Testimony of

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BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

REGARDING
OVERSIGHT HEARING: AIDING TERRORISTS - AN EXAMINATION OF THE MATERIAL SUPPORT STATUTE
5 MAY 2004

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

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

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

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

I. Origins of the Material Support Law

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

The first proposal to criminalize the provision of assistance to terrorists or terrorist organizations seems to have arisen in 1982 in the wake of revelations about a former CIA employee, Edwin Wilson, involved in exporting explosives and equipment to Libya. The "Antiterrorism and Foreign Mercenaries Act" would have criminalized the provision of military or intelligence assistance not only to the government of Libya but also to any other foreign government or sub-state terrorist organization designated by the President. The bill died in committee, but the concept reemerged two years later in the proposed "Prohibition Against the Training or Support of Terrorist Organizations Act." This bill would have made it a crime punishable by up to ten years' imprisonment to provide support, training, or services to the "armed forces" or "intelligence agencies" of any group or government identified by the Secretary of State as engaging in or supporting international terrorism threatening U.S. national security. A

section-by-section analysis of the proposal explained that the support provision was intended to address "the problems of United States nationals or business entities providing the technology of terrorism for use abroad and of the United States being used by foreigners for such a purpose."

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

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

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

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

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

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

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

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

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

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

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

(4) personnel.

See 18 U.S.C. § 2339A(b).

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

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

II. Section 2339B in the Courts

A number of courts have had occasion over the past few years to address the constitutionality of § 2339B. These decisions have focused on five arguments in particular: (1) whether the statute unconstitutionally imposes "guilt by association; (2) whether the statute otherwise infringes freedom of expression; (3) whether the statute is overbroad; (4) whether the definition of "material support or resources" is vague; and (5) whether due process requires that some form of specific intent mens rea requirement be read into the statute. As described below in more detail, courts have uniformly rejected arguments under the first three headings, but have split sharply on the last two.

A. Humanitarian Law Project v. Reno

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

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

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

The next occasion for a court to consider First Amendment challenges to the material support law did not arise until after 9/11. The prosecution of John Walker Lindh presented the first such opportunity. In a lengthy decision denying Lindh's motion to dismiss the indictment on a variety of grounds, Judge Ellis addressed substantially the same arguments that had arisen in the Ninth Circuit's Humanitarian Law Project decision. See United States v. Lindh, 212 F.Supp.2d 541, 568-74 (E.D.Va. 2002). In the course of rejecting Lindh's freedom of association argument, the court expressly noted the analogy between the material support law and the more familiar practice of placing embargoes on foreign states. Id. at 570. As the court observed, "there is no principled reason for according different constitutional treatment to restrictions on supplying goods or services to a foreign entity depending on whether the entity is a hostile foreign nation or an international terrorist organization and its host state. If the First Amendment is not offended in one case, it is similarly not offended in the other." Id. at 571. The court went on to reject the argument that § 2339B is overbroad, judging that any potential overbreadth was small in relation to the statute's plainly legitimate scope. Id. at 572-73. Finally, the court broke with Humanitarian Law Project, finding the definition of "personnel" and "training" to be sufficiently clear on their face that a reasonable person would not conclude that the terms encompassed protected advocacy. Id. at 574.

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

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

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

The next major development in the judicial assessment of § 2339B occurred in December 2003, when another Ninth Circuit panel had occasion to address the plaintiffs' constitutional arguments against § 2339B in Humanitarian Law Project. See Humanitarian Law Project v. Department of Justice, 352 F.3d 382 (9th Cir. 2003). The opinion by Judge Pregerson reaffirmed the prior panel's vagueness holding, but this was not the most notable aspect of the opinion. More significantly, the panel majority - over a dissent by Judge Rawlinson - interpreted § 2339B to require proof that the defendant not only knew the identity of the organization to which aid was provided, but also that he or she knew the organization had been designated a foreign terrorist organization or else "knew of the unlawful activities that caused it to be so designated". Id. at 400. According to the court, anything less by way of a mens rea requirement would violate due process by imposing guilt on the defendant without a sufficient showing of intent. Id. at 394-403.

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

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

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

III. Conclusions & Recommendations

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

No court, for example, has accepted the argument that the statute on its face is unconstitutionally overbroad. Any questions that might surround the law on its margins are small relative to its plainly constitutional scope of application. Similarly, no court has accepted the argument that the law unconstitutionally infringes defendants' rights of expression or association. On its face, the material support statute impacts these rights only incidentally to its purpose of suppressing the ability of foreign terrorist organizations to sustain their operations through support from persons subject to U.S. jurisdiction. As I have written elsewhere, an exception to this conclusion would arise in the event that the law was to be applied to punish a defendant for nothing other than "providing" himself or herself as a member of a designated organization. That circumstance would amount to direct punishment of membership standing alone, and as such would require courts to read into the statute a specific intent requirement along the lines described by the Supreme Court in Scales v. United States, 367 U.S. 203 (1961) (reading a specific intent requirement into the membership provision of the Smith Act in order to preserve the statute against constitutional challenge).

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

Finally, the most vexing question concerns the interpretation of the mens rea requirement of § 2339B. The Ninth Circuit's formulation (requiring proof not only (a) that the defendant knew the identify of the donee organization but also (b) that the defendant either was aware either that the organization had been designated by the Secretary of

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

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

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

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

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

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

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