a speculative sense are the bigger threat to us. We know because we have seen it before—it has happened before—that these are exactly the types of cells that we need to capture.

The other thing is trial lawyers like to say to juries that you shouldn't check your common sense at the door when you come into the courtroom and to the jury box. The escape provision that Professor Cole refers to as meaningless actually requires or says that the foreign national can demonstrate by clear and convincing evidence that he did not know and should not reasonably have known that the organization was a terrorist organization.

I frankly just don't see how anyone behaving reasonably could conceivably think of the army of a foreign national that is an ally of the United States that we have treaty and trade relations with and various other relations with could be confused as a terrorist organization. I just don't think that is reasonable.

Chairman KYL. Mr. Meron.

Mr. MERON. Mr. Senator, the provision that Professor Cole is complaining about is not a provision that your proposed bill changes. It is the preexisting law, and the only thing which your bill does which is very important is it eliminates a disparity between the standards for admissibility and deportation.

From the perspective of the Civil Division, which is the entity within the Department of Justice that litigates the immigration cases, relying exclusively on deportation rather than inadmissibility is a significant impediment. It takes a long time to go through the entire deportation proceedings for someone who is already in this country. There is a bit of a catch-22, which is that the longer they are able to stay, the more of a reliance interest the courts deem them to have in the United States, the more protected rights they are held to have. So there is really no justification for that kind of disparity. That is the only thing your bill does.

Another way of putting the point Mr. McCarthy put is there are conscientious officers within the Department of Homeland Security who implement the immigration laws. They use common sense in doing so. There are a array of judicial review provisions that apply under existing laws that your bill does nothing to remove.

Chairman KYL. I just would observe, too, that our Subcommittee has held hearings on different aspects of this phenomenon that you have got a new type of entity here. It is not like the old Red Brigade or some of these other—you almost had to have a membership card. The would-be terrorists today frequently aren't signed up

with any particular group, and the groups themselves are very amorphous and it is more of a brotherhood, one person helping another, not necessarily signed up as a particular terrorist organization.

While some are in existence and can be put on a list, there are a lot of other folks that are simply not working within that construct, which is one reason that we had to adopt the so-called Moussaoui fix. With Zacarias Moussaoui in the news these days, I think it is relevant to note that at the time that the warrant was sought to look into his computers, we weren't sure we could identify him with a particular terrorist group. Yet, there was good information that he was engaged in terrorist training.

So in this whole notion of trying to adapt to the circumstances of terrorism, a rather new phenomenon here, we shouldn't be so bound up in the ways of the past and the definitions in our law that we don't acknowledge this phenomenon and both write and interpret our laws in a way that we can be flexible enough to deal with it.

I think I just have a couple of more questions here, but one of the questions had to do with the penalties under 2339A and B. The sentence of five years for material support offenses and a minimum of three years for receiving military-type training—are these penalties out of the mainstream? Are they appropriate to the type of offenses, in your view?

Mr. MCCARTHY. I think, Senator, for the most part they are. The one exception I would say would be 2339A. It seems to me that if we know—and this is what a jury finding of conviction on a count like that would say—if we know that somebody has knowingly and intentionally contributed to an act of terrorism, so you don't even have the situation where somebody said, well, gee, whiz, I thought I was giving to Hizballah's social security wing—if we have a situation where the bottom line is we are saying that somebody intentionally contributed to the furtherance of an actual brutally violent terrorist attack, it strikes me that it is insufficient to say that five years does the trick for that.

Chairman KYL. Back to this other issue, and it is kind of a broad question, but the whole question of designating terrorist groups. Some people criticize this process and therefore it is a basis for criticizing the fruits of that process which are involved in this legislation.

What is your take on the process for designating the terrorist groups? Is it adequate?

Mr. SABIN. Courts have specifically found that it is consistent with due process and there are no constitutional infirmities. The D.C. Circuit Court specifically held in that regard.

The Intelligence Reform and Prevention Act modified some of the time periods for the redesignation, as well as the phenomenon that we have seen of groups taking on an alias. The way some targets of our operations have changed the cell phones that they use, the organizations have changed their names in order to possibly avoid the foreign terrorist organization designation list.

So the ability to not unduly burden the Government for every two years going through that redesignation process, as well as every time the name changed regarding an alias, is sort of an in-

side-baseball, important contribution that is in the Intelligence Reform Act and we applaud the Congress in that regard. The challenges have been brought by groups, and consistently the courts have said it is consistent with due process.

Chairman KYL. It kind of goes back to that notion about you don't check your common sense at the door. When you are dealing with terrorists, with a group of very clever people who continually evolve, as I said before, it seems to me that we have to be nimble as well. This statute combines a recognition of that with, nevertheless, sound responses to the questions of constitutional law that have been raised and at least in one case adjudicated.

It would be a shame to sunset for both the reason that we have got a good statute here that has been used as much as it has to very good effect and in view of the consequences of its sunsetting on our investigative techniques, as well as, ironically, the notion that some of the protections that have been built into it would be eradicated were it to be sunsetted.

So it seems to me that you three gentlemen have made a strong case for continuing this important tool in our war against the terrorists. It would be my desire to move the support for continuing the statute in existence forward.

I was just about to end here, Russ. If Senator Feingold would now like to either make a statement or ask you some questions, he is certainly able to do that, but I am finished with my questions.

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

Senator FEINGOLD. Thank you, Mr. Chairman. I am sorry I didn't get here earlier. A vote is starting right now. I will just be brief. Thank you so much.

I am glad this hearing is focused on the very important material support issue. This is one of the provisions of the USA PATRIOT Act that has actually been struck down as unconstitutional. So certainly I agree it is worthy of attention.

However, I am disappointed that this hearing is focused on the expansion of the material support statute and related laws, rather than also examining the problems with that statute. As I noted last fall when the intelligence reform conference passed the Senate, I am very concerned about the material support provision contained in that legislation. Of course, the legislation did take steps to cure the constitutional defects in the law. It responded to a Federal court that ruled last year that Section 805 of the PATRIOT Act, criminalizing the provision of expert advice or assistance to a terrorist organization, was vague and therefore violated the First Amendment.

But I am not convinced that these provisions actually cure the constitutional flaws. Most significantly, the statute still does not have an adequate intent requirement. Mr. Chairman, given the continuing constitutional problems with this law, we should not be eliminating the sunset or increasing the penalties for material support. We don't know yet how this new, revised provision will work or what problems might arise because of this. So this hearing is a first step and I appreciate that, but I do want to say we have much work to do.

Mr. Chairman, just one question.

Mr. Sabin and Mr. Meron, the material support provision requires knowledge on the part of the accused that the organization in question is a designated terrorist organization or that it has engaged or engages in terrorism. It does not, however, require any intent to further the terrorist goals of the organization or to further the commission of unlawful acts.

I understand and appreciate the need to be able to arrest and prosecute those who intend to do us harm as early as possible in their planning, but I am concerned that this could sweep in people who are actually trying to prevent terrorism or trying to help innocent civilians.

So, first, does the Department of Justice believe that providing peace-making and conflict resolution advice to a designated organization is barred by the material support statute?

Mr. SABIN. With respect to your comment, Senator, the intent provision, we believe, as articulated in the Ninth Circuit opinion and as adopted in the Intelligence Reform and Prevention Act, is the appropriate standard. It provides, consistent with legislative intent and consistent with the framework that Congress set up, that we should not only go after the person who is operational, but the person who is writing the check, regardless of the humanitarian or military purposes of that organization.

So once they have been designated, they are radioactive. And as long as that individual knows that they have been designated or knows of the violent activities, we should not have, as I talked about earlier, an escape hatch under Section 2339B so that that donor's intent can somehow prove not violative of the statute. So I think it would be substantially hindering our ability to use the backbone of our prosecutorial efforts to expand that.

Senator FEINGOLD. So the answer is a person is still potentially included if they are providing peace-making and conflict resolution advice? That is what I asked. Does the Department of Justice believe that providing peace-making and conflict resolution advice to a designated organization is barred by the material support statute?

Mr. SABIN. It depends. For example, if there was a lawyer that wanted to provide that kind of assistance, there is now a provision, as passed in the Intelligence Reform Act, 2339B(j), that enables the individual to seek clarity for providing that type of assistance.

Senator FEINGOLD. So there are certain narrow exceptions that would be allowed?

Mr. SABIN. Correct.

Senator FEINGOLD. Does the Department believe that humanitarian organizations providing tsunami relief in parts of Sri Lanka controlled by the Tamil Tigers violated the material support statute?

Mr. SABIN. It would depend again on the particular application. If you were working under the direction and control and you knew that that group was engaged in violent activities, it could be a violation of the statute. However, if it was something that is protected under the application of 2339B(j), then it would not be our exercise of prosecutorial discretion to bring that person into the criminal

justice system. So, again, it is going to depend upon the specific facts that are involved.

Senator FEINGOLD. Well, I appreciate those answers and they help me understand it. My understanding of the notion of vagueness, however, is that a person needs to have some sense in advance of whether they are violating the law or not. Otherwise, it is vague, and our continued conversations about this should be in that spirit, whether these provisions really do give a person adequate notice that they may be doing something that they shouldn't be doing.

Mr. Chairman, I know I came in here late. I look forward to working with you on this issue. Thank you, Mr. Chairman.

Chairman KYL. Thank you.

Again, I want to thank all of the witnesses. I don't know how many days we will leave this record open, but if anybody has questions or if you would like to submit anything else for the record, you are certainly entitled to do that. I want to thank you again for your testimony here today. I appreciate it.

[Whereupon, at 3:24 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

WRITTEN TESTIMONY OF PROFESSOR DAVID COLE

ON PROPOSED REVISIONS TO MATERIAL SUPPORT LAWS

BEFORE THE SENATE JUDICIARY COMMITTEE'S

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY & HOMELAND SECURITY

APRIL 20, 2005

INTRODUCTION

I appreciate the opportunity to provide the Subcommittee on Terrorism, Technology & Homeland Security with my views on Senator Kyl's proposed amendments to the criminal and immigration laws related to material support to terrorist organizations. I teach constitutional law, immigration law, national security, and criminal procedure at Georgetown University Law Center, and I am a volunteer staff attorney with the Center for Constitutional Rights. As a lawyer for the Center, I have been involved in several cases relating to the material support laws, in both the criminal and immigration contexts. I am lead counsel, for example, in *Humanitarian Law Project v. Gonzales*, in which several provisions of the material support law were declared unconstitutional. Congress sought to respond to the *Humanitarian Law Project* decisions in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) ("2004 Act"). The views expressed here are my own.

In my view, Senator Kyl's proposal is flawed in three significant respects. First, Section

2 prematurely seeks to eliminate the sunset that Congress placed on its 2004 amendments to the material support law, before Congress has had any opportunity whatsoever to see how those amendments operate in practice. Given the serious constitutional concerns presented by the 2004 amendments, and the absence of any experience to guide Congress in its evaluation of the amendments, it is entirely premature to eliminate the sunset. Second, Section 3 would vastly expand the concept of guilt by association, in ways that raise profound due process and administrability problems. And third, Section 5 of the bill retroactively holds people responsible for acts that were entirely legal when they were engaged in, for no legitimate purpose. I will address each concern in turn.

I. IT IS PREMATURE TO ELIMINATE THE 2004 ACT'S SUNSET PROVISION

In December 2004, just four months ago, Congress enacted substantial revisions to the material support law. As it has sometimes done with respect to laws that raise potential constitutional problems, Congress imposed a sunset on these provisions, providing that they will expire on December 31, 2006, unless Congress acts to extend the provisions. Section 2 of the bill would eliminate the sunset provision altogether, and make these changes permanent.

Section 2 violates the very purpose of the sunset provision adopted by Congress less than four months ago. The purpose of a sunset provision is to ensure that Congress will revisit an issue after it has had time to observe the law's implementation. Congress adopted such a sunset for several of the most controversial provisions of the USA Patriot Act, for example, and is now, more than three and one-half years after the law was enacted, considering whether to amend or extend those provisions. In doing so, it has been guided by disclosures (sometimes unfortunately

selective) about how the law has been used and/or abused. The idea of a sunset provision is that such experience will better inform Congress's judgment.

Section 2 of Senator Kyl's bill would short-circuit that process altogether. The ink on the 2004 Act that created the sunset is barely dry, and Congress has had no opportunity whatsoever to see how the amendments it enacted in December 2004 have operated in practice. Yet Section 2 would preemptively eliminate the sunset.

The amendments made by the 2004 Act raise as many constitutional questions as they resolve, and therefore awaiting some evidence of their application might inform Congress's judgment as to whether they should be made permanent. For example, Section 6603 of the 2004 Act provides new definitions for the terms "training," "personnel," and "expert advice or assistance," all of which the federal courts had previously ruled unconstitutionally vague. But the new definitions do not cure the vagueness problems. For example, limiting "training" to the imparting of a specific skill, rather than general knowledge, does not help clarify the ban. Is human rights advocacy or peacemaking a specific skill, or general knowledge? Is driving a car "general knowledge" or a "specific skill"? What about training in lobbying Congress, speaking to the public, or engaging in public advocacy in the press? The new definition provides no more guidance on these questions than the previous prohibition on "training" did.

Similarly, under the new definition of "personnel," which is defined as acting under the organization's "direction and control," writing an op-ed for a designated group to oppose its designation would be permissible only if undertaken "independently," but not if done under the group's "direction and control." Would running the op-ed by the group's leader for approval, or discussing its themes with him, constitute acceptance of "direction," or would that still be

"independent"? The distinction leaves a large gray area of conduct that might be seen as "under the direction and control" of the organization, but would clearly be protected by the First Amendment.

The 2004 Act's definition of "expert advice or assistance" also fails to clarify the scope of the prohibition. It defines "expert advice or assistance" as that advice and assistance derived from "specialized knowledge." But that provides no more than a synonym for "expert," a term already deemed unconstitutionally vague. It provides no additional clarity, and in fact only exacerbates the statute's vagueness, because now an individual must guess as to whether the knowledge that makes his advice "expert" is "specialized" or not. Given that "expert advice" would on its own terms already seem to imply some sort of specialized knowledge, it is difficult to see how this "definition" clarifies the provision in any meaningful sense.

Section 6603(e) of the 2004 Act states that "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." This provision also does not cure the vagueness problems, because it lacks the precision required to permit ordinary people to know what is permitted and what is prohibited under the statute. As the Fifth Circuit said of identical language in another federal statute: "Such a provision cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments." *CISPES (Committee in Solidarity with People of El Salvador) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985).

Section 6603(j) of the 2004 Act appears to create a licensing regime for those who obtain advance approval from the Secretary of State and Attorney General to provide personnel, training, and expert advice or assistance to designated groups. This subsection provides:

> No person may be prosecuted under this section in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

This provision raises serious constitutional problems, because it essentially grants the Secretary of State unfettered discretion to license speech. It creates a facially deficient prior restraint licensing scheme. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (licensing schemes must have clear standards and strict procedural safeguards, including prompt judicial review). It sets forth no standard whatsoever for *granting* approvals, stating only the circumstances in which approval may *not* be granted. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (striking down licensing scheme that gave mayor unfettered discretion to grant or deny licenses for newspaper distribution boxes). And it provides for none of the procedural safeguards required for prior restraint licensing schemes.

The amendments made in the 2004 Act thus raise serious constitutional questions. All of these issues are pending in federal court in the *Humanitarian Law Project* case. *Humanitarian Law Project v. United States DOJ*, 393 F.3d 902 (2004) (remanding for consideration of constitutionality of 2004 Intelligence Act amendments). There is no reason for Congress to make them permanent prematurely, and every reason to see how they are applied and enforced by the executive branch before deciding on whether to extend or eliminate the sunset. There is no good reason for acting precipitately here. The sunset should be permitted to remain in place, and Congress should wait until 2006 to take up whether the sunset should be extended or eliminated. At that time, there will be a track record of operation and application for Congress to consider to

make an informed judgment. At this point, Congress has *no more evidence than it had in December 2004*, when it decided to impose the sunset. Thus, there is no good reason for eliminating the sunset now.

II. SECTION 3 WOULD IMPOSE SWEEPING GUILT BY ASSOCIATION ON IMMIGRANTS AND VISITORS

Section 3 of the bill would deny entry to any foreign national who is a member of an undesignated terrorist organization, subject only to a largely meaningless defense. This is wholly unnecessary to protect national security, and raises serious fairness, overbreadth, and due process concerns. It is unnecessary because current law already renders inadmissable members of terrorist organizations designated by the Secretary of State and/or Attorney General. That bar applies to the 36 or so organizations that have officially been designated "terrorist organizations." Current law also permits exclusion of any person associated with even an undesignated terrorist organization where the individual's activities might pose a threat to "the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(3)(F). And it allows exclusion of any individual who the government has reason to believe is likely to engage after entry in any terrorist activity. " 8 U.S.C. § 1182(a)(3)(B)(i)(II).

Senator Kyl's bill would vastly expand this ground of inadmissability, in ways that trench on First and Fifth Amendment rights. (It would also expand the grounds of removal of foreign nationals here, because removal can be based on evidence that one was inadmissible at the time of entry). The scope of undesignated "terrorist organizations" is virtually limitless. Senator Kyl's section-by-section analysis erroneously states that an undesignated terrorist organization is

"a group that commits or incites terrorist activity with the intent to cause serious bodily injury, prepares or plans terrorist activity, or gathers information on potential targets for terrorist activity." In fact, the definition is far more expansive. Under current immigration law, undesignated terrorist organizations consist of any group of two or more persons who have ever engaged in "terrorist activity" as defined by immigration law. 8 U.S.C. § 1182(a)(3)(B)(vi). Immigration law in turn defines "terrorist activity" so broadly as to include any use or threat to use a weapon against person or property. 8 U.S.C. § 1182(a)(3)(B)(iii)((V)(b), (VI). Thus, any group of two or more persons that has ever used or even threatened to use a weapon is a "terrorist organization." The weapon need not be used against civilians, or for a political purpose. Terrorist organizations also also includes any group that has ever provided material support to any other group of two or more persons who have ever used or threatened to use a weapon. The definition is so capacious as to include the African National Congress, the Northern Alliance, the Israeli military, and any groups that ever provided material support to these groups.

To make all members of any group that has ever used or threatened to use a weapon inadmissible, without any showing that the individual seeking admission supported such violence, or was engaged in such violence, or poses any threat of violence, is wholly unnecessary to protect the national security, and inconsistent with fundamental First and Fifth Amendment values. The Northern Alliance fought with us against Al Qaeda and the Taliban, yet under this law every member of the Northern Alliance would be barred entry. So, too, would members of the African National Congress, the ruling party in South Africa.

Existing immigration law permits the exclusion of members of those groups we consider sufficiently dangerous to designate as "terrorist organizations," and also permits exclusion of any

person who we have reason to believe would engage in activity while here that would threaten the national security. If a person is not a member of a designated group, and if there is no reason to believe that he poses any threat to our national security, why should he be denied entry simply because he fought alongside us against Al Qaeda, or fought against the apartheid regime in South Africa, or was a member of the Israeli military?

The only exception the provision would allow for is where a foreign nationals can demonstrate "by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization." Given the expansive definition of "terrorist organization," this exception is largely meaningless. No member of the Israeli military, for example, could reasonably say that he did not know that the military had used or threatened to use weapons against person or property in the West Bank. Nor could any member of the Northern Alliance or the ANC reasonably say that they were unaware that these organizations ever used or threatened to use weapons. Thus, members of these and many other organizations that have used violence in one way or another will be absolutely precluded from entry, even where they themselves took no part whatsoever in the violence, and pose no threat to the United States.

III. SECTION 5 OF THE BILL IMPOSES ITS BURDENS RETROACTIVELY

Section 5 of the Act expands the already remarkably sweeping ground of inadmissibility established by Section 3, and discussed above, by making the bar retroactive. Thus, not only would foreign nationals be denied entry for belonging to any group that has ever used or threatened to use a weapon, but they would be denied entry for belonging to such a group even

when no law in their home country or in the United States barred such membership. Given the potentially limitless number of groups that fall under the definition of "undesignated terrorist organizations," such retroactive effect is especially unfair. It is one thing to exclude members of those groups that have been specifically identified as "terrorist organizations" by the Secretary of State. It is another matter entirely to subject immigrants to exclusion based on their affiliations with groups that neither the United States nor any other country ever even identified as proscribed.

U.S. Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senator John Cornyn (R-TX)

"A Review of the Material Support to Terrorism Prohibition Improvements Act"

Wednesday, April 20, 2005, 2:30 p.m., Dirksen Senate Office Building Room 226

I want to thank Chairman Kyl for scheduling today's hearing which addresses critical deficiencies in both our Material Support. The Material Support statute is of paramount importance to the safety and security of our country and has proven invaluable to the Department of Justice's efforts to thwart terrorists before they are able to carry out their deadly attacks.

I support Senator Kyl's effort to reconcile the Immigration and Nationality Act's provisions surrounding the admissibility of aliens who have attended terrorist training camps and have joined him as a co-sponsor of this bill. Currently our immigration law provides that those who have attended a terrorist training camp must be deported from this country. However, there is no similar provision making aliens inadmissible ***before*** they enter our country. It is important that those who attend terrorist training camps be both deportable and inadmissible, which is what this bill does.

Senator Kyl and I are in the midst of conducting a series of top down hearings examining our immigration system. Unfortunately, it seems that the more we examine the current immigration system, the more we see perverse and non-sensible results, like the discrepancies addressed by this bill, that plague our immigration system.

I additionally support the bill's intent to raise punishments for those who commit material support crimes. Following the Supreme Court's U.S. v. Booker decision which invalidated the sentencing guidelines, it is the responsible thing for Congress to specify a minimum punishment for serious crimes, particularly those related to terrorism.

The improvements to these statutes made by this bill cannot be overstated. It is no longer acceptable that we just prosecute those who commit these crimes after the fact and assess stiff punishments. Our country has made the ***prevention*** of terrorist attacks the number one priority of our government. And to effectively do this, we need to combat the full range of terrorist supporters, including those in more peripheral and passive roles.

By aggressively attacking the entire terrorist organization, including those who raise money behind the scenes, we maximize our ability to disable the networks on which successful terrorist operations depend. To achieve this, the government must stop all persons acting within a terrorist organizational structure, including those individuals and organizations that engage in fundraising, procurement, training, logistics and recruiting on behalf of terrorist organizations.

It is the Material Support statute that arms our law enforcement officers to cut across the entire terrorist network and disrupt entire operations. And make no mistake, terrorists are aware of our efforts to proactively disrupt their efforts. Jeffery Battle, a member of the terrorist cell from Portland, explained why his enterprise was not as organized as he thought it should be in a confidential conversation with a sympathizer. He said:

"[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."

Terrorists are taking note of our country's resolve to fight them and anyone who may support them. Whether it be terrorist fundraising, training at a terrorist training camp, or terrorist recruiting Congress has taken an unqualified stand that anyone guilty of these types of crime be punished severely and, if appropriate, removed from this country. This bill furthers that purpose.

I look forward to hearing from our witnesses today. Thank you Mr. Chairman.

News From:

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Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Subcommittee Hearing on Terrorism, Technology and Homeland Security, "A Review of the Material Support to Terrorism Prohibition Improvements Act"

April 20, 2005

Thank you, Mr. Chairman. I am glad this hearing is focused on the very important material support issue. This is one of the provisions of the USA PATRIOT Act that has been struck down as unconstitutional, so I certainly agree it is worthy of our attention. However, I am disappointed that this hearing is focused on the expansion of the material support statute and related laws rather than also examining the problems with that statute.

As I noted last fall when the intelligence reform conference report passed the Senate, I am very concerned about the material support provision contained in that legislation. Of course, the legislation did take steps to cure the constitutional defects in the law. It responded to a federal court that ruled last year that the Section 805 of the Patriot Act, criminalizing the provision of "expert advice or assistance" to a terrorist organization, was vague and therefore violated the First Amendment.

The revised material support statute states that the law criminalizing material support to a foreign terrorist organization shall not be construed to abridge rights guaranteed by the First Amendment. It also allows an exception for providing personnel, training, or expert advice or assistance that is approved by the Secretary of State and the Attorney General. But I am not convinced that these provisions cure the constitutional flaws. Most significantly, the statute still does not have an adequate intent requirement. The statute does not require that the accused have intent to further terrorism or other unlawful acts, raising the possibility that

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Testimony of

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Before the

United States Senate Judiciary Committee
Subcommittee on Terrorism, Technology and Homeland Security

Wednesday, April 20, 2005 at 2:30 p.m.
Dirksen Senate Office Building Room 226

Chairman Kyl, Senator Feinstein, and members of the Subcommittee on Terrorism, Technology and Homeland Security, thank you for inviting me here this afternoon. It is an honor to testify before you, particularly on a matter of such importance to our national security.

I am currently an attorney in private practice in the New York area and a Senior Fellow at the Foundation for the Defense of Democracies, a non-partisan, non-profit policy institute here in Washington that is dedicated to defeating terrorism and promoting freedom. For close to eighteen years up until October of 2003, I served as an Assistant United States Attorney in the Southern District of New York.

While I held several executive staff positions in our Office and had the opportunity to participate in a number of significant cases, the most important work that I participated in, along with teams of dedicated Assistant United States Attorneys working arm-in-arm with our colleagues in the FBI and other federal and state law enforcement agencies, was in the area of counterterrorism.

From a time shortly after the World Trade Center was bombed on February 26, 1993, through early 1996, I was privileged to lead the prosecution against Sheik Omar Abdel Rahman and eleven others for conducting against the United States a war of urban terrorism that included, among other things: the WTC bombing, the 1990 murder of Meir Kahane (the founder of the Jewish Defense League), plots to murder prominent political and judicial officials, and a conspiracy to carry out what was called a "Day of Terror" – simultaneous bombings of New York City landmarks, including the United Nations complex, the Lincoln and Holland Tunnels (through which thousands of commuters traverse daily between lower Manhattan and New Jersey), and the Jacob K. Javits Federal

Building that houses the headquarters of the FBI's New York Field Office (a plot that was thwarted).

After defending those convictions on appeal, I also participated to a lesser extent in some of our Office's other prominent counterterrorism efforts – including pretrial litigation in the prosecution against the bombers of the U.S. embassies in Kenya and Tanzania, and the appellate defense of convictions in the case involving the conspiracy to bomb Los Angeles International Airport during the Millennium observance. Finally, following the 9/11 attacks, I supervised the U.S. Attorney's command post in lower Manhattan, near ground zero, working closely with all our colleagues in the law enforcement and intelligence communities to try to do what we have been trying to do ever since that awful day: prevent another attack against our homeland.

It is for that reason that I am happy to come here today to respectfully and enthusiastically urge the committee to vote in favor of the proposed "Material Support to Terrorism Prohibition Improvements Act of 2005."

The proposed bill focuses on what are two of the most critical aspects of our national struggle to defeat the network of Islamic militants that is waging a terrorist war against us: (a) the need to beef up the statutory arsenal that enables law enforcement to stop attacks at an early stage, before they endanger Americans; and (b) the need to recognize the threat posed by paramilitary training.

Both of these concerns emerged as serious problems from the very start of our confrontation with militant Islam in the early 1990s. When the WTC was attacked in 1993, it was not only the American public and political system that were taken by surprise. Although terrorism was not unknown in the United States, its incidents – at

least since the Civil War – had been neither frequent nor threatening on the scale with which we have become all too familiar in recent years. As a result, the then-existing legal system was not sufficiently prepared to deal with the onslaught.

The inadequacy of the legal tools for combating terrorism came into sharpest relief in the months immediately following the WTC bombing. By then, it had become clear that an international jihad army, under the leadership of Sheik Omar Abdel Rahman – the blind cleric who led the murderous Egyptian Gama'at al Islamia (or Islamic Group) which had played a key role in the 1981 assassination of President Anwar al-Sadat – had been had been forming since the late 1980's. This militia had actually been surveilled by the FBI during 1988 and 1989, the time during which it first started conducting paramilitary exercises in marksmanship, assassination tactics and explosives training in remote outposts like Calverton, Long Island, and western Connecticut.

While it is difficult in our post-9/11 world to look at history without the prism of all we have been through for the past twelve years, it is important to underscore that this was what might be called the pre-terror era. We now know that paramilitary training – not only in the U.S. but overseas – is perhaps the surest sign that people are committed to doing our nation harm. But at the time, the U.S. government was not investigating the nascent group in the New York area as a terrorist organization. Rather, understanding that the training might, at least in part, be geared toward supporting the Afghan mujahideen, the FBI's concern was that the group could be violating federal "neutrality" laws, which generally prohibit American persons (citizens and legal aliens) from helping make war on a country with which the United States is at peace.

The true significance of this training emerged only after the WTC bombing. It was then that the old surveillance photos of the training were reviewed and found to depict key members of the bombing conspiracy. These included Mohammed Salameh, Nidal Ayyad and Mahmud Abouhalima, all later convicted of the WTC bombing; Clement Hampton-El, later convicted of terrorism charges relating to the bombing; and El Sayyid Nosair, later convicted not only of the same terrorism charges but also the 1990 Kahane homicide. I should note here that Abouhalima and Hampton-El, even then, even before any of the atrocities that followed, were already prominent figures in what was a growing jihadist movement. Why? Precisely because they had gone to Afghanistan, they had participated in the rigorous training there, they had fought with the mujahideen, and they had come back to the United States to share what they had learned with the new recruits.

The crucial role of paramilitary training – especially the kind imported from overseas – was also evident from the activities of two other men who were central to the WTC bombing conspiracy. Ahmed Ajaj had settled in Houston, Texas, upon first arriving in the United States on September 9, 1991, and petitioning for political asylum. He was permitted to remain at liberty – despite failing to show up for his immigration hearing. He used that liberty to make some necessary militant contacts. These helped him arrange to attend a terrorist training camp in Afghanistan.

Ajaj left the United States to do precisely that in April 1992. When he returned from the training on September 1 of that year, he was not alone. His traveling companion, aboard a flight to New York City from Pakistan, was Ramzi Ahmed Yousef, a trained explosives expert who would later become the chief architect of the WTC

bombing. Nor was Ajaj empty-handed. He had in tow items that his training had taught him would be most valuable: bomb making manuals and instructions on the creation of false identity documents.

Tragically, while Ajaj was arrested on immigration charges upon attempting to enter our country, Yousef was permitted to enter and remain at liberty upon claiming asylum. He immediately took up residence with Salameh in New Jersey and spent the next six months experimenting with various compounds and finally constructing the powerful urea nitrate explosive that was detonated at the WTC, killing six people including a pregnant woman, injuring countless others, causing hundreds of millions of dollars in damages, and, effectively, declaring war on the United States.

Yousef, of course, eluded capture for nearly two years, fleeing the U.S., returning to militant strongholds overseas, and planning what became known alternatively as the "Bojenka" conspiracy or the "Manilla Air" conspiracy – a plot to bomb U.S. airliners while they were in flight over the Pacific, which claimed the life of one man, and nearly took down a crowded flight, as a result of one of Yousef's test runs during which a bomb was detonated using a timing device.

The realization in early 1993, after the WTC bombing, of an emergent, international jihad army with members stationed inside the United States had immediate consequences. An acceptance of responsibility letter penned by Yousef warned that the terrorist militia had many trained members and was fully prepared to strike again. This proved instantly to be the case. An FBI informant soon learned that a plot for even greater devastation was underway: the aforementioned "Day of Terror" conspiracy.

Once again, paramilitary training proved critical to this plot, which was to be carried out by members of different cells under Sheik Abdel Rahman's influence.

Of course, by the spring of 1993, in the wake of the WTC bombing, we already knew that while the Afghan mujahideen was quite real, it had also been ostensibly valuable as a cover in the United States for the true purpose of the training. This was plainly to have trained individuals, infiltrated into our community and at the ready to perform violent jihadist activities, on short notice, whenever and wherever the opportunities presented themselves. Still, in the investigation of the Day of Terror plot by the FBI and the New York Joint Terrorism Task Force, the obvious was made explicit.

An informant became accepted into one of the aforementioned cells, a primarily Sudanese group under the leadership of a man named Siddig Ibrahim Siddig Ali. Siddig Ali repeatedly stressed to the informant the importance of training, and detailed how members of his cell had conducted training exercises in a public park in Jersey City, New Jersey as well as in days-long ventures to rural Pennsylvania. As was the case with the purported Afghanistan training in the late 1980's and early 1990's, participants in the training had a cover story: they were readying themselves to take up arms in the former Yugoslavia on behalf of the Bosnian Muslims. But Siddig Ali explained to the informant that the essential point was to have people "ready for action" whether in the U.S. or overseas. As the leader of the cell, Siddig Ali elaborated that this arrangement meant he could plot terror operations, get the necessary approval from Sheik Abdel Rahman, and then follow the practice of not "speak[ing] to these people about what we are going to do until the last moment" since these people had already been instructed to stand "ready" for further instructions.

Indeed, in the early spring of 1993, Siddig Ali had planned to use the cell to carry out the assassination of Egyptian President Hosni Mubarak during the latter's scheduled visit to New York City. The plot was aborted when Siddig Ali learned that that law enforcement had become suspicious and taking some investigative steps. But Amir Abdelgani, a member of Siddig Ali's cell, later confirmed for the FBI's informant the "sleeper" nature of the cell by telling the informant that even though Siddig Ali had not told Abdelgani about targeting Mubarak, Abdelgani had been trained and would have been willing and able to carry out an attack.

The paramilitary training we are talking about was no amateur hour. Its leaders had military experience, including combat, and trained would-be terrorist operatives in commando tactics, the use of small and large firearms, the construction of explosives, techniques for neutralizing sentries, and various other maneuvers. It should come as no surprise then that, before law enforcement interdicted the Day of Terror plot, the would-be bombers had engaged in a host of activities that were consistent with their training – including repeated and detailed surveillance of the targets.

Of course, unearthing this plot before it could be executed was an enormous public service. In matters of terrorism, the object for law enforcement (and for the rest of government) must always be to prevent attacks from happening rather than to bring terrorists to justice only after mass murder has already occurred. But one important effect of thwarting the Day of Terror plot was the revelation that there were gaping weaknesses in American anti-terrorism law – weaknesses that counterintuitively penalized investigators for foiling plots.

For example, under American criminal law, circa 1993, a successful bombing could be punished with a term of life imprisonment and, once capital punishment was revived under federal law in the mid-1990s, by execution if the bombing had caused any deaths. The criminal code, however, contained no specific provision for bombing *conspiracy*. Thus, if a group plotted a bombing but was interrupted by effective law enforcement, the plotters had to be charged under the catch-all federal conspiracy statute (18 U.S.C. ' 371), which punishes an agreement to violate any criminal statute with a maximum *five-year* penalty (and no requirement that the judge impose any minimum term of incarceration at all). Such a term was grossly insufficient for a conspiracy to kill of tens of thousands.

Federal law also made it a crime to attempt to carry out a bombing (18 U.S.C. ' 844), which at least provided another charge against unsuccessful plotters. But the penalty was paltry: a maximum of ten years' imprisonment (and, again, no requirement that the judge impose any minimum term of incarceration at all). Attempt law, in addition, created a counterproductive tension between public safety and prosecution. Proving attempt requires the government not only to show that the plotters agreed to commit the crime at issue (here, bombing) and took some preparatory measures, but also that those measures amounted to a "substantial step" toward the accomplishment of the crime. But the difference between "mere preparation" (which is insufficient) and a "substantial step" (which is required to establish guilt) can be murky – made more ambiguous back in 1993 because the leading court case on attempt, which was not a model of clarity, came in the context of an attempted bombing.[1]

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[1] *United States v. Ivic,* 700 F.2d 51 (2d Cir. 1983).

The tension here was palpable. Because prosecutors and investigators must fear that purposeful actions to carry out a bombing could be construed as "mere preparation" rather than a "substantial step," their incentive is to let the conspirators go forward with their plans until the last possible second in order to bolster the chances of conviction. Public safety, however, strongly counsels against this approach, for if the investigators lose control of events – which can easily happen when dealing with organizations whose operations are by nature secretive – massive loss of life can result. Fortunately, this did not occur in the Day of Terror plot, but the possibility of its happening was too great in the WTC bombing era.

The Clinton Administration's Justice Department and the members of this Congress are to be greatly commended for energetically dealing with these grave problems in the best tradition of bipartisanship in the arena of national security. In 1996, anti-terrorism legislation was enacted which both ratcheted up the penalties for terrorism-related crimes and, perhaps more significantly, gave prosecutors urgently needed tools, designed to root out terrorist plots at an early stage, shut down funding channels, and place a premium on preventing terrorist acts rather than simply prosecuting them afterwards.

Among these much needed improvements were the material support statutes this subcommittee is again considering today, Sections 2339A and 2339B of Title 18, United States Code. Of course the greatest threats we face come from the frontline operatives who are actually willing to carry out attacks. But, as we have learned the hard way, those terrorists simply cannot succeed without support networks: people and entities willing to

fund them, to train them, to provide them with fraudulent documents that facilitate their travel, and to provide them with the other assets they need to carry out their savage deeds.

The material support statutes target just this type of behavior. Thus, it should come as no surprise that the material support statutes have become the backbone of anti-terrorism enforcement since they were enacted in 1996. And, I respectfully submit, it is no accident that we have not had another domestic terror attack since 9/11, during a period of time when the Justice Department under President Bush has been appropriately aggressive in using the material support statutes to isolate and disrupt activity that facilitates terror networks.

I strongly support the theory behind both statutes. Section 2339A is the most straightforward. If the government can prove that someone has contributed assets or any kind of assistance with the intention or awareness that these resources will be used to carry out the types of violent crimes we commonly associate with terrorism, the law must treat such contributions harshly – both to neutralize the contributors who have been identified and to convey an unambiguous message to other would-be contributors that this behavior will not be tolerated.

Section 2339B is at least equally important, although it has been subjected to more criticism. It stipulates that once an entity that has been designated a "foreign terrorist organization" (FTO) by the Secretary of State Under, it is illegal to provide material support to that organization. Because many terrorist organizations compartmentalize themselves into purportedly separate military wings, political wings and social services wings, it is sometimes contended that Americans should not be restrained from contributing assets, advice or expertise to the non-military activities.

I respectfully submit that this is ill-conceived. Our goal here, for the sake of national security, has to be to marginalize and eradicate terrorist activity. Organizations that practice terrorism must be made aware that, no matter what good they may seek to do, by participating in conduct that targets civilians and aims to extort concessions by force, they forfeit any claim on our good will. Once an organization has been designated an FTO, it must be considered radioactive – an entity that merits only our contempt, not our contributions.

It also bears noting here that Congress did not give the Secretary of State a blank check. Federal law provides for a rigorous administrative procedure, the State Department must support its conclusions with findings of fact, and key congressional members must be given an opportunity to object prior to the designation's publication in the Federal Register. Moreover, even though it may be an avowed enemy of the United States, an FTO is permitted to appeal the designation to the U.S. Court of Appeals for the District of Columbia — a system that provides due process but also centralizes all adjudication in a single tribunal that can develop the requisite competence and apply a uniform set of analytical standards.

These well-considered safeguards should give us confidence that only the organizations which deserve the designation are being targeted, and that an entity which is either wrongly accused of practicing terrorism or that convincingly renounces terrorism has an open avenue to challenge the designation. Given that, the law does not and should not allow individuals, however well intentioned they may be, to provide material support. Such individuals may sincerely believe they are performing in a socially beneficial manner by contributing resources to non-violent activities. Many resources that terrorists

need, however, are fungible. A dollar contributed for charity may be used for weapons. Expertise or other assets that help an FTO carry out seemingly innocent activity may allow it to shift a greater percentage of its resources to violence or to function more efficiently and more attractively – which inevitably helps its recruiting and its capacity to use force. If we are to win the war in which we are engaged, these organizations must be starved and ostracized, not fed and emboldened.

I strongly support the measures in the proposed bill to improve the effectiveness of the material support statutes, as well as the much needed crack-down on the menace of paramilitary training. I commend Senator Kyl for proposing them.

Last year's Intelligence Reform Act provided much needed clarification on statutory terms such as "personnel", "training", and "expert advice or assistance," to address constitutional vagueness objections; expanded the jurisdictional bases for material-support offenses; and clarified the mens rea element to require that the government need only show a defendant knew that the organization to which he gave material support either engaged in terrorism or was designated as a terror group. These changes both helped the government target appropriate offenders and promoted fairness and due process by ensuring clarity in the law.

Allowing such improvements to sunset would take us a step back to the uncertainty of judicial decisions that created doubt about the statutory requirements and thus reduced the effectiveness of material support laws as the vital law enforcement tool Congress intended them to be. I respectfully urge the committee that the sunsets be removed and the improvements enacted by the Intelligence Reform Act be made permanent.

I also support the increased penalties for material support offenses. Terrorism is the most profound national security challenge our country faces, and it must result in penalties that reflect that reality. The Supreme Court's recent ruling that the federal Sentencing Guidelines are advisory at best will obviously challenge this Congress in many ways to ensure that the worst offenders are subjected to commensurate terms of incarceration. Mandatory minimums are often unpopular, and in many instances they may be overkill. But here, we are not dealing with a blight we are merely seeking to prosecute. We are actually at war with a vicious terror network and our highest priority must be to eradicate terror networks. If there is any context in which mandatory minimums are proper and prudent, it is surely this one.

Finally, it is time to recognize in an assertive way the threat posed to our country by militant Islam's emphasis on paramilitary training. Recent expert estimates suggest that as many as 70,000 people may have gone through paramilitary training at al Qaeda camps over the years.[2] Obviously, not every one of those trainees becomes or has any intention of becoming an active terrorist operative. But we would be foolish not to recognize that some percentage will, that this percentage may well be higher than we'd like to think, and that even if it were only one percent that would be far too many. Nor can we close our eyes to the fact that paramilitary training by at least some defendants has been a staple of virtually all the major terrorist prosecutions in our country over the past dozen years. As we have seen, it is what makes effective sleeper cells possible.

I thank the subcommittee for its time and attention.

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[2] See, e.g., BBC Report ("Some 70,000 people received weapons training and religious instruction in al-Qaeda camps, German police say") (Jan. 1, 2005) (http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4146969.stm).

Department of Justice Joint Statement by

Daniel Meron, Principal Deputy Assistant Attorney General, Civil Division

and

Barry Sabin, Chief, Counterterrorism Section, Criminal Division

Hearing Before the United States Senate Judiciary Committee

April 20, 2005

Mr. Chairman, members of the Committee, thank you for the opportunity to testify at this important hearing. We are pleased to discuss with you the Justice Department's efforts in investigating and prosecuting terrorists and in protecting the American people from future terrorist attacks, owing to the important tools Congress has provided us over the years. Specifically, we will focus on our use of the material support statutes, 18 U.S.C. Sections 2339A and 2339B, which are at the heart of the Department's prosecutive efforts.

As President Bush recently said, "Our country is still the target of terrorists who want to kill many, and intimidate us all. We will stay on the offensive against them, until the fight is won." We, at the Department of Justice, continue that fight, always cognizant of the vital importance of the liberties guaranteed by our Constitution. Working together with the Intelligence community and our international allies, law enforcement agents and prosecutors have made significant progress in the war on terror through use of the criminal justice system, one of the many tools in the American counterterrorism arsenal.

The material support statutes, as enhanced and clarified by the USA PATRIOT Act in 2001, and the Intelligence Reform and Terrorism Prevention Act just a few months ago, are critical features of the law enforcement approach to counterterrorism. Rather than criminalizing the violent acts used by terrorists, these statutes recognize that there are important components of the terrorist infrastructure that stop short of actual attacks. We know from experience that terrorists need funding and logistical support to operate. They need to raise funds, open and use bank accounts to transfer money, and to communicate by phone and the Internet. They need travel documents. They need to train and recruit new operatives, and procure equipment for their attacks. People who occupy this position in the terrorism division of responsibility might not themselves be bomb-throwers. The front-line terrorists cannot operate without specialists. The material support statutes are designed to reach the non-violent specialists and the logistical support networks.

Even before the most recent amendment, which we will address shortly, these provisions criminalized the act of knowingly providing "material support or resources" to terrorist acts and to foreign terrorist organizations, or FTOs, designated by the Secretary of State. "Material support or resources" is a term of art specifically defined to include a broad range of conduct – all along the terrorist chain. It includes providing financial services, lodging, safe houses, false

documentation or identification, weapons, communications equipment, and explosives. Section 2339A, passed in 1994, criminalizes knowingly providing material support or resources to a particular crime of terrorism, such as a bombing plot, while Section 2339B, which became operational in October 1997, criminalizes the knowing provision of material support or resources to a foreign terrorist organization such as al Qaeda or Hamas, irrespective of the providors' violent intent.

Section 2339B provides a criminal sanction for anyone who supports a foreign terrorist organization designated by the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury. One of the consequences of such a designation is that providing support to such an organization is illegal. There are presently 40 designated FTOs ranging from Al Qaeda to Abu Musab al-Zarqawi's Jama'at al-Tawhid wa'al-Jihad to the Palestinian rejectionist groups, such as the Palestinian Islamic Jihad, to narco-terrorist groups, such as the Revolutionary Armed Forces of Columbia (FARC).

Thanks to Congress, the material support laws contain the inchoate offenses of attempt and conspiracy, which allow law enforcement the legal basis to intervene at the very early stages of terrorist planning, several steps removed from the execution of particular attacks. This capability is crucial to the prosecution of terrorist supporters who may not themselves be prone to violence. By allowing for the prosecution of someone who intends to provide support to terrorists and takes an affirmative step in that direction, we can successfully interdict the support before it reaches the terrorist, let alone waiting until it culminates in a terrorist attack.

Over the past several years, our concerted efforts have led to the identification, disruption or demise of terrorist support conspiracies throughout the country. Some of these cases have involved individuals who are operational. Many have not. The terrorists and their supporters in these cases were brought down by the material support statutes you have provided us criminalizing such conduct.

Convictions

A number of victories in recent months illustrate these powerful law enforcement tools and how they operate in practice.

On March 10, 2005, after a five-week trial, a jury in Brooklyn, New York, convicted two Yemeni citizens, Mohammed Ali Hasan Al-Moayad and Mohsen Yahya Zayed, of conspiring to provide material support to al Qaeda and Hamas, pursuant to 18 U.S.C. 2339B. They were both found guilty of attempting to provide material support to Hamas. Al-Moayad was also convicted of providing material support to Hamas and attempting to provide material support to al Qaeda. Al-Moayad, the imam of a large Yemeni mosque and an influential political leader, was caught on undercover tape recordings discussing the collection of monies from the al Farook mosque in Brooklyn and his desire to distribute the monies to al Qaeda and Hamas to finance violent *jihad*. Additional proof collected by the German authorities against Zayed - who accompanied Al Moayad to Franfurt, Germany in 2003, where they thought they would receive a large donation – allowed us to charge both of them.

This case also clearly demonstrates two important principles:

First, that United States prosecutors and investigators, like our colleagues in the intelligence community and the military, must rely upon our international partners to be successful. Al Moayad and Ziyad could not have been brought to justice without the assistance of our German colleagues, who worked alongside the FBI in the sting operation, and made the arrests that ultimately culminated in the extradition of the defendants to the United States from Germany. German officials testified about their actions in federal court in Brooklyn.

Second, that successful indictments and prosecutions often lead to further successes in combating terror. We are able to leverage the intelligence collected from cooperators in our criminal cases to discover and track down new leads and evidence. This investigation uncovered Al-Moayad's contacts in Brooklyn, including a Brooklyn associate who had transferred over $20 million overseas through the bank account of his tiny ice cream store. Those Brooklyn associates have been charged with various federal crimes ranging from unlicensed money remitting to making false statements as part of the Department's disruption approach. In the *Al-Moayad* trial, prosecutors presented the testimony of Yaya Goba, one of the convicted defendants in the Lackawanna case. Successful prosecutions beget more prosecutions.

On February 10, 2005, a Manhattan jury in United States v. Sattar found all defendants guilty on all counts, which also involved material support charges. This case sent a clear message that the Department will prosecute professionals who cross the line to assist terrorists with their murderous goals. Ahmed Abdel Sattar, an Islamic Group (AGAI) leader and associate of Sheik Omar Abdel Rahman, was convicted of plotting to kill and kidnap persons in a foreign country which included evidence highlighting his crucial participation in drafting and disseminating a legal fatwah in Abdel Rahman's name urging the murder of Jews wherever found. Lynne Stewart, a criminal defense attorney who has represented the Sheik, and Mohammed Yousry, an Arabic interpreter for the Sheik, were convicted on both substantive and conspiracy counts of providing, and concealing the provision of, material support or resources, knowing that such support was to be used in carrying out a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A.

Stewart and Yousry smuggled messages concerning Islamic Group activities between Sheik Abdel Rahman and his co-conspirators, including Sattar, and actively concealed the fact that they had done so in violation of the administrative prison rules to which Stewart agreed to be bound. Sheik Abdel Rahman is serving a life sentence for participating in a failed plot to bomb a series of New York City landmarks and soliciting the murder of Egyptian President Hosni Mubarak.

In February of this year, prosecutors in Detroit obtained a guilty plea from a Hizballah financier. The defendant, whose brother is the organization's Chief of Military Security in Southern Lebanon, admitted that he helped others raise money for Hizballah. Last year, we obtained a guilty plea to violations of both Sections 2339A and 2339B, among other charges, from a Pakistani-American involved in al Qaeda procurement, training and recruitment, who had appeared on British television stating "I do not feel any remorse for the Americans [who died] . . . I am willing to kill Americans. I will kill every American that I see in Afghanistan. And every

American soldier that I see in Pakistan." The defendant, Mohammed Junaid Babar, arranged for a month-long jihadi training camp, at which attendees received training in basic military skills, explosives and weapons. Among the attendees were individuals who were plotting to bomb targets abroad.

Indictments

The operation of the material support statutes is also illustrated by a number of pending prosecutions. Last week, the Department announced the unsealing of an indictment that made important use of Section 2339A to charge three individuals for their alleged participation in terrorist plots to attack the financial sectors in New York, New Jersey and the District of Columbia. Dhiren Barot, Nadeem Tarmohamed and Qaisar Shaffi, all British nationals, are charged with assisting in a plot to attack the New York Stock Exchange and the Citigroup building in New York, the Prudential Building in New Jersey, and the International Monetary Fund and World Bank buildings in Washington, D.C.

Meanwhile, prosecutors in Miami superseded another indictment charging a Section 2339A violation, adding Kihah Jayyoussi as a defendant. A U.S. citizen, Jayyoussi was arrested on March 27, 2005 at the airport in Detroit upon his return from a trip to Qatar. According to the superseding indictment, Jayyousi, Adham Hassoun and Mohammed Youssef conspired to fund and support violent *jihad* in Bosnia, Chechnya, Kosovo, and Somalia. Jayyousi and his co-conspirators allegedly raised money and recruited fighters for *jihadi* groups. Hassoun, Youssef, Jayyousi and several other unindicted co-conspirators allegedly conducted dozens of semi-coded conversations between 1994 and 2000 about acts of violent *jihad*. Jayyousi and Hassoun are in federal custody in Miami and Youssef is in custody in Egypt. These two cases demonstrate how § 2339A can be used in the absence of evidence that the particular support was provided to a group that had been designated.

Another § 2339A case involves Babar Ahmad and Azzam Publications, charged in Connecticut in October of 2004. Ahmad, a resident of the United Kingdom, allegedly operated and directed Azzam Publications and its family of Internet websites to recruit and assist the Chechen mujahideen and the Taliban and to raise funds for violent *jihad* in Afghanistan, Chechnya and other locations. These websites existed and operated throughout the world, including in the United States. Along with other Internet media allegedly created and operated by Ahmad, these sites gave instructions for travel to Pakistan and Afghanistan to fight with these groups and for surreptitious transfer of funds to the Taliban; they also solicited military items for these groups, including gas masks and night vision goggles. The websites also advertised videotapes – allegedly produced by Ahmad and others – depicting violent jihad in Chechnya, Bosnia, and Afghanistan, and the torture and killing of captured Russian troops.

Ahmad has been charged with crimes that include providing material support to terrorists under 18 U.S.C. 2339A. We describe this indictment to you -- in part -- to highlight the use of the Internet by those who support their violent goals through communications, recruiting and propaganda. This is criminal conduct, not rights protected by the First Amendment. The government must meet the challenges posed by the technology of the twenty-first century through the use of all our tools, including criminal investigation and prosecution.

Meanwhile, we have a couple of important pending § 2339B cases. In Florida, the trial of four of the defendants in the *Sami al Arian* case is scheduled to begin on May 16, 2005. In a 53-count indictment, Sami Al-Arian and eight other defendants, including Ramadan Shallah, the acknowledged worldwide leader of the Palestinian Islamic Jihad (PIJ), have been charged with using facilities in the United States, including the University of South Florida, as the North American base for PIJ, providing material support to PIJ, and conspiring to murder individuals abroad, among other offenses. PIJ was designated as a foreign terrorist organization in 1997, and has claimed responsibility for suicide bombings in the Middle East that have killed U.S. citizens.

In August 2004, a Chicago grand jury indicted Mousa Marzook, Abdelhaleem Ashqar, and Mohammad Salah for participating in a 15-year racketeering conspiracy in the United States and abroad to illegally finance Hamas's terrorist activities in Israel, the West Bank, and Gaza Strip, including providing money for the purchase of weapons. The indictment, which for the first time identifies Hamas as a criminal enterprise, also charges Salah under 18 U.S.C. § 2339B for providing material support to Hamas. All three defendants allegedly used bank accounts in the United States to launder millions of dollars for Hamas, which has publicly claimed credit for engaging in suicide bombings that resulted in the deaths of Americans and other foreign nationals in Israel and the West Bank, as well as Israeli military personnel and civilians.

These cases, plus the other matters that have already resulted in convictions, demonstrate the manner in which we have come to rely upon the material support statutes.

Legal Victories

We have also obtained important, favorable appellate court rulings in recent months that are vital to the enforcement of Section 2339B. In *United States v. Afshari* and *United States v. Hammoud,* a panel of the Ninth Circuit and the *en banc* Fourth Circuit, respectively, held that a criminal defendant charged with providing material support to a designated FTO under Section 2339B may not challenge the validity of the underlying FTO designation in the course of the criminal prosecution. The *Afshari* district court opinion, which was overturned by the appellate court, had raised the untenable specter of multi-district challenges to an FTO designation and the resulting criminalization of terrorist conduct in one district but not another. The appellate courts agreed with the government in both cases that the validity of an FTO designation is not an element of the offense under 18 U.S.C. 2339B, consistent with language explicit in the FTO statute to that effect.

Furthermore, in *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit held *en banc* that there is no First Amendment right to provide material support to the ostensibly humanitarian or political activities of a designated FTO. Similarly, in *United States v. Hammoud*, the Fourth Circuit *en banc* rejected claims that the material support prohibition contained in Section 2339B impermissibly encroached on First Amendment rights of free association and expression. In the words of the Ninth Circuit, "giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."

The Future and the Intelligence Reform Act

Looking to the future, we are confident that the amendments to the material support statutes and foreign terrorist organization provisions of the Immigration and Nationality Act, passed by Congress and signed by the President in December, will significantly enhance the capabilities of prosecutors to eradicate terrorist activity at every stage. These amendments—contained in the Intelligence Reform and Terrorism Prevention Act—give prosecutors important new and enhanced tools in the fight against terrorism here and abroad.

Significantly, the definition of "material support or resources" was expanded to encompass all property—whether tangible or intangible—and all services, except for medicine and religious materials. The definition formerly was limited to specified types of material support and "other physical assets." Congress's action to clarify this definition assures that no form of terrorist assistance or activity will escape the reach of the statute.

The amendments also clarify the meaning of the terms "personnel," "training," and "expert advice or assistance," as used in the definition of "material support or resources." These changes should eliminate some of the uncertainty generated by a few adverse court decisions rejecting the government's interpretation of those terms. For example, it is now clear that the provision of "personnel" to a terrorist act or organization includes providing *oneself*. Congress also clarified that no one could be prosecuted for providing "personnel" under section 2339B unless the individual(s) were provided to manage, supervise or otherwise direct the terrorist organization or, conversely, to work under its direction or control. These changes respond to a few court decisions which opined that the term "personnel" could be vague. The amendments also defined the terms "training," and "expert advice or assistance," in response to perceived constitutional problems identified by the Ninth Circuit or the district court in *Humanitarian Law Project*. We are hopeful that these amendments will achieve their desired effect, especially in light of the Ninth Circuit's recent orders in *HLP* vacating the district courts' injunctions against enforcement of the terms "training," "personnel,"and "expert advice or assistance" and remanding to the district court in light of changes made by the IRTPA.

Two other changes to the material support statutes are also significant. First, the recent amendments expand the jurisdictional basis for material support charges. Under the old jurisdictional provisions, Section 2339B was limited to activity occurring within the United States, and to overseas activity committed by persons "subject to the jurisdiction of the United States." Now, among other things, Section 2339B also reaches conduct by any lawful permanent resident alien anywhere in the world, as well as stateless persons who habitually reside in the United States. Jurisdiction also extends to conduct by an alien offender *outside* the United States who is later brought to the country or found here, regardless of whether the alien is a permanent resident alien. The rationale for the latter expansion is that those aliens outside the United States who furnish material support or resources to an FTO endanger the national security of the United Sates and should be subject to prosecution if they are present here.

The amendments also clarify the knowledge requirement of Section 2339B. That section now expressly says that the defendant must either know that the organization is a designated FTO or that it engages in certain terrorist conduct. The government is not required to show that

the material support was provided for the express purpose of furthering the FTO's terrorist activities, a standard at odds with the purposes of Section 2339B.

The Intelligence Reform Act also created a new "material support" offense, 18 U.S.C. 2339D, that explicitly criminalizes the receipt of military-type training from a foreign terrorist organization. Under the statute, "military-type training" includes "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on [sic] the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction[.]" 18 U.S.C. § 2339D(c)(1).

Section 2339D fills an arguable gap in 18 U.S.C. § 2339B, which criminalizes *providing* material support, including training, *to* a foreign terrorist organization, but does not explicitly prohibit *receiving* training *from* a foreign terrorist organization, as Section 2339D now does. Thus, for post-enactment conduct, the prosecutor has a charging option that is a narrowly tailored fit and improves our ability to apprehend those who threaten our homeland.

Section 2339D is also a potent remedy for the serious problems created by the steady flow of recruits to terrorist training camps. Various investigations have uncovered individuals who have traveled overseas to training camps to receive military-style training. These individuals, who in many cases have received firearms and explosives training, appear to be preparing to conduct terrorist activity or violence and pose a clear threat here and abroad. Investigations have also disclosed that attendees sometimes maintain longstanding relationships with other training camp "alumni," who may later seek to recruit and utilize them in their plots. In an even more basic way, a trainee's participation in a terrorist organization's training camp, without more, benefits the organization as a whole. By attending a camp, an individual lends critical moral support to other trainees and the entire organization, a support that is essential to the health and vitality of the organization. Consequently, an attendee at a military-style training camp provides value to the organization, and his activities are appropriately within the reach of United States law.

Material Support to Terrorism Prohibition Improvements Act

The amendments to the material support statutes contained in Intelligence Reform and Prevention Act of 2004 are currently scheduled to sunset at the end of 2006. As described above, these amendments are critical to maintaining the efficacy of the material support statutes as a potent prosecutorial tool in combating terrorism. The Department therefore supports making these revisions to the material support statutes permanent, and we commend Senator Kyl for introducing the Material Support to Terrorism Prohibition Improvements Act (MSTPIA), which would do just that.

Although the Department has not yet had a chance to evaluate thoroughly all of the provisions in the proposed legislation, repealing the sunset on those amendments to the material support statutes contained in the Intelligence Reform Act would represent a significant step forward, ending uncertainty in this area of the law and ensuring that prosecutors will not lose a critical tool.

The proposed legislation also contains another important provision, which the Department strongly supports. Under current law, those aliens who have received military-type training from or on behalf of a terrorist organization may be deported from the country. Such aliens, however, are not inadmissible. This anomaly in the law does not make any sense, and the proposed legislation would fix this problem by rendering inadmissible those aliens who have received military-type training from or on behalf of a terrorist organization. To put it simply, such aliens represent a clear and present danger to the safety of the American people and should not be allowed to enter nor remain present in the United States.

The MSTPIA also contains other worthwhile provisions, and the Department looks forward to working with Senator Kyl and other Committee members on this important piece of legislation.

Conclusion

The changes recently enacted in the Intelligence Reform Act have built upon, and enhanced, the work of prior Congresses in the USA PATRIOT Act, the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Violent Crime Control and Law Enforcement Act of 1994. Together, this legislation has provided law enforcement and prosecutors with a solid framework within which to pursue the goal of prevention, disruption and eventual eradication of terrorism within our borders and beyond. We, as prosecutors in the Justice Department, have more work to do to eliminate this deadly threat, and we urge you in Congress to continue to build upon and enhance the legal tools needed to accomplish our mutual goals.

Mr. Chairman, 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. We would also like to thank this Committee for its continued leadership and support. Together, we will continue our efforts to defeat those who would harm this country.

someone could be prosecuted for providing purely humanitarian assistance, or even for encouraging a terrorist organization to use non-violent means.

Mr. Chairman, given the continuing constitutional problems with this law, we should not be eliminating the sunset or increasing the penalties for material support. We don't know yet how this new revised provision will work, or what problems might arise because of it. This hearing is a first step, and I appreciate that, but we still have much work to do.

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