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The Material Support Prosecution and Foreign Policy

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The Material Support Prosecution and Foreign Policy

WADIE E. SAID*

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INTRODUCTION

On April 30, 2009, Ali Saleh Kahlah al-Marri pled guilty to the charge of conspiracy to provide material support to al-Qaeda, a banned Foreign Terrorist Organization (FTO), in violation of 18 U.S.C. § 2339B (“§ 2339B”).¹ The case of al-Marri, who previously had been held for nearly six years in isolation at a military brig in Charleston, South Carolina, as an enemy combatant, generated significant litigation regarding the government’s power to detain individuals so designated who were apprehended in the United States.² While the Supreme Court was set to hear argument on the extent of its enemy combatant power, the government decided to transfer al-Marri’s case to a federal court in Illinois, where he was indicted and ultimately pled guilty to the material support charge noted above.³ The guilty plea outlines the role he played in al-Qaeda, his relationship with Khalid Sheikh Mohammed, and his travel to the United States for purposes related to

* Assistant Professor, University of South Carolina School of Law. Many thanks to Tommy Crocker, Lisa Eichhorn, Susan Kuo, and Sudha Setty for their comments on earlier drafts of this paper. Thanks to Wafa Abu-Salim for excellent research assistance. Versions of this paper were presented at the University of Kansas School of Law, the University of South Carolina School of Law, and Yale Law School’s Middle East Legal Forum. As an assistant federal public defender in the Office of the Federal Public Defender for the Middle District of Florida, the author was counsel to Hatim Fariz, one of the defendants in *United States v. Al-Arian*, discussed *infra*.

1. John Schwartz, *Plea Agreement Reached with Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16.

2. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008); *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

3. John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 30, 2009, at A22.

furthering the organization's goals.⁴ Even though al-Marri's plea exposed him to the maximum possible sentence allowed under § 2339B, fifteen years in prison, he was given credit for his eight years in custody, and sentenced to a little over eight years imprisonment.⁵

Approximately one month later, five defendants convicted of multiple counts of violating § 2339B and related crimes stemming from their roles as officers in the Holy Land Foundation for Relief and Development (HLF) received their sentences in the federal courthouse in Dallas.⁶ The sentences ranged from fifteen years in prison on the low end to sixty-five years for Shukri Abu Baker, the former CEO of HLF, and Ghassan Elashi, the former chairman of its board.⁷ Despite the serious and lengthy nature of the prison terms handed down, the government conceded that the defendants were not in any way connected to an act of violence, and that HLF had provided genuine humanitarian aid to charitable organizations, known as zakat committees, lawfully operating in the West Bank and Gaza Strip.⁸ The government's theory was that the zakat committees were controlled by Hamas, a banned FTO, that used the humanitarian aid to gain support for its agenda among the Palestinian people.⁹

The above two cases are examples of the extremely wide range of activities that can lead to a defendant's conviction for having provided material support to a terrorist organization, and of the sometimes counterintuitive nature of that sentencing.¹⁰ Since September 11, 2001, the chief statute for charging terrorism suspects in federal court has been § 2339B,¹¹ which criminalizes material support of terrorist groups.¹² Where previous terrorism prosecutions focused on punishing offenders for acts of violence that had already occurred, the new focus on material

4. Plea Agreement and Stipulation of Facts at 9–17, *United States v. al-Marri*, No. 09-CR-10030 (C.D. Ill. Apr. 30, 2009) (guilty plea).

5. Schwartz, *supra* note 3.

6. Press Release, Federal Bureau of Investigation—Dallas, Department of Justice Press Release, Federal Judge Hands Down Sentences in Holy Land Foundation Case (May 27, 2009), available at <http://dallas.fbi.gov/dojpressrel/pressrel09/dl052709.htm>. The primary difference in the length of the sentences received by the HLF defendants and that of al-Marri apparently stemmed from the number of counts on which the defendants were convicted.

7. *Id.*

8. Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 18, 2007, at A20.

9. *Id.*

10. See Jason Trahan, *5 Decry Prison Terms in Holy Land Foundation Case*, DALL. MORNING NEWS, May 28, 2009 (State and Regional News). In response to defense counsel in HLF raising the issue of the sentence handed down in the al-Marri case, “[Federal District Judge Jorge A.] Solis retorted that ‘raising millions of dollars to fund terrorism, that’s a different situation.’ He said that al-Marri is an example of someone who wanted to ‘commit “an” act of terrorism, as bad as that is. This is support over years.’” *Id.*

11. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR* 75–76 (2003) (calling § 2339B “the centerpiece of the Justice Department’s criminal war on terrorism”); DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 49–50 (2007).

12. 18 U.S.C. § 2339B (2006).

support-type prosecutions was engineered to aid in preventing terrorism activity from taking place in the future.¹³ The so-called prevention paradigm of terrorism enforcement has been criticized as being ineffective in curtailing terrorism.¹⁴ What has been left largely unexplored is what § 2339B litigation reveals about the United States' position on political violence and the groups that carry it out. Specifically, what these prosecutions demonstrate is a divergence between terrorism enforcement as a matter of direct national security, that is, focused on groups that engage in violence against the United States, its personnel, and property, whether at home or abroad, and terrorism enforcement as a kind of foreign policy tool, that is, geared at prosecuting individuals connected to organizations targeting foreign individuals and entities. In the former instance, where a prosecution directly alleges that the defendant engaged in violent activity, prosecutions are more straightforward. When there is little or no link between the defendant and the violent acts of an organization with which he has affiliated himself, however, the basis of a prosecution is on shakier ground. In such a situation, the further the relationship is from violence, the greater the possibility that the prosecution will be transformed into a debate on foreign policy, despite efforts by the courts to limit defendants' ability to engage in such arguments.

Although the federal courts have consistently narrowed the framework in which a criminal defendant accused of engaging in or supporting terrorism can make arguments rooted in political or religious belief, the nature and conduct of terrorism prosecutions themselves have the potential to make such arguments relevant nonetheless.¹⁵ A review of the process by which groups are designated as FTOs reveals that the government has taken a de facto position that all political violence perpetrated by nonstate actors is terrorism.¹⁶ There are currently no standards or guidelines defining when nonstate political violence can be justified or even excused.¹⁷ Further, § 2339B prosecutions operate under the theory that "money is fungible," and that support sent to terrorist groups for charitable purposes frees up money for violence.¹⁸ This theory, when coupled with the current vagueness of the FTO designation process, has profound implications for the Fifth Amendment due process rights of defendants charged under the statute.¹⁹

This Article advances two main recommendations. First, the government should have to articulate when and under what conditions, if any, nonstate groups might be allowed to engage in violence. Such an explicit standard would provide a more legitimate legal basis for prosecutions of individuals charged with supporting FTOs and prevent such prosecutions from selective and inappropriate attempts to create or assert foreign policy. Second, the "money is fungible" theory should be subjected to a more extensive review. While the theory seems to make sense on an abstract level, the prosecution should have to make a specific showing that

13. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 28–30 (2005).

14. See generally COLE & LOBEL, supra note 11.

15. See *infra* Part I.

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part III.D.

19. See *infra* Part III.D.

humanitarian support to a given organization does in fact facilitate violence. This showing is necessary in cases where the government never contends that the defendant planned or carried out any violent activity. Otherwise, the courtroom risks being turned into a forum in which to have a foreign policy debate and unjustly convict § 2339B defendants.

Part I of this Article provides a historical overview of modern terrorism prosecutions prior to September 11, 2001. Part II discusses the FTO designation process, the foreign policy considerations behind it, and how it essentially defines terrorism as all nonstate political violence. Part III examines the Fifth Amendment's due process personal-guilt standards in light of the HLF prosecution and explains how far the "money is fungible" theory can take a prosecution.

I. THE PRE-9/11 TERRORISM PROSECUTION—EXAMPLES AND TRENDS

As with a great number of nations in the modern world, the United States has grappled both directly and indirectly with the phenomenon of subnational groups engaging in violence against civilian and military targets to achieve a change in policy of a particular government. Prior to 9/11, the risks to U.S. citizens or interests stemming from international terrorism were not perceived to be on a grand scale.²⁰ However, the federal courts did have occasion to issue several rulings of note regarding what has come to be called "international terrorism," provided there was a significant enough link to the United States to justify criminal prosecution. A number of these decisions are discussed below and serve to illustrate the courts' willingness to expand the law in various directions to combat what is regarded as abhorrent and unjustified behavior. Prerequisites for prosecution were allegations of violent activity (or plans to engage in such activity) on the part of the defendant and a nexus to the United States, more often than not through an American victim. As shown below, in such situations, courts refused to allow legal challenges to criminal charges rooted in political arguments.

A. United States v. Yunis

1. Facts

In June 1985, Fawaz Yunis, a Lebanese national and member of the Shiite militia Amal, played the lead role in hijacking a Jordanian passenger aircraft and all those onboard, including several American citizens, from the Beirut airport.²¹ After

20. See, e.g., PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 4 (2003).

21. United States v. Yunis (*Yunis I*), 859 F.2d 953, 955–56 (D.C. Cir. 1988). The goal of the hijackers was to fly to Tunisia in the hopes of securing a meeting with representatives of the Arab League to demand that all Palestinians be removed from Lebanon. *Id.* at 955. Amal, which was loyal to Syria during the entirety of the Lebanese civil war, laid siege to several Palestinian refugee camps in Lebanon between 1985 and 1987, an event referred to as the "War of the Camps," in an attempt to drive out Palestinian forces loyal to then-PLO Chairman Yasser Arafat. See generally ROBERT FISK, PITY THE NATION: THE ABDUCTION OF LEBANON (Thunder's Mouth Press/Nation Books 2002) (1990).

failing to achieve their objectives, Yunis and the other members of the hijacking team eventually released the passengers unharmed after a series of trips around the Mediterranean region, and then escaped back into Beirut after blowing up the empty aircraft.²² In September 1987, Yunis was lured by an informant working with the FBI from Lebanon to a drug deal in international waters off the coast of Cyprus, where he was promptly arrested and returned to the United States.²³ Not surprisingly, given the unorthodox nature of his capture, Yunis's case generated several significant decisions by the D.C. Circuit.²⁴

The implications of the decisions in *Yunis* reflect a larger policy perspective in that the government displayed an ambitious willingness to capture a hijacker abroad and return him to the United States to stand trial, even where no one was hurt during the hijacking, and where the Amal militia was not a party in conflict with the United States, its allegiance to Syria notwithstanding. Yunis's capture came in the aftermath of the bombing of the U.S. embassy in Beirut in April 1983,²⁵ the attack on the Marine barracks in October 1983,²⁶ the March 1984 abduction of the CIA station chief for Beirut,²⁷ the hijacking of TWA Flight 847 and the killing of a Navy serviceman onboard in June 1985,²⁸ as well as various other kidnappings of American nationals in Lebanon during that time period. Although Amal was not responsible for any of the above incidents, in light of this background, it is perhaps unsurprising that the D.C. Circuit signaled its acceptance of the government's arguments to a large degree and allowed Yunis to be prosecuted and ultimately convicted for his role in the hijacking. As an initial matter, the court overturned the district court's suppression of his confession to the FBI, which he made over several sessions after he had received his *Miranda* warnings but while he was being transported by ship to the United States and in a weakened physical state due to injuries he suffered during his capture.²⁹

2. Jurisdictional Arguments and International Law

The third ruling³⁰ of the D.C. Circuit in *Yunis* spelled out the role that customary international law plays when it conflicts with domestic law. With regard to the

22. *Yunis I*, 859 F.2d at 955.

23. *Id.* Apparently, the CIA also played a role in Yunis's arrest, as reported by former CIA case officers with knowledge of the incident. See ROBERT BAER, *SLEEPING WITH THE DEVIL: HOW WASHINGTON SOLD OUR SOUL FOR SAUDI CRUDE* 119–22 (2004) (also discussing the use of a man indicted for several murders in Lebanon as the informant in the case, as well as describing governmental pressure to capture Yunis so as to demonstrate some success in apprehending and trying terrorists); MELISSA BOYLE MAHLE, *DENIAL AND DECEPTION: AN INSIDER'S VIEW OF THE CIA FROM IRAN-CONTRA TO 9/11*, at 202 (2005).

24. See *Yunis I*, 859 F.2d 953; *infra* note 30.

25. See FISK, *supra* note 21, at 478–80.

26. See *id.* at 511–22.

27. See *id.* at 565.

28. See *id.* at 605–09.

29. *Yunis I*, 859 F.2d at 969–70 (“The interrogation of Yunis hardly qualifies as a model for law enforcement behavior.”).

30. *United States v. Yunis (Yunis III)*, 924 F.2d 1086 (D.C. Cir. 1991). In its second decision, the court reversed another of the district court's rulings that Yunis was entitled to

charges against him under the Hostage Taking Act,³¹ Yunis argued, inter alia, that his prosecution was not allowed by the universal³² and passive personal³³ principles of jurisdiction under customary international law.³⁴ The court made short work of Yunis's argument on both fronts, even though it recognized that his arguments could have merit under international law, and held that when "the statute in question reflects an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take American hostages abroad no matter where the offense occurs or where the offender is found," then customary international law must take a back seat to domestic law.³⁵

By way of contrast, the court ruled that international law allowed for jurisdiction over Yunis's prosecution under the relevant provision of the Antihijacking Act,³⁶ which codified in domestic law the Hague Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention").³⁷ It held that the nature of Yunis's presence in the United States rendered him "found in the United States" for purposes of the Antihijacking Act, regardless of its involuntariness, since both the Hague Convention and Congress were silent on the issue of how a hijacker came into a state's custody, leading the court to conclude that it was a nonissue.³⁸ To underscore the court's position on the matter, it invoked international law to make its point: "Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved."³⁹

the transcripts of his conversations with the government's informant, and held that those conversations, as classified information, were not discoverable under the Classified Information Procedures Act (CIPA), since they were neither helpful nor relevant to the defense. *See United States v. Yunis (Yunis II)*, 867 F.2d 617, 623–26 (D.C. Cir. 1989).

31. 18 U.S.C. § 1203 (2006).

32. *Yunis III*, 924 F.2d at 1091 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423). The universal principle allows for jurisdiction over certain acts, regardless of their relation to the prosecuting state, where they are particularly grave, so as to be "of universal concern," and Yunis took the position that hostage taking was not recognized as such. *Id.*

33. *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402). The passive personal principle allows for jurisdiction over non-nationals for acts committed extraterritorially against a state's nationals where the state has a strong interest in the crime. Referring to customary international law, *Yunis* noted that jurisdiction under the passive personal principle could lie only in the hostage-taking context if he had specifically targeted the Americans onboard the hijacked plane because of their nationality. *Id.*

34. *Id.*

35. *Id.*

36. 49 U.S.C. § 46502(b) (2006) (formerly 49 U.S.C. App. § 1472(n)).

37. *Yunis III*, 924 F.2d at 1092.

38. *Id.*

39. *Id.* (citations omitted).

3. Lawful Combatants Test

Yunis also attempted to argue that, as a member of a military organization, he was merely carrying out orders, which, he posited, was an affirmative defense to the charges against him, unless he knew the orders were illegal.⁴⁰ While the parties agreed on the elements of this affirmative defense, the district court ruled that Amal could be deemed a military organization only “if the group has a hierarchical command structure and ‘[c]onducts its operations in accordance with the laws and customs of war,’ and if its members have a uniform and carry arms openly.”⁴¹ The court noted that this definition was drawn from international law, which in this case stemmed from the United States’ treaty obligations as a signatory under both the Geneva and Hague (IV) Conventions, and that the jury instructions properly defined a military organization.⁴² Inevitably, like the court in *Yunis*, the later courts hearing prosecutions of nonstate militia members have usually held the lawful combatant defense inapplicable,⁴³ since members of nonstate militias, if they did not wear uniforms and engaged in activity that could or did in fact target civilians, could not be regarded as lawful combatants, regardless of their motivation and perceived justness of their cause.⁴⁴

The *Yunis* holdings thus serve as a strong jurisprudential basis for criminal prosecutions of nonstate actors engaged in violent activities abroad that touch upon America and its citizens, regardless of whether the nonstate actors intended to

40. *Id.* at 1097–99.

41. *Id.* at 1097 (alteration in original) (quoting the district court’s jury instructions).

42. *Id.* at 1098. Incidentally, the standards for determining whether an individual is part of a military organization are the same as those the federal courts have been using with more frequency since 9/11 to determine whether individuals charged with terrorism-related offenses could avail themselves of the protection of lawful combatant status. *See, e.g.*, *United States v. Pineda*, No. CR. 04-232(TFH), 2006 WL 785287, at *2–5 (D.D.C. Mar. 28, 2006) (denying lawful combatant immunity to defendant based on membership in the FARC, a banned terrorist organization); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917–18 (N.D. Ill. 2003) (finding that members of various Muslim militias in Bosnia and Chechnya could not be construed as lawful combatants based on the facts in the record); *United States v. Lindh*, 212 F. Supp. 2d 541, 556–58 (E.D. Va. 2002) (deciding the case of an American citizen charged with fighting with the Taliban).

43. *See supra* note 42.

44. This holding is not surprising, in light of the United States’ position on the status of members of nonstate militias under international humanitarian law. *See, e.g.*, George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 3–10 (1991) (discussing the reasons behind the United States’ refusal to ratify the First Geneva Protocol, especially in light of the Reagan administration’s view that the text served as a significant victory for the PLO); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 93–95 (2006) (noting the United States’ position on military targets is at odds with international law principles generally excluding military targets as a victim of terrorism); *see also* Gerald L. Neuman, *Humanitarian Law and Counter-Terrorist Force*, 14 EUR. J. INT’L L. 283, 285 n.5 (2003) (noting the United States’ objection to the First Geneva Protocol’s prohibition on reprisals against the civilian populations of an enemy country).

single out American targets. In this case, the D.C. Circuit, understandably, allowed the government to prosecute the hijackers of an international civilian airliner with passengers of various nationalities—including Americans—aboard, and paid no attention to the motivations of the hijackers. In *Yunis*, that motivation was to persuade the Arab League to remove the Palestinians from Lebanon. The court's position was a clear indication that certain violent activity renders moot the fact that the United States and its citizens were not purposefully targeted.⁴⁵

B. United States v. Rezaq

1. Facts

In *United States v. Rezaq*,⁴⁶ the D.C. Circuit again had occasion to examine the prosecution of an individual who had hijacked an international flight. In November 1985, Rezaq, a “Palestinian, [who] was, at the time of the hijacking, a member of a Palestinian terrorist organization,” hijacked an Air Egypt flight in Athens and had it diverted to Malta.⁴⁷ While there, he released a number of passengers but singled out the Americans and Israelis, and when his demands were not met by the Maltese authorities, he shot two Americans, killing one, and three Israelis, also killing one.⁴⁸ Egyptian commandos later stormed the plane in a botched raid that resulted in the deaths of fifty-seven passengers due to the commandos' own incompetence.⁴⁹ After his capture, Rezaq pled guilty to murder, attempted murder, and hostage taking and was sentenced to twenty-five years, of which he served only seven and was subsequently released by the Maltese authorities.⁵⁰ After he made his way to Nigeria, the authorities there turned him over to the FBI, which brought him to the United States, where he was charged with one count of violating the Antihijacking Act under 49 U.S.C. App. § 1472(n).⁵¹ He went to trial and was found guilty.⁵²

2. Jurisdictional Arguments and International Law

The D.C. Circuit began its analysis by finding that double jeopardy did not bar Rezaq's sequential prosecution in the United States under the dual-sovereignty theory, and, in any event, the charge of air piracy in the United States carried different elements than those of the crimes of murder, attempted murder, and hostage taking in Malta.⁵³ It further held that the Hague Convention did not require

45. See *Yunis III*, 924 F. 2d at 1091.

46. 134 F.3d 1121 (D.C. Cir. 1998).

47. *Id.* at 1126.

48. *Id.*

49. *Id.*

50. *Id.* (pointing out that the reason for Rezaq's release so early into his sentence was unclear).

51. *Id.* at 1126–27. On July 5, 1994, 49 U.S.C. App. § 1472(n) was recodified in Title 49 by Public Law No. 103-272, § 1(e), 108 Stat. 1240-45, and can now be found at 49 U.S.C. § 46502(b).

52. *Rezaq*, 134 F.3d at 1127.

53. *Id.* at 1128–30.

a more stringent double jeopardy test than that required by U.S. law.⁵⁴ The court also rejected Rezaq's argument that the government had manufactured jurisdiction by bringing him to the United States against his will, holding that Rezaq was "afterward found in the United States" as per § 1472(n) and, as such, could be prosecuted under the Antihijacking Act, a position not limited or contravened by the Hague Convention.⁵⁵ In so holding, the court relied to a large degree on *Yunis III* and did not credit Rezaq's argument that the Yunis situation was different since Yunis had been charged with violating the Antihijacking Act only after being present in the United States, whereas Rezaq had been brought to the United States for the sole purpose of being prosecuted under § 1472(n).⁵⁶ The final procedural issue decided by the court stemmed from Rezaq's challenge to the district court's application of the "death results"⁵⁷ provision of § 1472(n) against him under both the Hague Convention and customary international law.⁵⁸ It found no restriction on the application of this provision under the Hague Convention and ruled that customary international law would allow for jurisdiction on the "death results" provision based on the passive personal principle, since Rezaq had killed an American during the hijacking.⁵⁹

3. Post-Traumatic Stress Disorder Defense Rooted in the Larger Political Context

With respect to Rezaq's remaining arguments, the most pertinent to this Article concerns the admission into evidence of the fifty-seven deaths caused by the storming of the hijacked plane by Egyptian security forces. Rezaq had put forth an insanity defense that was rooted in his suffering from Post-Traumatic Stress Disorder (PTSD) when he carried out the hijacking, a condition developed through his childhood in a Palestinian refugee camp in Jordan, "witnessing the killing of hundreds of refugees by Israeli forces in Beirut in 1982; witnessing the killings of the populations of entire villages; and nearly being killed in a car bombing."⁶⁰ The district court allowed the government to present evidence of the fifty-seven deaths to the jury, over Rezaq's Federal Rule of Evidence 403 objection, since the government, on cross-examination of his expert witnesses, could contend in good faith that the storming of the plane and its aftermath were what caused the PTSD.⁶¹ Both the district court and the D.C. Circuit therefore did not allow Rezaq, even indirectly, to ground his defense in a larger political context, one that encompasses the status of Palestinian refugees in Jordan, the Israeli invasions of Lebanon in 1978 and 1982, and other random violence committed by unnamed groups in the time period of the Lebanese Civil War. Since the crime was heinous and an American had been murdered, the fact that the episode ended in further tragedy

54. *Id.*

55. *Id.* at 1130–32.

56. *Id.*

57. This part of the statute "requir[es] the imposition of the death sentence or of life imprisonment in cases in which death results." *Id.* at 1132.

58. *Id.* at 1132–33.

59. *Id.*

60. *Id.* at 1126.

61. *Id.* at 1138–39.

could be employed to rebut an attempt to establish a defense that, at heart, strove to show that Rezaq was not acting in a vacuum. Inevitably, however, defenses rooted in the personal or larger historical backgrounds of an individual's role in a foreign conflict involving war and occupation are found to be either irrelevant or subject to devastating impeachment, especially when a United States citizen has been killed in an airplane hijacking.⁶² This is hardly surprising and certainly not illegitimate, given the extremely violent nature of the crime with which Rezaq was charged and ultimately convicted.

C. International Terrorism in the United States—The Rahman Case

1. Islamic Law and Expert Testimony

As the issue of international terrorism came to the United States, the patterns of courts restricting the possibility of political arguments continued, and even expanded. With the advent of prosecutions rooted in crimes committed by foreign Islamists,⁶³ courts were confronted with defenses rooted in Islamic law. Indeed, in *United States v. Rahman*,⁶⁴ the Second Circuit, in upholding the convictions of Sheikh Omar Abdel Rahman (the “Blind Sheikh”) and his associates for their roles in the plot to blow up various landmarks around the New York metropolitan area as well as assassinate the president of Egypt, issued a holding rejecting defenses rooted in the wider context of both Islamic law and perceived oppression or injustice. Abdel Rahman had sought the benefit of expert testimony under Federal Rule of Evidence 702⁶⁵ to argue that any advice he might have given to his codefendants, as members of his congregation, was legal under Islamic law, and that as a religious leader, he was duty-bound to offer such advice.⁶⁶ The court

62. The fact pattern of *Rezaq* has now been repeated in more than one instance, as the government has prosecuted individuals convicted and imprisoned abroad for extraterritorial hijacking offenses on several occasions, even going so far as to seek the death penalty against a Palestinian who had previously served fifteen years in a Pakistani prison. *See United States v. Safarini*, 257 F. Supp. 2d 191, 193 (D.D.C. 2003) (barring the government from seeking the death penalty under the Federal Death Penalty Act as in violation of retroactivity principles and the Ex Post Facto Clause); *see also United States v. Rashed*, 234 F.3d 1280, 1281 (D.C. Cir. 2000) (denying double-jeopardy challenge of Palestinian hijacker previously convicted and imprisoned in Greece).

63. The attack on the World Trade Center in 1993 produced the first of these prosecutions. *See United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998).

64. 189 F.3d 88 (2d Cir. 1999). Incidentally, the correct last name of the named defendant is Abdel Rahman, although it is not uncommon to see courts make this basic mistake in transliterating Arabic names. *See, e.g., United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (the named defendant's correct name is in fact Abdel Sattar).

65. FED. R. EVID. 702 (2009) (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

66. *Rahman*, 189 F.3d at 134–38. Following 9/11, at least one individual has been

rejected testimony under that theory, in addition to testimony under an Islamic customary argument that as a Muslim who was a guest of a non-Muslim country, Abdel Rahman could not advocate violence against the United States, explaining that:

The issue was whether the evidence showed that Abdel Rahman, with the requisite criminal intent, conspired to wage war on the United States through acts of terrorism or solicited others to commit crimes of violence. The question whether such acts on his part would have been condoned or forbidden by Islamic law could lead to an evidentiary dispute about Islamic law that would have little likelihood of illuminating whether he committed the forbidden acts of terrorism.⁶⁷

The court further ruled that testimony as to what Abdel Rahman's thoughts and intentions were when he issued *fatwas* on the concept of *jihad* would have been an impermissible attempt to have expert witnesses testify in his place.⁶⁸ Testimony regarding the human rights situation in Egypt, however horrible it may be, was also excluded as irrelevant to the issue of whether Abdel Rahman committed the acts with which he was charged.⁶⁹ Finally, his attempt to have an expert witness testify that terrorism against the United States would harm his agenda of changing the United States' relationship with the government of Egypt was rejected because the court held that the testimony would be speculative and would again act as an improper substitute for Abdel Rahman's own testimony.⁷⁰

It is difficult to find fault with the reasoning of *Rahman* on the above points of law as they apply to that particular set of facts. The charges all related to various plots and conspiracies to engage in violent behavior in the United States, and, even assuming that everything Abdel Rahman said was permitted by Islamic law,⁷¹

convicted and sentenced to life imprisonment for advocating that, under Islamic law, his followers had a duty to fight the United States and its forces in Afghanistan. See Elisa F. Kantor, Note, *New Threats, Old Problems: Adhering to Brandenburg's Imminence Requirement in Terrorism Prosecutions*, 76 GEO. WASH. L. REV. 752, 770–75 (2008) (discussing the al-Timimi prosecution); Jerry Markon, *Muslim Leader Is Found Guilty; Fairfax Man Urged Followers to Train for Violent Jihad*, WASH. POST, Apr. 27, 2005, at A1.

67. *Rahman*, 189 F.3d at 136. The court rejected Abdel Rahman's First Amendment challenges to the seditious conspiracy charges on similar grounds. See *id.* at 114–16.

68. *Id.* at 136–37 (noting that testimony on several discrete issues, such as the literal meaning of and concept behind the words “jihad” or “fatwa,” for example, would have been relevant).

69. *Id.* at 137–38.

70. *Id.* Testimony from the same proposed expert that Abdel Rahman's codefendants were not technically capable of carrying out the bombing of the World Trade Center was also rejected as speculative. *Id.* at 138.

71. Attempting to frame the issue in the guise of Islamic law is also problematic, given the nebulous nature of that term. There are four main schools of Islamic law in Sunni Islam alone, each of which contain their own substrands and varying interpretations, and since none of these schools are rigidly constrained by a central authority, any individual religiously qualified to issue a *fatwa* (a *mufti*) can expound on any issue they might be asked to decide. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 161–62, 169–71, 176 (2002). Allowing testimony on this point would have necessitated, for example, the unwieldy step of

federal courts are loath to let such a defense stand in the way of conviction when violence in this country is the intended objective of a conspiracy. It is also hard to see how the human rights situation in Egypt was relevant to the charged conspiracies, although there might be room to argue that such information could become relevant under a perceived self-defense theory if the only crimes charged related to a conspiracy to assassinate the Egyptian president, but even then the testimony may be irrelevant or of such little probative value as to be excluded. In short, the conclusion here is that expert testimony regarding the larger political context of an individual's motivations or intentions will be excluded in a terrorism case when the threat of violence in the United States is at the heart of the government's allegations. In *Rahman*, that context was the defendant's conflict with the Egyptian government and the United States' support of that government.

2. Allegations of Judicial Bias

Another example of a defendant trying to interject a wider political context into a case occurred when counsel for Ibrahim El-Gabrowny, one of Abdel Rahman's codefendants, moved to recuse then-District Judge Michael Mukasey on the basis of bias, which was allegedly rooted in the judge's adherence to the tenets of Orthodox Judaism and Zionism.⁷² The thrust of the motion was that, as the government had argued that El-Gabrowny and his codefendants undertook the acts charged in the indictment in opposition to the United States' relationship with Israel, any bias in favor of Israel was unfairly prejudicial to him.⁷³ The motion also requested that Judge Mukasey disclose his and his family's relationships with the state of Israel as evidence of his Zionist beliefs.⁷⁴ Judge Mukasey denied the motion on the basis, *inter alia*, that Israel had no relationship to any of the counts against the defendants, which all involved plots and conspiracies to attack targets primarily in the United States.⁷⁵ He also refused to answer any questions about his or his family's relationship to Israel on the basis that such information was irrelevant, and that to answer the questions on that topic would concede the relevance of the argument, which he had already rejected.⁷⁶

Even though the motion aimed at securing a purportedly less biased judge on the basis of the larger political issues at play in the case, the ruling was unsurprising. At the outset, any reference to the judge's religion as a basis for bias was clearly improper, since tangential theories about a clash of religions do not constitute a real defense to allegations of a conspiracy to attack targets in the United States, as

the government's calling its own expert in Islamic law to demonstrate possibly that Abdel Rahman's theories could be deemed illegal under other schools of Islamic law or even under other strands of the same school.

72. *United States v. El-Gabrowny*, 844 F. Supp. 955, 957-62 (S.D.N.Y. 1994).

73. *See id.* at 957.

74. *Id.* at 958.

75. *Id.* at 961 ("Even if those who are charged with committing and planning such acts are alleged to have done so in part because they oppose United States support for the policies or the existence of the State of Israel, it is impossible to imagine any effect on Israel from the outcome of this case, whatever it may be, that can be described by a rational person as 'substantial.'" (citations omitted)).

76. *Id.* at 962.

pointed out by Judge Mukasey in his opinion.⁷⁷ Regardless of the thrust of the motion, however, in this case there was no factual or legal basis to use a larger political context as grounds for relief.

The pre-9/11 terrorism prosecution centered on some act of violence and a link to the United States; arguments that such violence could be justified or excused on religious or political grounds were unavailing in the eyes of the federal courts adjudicating the cases.⁷⁸ Jurisdictional arguments that the United States should not try individuals who committed their crimes abroad were rejected as well.⁷⁹ When the potentially complicating factor of religious law was involved, the courts could take refuge in the notion that the authenticity of religious belief did not render violence acceptable.⁸⁰ Simply stated, the message seemed to be that there was no compelling legal reason to allow hijackers and international terrorists who used violence to escape prosecution, provided their acts of violence had links to the United States.

77. *Id.* at 961–62. The only link to Israel was that several of the charges in the case stemmed from the killing of Meir Kahane, the founder of the militant Jewish Defense League and a former member of the Israeli Knesset. *See* *United States v. Rahman*, 189 F.3d 88, 103, 105 (2d Cir. 1999). The motion appeared to be an attempt by counsel for El-Gabrowny to frame the allegations against him in a political context, namely one in which he was motivated by what he perceived as unjust policies of the United States in support of Israel. *See, e.g.*, *United States v. Khalil*, 214 F.3d 111, 116–117 (2d Cir. 2000) (upholding conviction and sentence of defendant convicted of plotting to bomb targets in the United States to punish it for its policies in favor of Israel). Perhaps the motion, had it succeeded, would have been followed by attempts to disqualify jurors on the basis of whether or not they were Zionists, thus giving the defense an advantage in the voir dire process. In any event, the motion had the effect of unnerving Judge Mukasey, who accused El-Gabrowny’s counsel of engaging in a pattern of accusing judges of this type of bias without foundation. *El-Gabrowny*, 844 F. Supp. at 962 n.4. The district court referred to the comments made by the late William Kunstler, who served as counsel for El-Gabrowny, after the sentence handed down by Judge Weinstein of the Eastern District of New York to Khaled El-Jassem, a Palestine Liberation Organization (PLO) official convicted of attempting to set off three car bombs in New York City in 1973 against Israeli targets. *United States v. El-Jassem*, 819 F. Supp. 116 (E.D.N.Y. 1993). Specifically, in his representation of El-Jassem, Kunstler accused Judge Weinstein of being a Zionist and showing a lack of compassion for defendants connected to the PLO after he sentenced El-Jassem to three consecutive, rather than concurrent, ten-year terms. *See id.* However, comments by counsel to the press after a major ruling like the issuance of a sentence are not the same as a recusal motion on the record. Further, El-Gabrowny’s motion, which implicitly framed the issues in his case as rooted in some sort of civilizational war between Islam and Judaism, was particularly easy to dismiss.

78. *See supra* Part I.

79. *See supra* Part I.A.

80. *See supra* Part I.C.

II. POST-9/11 PROSECUTIONS—§ 2339B AND THE GREATER POLITICAL CONTEXT

After 9/11, § 2339B⁸¹ emerged as the statute most utilized by the government in terrorism prosecutions.⁸² Where previously international terrorism prosecutions in federal court sounded in statutes that criminalized concrete violent activity with an American nexus, § 2339B now permitted the government to criminalize activity not directly related to the commission of a violent act.⁸³ At every stage, the ban on material support has implicated matters of foreign policy, and courts have resisted, to the extent possible, allowing the groups and individuals targeted by its provisions from litigating whether the conduct criminalized actually harms United States foreign policy goals.

A. Background to § 2339B's Passage

What became § 2339B was part of a bill known as the Antiterrorism and Effective Death Penalty Act (AEDPA) passed by Congress and signed into law by President Clinton in April 1996.⁸⁴ The substance of this provision was debated in Congress for several years and was designed to close a loophole supposedly left open by 18 U.S.C. § 2339A.⁸⁵ In essence, the provision criminalized material support in aid of several enumerated crimes of violence, but did not deal with the purportedly pressing problem of foreign terrorist groups raising money in the United States by way of appeals to humanitarian aid.⁸⁶ Taken together, the majority

81. 18 U.S.C. § 2339B (2006) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”).

82. See COLE & LOBEL, *supra* note 11, at 49; COLE, *supra* note 11, at 75 (calling § 2339B “the centerpiece of the Justice Department’s criminal war on terrorism”).

83. See 18 U.S.C. § 2339B (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).”).

84. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

85. 18 U.S.C. § 2339A defines material support or resources as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

86. See H.R. REP. 104-383, at 43 (1995) (Congress was concerned that groups were

of post-9/11 terrorism prosecutions sound in whole or in part in allegations of illegal material support, suggesting that the government is using these statutes “as catch-all offenses that can be invoked in widely varying situations where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses” and also as “a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud.”⁸⁷

The passage of the law came at a time when President Clinton had exercised his right under the International Emergency Economic Powers Act (IEEPA) in January 1995, by way of an executive order to designate as Specially Designated Terrorists (SDTs) certain groups and individuals seriously disrupting the Middle East peace process in contravention of U.S. national interests.⁸⁸ The order froze assets held by the SDTs in the United States, forbade any dealings in the assets of an SDT, and outlawed the giving or receiving of funds, goods, and services that benefited an SDT.⁸⁹

On the domestic front, the April 1995 Oklahoma City bombing spurred the passage of AEDPA, giving it greater urgency and relevance, even though the material support ban was set to apply only to foreign terrorist groups.⁹⁰ With respect to events occurring abroad, the bill was signed into law on the heels of a series of suicide bombing attacks on civilian targets in Jerusalem and Tel Aviv by

raising money “under the cloak of a humanitarian or charitable exercise,” and through the legislation resolved to “severely restrict[] the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.”). For a discussion of the history of the passage of 18 U.S.C. § 2339B, see Chesney, *supra* note 13, at 12–18.

87. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 7 (2005).

88. Exec. Order No. 12,947, 3 C.F.R. 319 (1995). For a detailed discussion of the history of IEEPA and its use in times of national emergency, as well as the consequences of being designated, see Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1354–74 (2004).

89. Exec. Order No. 12,947, 3 C.F.R. 319 (1995). The executive order was issued in the direct aftermath of a suicide bombing attack in Beit Lid, Israel by a group opposed to the United States-sponsored Middle East peace process of that time. The White House, Office of the Press Secretary, Fact Sheet: Executive Order on Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process (Jan. 24, 1995), *available at* <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6no05.html>. The executive order was of questionable efficacy, in that it had the effect of designating as SDTs groups and individuals who in some cases were incapacitated and in others had no assets to speak of in the United States, and therefore posed little or no ostensible threat to the peace process. For example, Abbud Al-Zumar, a leader of the Egyptian Jihad group, was listed, as was Shaykh Ahmad Yasin, the founder and ideological leader of Hamas. In January 1995, Al-Zumar had been in prison in Egypt since 1981 for his role in the Jihad’s assassination of Egyptian President Anwar Sadat, while Yasin was in an Israeli prison serving a lengthy sentence. Sheikh Omar Abdel Rahman, listed as Shaykh Umar Abd Al-Rahman, was detained and had just begun his nine-month criminal trial in federal court earlier in January 1995. *See United States v. Rahman*, 189 F.3d 88, 111 (2d Cir. 1999); 60 Fed. Reg. 5084-01 (Jan. 25, 1995); BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–1999*, at 626, 645 (2001); MIPT Terrorism Knowledge Base, Egyptian Islamic Jihad, *available at* <http://www.tkb.org/Group.jsp?groupID=3611>.

90. *See* Chesney, *supra* note 13, at 15–17.

the Palestinian groups Hamas and the Palestinian Islamic Jihad (PIJ), respectively.⁹¹ So, while the timing may have been coincidental,⁹² in practice, the passage of the material support ban occurred when the problem of international terrorism, in the eyes of the United States government, significantly concerned violence committed by subnational groups opposed to the Middle East peace process.⁹³

B. The Designation Process and the Ensuing Legal Debate

1. Designation Process

A defendant in a § 2339B prosecution may not defend himself against charges of supporting an FTO by arguing that the organization he allegedly supported was improperly designated an FTO.⁹⁴ For this reason, a discussion of the FTO-designation process is in order. Under 8 U.S.C. § 1189, the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, may designate a group as an FTO on the basis of an administrative record she compiles, a record which, of necessity, contains classified information.⁹⁵ The actual designation is made public in the Federal Register a mere seven days after the Secretary of State informs specified members of Congress of the decision to designate and gives them the information on which her decision is based.⁹⁶ She

91. See Serge Schmemmann, *Arafat Men Seize 3 in Hamas; Not Enough, Peres Says*, N.Y. TIMES, Mar. 11, 1996, at A6. As a result of the bombings, the United States convened a summit on terrorism in the Middle East, which was held in Sharm El-Sheikh, Egypt in March 1996. See Steven Erlanger, *Summit in Egypt: The Symbolism; the Meeting's Message: Put Terrorists on Notice*, N.Y. TIMES, Mar. 14, 1996, at A10. When the first list of FTOs was issued by the Secretary of State in accordance with AEDPA in 1997, it contained a large number of groups active in the Arab-Israeli conflict. See, e.g., Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52650-01 (Oct. 8, 1997).

92. For an argument that the passage of the law was not coincidental, see Michael E. Deutsch & Erica Thompson, *Secrets and Lies: The Persecution of Muhammad Salah (Part I)*, 37 J. PALESTINE STUD. 38, 40 (2008).

93. Indeed, Al-Qaeda was not present on the first list of FTOs and was only designated as such in October 1999. See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55112-01 (Oct. 8, 1999). Despite the seeming urgency of the need to stop foreign groups from raising money for terrorist activities under the guise of charity, there were only three pre-9/11 prosecutions under the statute, two of which dealt with materially supporting Hizballah. See *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc) (material support to Hizballah), *rev'd on other grounds*, 543 U.S. 1097, *reinstated in part*, 405 F.3d 1034 (4th Cir. 2005); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2006) (material support to Hizballah).

94. 8 U.S.C. § 1189(a)(8) (2006) (“If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.”).

95. *Id.* § 1189(a), (d).

96. *Id.* § 1189(a)(2)(A).

does not provide prior notice to the foreign organization that is being designated. To make such a designation, the Secretary of State must determine that:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.⁹⁷

Designations last until the Secretary of State or Congress decides to revoke them, or until they are judicially overturned.⁹⁸

According to the language of the statute, designated groups may choose to challenge their designations by seeking judicial review, but all such challenges must be made in the D.C. Circuit within thirty days of the designation being published in the Federal Register.⁹⁹ During the review process, the court may rely only on the administrative record generated by the Secretary of State, and, on an *ex parte* and *in camera* basis, the Secretary of State may supplement this record with

97. *Id.* § 1189(a)(1)(A)–(C). “Terrorist activity” is defined as follows:

[T]he term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device,

or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii).

98. 8 U.S.C. § 1189(a)(4)–(6).

99. *Id.* § 1189(c). For a criticism of this provision, see Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125 (2003) (recommending the use of notice and a hearing before an organization is designated an FTO).

classified information used in making the designation.¹⁰⁰ A decision to designate can be set aside by the court of review only if it is

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (d) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court; or (e) not in accord with the procedures required by law.¹⁰¹

During the pendency of a challenge to a designation, the designation remains in force.¹⁰² A group may also petition to have its designation revoked administratively by the Secretary of State.¹⁰³ Overall, however, by keeping designations valid indefinitely and placing the burden on an FTO to challenge its designation, the statutory scheme minimizes the potential of an organization to overturn its designation, all the while consolidating power in the executive branch at the expense of the judiciary.¹⁰⁴ Critically, when a designation is used as the basis for a criminal prosecution, “a defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.”¹⁰⁵

2. Legal Challenges

Only a few groups have attempted to challenge their designations as FTOs in the D.C. Circuit, and those challenges have been almost uniformly unsuccessful. In 1999, in the first challenge of its kind, the court upheld the FTO designations of the People’s Mojahedin Organization of Iran (PMOI) and the Liberation Tigers of Tamil Eelam (LTTE), ruling that “a foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise.”¹⁰⁶ Two years later, when the National Council of Resistance of Iran

100. *Id.* § (a)(7). The D.C. Circuit recently remarked that it has yet to decide whether a designation that was based in large part on classified information would comport with due process. *See People’s Mojahedin Org. of Iran v. Dep’t of State*, 613 F.3d 220, 231 (D.C. Cir. 2010) (“[N]one of [the D.C. Circuit’s] cases decides whether an administrative decision relying critically on undisclosed classified material would comport with due process because in none was the classified record essential to uphold an FTO designation.”).

101. 8 U.S.C. § 1189(c)(3).

102. *Id.* § 1189(c)(4).

103. *Id.* § 1189(a)(4)(B); *see also* Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effects on the Separation of Powers*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 547, 573–75 (2008).

104. *See* Shapiro, *supra* note 103. Additionally, Congress may stop or revoke a designation via an act of Congress, although the statute is silent on what might bring about such a result. *See* 8 U.S.C. § 1189(a)(5).

105. 8 U.S.C. § 1189(a)(8); *see, e.g.*, *United States v. Chandia*, 514 F.3d 365, 371 (4th Cir. 2008); *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2005).

106. *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 20 n.3, 22 (D.C.

(NCRI) was designated an FTO on the basis of its being an alter ego of the PMOI, it also challenged its status.¹⁰⁷ The D.C. Circuit ruled that because the NCRI held an interest in a bank account in the United States, it had a presence in the United States, so its designation by the Secretary of State violated due process in that it received no prior notice of its designation and no opportunity to be heard.¹⁰⁸ Due process required that the NCRI receive notice, before the designations were finalized, of the unclassified items in the administrative record upon which the Secretary was relying, as well as an opportunity to present evidence to rebut that record, at the least in the form of a written submission.¹⁰⁹ Even though the court found due process to have been violated, it refused to set aside the designation of the NCRI and instead remanded the matter to the Secretary to provide adequate notice, allow for a response to the administrative record, and permit the NCRI to present evidence in defense of its contention that it was not a terrorist group.¹¹⁰ After providing the NCRI with proper notice and an opportunity to be heard, subject to the limitations imposed by statute, the Secretary designated the group as an FTO once again, and the D.C. Circuit subsequently upheld the designation.¹¹¹

The PMOI challenged its designation yet again in 2008, citing a change in circumstances.¹¹² Although the group had received notice of the Secretary of State's intention to renew the designation, the D.C. Circuit ruled that due process was violated when the Secretary did not provide the PMOI an opportunity to rebut the allegations in the unclassified section of the administrative record.¹¹³ Without

Cir. 1999) (The group is also known as Mujahedin-e-Khalq or MEK.); *see also* 32 Cnty. Sovereignty Comm. v. Dep't of State, 292 F.3d 797 (D.C. Cir. 2002) (upholding the designation of an alter ego of the Real IRA, a banned FTO, on the same basis).

107. Nat'l Council of Resistance of Iran (NCRI) v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001).

108. *See id.* at 196, 200–01, 204. The court did not rule out post-designation notice where prior notice would impinge on the national security of the United States or other foreign policy goals. *Id.* at 208.

109. *Id.* at 209.

110. *Id.*

111. Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152, 159–60 (D.C. Cir. 2004); People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1245 (D.C. Cir. 2003).

112. People's Mojahedin Org. of Iran v. Dep't of State, 613 F.3d 220, 225 (D.C. Cir. 2010) (“[S]ince its initial FTO designation in 1997, it had: ceased its military campaign against the Iranian regime and renounced violence in 2001; voluntarily handed over its arms to U.S. forces in Iraq and cooperated with U.S. officials at Camp Ashraf (where all of its members operating in Iraq are consolidated) in 2003; shared intelligence with the U.S. government regarding Iran’s nuclear program; in 2004 obtained ‘protected person’ status under the Fourth Geneva Convention for all PMOI members at Camp Ashraf based on the U.S. investigators’ conclusions that none was a combatant or had committed a crime under any U.S. laws; disbanded its military units and disarmed the PMOI members at Ashraf, all of whom signed a document rejecting violence and terror; and obtained delisting as a terrorist organization from the United Kingdom (the Proscribed Organisations Appeal Commission and the Court of Appeal) in 2008 and from the European Union (the European Court of First Instance) in 2009. The PMOI also thrice supplemented its petition with additional information and letters in support from members of the U.S. Congress, members of the UK and European parliaments and retired members of the U.S. military, among others.”).

113. *Id.* at 227–28. It appears that the State Department takes seriously its responsibility

overturning the designation, the D.C. Circuit remanded the matter to the Secretary, ordering her to allow the PMOI to prepare a rebuttal to the unclassified information in the administrative record.¹¹⁴ In total, therefore, the D.C. Circuit's opinions in designation cases demonstrate a strict unwillingness to consider the foreign policies behind any particular group's designation, and are focused instead on whether the statute has been properly applied. In so doing, the opinions offer no guidance on what factors might allow a group to overcome its designation.

3. The *Rahmani/Afshari* Litigation

United States v. Rahmani, a criminal prosecution from the Central District of California, generated significant jurisprudence on the designation process in a case involving constitutional challenges to the indictment of various individuals of Iranian origin for raising funds in the United States on behalf of the PMOI.¹¹⁵ The district court rejected the contention that the D.C. Circuit was the sole arbiter of an FTO's designation, basing its reasoning on the fact the statutory language did not provide clear and compelling evidence of Congress's intent to divest courts in other circuits of judicial review over the process.¹¹⁶ It held that it could no more be stripped of the power to review the underlying designation than it could the power to examine the sufficiency of an indictment.¹¹⁷ The court then held § 1189 unconstitutional on its face because the statute denied a designated FTO proper notice, access to the evidence against it, and a meaningful opportunity to present its own evidence against an attempt to designate.¹¹⁸ With respect to the first PMOI opinion, the *Rahmani* court essentially found that there could be no finding of constitutionality when a statute was applied to an entity that enjoyed no constitutional rights due to its lack of presence in the United States.¹¹⁹ As to the second PMOI ruling, it held that it had not addressed the facial constitutionality of the statutory scheme, but only the as-applied challenge based on the NCRI's lack of notice and hearing.¹²⁰ Finally, the court addressed the government's point that invalidating § 1189 would damage United States national security by hampering counterterrorism efforts:

to provide notice to groups with a presence in the United States. In at least one case, the State Department invited individuals it believed represented Kahane Chai (Kach), a designated FTO, to bring forth a challenge to its designation, which the D.C. Circuit upheld after the government turned over the nonclassified portion of the administrative record. *See Chai v. Dep't of State*, 466 F.3d 125, 134 (D.C. Cir. 2006).

114. *People's Mojahedin Org. of Iran*, 613 F.3d at 229.

115. 209 F. Supp. 2d 1045 (C.D. Cal. 2002), *rev'd sub nom.* *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004), *reh'g*, 426 F.3d 1150 (9th Cir. 2005).

116. *See id.* at 1053, 1053 n.10 (citing fundamental fairness concerns, and pointing out that the first D.C. Circuit ruling in the PMOI saga remarked on its "inability to conduct an effective judicial review of the designation").

117. *Id.* at 1054–55.

118. *Id.* at 1055–59 (rejecting the government's argument that the first two rulings from the D.C. Circuit in the PMOI saga upheld the constitutionality of the designation process).

119. *Id.*

120. *Id.* at 1056–57 ("[T]his is no longer judicial construction; it is impermissible judicial legislation." (citations omitted)).

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

The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections. Such protections should not be dispensed with where the Secretary has not shown how the [PMOI] is a national security threat.¹²¹

The ruling in *Rahmani* holding § 1189 unconstitutional and thus dismissing the indictment against the defendants was directly overturned by the Ninth Circuit under the name of *United States v. Afshari*.¹²² In spite of the statutory language in § 1189 that prescribes setting aside the designation if it violates one of the explicitly stated grounds, the Ninth Circuit refused to second-guess either the decision of the Secretary of State to designate the PMOI or the D.C. Circuit's decision not to overturn the designation in the *NCRI* case, finding that it lacked the authority to do so.¹²³ The court then rejected the defendants' further due process challenge arising out of the unconstitutional designation of the PMOI, on the basis of the D.C. Circuit's ruling in the *NCRI* case. First, it cited to Supreme Court precedent that allowed for prosecution on felon-in-possession charges even when the underlying felony charges had been subsequently reversed on appeal.¹²⁴ It noted that the *NCRI* decision did not actually result in the PMOI's designation being set aside, and that where there was no question as to the validity of the designation, the elements of § 2339B required only knowledge that a group was designated.¹²⁵ Further, it held that where the PMOI had admitted to numerous terrorist acts, any constitutional deprivation was harmless.¹²⁶ This was despite the PMOI's assertion of a "the enemy of my enemy is my friend" theory to oppose its FTO designation (based on its opposition to the Iranian government, a designated state sponsor of

121. *Id.* at 1057–58 (footnote omitted).

122. 426 F.3d 1150 (9th Cir. 2005). As an initial matter, the court found that restricting judicial review of the designation process to the D.C. Circuit was not unconstitutional, and cited several other statutes that provided for judicial review in a specified circuit. *Id.* at 1154–55. Prior to the Ninth Circuit's decision in *Afshari*, courts in other districts had disagreed with the ruling in *Rahmani*. See, e.g., *United States v. Sattar*, 272 F. Supp. 2d 348, 363–64 (S.D.N.Y. 2003) (finding the *Rahmani* opinion "unpersuasive").

123. *Afshari*, 426 F.3d at 1156.

124. *Id.* at 1157 (citing *Lewis v. United States*, 445 U.S. 55, 62, 64 (1980)).

125. *Id.* at 1157–58 (citing *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc), *rev'd on other grounds*, 543 U.S. 1097 (2005), *reinstated in part*, 405 F.3d 1034 (4th Cir.) ("[Congress has provided that] the fact of an organization's designation as an [FTO] is an element of § 2339B, but the validity . . . is not." (emphasis in original))).

126. *Id.* at 1158.

terrorism).¹²⁷ To cement its holding on this point, the court likened the case before it to previous decisions involving violations of the Export Administration Act, where the convictions of individuals charged with exporting restricted goods without the proper license were upheld—the issue there was not whether the restriction on the good was valid, but rather whether the defendant knew of the existence of the restriction.¹²⁸

Even though the district court had not ruled on the First Amendment claims presented by the defendants, since it ceased its analysis once it held the designation process unconstitutional, the Ninth Circuit directly addressed those claims.¹²⁹ In response to the defendants' arguments that their First Amendment rights to free speech were being suppressed by the ban on funding FTOs, the court emphatically ruled that providing money to an FTO could not be construed as speech, and therefore the ban on material support need not be subject to strict scrutiny.¹³⁰ It remarked that “[g]uns and bombs are not speech,” and that “[t]here is no First Amendment right ‘to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions.’”¹³¹ The court concluded with the following paragraph explaining its view that courts and juries could not appropriately consider defenses to § 2339B prosecutions rooted in politics:

Conceivably the [PMOI] developed its practices at a time when the United States supported the previous regime in Iran, and maintained its position while harbored by the Saddam Hussein Ba’ath regime in Iraq. Maybe the [PMOI’s] position will change, or has changed, so that its interest in overturning the current regime in Iran coincides with the interests of the United States. Defendants could be right about the [PMOI]. But that is not for us, or for a jury in defendants’ case, to say. The sometimes subtle analysis of a foreign organization’s political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch. Juries could not make reliable determinations without extensive foreign policy education and the disclosure of classified materials. Nor is it appropriate for a jury in a criminal case to make foreign policy decisions for the United States. Leaving the determination of whether a group is a “foreign terrorist organization” to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make such determinations. The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to

127. *Id.*

128. *Id.* at 1158–59 (citing *United States v. Bozarov*, 974 F.2d 1037 (9th Cir.1992); *United States v. Mandel*, 914 F.2d 1221 n.11 (9th Cir. 1990)).

129. *Id.* at 1159–61.

130. *Id.*; see also *Hammoud*, 381 F.3d at 328–29 (employing similar reasoning).

131. *Afshari*, 426 F.3d at 1161 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).

refrain from furnishing material assistance to designated terrorist organizations during the period of designation.¹³²

Judge Kozinski, joined by four other judges, dissented from the refusal of the Ninth Circuit to rehear the *Afshari/Rahmani* case en banc.¹³³ He argued that while providing money to a designated FTO was not protected speech, the issue in this case was whether the designation process was constitutional, since, if the designation of the PMOI were held unconstitutional, providing money to it would amount to a form of protected speech.¹³⁴ In his view, since the ban on material support was a type of prior restraint of speech, in order for the designation process to be found constitutional, it had to comply with the standards laid out by the Supreme Court in *Freedman v. Maryland*¹³⁵ and *McKinney v. Alabama*,¹³⁶ a position explicitly rejected by the panel in its opinion.¹³⁷ Under *Freedman*, “only a *judicial determination* in an *adversary proceeding* ensures the necessary sensitivity to freedom of expression, [thus] only a procedure requiring a *judicial* determination suffices to impose a valid final restraint.”¹³⁸ Judge Kozinski argued that none of these factors were present, given that the process puts the burden of challenging a designation on the organization, that the ban on support remains in force during the pendency of any proceedings, that the statute does not ensure a prompt judicial determination (especially where a foreign organization is adjudged to have no constitutional rights), and that, thus, there is no opportunity for meaningful review.¹³⁹ Even though the D.C. Circuit refused to set aside the designation of the PMOI, it did hold the designation to have been unconstitutional in the years 1997–2001, precisely the time frame that the defendants were charged with providing material support, a result that Judge Kozinski found to be a “uniquely unconstitutional (and oxymoronic) practice: an *ex post facto* prior restraint.”¹⁴⁰

In discussing *McKinney*’s applicability to the instant case, Judge Kozinski noted initially that “[i]t is not at all clear to me that a constitutional challenge that can

132. *Id.* at 1162 (footnote omitted).

133. *United States v. Afshari*, 446 F.3d 915, 915–22 (9th Cir. 2006) (Kozinski, J., dissenting).

134. *Id.* at 917–18.

135. 380 U.S. 51, 59–60 (1965) (holding unconstitutional a Maryland statutory scheme banning the showing of obscene films on threat of criminal prosecution since (a) the burden of initiating judicial review was on the exhibitor of the film; (b) the film would remain banned pending judicial review; and (c) there was no prompt assurance of judicial review).

136. 424 U.S. 669, 676–77 (1976) (holding that in a prosecution for selling an obscene magazine in violation of the law, the defendant had a right to challenge the underlying designation as such in his own criminal trial).

137. *Afshari*, 446 F.3d at 918.

138. *Id.* (alteration in original) (emphasis in original) (quoting *Freedman*, 380 U.S. at 58).

139. *Id.* at 919.

140. *Id.* at 919–21 (emphasis in original) (“The simple fact is that Rahmani is being prosecuted—and will surely be sent to prison for up to 10 years—for giving money to an organization that no one other than some obscure mandarin in the bowels of the State Department had determined to be a terrorist organization. The panel has simply overruled *Freedman*—without so much as mentioning it.”).

(maybe) be raised only by a third party in a separate proceeding can *ever* be an adequate substitute for the procedures specified in *McKinney*.¹⁴¹ However, even accepting the panel's reasoning that the PMOI designation was subject to judicial review, he remarked that during the time period at issue, the designation was held to be improper by the D.C. Circuit. He explained that this holding effectively stated that any money sent to the PMOI should be considered donations to a legitimate political organization that are deserving of the heightened protection afforded political speech.¹⁴² Likewise, the government's attempt to frame the issue as one of national security in which the judiciary must defer to the executive must fail, since, Kozinski reasoned, there was no issue of national security once the designation was found to be improper.¹⁴³

While Kozinski pointed out his belief that the designation process should be held unconstitutional, he opined that the panel could have dismissed the action without interfering with the decision of the D.C. Circuit regarding the designation of the PMOI.¹⁴⁴ He reasoned that the panel could have simply ruled that an unconstitutional designation like that at the heart of the *NCRI* case could not serve as the basis for a criminal prosecution, and left the subsequent PMOI designation intact, with all the attendant consequences.¹⁴⁵ Such a result would not have interfered with another circuit court's decision on the issue of the designation of the PMOI.¹⁴⁶ Judge Kozinski then concluded with the following observation:

I can understand the panel's reticence to interfere with matters of national security, but the entire purpose of the terrorist designation process is to determine *whether* an organization poses a threat to national security. Under the Constitution, the State Department does not have *carte blanche* to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it. Far too much political activity could be suppressed under such a regime.¹⁴⁷

4. The Debate over the Definition of a Terrorist Group

A review of the cases involving challenges to an FTO designation demonstrates the difficulties of engaging in a debate over what groups or actors, if any, are entitled to commit violence in the service of a political cause. That the three circuit courts that have examined the designation process have all found it to be constitutional reveals the reluctance of appointed federal judges to become involved in what is reasonably perceived to be a foreign policy question rightly committed to the political branches. The legal challenges themselves highlight the

141. *Id.* at 920–21 (emphasis in original).

142. *Id.*

143. *Id.* at 922 (“What possible relevance could national security have once the terrorist designation was declared unconstitutional?”).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (emphasis in original).

difficulty of applying a definition of terrorism to all nonstate actors¹⁴⁸ active around the world in political violence. While producing a universally accepted definition of terrorism in international law has proved elusive, and may even be impossible, the area of greatest consensus appears to be a definition that prohibits violent attacks on civilians with the intent to intimidate or coerce a sovereign government.¹⁴⁹ A glance at the relevant definitions of terrorism in domestic law confirms American acceptance of this general principle.¹⁵⁰

Based on the above definition, none of the groups on the FTO list can complain that they are unfairly listed. Since all of the groups can be tied to acts of political violence that harmed civilians at some point in their respective histories, characterizing them as “terrorist” is both unsurprising and uncontroversial. Even leaving aside the perhaps unfair focus on nonstate actors as terrorists, the definition of the term in U.S. law, in accordance with international law, is relatively clear that groups engaging in violent activity in pursuit of political goals run the risk of being declared terrorist organizations.¹⁵¹ Of course, not all groups that engage in terrorism under the relevant statutes will be so designated.¹⁵² So, while the

148. In analyzing terrorism prosecutions in federal court, this article is bound by the relevant definitions in United States law, as discussed. Outside the scope of the laws referenced *infra*, when this article refers to “terrorism” in general, it does not incorporate the category of state terrorism, but rather focuses solely on violence against civilians by nonstate actors. See Neuman, *supra* note 44, at 288–89 (adopting this approach).

149. See, e.g., Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 19–27 (2008) (noting that an internationally agreed-upon definition exists, and that the current debate centers on the exceptions to that definition); George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT’L CRIM. JUST. 894, 911 (2006) (“A concept like terrorism that lies at the centre of our political life may not lend itself to the discipline of legal thinking. It is probably like the notions of ‘democracy’ or ‘constitutionalism’ or ‘rule of law’—too important to be settled once and for all in a legislative definition.”); Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospect*, 36 CASE W. RES. J. INT’L L. 359, 360–63 (2004); Young, *supra* note 44, at 42.

150. See 8 U.S.C. § 1189(a)(1)(A)–(C) (2006); 18 U.S.C. § 2331(1) (2006) (defining “international terrorism” as “violent acts or acts dangerous to human life” occurring abroad that are intended “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping”); see also 22 U.S.C. § 2656f(d)(2) (2006) (“[T]he term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”).

151. See 18 U.S.C. § 2331 (defining “international terrorism” as “violent acts or acts dangerous to human life,” which seek “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping”).

152. A relatively high-profile example is that of the Cambodian Freedom Fighters (CFF), which carried out an attack on the Cambodian government in 2000 in which several people were killed, at a time when Cambodia was not at war with the United States. The attack was planned by the CFF’s leadership in the United States, which openly raised funds for the group’s violent activities. See Joshua Kurlantzick, *The Strip Mall Revolutionaries*, N.Y. TIMES MAG., Mar. 21, 2004, at 50. The incident eventually led to the CFF’s leader being convicted on charges of conspiracy to commit murder abroad and violations of the Neutrality Act, although the CFF has not been designated as an FTO, therefore ensuring no

definition of terrorism underpinning the designation process is universal in its nature, just because a group could be listed does not mean that it will be. For a terrorist group to be banned, it has to threaten the security of U.S. nationals or American “national security,”¹⁵³ which is defined as “the national defense, foreign relations, or economic interests of the United States.”¹⁵⁴

Essentially, the list of FTOs contains two types of groups: (1) those that genuinely threaten the national security of the United States in a direct way, such as by targeting its nationals and government; and (2) those that challenge the more opaque foreign relations or economic interests of the United States. While courts have determined that the extent of a group’s threat to American national security will not be subjected to scrutiny after the fact,¹⁵⁵ banning groups that fall into the latter category raises certain questions about the designation process and the purposes it serves.¹⁵⁶ As scholars have noted, echoing Judge Kozinski’s point in dissent in *Afshari*, the amount of judicial deference given to a finding by the executive that a group harms national security to the extent that it should be listed as an FTO, renders such a decision essentially unreviewable.¹⁵⁷ At the most basic level, this position makes sense, even if the outcome results in a concentration of power in the executive; judges are not in a position, politically or informationally, to render decisions on whether a group’s activities actually harm U.S. national security in its expansive definition. However, despite a group’s inability to ascertain, by litigation or otherwise, what national security reasons cause it to be

criminal exposure results from materially supporting its activities that cannot be explicitly linked to violence. *See Man Guilty of Cambodia Coup Plot*, BBC NEWS (Apr. 17, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7351778.stm>. While the CFF, along with several other organizations, including the Irish Republican Army, was previously listed as a “terrorist group” by the State Department, it was then classified as a “group of concern,” and it now appears that the most recent incarnations of the State Department’s terrorism report have eliminated this category, concentrating instead on FTOs exclusively. *Compare* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2009 ch. 6 (2010) [hereinafter STATE DEPARTMENT TERRORISM REPORT 2009] (only listing FTOs), *with* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2005, at 234–35 (2006) (listing the CFF as a “group of concern”), *and* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003, at 142–43 (2004) (listing the CFF as a “terrorist organization”).

153. 8 U.S.C. § 1189(a)(1)(c).

154. *Id.* § 1189(d)(2).

155. *See People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, ‘decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’” (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))); *see also* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1366, 1374–75 (2009).

156. Most of the groups on the FTO list tend to be marginal in terms of membership, the level of popular support they enjoy among their purported constituents, and their willingness to participate in legitimate civilian governments. The two exceptions to this general rule are the Lebanese group Hizballah and the Palestinian group Hamas.

157. *See, e.g.,* COLE & LOBEL, *supra* note 11, at 54.

designated an FTO, the designation process sends a few clear messages regarding the United States' position on violence in the service of political goals.

First, a review of the handful of designation challenges suggests that the organizations involved were disputing, at least initially, not the fact that they engaged in violence in service of their respective causes, but rather the finding that they threatened, even indirectly, the United States.¹⁵⁸ In other words, if the real enemy is Islamic fundamentalism, why should the United States list as terrorists a group composed of Iranian exiles fighting the Islamic government in Tehran, a Tamil movement fighting the Sri Lankan government, a dissident Irish republican group, or an anti-Arab Israeli group? These groups are all either peripheral themselves or engaged in struggles that do not impinge on major U.S. foreign policy interests. The groups admit that they are guilty of engaging in terrorism as defined by domestic law, but that the government should simply not bother to ban them because they do not constitute a nuisance to the United States.¹⁵⁹ Additionally, the LTTE attempted, without success, to argue that it could not be designated an FTO according to the operative statute, since it was not an organization, but rather a foreign government.¹⁶⁰ The above arguments failed to persuade courts to reverse the designation.

Second, and on a somewhat related note, arguments that a designated group has interests similar to those of the United States, on the “an enemy of my enemy is my friend” theory, will also fail. The PMOI-affiliated defendants in the *Rahmani/Afshari* litigation attempted this line of argument and failed to convince the Ninth Circuit to overturn a designation.¹⁶¹ This occurred despite the support of numerous members of Congress for overturning the ban on the PMOI, the existence of a cooperation agreement between the group and the U.S. military in Iraq (where the group maintains a military camp), and a common enemy (the government of the Islamic Republic of Iran).¹⁶² The government has continued to prosecute PMOI-affiliated officials; in one recent case, the official in question was a resident in the

158. See *supra* Part II.B.2. It was only after its main military base in Iraq came under the control of the U.S. military that the PMOI claimed that it had renounced violence. See *supra* note 112 and accompanying text.

159. See, e.g., *Chai v. Dep't of State*, 466 F.3d 125, 129–30 (D.C. Cir. 2006) (discussing Kach/Kahane Chai's links to terrorist activity); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (detailing a list of violent attacks the PMOI admits to having committed against targets of the Iranian government).

160. *People's Mojahedin Org. of Iran*, 182 F.3d at 24 (noting that because the government has failed to recognize the LTTE as a foreign government, the court cannot judicially make such a finding). The LTTE stands for the Liberation Tigers of Tamil Eelam, and are more commonly known as the Tamil Tigers.

161. See *United States v. Afshari*, 426 F.3d 1150, 1157–58 (9th Cir. 2005).

162. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1051 (C.D. Cal. 2002), *rev'd sub nom.* *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004), *reh'g granted*, 426 F.3d 1150 (9th Cir. 2005); Shapiro, *supra* note 103, at 579–83 (arguing that the PMOI's designation as an FTO stems in great part from the American government's desire to appease Iran in the context of the two nations' otherwise extremely tense bilateral relationship); Sam Dagher, *Iranian Resistance Group Criticizes Iraq's Efforts to Expel It*, N.Y. TIMES, Dec. 22, 2008, at A11 (explaining that the PMOI has “enjoyed the protection of the American military since 2003”).

Iraqi camp where all the residents had been cleared by the U.S. military of any violations of American law.¹⁶³ Whatever the compatibility of the PMOI's agenda with United States national security interests, it would seem that convergence with American foreign policy goals does not suffice to bar a group from inclusion on the FTO list where the group has committed violence considered illegal by U.S. law.

5. Further Implications

What the legal challenges to the designation process have revealed is that any political violence carried out by a nonstate actor, whether or not linked to the United States, is sufficient to render the nonstate actor an FTO. When taken out of the narrow confines of the designation debate, this ostensible ban on nonstate political violence in all contexts reveals itself to be potentially limitless. Consider the immigration context, where providing material support to a group engaged in "terrorist activity," that is, violence in support of political goals—regardless of whether the group committing it has been listed or designated by any government agency—triggers a statutory prohibition on political asylum in and withholding of removal from the United States.¹⁶⁴ Professor Gerald Neuman provides the following analysis of this aspect of U.S. immigration law:

Read literally, "terrorist activity" would include the unlawful shooting of an abusive husband by a battered spouse, and perhaps more importantly, would include any locally unlawful use of a firearm for political purposes, including self-defense or use in insurgency consistent with the laws of war. Even if such actions do not constitute "terrorism" within any other legally operative definition, they may constitute "terrorist activity" rendering an alien inadmissible or deportable under the [Immigration and Nationalization Act].¹⁶⁵

The definition of "terrorist activity" in the immigration context is the same as that used to support a designation under 8 U.S.C. § 1189; so while the two statutory schemes serve different legislative purposes, the position on what constitutes terrorism is basically identical.¹⁶⁶ The two contexts are further intertwined when one considers that the term "material support" in the context of terrorism first

163. *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 185 (E.D.N.Y. 2008) (upholding prosecution of a PMOI official formerly resident at group's Iraq camp upon return to the United States); Douglas Jehl, *People's Mujahedeen: U.S. Sees No Basis to Prosecute Iranian Opposition "Terror" Group Being Held in Iraq*, N.Y. TIMES, July 27, 2004, at A8 (noting that while the State Department did not consider the "determination of the status of [the PMOI] in Iraq" as having any bearing on "its status as a terrorist organization," American officials "did not expect any of [the camp's residents] to be charged in American courts").

164. *See S-K-*, 23 I. & N. Dec. 936, 937–38 (BIA 2006) (citing relevant legislative provisions).

165. Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 327 (2000).

166. *Id.* (noting that the definition of "terrorist activity" in the immigration context "also governs the process, created in 1996, for the designation of 'foreign terrorist organizations'").

appeared in congressional debates over what eventually became the Immigration Act of 1990.¹⁶⁷

a. Limitless Definitions—*Matter of S-K-*

The seemingly limitless nature of what constitutes terrorist activity was given expression in the *Matter of S-K-*, a 2006 decision of the Board of Immigration Appeals (BIA) on the asylum application of a Burmese national of the Christian Chin minority.¹⁶⁸ The applicant became acquainted with a member of an organization called the Chin National Front (CNF), which is dedicated to the “goal of securing freedom for ethnic Chin people” within Burma, and grew sympathetic with its cause, eventually donating money and trying to donate other items, such as a camera and binoculars.¹⁶⁹ When she was warned that the Burmese military had been tipped off as to her support of the CNF, she fled to the United States to seek political asylum.¹⁷⁰ After the immigration judge denied relief, the BIA considered the appeal to address the question of “whether the use of justifiable force against an illegitimate regime and the right of people to self-determination, which the respondent argues is the CNF’s purpose, is a valid purpose, which would not fall within the definition of terrorist activity under the [Immigration and Nationalization] Act.”¹⁷¹ Because the CNF was found to engage in terrorist activity by “us[ing] firearms and/or explosives to engage in combat with the Burmese military,” and S-K-’s actions were found to constitute material support of the CNF, the BIA denied the application for asylum and withholding of removal.¹⁷² Critically, with respect to the type of struggle the CNF was waging against one of the world’s most repressive and ostracized regimes, the BIA noted that “Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic.”¹⁷³

As the concurring opinion of the Vice Chairman pointed out, the upshot of the legislative scheme was that “[a]ny group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization.”¹⁷⁴ This is true regardless of whether the group in question is allied to the United States. For example, at oral argument, the government acknowledged that an individual providing material support to the Northern Alliance during the

167. Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SECURITY L. & POL’Y 297, 306–26 (2008) (detailing the history of the term and its use in the immigration context, where it first appeared).

168. *S-K-*, 23 I. & N. Dec. at 937.

169. *Id.*

170. *Id.*

171. *Id.* at 938.

172. *Id.* at 941. However, the BIA did grant deferral of removal on Convention Against Torture grounds. *Id.* at 946.

173. *Id.* at 941.

174. *Id.* at 948 (Osuna, Acting Vice Chairman, concurring).

1990s in its battle with the Taliban would be statutorily barred from asylum based on the material support ban.¹⁷⁵

The result in *S-K-* is the natural outcome of treating all forms of political violence by nonstate actors as terrorism. When material support to a group resisting one of the world's most repressive governments is considered support of terrorist activity, the very notion of resistance to an oppressive regime, if it functions as the official government of a recognized state, becomes suspect by default. There is then no method to distinguish a legitimate resistance group from one that is merely engaged in illegal violence for illegitimate ends. Thus, although legitimacy stems from the people a group purports to represent, as well as international solidarity, an organization with a solid popular base or mandate and significant international support cannot and will not be able to claim that it is somehow different from a more nihilistic or extremist group that operates without such attributes. Put differently, a nonstate actor cannot engage in violence against a legitimate government without having its supporters run afoul of United States criminal and immigration law, no matter how repressive the government's conduct, and no matter if the group restricts its violence to operational military targets.¹⁷⁶

The only way out from under the terrorist stigma is to be declared exempt in some form or another. After the BIA's first decision in *S-K-*, Congress passed an appropriations bill expanding the authority of the Secretary of Homeland Security and the Secretary of State to discretionarily grant waivers from the terrorist exclusion provisions of the Immigration and Nationality Act.¹⁷⁷ This congressional action coincided with the Secretary of Homeland Security's decision to grant a discretionary waiver to *S-K-* following the BIA's remand.¹⁷⁸ Additionally, certain specifically listed groups, among them the CNF, "shall not be considered to be a terrorist organization on the basis of any act or event occurring *before* the [December 26, 2007] date of enactment of this section."¹⁷⁹ Even though the government chose to make an exception for the CNF, the second BIA opinion left intact the broad definition of terrorist activity articulated in the original opinion.¹⁸⁰

175. *Id.* ("This despite the fact that the Northern Alliance was an organization supported by the United States in its struggle against a regime that the United States and the vast majority of governments around the world viewed as illegitimate.").

176. This position is in line with the United States' position rejecting the applicability of the First Geneva Protocol's provisions affording legal combatant status to members of national liberation movements. *See supra* note 42 and accompanying text. However, for an argument that armed political groups should have to forswear violence, whether directed at civilian or military targets, as a method to attain international legitimacy, see Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65, 95–96 (2007) ("[V]iolence of any kind is a habit. Violence against armed forces shades into violence against civilians, whether through collateral damage or through an ongoing disposition to target civilians themselves.").

177. *S-K-*, 24 I. & N. Dec. 475, 476 (BIA 2008).

178. *Id.*

179. *Id.* at 476 & n.3 (alteration in original) (emphasis in original) (internal citations omitted).

180. *Id.* at 476.

b. The Impossibility of Distinguishing Between Groups

Given this expansive definition of terrorist activity for designation purposes, it is not surprising that FTOs cannot avail themselves of arguments rooted in the perceived justice of their cause. Consequently, defendants in § 2339B material-support prosecutions cannot make arguments that sound in the popular legitimacy of the group in the area in which it operates. For example, Fawzi Mustafa Assi, a naturalized American citizen of Lebanese origin, was charged with providing material support to Hizballah, a banned FTO, in the form of night-vision goggles and other equipment that could be used for military purposes.¹⁸¹ He attempted to argue that, *inter alia*, under his First Amendment right to free association, his support was intended only to assist the group in resisting the Israeli occupation of southern Lebanon and could not qualify as material support of terrorism.¹⁸² The court rejected his First Amendment arguments as far too sweeping to merit consideration, in light of the government's serious concerns with stopping terrorist activity in the United States.¹⁸³

While Assi's argument was too broad to be deemed acceptable, *S-K-* is not the only situation in which the definition of terrorism can seem counterintuitive. In enacting a kind of blanket ban on political violence by equating it with terrorism, curious results can ensue, even long after a designation has been mooted. For example, in 2008 it was revealed that former South African president and leader of the African National Congress (ANC), Nelson Mandela, was on a United States terrorism watch list and, as a result of that status, needed special permission to travel to the United States.¹⁸⁴ The status of the ANC and Mandela dated from the 1980s, when the State Department routinely classified the group as a terrorist organization.¹⁸⁵ To remove him and other ANC members from the watch list required legislation by Congress that was speedily passed and signed by President George W. Bush.¹⁸⁶

181. *United States v. Assi*, 414 F. Supp. 2d 707, 709–11 (E.D. Mich. 2006); Paul Egan, *Terror Case Plea Dec. 6; Dearborn Man Accused of Providing Support to Hezbollah*, DETROIT NEWS, Nov. 23, 2007, at B2.

182. *Assi*, 414 F. Supp. 2d at 711, 715.

183. *Id.* (“To accept Defendant’s First Amendment challenge under these facts would invalidate any attempt to outlaw contributions of military hardware or weaponry to any organization, no matter how heinous its actions or abhorrent its mission, so long as the donor could identify some political aim he sought to advance through his donation.”) In a similar vein, in what was then a joint § 2339B and RICO conspiracy prosecution, defendant Muhammad Salah moved that the banned FTO Hamas could not be deemed as a RICO enterprise on political question grounds. *United States v. Marzook*, 426 F. Supp. 2d 820, 824 (N.D. Ill. 2006). The court found no bar on listing the group as a RICO enterprise and denied the motion, explicitly rejecting that Hamas, as a “political force,” could not be deemed a “racketeering enterprise.” *Id.* at 825.

184. Mimi Hall, *Mandela Is on U.S. Terrorist Watch List*, USA TODAY, May 1, 2008, at 2A.

185. DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 117 (3d ed. 2006).

186. *Mandela Taken Off U.S. Terror List*, BBC NEWS (July 1, 2008), <http://news.bbc.co.uk/2/hi/americas/7484517.stm> (noting that then-Secretary of State Rice

Referring to Nelson Mandela and other ANC members as terrorists may seem outrageous to many, given Mandela's near-saint-like status as a courageous freedom fighter who spent twenty-seven years in prison in service of his cause.¹⁸⁷ However, it is legitimate to ponder what distinguishing factors tip the scales in favor of embarrassed congressional repudiation of terrorist status in the case of the ANC, as opposed to the consistent designation of the PMOI. The ANC, despite its having a violent armed wing, engendered massive international support and successfully managed to render apartheid South Africa a pariah state before coming to power on the heels of the first truly democratic elections in the country's history.¹⁸⁸ The PMOI is a cult-like Iranian group without any real popular support in its native country that, prior to the 2003 United States invasion of Iraq, "received all of its military assistance and most of its financial support from Saddam Hussein."¹⁸⁹ Most outside observers would recognize a distinction between these two groups, yet from a legal point of view it is not at all clear which, if any, of the two groups' attributes and histories convinced the government to render judgment one way or another. Maybe the fact that the ANC was officially legalized in South Africa changed the government's posture toward it.¹⁹⁰ When all political violence by nonstate groups is by default illegal, and where the courts refuse to allow inquiries into the State Department's determination of how a group harms national security, there is no way of knowing what standards tipped the determination in either direction. Even though most observers would be able to view the ANC and the PMOI as two completely different types of political movements, both engaged in violence that runs afoul of the definition of terrorist activity.¹⁹¹ A serious attempt

was embarrassed about the situation).

187. See generally ANTHONY SAMPSON, MANDELA: THE AUTHORIZED BIOGRAPHY (2000).

188. *A Brief History of the African National Congress*, AFRICAN NATIONAL CONGRESS (2010), <http://www.anc.org.za/show.php?include=docs/misc/2010/umzabalazo.html>. The pattern of groups condemned as terrorist becoming legitimate political parties in the wake of armed conflict is a familiar one. See, e.g., Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 489–90 (2006) ("Conversely, we know that many organizations formerly condemned as terrorist can become legitimate states, by assuming powers of government and using those powers to promote security for all its subjects, rather than using terrorist powers to promote the insecurity of, for example, the members of a colonial regime.").

189. STATE DEPARTMENT TERRORISM REPORT, *supra* note 152, at 314.

190. *Id.* The fact that a group is legal where it operates is not a guarantee that it will not be listed as an FTO, however. Hizballah, the Lebanese FTO, is an officially recognized movement and political party in Lebanon, where several of its members serve in that country's parliament. See *id.* at 300 ("The Lebanese government and the majority of the Arab world, still recognize Hizballah as a legitimate 'resistance group' and political party. Hizballah has 14 elected officials in the 128-seat Lebanese National Assembly and is represented in the Cabinet by the Labor Minister, Mohammed Fneish.").

191. The fear of regulating terrorism is inconsistent with results in cases involving foreign relations, much as the interpretations of the political offense exception to extradition in the 1980s generated differing holdings on which individuals were entitled to legal relief on that basis, prior to the extradition statute being amended to correct this anomaly. See, e.g., *United States v. Doherty*, 786 F.2d 491, 492–93, 503 (2d Cir. 1986) (denying government's effort to seek collateral review of magistrate's denial of extradition request by the United Kingdom of IRA member charged with killing a British soldier in Belfast on the basis of the political offense exception); *Eain v. Wilkes*, 641 F.2d 504, 507, 522 (7th Cir. 1981) (political

to distinguish between the two is in order if an FTO designation is to properly serve as the basis for a criminal prosecution.¹⁹² Without any standards to govern when a group should be deemed terrorist, and therefore subject to designation by “some obscure mandarin in the bowels of the State Department,”¹⁹³ the designation of an FTO risks being rendered something akin to an “I know it when I see it” standard.¹⁹⁴

c. Selectivity

A glance at the list of FTOs reveals certain patterns about what, specifically, the United States views as a threat. Of the forty-five groups currently listed as FTOs, twenty-four are Islamist in orientation, nine are focused on the Palestinian-Israeli conflict (three of which overlap with the first category), with the remainder being assorted groups involved in local conflicts around the globe, most but not all of which have some sort of leftist/communist orientation.¹⁹⁵ The focus on Islamist

offense exception not applicable to Palestinian allegedly involved in an attack on a market in the Israeli city of Tiberias); *United States v. Mackin*, 668 F.2d 122, 123–24, 137 (2d Cir. 1981) (denying government’s appeal of magistrate’s denial of extradition request by the United Kingdom for an IRA member charged with killing a British soldier in Northern Ireland on political offense grounds); *Ahmed v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff’d*, 910 F.2d 1063 (2d Cir. 1990) (finding a Palestinian extraditable to Israel based on attack on a bus in the West Bank—the political offense exception to extradition did not apply); *see also* *Quinn v. Robinson*, 783 F.2d 776, 810, 817–18 (9th Cir. 1986) (holding that target of attack is immaterial to whether offense is political, but allowing extradition based on the fact that political uprising in Northern Ireland did not apply to England, the site of the IRA’s violent activity).

192. For a considered and nuanced proposal of when certain types of terrorism might be justified as “illegal but justifiable” under certain conditions, see Ben Saul, *Defending “Terrorism”: Justifications and Excuses for Terrorism in International Criminal Law*, 25 AUSTL. YEARBOOK INT’L LAW 177 (2006) (recommending that political violence by a nonstate actor be permitted only when 1) it combats serious human rights deprivations, 2) all alternatives to violence to change the situation have been exhausted, 3) the group carrying out the violence can legitimately claim to represent the people in whose name it acts, 4) the purpose of the violence is to replace oppression with freedom, rights protection, and democracy, and 5) it must follow international humanitarian law on civilian immunity).

193. *United States v. Afshari*, 446 F.3d 915, 920 (9th Cir. 2006).

194. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to the legal definition of obscenity). Professor Jeremy Waldron provides a thoughtful discussion of standards by which the legitimacy of a nonstate actor might be established. *See* Waldron, *supra* note 188, at 490 (“If we were wondering about the legitimacy of one of these organizations, we would have to ask whether the security of members of its community was actually enhanced by its activities . . . [taking] into account not just the benefit to members of the relevant community of measures taken against the other paramilitary group, but also the effect, both beneficial and detrimental, of measures taken by the organization against members of the very community it claimed to be protecting.”). There are of course reasons why a government may want to refrain from articulating objective standards. *See* Scharf, *supra* note 149, at 370–74 (arguing that treating terrorism as the peacetime equivalent of a war crime would immunize members of terrorist groups from prosecution for attacks on military or police targets).

195. STATE DEPARTMENT TERRORISM REPORT, *supra* note 152, at 282–84.

groups is no surprise, as they represent the threat of the present, with the inclusion of leftist/communist groups reminding us of yesterday's threats. Clearly, the list is representative of what the State Department regards as national security threats to the United States, since no observer could reasonably argue that these forty-five organizations make up the whole or even a majority of the nonstate actors around the world engaged in some form of violent political campaign. However, a defendant in a § 2339B material support prosecution has virtually no chance of succeeding on a theory of selective prosecution, given the impossibly high standards accorded such a motion¹⁹⁶ and the emphasis placed on stopping terrorist crimes.¹⁹⁷

The implications of the designation of those groups currently listed as FTOs, when viewed in the context of the United States' overall position on political violence by nonstate actors, are far ranging indeed. Collectively, it appears that the United States, in articulating its view as to what constitutes a terrorist group, is stating that a nonstate actor is presumptively barred from engaging in violence—except in those rare cases, like that of the ANC, where it can be shown that the group is engaged in legitimate resistance to impermissible oppression. In other words, the message seems to be that the era of decolonization is over and that the state, no matter how oppressive, holds a monopoly on legalized violence. Selectivity in the FTO designation process further reveals that, despite the presumptive ban on all nonstate political violence, the government believes violence is sometimes acceptable under certain circumstances. What is problematic is determining when those circumstances occur. Therefore, what is needed is an articulation of standards which would allow groups to resist state oppression in specific situations.¹⁹⁸ Perhaps some groups would never take into account what the United States recognizes as legal resistance or proscribes as illegal terrorism, but were there clear guidelines, at the very least groups might have an incentive to conform their conduct accordingly.

On the other hand, if the position really is that violence by nonstate actors is presumptively terrorist, arguments regarding the justness of an FTO's cause, while not being legally persuasive, have the potential to turn a prosecution into an argument over foreign affairs played out in front of a jury. This is most true when the link to violent activity and the criminal defendant on trial is remote or even nearly non-existent. It is at this point that the debate over standards of personal guilt comes into play.

196. See *United States v. Armstrong*, 517 U.S. 456, 465–66 (1996) (holding that for a selective prosecution claim to be successful, a criminal defendant must make a showing that the challenged prosecutorial policy had a discriminatory effect and purpose).

197. See *United States v. Khan*, 461 F.3d 477, 498 (4th Cir. 2006) (“The Executive branch has the right to focus its prosecutorial energies on alleged terrorists groups that present the most direct threat to the United States and its interests.”).

198. See Shapiro, *supra* note 103, at 597–98 (making a recommendation that groups be given a “road map” that would allow them to be removed from the FTO list, but limiting the recommendation to groups that no longer harm American interests).

III. SUSTAINING A CONVICTION—PERSONAL GUILT STANDARDS

The issues of what standards of knowledge and intent are necessary to sustain a conviction under § 2339B have been extensively litigated.¹⁹⁹ The statutory text and legislative history of the statute had, prior to 2004, left out what “knowing” provision of material support meant, but addressed the issue of intent, with Congress making the explicit statement that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”²⁰⁰ Taken in the context of a legislative effort intended to stop the supposed rise in material aid flowing from individuals and organizations in the United States to foreign groups involved with terrorism under the guise of humanitarian assistance, Congress’s proclamations seemed to effect a statutory scheme operating under a strict liability standard for those who send money and other forms of proscribed aid to banned terrorist groups, irrespective of their knowledge of the group’s status or their intent as to how the aid should be used.

A. “Knowingly” Mens Rea Standard—Humanitarian Law Project

In *Humanitarian Law Project v. U.S. Department of Justice (HLP II)*,²⁰¹ the Ninth Circuit addressed the mens rea required to sustain a conviction on § 2339B grounds. The case involved several groups and individuals who petitioned for declaratory and injunctive relief based on their desire to provide aid to the political and humanitarian work carried out by two banned FTOs, the Kurdistan Workers’ Party (PKK) and the LTTE.²⁰² In an earlier ruling in the same case, the Ninth Circuit upheld the district court’s determination that § 2339B did not violate the First Amendment, and as such, did not require a showing of a defendant’s specific intent to further the unlawful aims of an FTO to sustain a conviction.²⁰³ On the

199. See *infra* Part III.A.

200. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 301, 110 Stat. 1247 (1996) (making a finding, inter alia, that certain foreign terrorist groups raised funds for violent activity in the United States under humanitarian pretenses). This finding has been cited with approval by the Supreme Court, as well as several circuit courts. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724, 2729 (2010); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004), *opinion reinstated in part*, 405 F.3d 1034 (4th Cir. 2005), *vacated*, 543 U.S. 1097 (2005); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026–27 (7th Cir. 2002) (“Terrorist organizations use funds for illegal activities regardless of the intent of the donor, and Congress thus was compelled to attach liability to all donations to foreign terrorist organizations.”); *Humanitarian Law Project v. Reno (HLP I)*, 205 F.3d 1130, 1136 (9th Cir. 2000).

This finding also undergirds another key theory in the ban on material support—the fungibility of money, that is, that funds donated to a terrorist group for humanitarian purposes free up resources to carry out violent acts. See *infra* Part III.D.

201. 352 F.3d 382 (9th Cir. 2003), *vacated as superseded by statute*, 393 F.3d 902 (9th Cir. 2004).

202. *HLP I*, 205 F.3d 1130, 1137 (9th Cir. 2000) (finding the material support terms “personnel” and “training” void on vagueness grounds).

203. *Id.* at 1133–36; see also *Hammoud*, 381 F.3d at 328–29 (rejecting a similar First

issue of knowledge, *HLP II* held that, in keeping with due process concerns of personal guilt under the Fifth Amendment, a conviction under § 2339B “require[d] proof of knowledge, either of an organization’s designation [as an FTO] or of the unlawful activities that caused it to be so designated.”²⁰⁴ The Ninth Circuit derived its ruling on the meaning of the term “knowingly” from the principle of statutory construction articulated by the Supreme Court that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.”²⁰⁵ This ruling thus came as a rejection of the government’s strict liability position that an individual could be convicted upon the mere provision of material support, even without knowledge of the group’s designation or terrorist activity.²⁰⁶ In accordance with this ruling, Congress subsequently amended § 2339B to read as follows: “[a] person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.”²⁰⁷

The issue of the required level of intent under Fifth Amendment due process principles closely resembles the contours of the debate on § 2339B’s constitutionality under the First Amendment. In the latter context, the Supreme Court has denied a First Amendment challenge to the statute and refused to read in a requirement of specific intent to further the illegal aims of the FTO.²⁰⁸ The debate on this same issue in the Fifth Amendment context has been a bit more complicated and has not yet been addressed by the Supreme Court.

B. *Specific Intent Mens Rea*—United States v. Al-Arian

In *United States v. Al-Arian* (“*Al-Arian I*”), a prosecution involving, inter alia, various material support charges against four defendants accused of operating the North American cell of the Palestinian Islamic Jihad (PIJ), the United States District Court for the Middle District of Florida held that, for § 2339B to be constitutional, it had to read into the statute a requirement that a defendant have had a specific intent to further the illegal aims of the FTO as one of the elements for conviction.²⁰⁹ The *Al-Arian* court’s position on a scienter requirement represents the minority view of what constitute the elements of establishing criminal liability

Amendment challenge). This ruling was ultimately upheld by the Supreme Court. *See Holder*, 130 S. Ct. at 2717–18.

204. *HLP II*, 352 F.3d at 402–03. This standard also underscores the political calculations that go into an FTO designation. For example, there may be several Cuban exile groups based in the United States that engage in violent activities of similar or greater magnitude than groups on the FTO list. While knowing full well their violent activities, an individual providing material support to those Cuban groups would never expect the groups to be designated as FTOs, largely based on political considerations.

205. *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994).

206. *HLP II*, 352 F.3d at 397.

207. 18 U.S.C. § 2339B(a)(1) (2006) (as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638).

208. *See Holder*, 130 S. Ct. at 2717–18.

209. *Al-Arian I*, 308 F. Supp. 2d 1322, 1335–39 (M.D. Fla. 2004).

under § 2339B, as no other court has adopted their holding.²¹⁰ In the first instance, while it adopted the *HLP* court's requirement that the defendant know of an FTO's designation or terrorist activities, the court disagreed with the Ninth Circuit's reluctance to extend the Supreme Court presumption, spelled out in *United States v. X-Citement Video*, of a scienter requirement to the material support element of the statute.²¹¹ In the court's opinion, a failure to do so would lead to absurd results. The court posited the hypothetical of a cab driver with no connection to an FTO giving a ride to an individual he knew to be a member of an FTO as an example of imposing criminal liability for what was otherwise innocent conduct.²¹² Second, the court noted that extending the scienter requirement to the material support prong allowed § 2339B to be salvaged from a rash of vagueness challenges as to what constitutes material support and also avoided the criminalization of innocent conduct.²¹³ Even in ruling that a specific intent was necessary, however, the *Al-Arian* court was quick to point out that it did not believe it had created an insurmountable burden for the government because, for example, "a jury could infer a specific intent when a defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses."²¹⁴ The court also ended this section of its opinion on a somewhat defensive note, albeit one that recalled Congress's intent in passing § 2339B: "This opinion in no way creates a safe harbor for terrorists or their supporters to try and avoid prosecution through utilization of shell 'charitable organizations' or by directing money through the memo line of a check towards lawful activities."²¹⁵

210. See *infra* Part III.C.

211. *Al-Arian I*, 308 F. Supp. 2d at 1335–39.

212. *Id.* at 1337–38.

213. *Id.* at 1338. The Supreme Court recently upheld the statute in the face of vagueness challenges to several of its provisions, despite disparate holdings in the lower courts. See *Holder*, 130 S. Ct. at 2718–22, *overruling* *Humanitarian Law Project v. Mukasey (HLP III)*, 552 F.3d 916, 928–30 (9th Cir. 2009) (finding ban on "training," "service," and "other specialized knowledge" provided as "expert advice or assistance" void for vagueness); *United States v. Sattar*, 272 F. Supp. 2d 348, 358–59 (S.D.N.Y. 2003) (finding ban on "personnel" void for vagueness). *But see* *United States v. Goba (Goba I)*, 220 F. Supp. 2d 182, 193–94 (W.D.N.Y. 2002) (finding term "personnel" not unconstitutionally vague based on the reasoning of *United States v. Lindh*, 212 F. Supp. 2d 541, 573–77 (E.D. Va. 2002)), *denying motion for revocation of detention order*, 240 F. Supp. 2d 242 (W.D.N.Y. 2003). To the extent that "personnel" and "training" were used as tools to prosecute individuals who had received military training abroad at the hands of an FTO, in December 2004 Congress passed 18 U.S.C. § 2339D as part of IRTPA, which made it a crime to receive such training. This new statute presumably does away with those attempts to prosecute individuals who received training as materially supporting an FTO by receipt of "training" and "providing" themselves as "personnel." See Chesney, *supra* note 13, at 58–61, 77–81 (discussing cases and recommending a statutory ban on military training at the hands of FTOs).

214. *Al-Arian I*, 308 F. Supp. 2d at 1339. The fungibility of money theory was also articulated in the First Amendment context by the opinion in *HLP I*, 205 F.3d 1130, 1136 (9th Cir. 2000). This theory is discussed further in Part III.D.

215. *Al-Arian I*, 308 F. Supp. 2d at 1339.

The court subsequently expanded on its ruling in denying the government's motion to reconsider the issue of a scienter requirement.²¹⁶ Specifically, the court referenced the Supreme Court's decision in *Scales v. United States*, which involved the prosecution of an individual charged with unlawful membership in the Communist Party, a group that had as one of its aims the overthrow of the United States government.²¹⁷ The court cited the following language from *Scales* in support of its adoption of a specific intent standard in the § 2339B context:

‘In our jurisprudence guilt is personal, and when imposition of punishment on a status *or on conduct* can only be justified by reference to the relationship of that status *or conduct* to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.’²¹⁸

The court reasoned that the Supreme Court's pronouncement on the topic could not be confined only to membership statutes and stated, “[t]he Court held that when criminality and punishment are justified by a relationship to others' conduct, that relationship must be sufficiently substantial to constitutionally support criminal liability.”²¹⁹ As with its previous ruling, the court posited a hypothetical of an FTO member whose own conduct was entirely innocent but who could be found guilty under the statute based on his association with another FTO member engaged in the group's illegal activity.²²⁰ The court concluded its opinion by indicating that it would be forced to change both its vagueness and First Amendment analyses of § 2339B—implying that all or large sections of the statute would be deemed unconstitutional—if it declined to read in the specific intent requirement it proposed.²²¹

216. See *United States v. Al-Arian (Al-Arian II)*, 329 F. Supp. 2d 1294, 1298–1300 (M.D. Fla. 2004).

217. *Id.* at 1299–1300 (citing *Scales v. United States*, 367 U.S. 203, 205–06 (1961)).

218. *Id.* at 1299 (alteration in original) (emphasis in original) (quoting *Scales*, 367 U.S. at 224–25).

219. *Id.* at 1300.

220. *Id.*

221. *Id.* at 1300–05. The court also reiterated its statement that the specific intent requirement should not hinder the government's anti-terrorism efforts, nor should it create a “safe harbor” for terrorists. *Id.* at 1305. The court also wavered somewhat in ruling that the material support provided was with the knowledge that the recipient “*could or would* utilize the support to further the illegal activities of the entity.” *Id.* at 1298 (emphasis added). By contrast, its prior ruling in *Al-Arian I* simply established that the specific intent requirement mandated that the support provided “*would* further the illegal activities” of the FTO. *Al-Arian I*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004) (emphasis added). In the end, the court's jury instruction on the material support charges left the standard at “*would*.” Jury Instruction No. 25 at 42, *United States v. Al-Arian*, No. 8:03-CR-77-T-30-TBM (M.D. Fla. Nov. 15, 2005), ECF No. 1431.

C. Al-Arian's Rulings Rejected

The only other court to adopt a specific intent requirement in the § 2339B context occurred in the case of *United States v. Al-Hussayen*, a District of Idaho case in which a Saudi graduate student at the University of Idaho was charged with providing material support to a banned FTO via his administration of various websites.²²² Since the *Al-Arian* decisions were issued, a growing number of courts have directly refuted their holdings by issuing opinions finding that due process personal guilt concerns do not mandate a specific intent requirement to further the illegal activities of an FTO under the statute.²²³ Each court's decision employs similar reasoning and makes a number of separate points, which run as follows.

With respect to the *Al-Arian* court's reliance on the holding in *Scales*, the statute at issue in the latter case dealt directly with the issue of membership, thereby threatening legally protected association or membership but not the affirmative conduct of providing material support to a banned organization.²²⁴ In this regard, the requirement that a defendant know that the group being supported was an FTO or engaged in terrorist activity suffices to meet any due process personal guilt concerns.²²⁵ Congress recognized this reasoning in late 2004 when it purposefully added such a knowledge requirement via the Intelligence Reform and Terrorism Prevention Act (IRTPA) but pointedly declined to make any mention of a specific

222. See Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What's Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 365, 367–73 (2008); see also Jury Instruction No. 37 at 40, *United States v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho June 1, 2004), ECF No. 660. The defendant was ultimately acquitted on the material support charges. Williams, *supra*, at 378. Judge Roger Gregory of the Fourth Circuit also adopted the *Al-Arian* court's reading of § 2339B in his dissenting opinion in *United States v. Hammoud*, 381 F.3d 316, 376–81 (4th Cir. 2004) (Gregory, J., dissenting), *vacated*, 543 U.S. 1097 (2005).

223. See, e.g., *HLP III*, 552 F.3d 916, 924–27 (9th Cir. 2007), *aff'd in part*, 130 S. Ct. 2705 (2010); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 177–80 (E.D.N.Y. 2008); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1020–22 (D. Minn. 2008); *United States v. Assi*, 414 F. Supp. 2d 707, 719–24 (E.D. Mich. 2006); *United States v. Paracha*, No. 03 CR 1197(SHS), 2006 WL 12768, at *25–30 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008); *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 585–87 & n.11 (E.D.N.Y. 2005); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1068–70 (N.D. Ill. 2005). For an extended discussion of *Scales*, see Chesney, *supra* note 13, at 66–71; David H. Pendle, Comment, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 786–802 (2007); Benjamin Yaster, Note, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 83 N.Y.U. L. REV. 1353 (2008).

224. See *Paracha*, 2006 WL 12768 at *26–27 (citing *Scales v. United States*, 367 U.S. 203, 205 (1961) (discussing the Smith Act as compared to 18 U.S.C. § 2339B)).

225. See *HLP III*, 552 F.3d at 925, 927; *Marzook*, 383 F. Supp. 2d at 1070 (“[A]s Defendant points out, a donor could contribute material support with impunity to any number of organizations that engage in ‘terrorist’ activity, so long as the Secretary of State has not designated the recipient a ‘foreign terrorist organization.’ Thus, the criminalizing fact—the fact that separates innocent conduct from criminal—is that the individual provided material support to an organization that has been designated an FTO.” (emphasis in original)).

intent requirement in the wake of the *Al-Arian* decisions.²²⁶ That the Ninth Circuit also declined to adopt a scienter requirement regarding material support—as opposed to the FTO designation—further militates in support of this position.²²⁷ A scienter requirement is further contradicted by the fact that Congress enacted § 2339B to close the loophole left open by § 2339A, which allowed for the continued flow of aid to terrorist groups under the guise of humanitarian or charitable activity. Congress also stated that the purpose of § 2339B was to end this phenomenon, regardless of donor’s intent.²²⁸ Congress took these actions after hearing testimony from advocates who urged it to adopt a specific intent standard. The advocates feared that without such a standard, § 2339B would chill donations of aid by American Muslims, who have a religious obligation to give a certain amount of their income as charity on a yearly basis—a point that serves only to strengthen the argument against the scienter requirement.²²⁹

D. The Limits of “Money Is Fungible”

Academic commentators have divided on what personal guilt standard should govern in material support prosecutions under § 2339B.²³⁰ The application of the law is less controversial when it is used to prosecute individuals engaged in activities that are much more likely to fund violence. For example, when an individual is charged with supporting Al-Qaeda, the link between material support and violence is strong because the goals of the organization are all violent.²³¹ The

226. *HLP III*, 552 F.3d at 927.

227. *Id.* at 925 (“In December 2004, Congress passed IRTPA that revised AEDPA to essentially adopt our reading of AEDPA section 2339B to include a knowledge requirement.”).

228. *See id.*; *Paracha*, 2006 WL 12768 at *28; *Marzook*, 383 F. Supp. 2d at 1070.

229. *See* Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005) (citing *Comprehensive Antiterrorism Act of 1995: Hearing on H.R. 1710 Before the H. Comm. on the Judiciary*, 104th Cong. 316 (1995) (statement of Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union); *Comprehensive Antiterrorism Act of 1995: Hearing on H.R. 1710 Before the H. Comm. on the Judiciary*, 104th Cong. 440 (1995) (statement of Azizah Y. Al-Hibri, Ph.D., National Advisory Board, American Muslim Council); *Comprehensive Antiterrorism Act of 1995: Hearing on H.R. 1710 Before the H. Comm. on the Judiciary*, 104th Cong. 420 (1995) (statement of Khalil E. Jahshan, Executive Director, National Association of Arab Americans)).

230. *See* Abrams, *supra* note 87, at 21 (recommending the adoption of a knowledge plus substantial aid standard for criminal liability under § 2339B); Chesney, *supra* note 13, at 84–85 (recommending the adoption of, inter alia, a recklessness standard as a lesser state of culpability for those without the requisite specific intent to further an FTO’s illegal activities); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 724–25 (2009) [hereinafter Cole, *Out of the Shadows*] (advocating a specific intent standard); Pendle, *supra* note 223, at 778–79 (recommending a recklessness standard); *see also* Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45, 89 (2003) (recommending a specific intent standard).

231. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38

true challenge in the law's use lies in prosecuting individuals when (1) they are charged with supporting legitimate charitable activities, which, but for the group's designation, would be completely lawful, and (2) the charged individuals have no connection to violent activity.

The theory underpinning such prosecutions is the idea that money is fungible. Take this prominent and often-cited passage from *HLP I*, which states:

[A]ll material support given to such organizations aids their unlawful goals. Indeed, as the government points out, terrorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used. Further, as amicus Anti-Defamation League notes, even contributions earmarked

HARV. C.R.-C.L. L. REV. 1, 14 (2003) [hereinafter Cole, *The New McCarthyism*] (“An organization like Al Qaeda may present a special case, for it does not appear to have legal purposes at all. Unlike, say, the Irish Republican Army, the Palestinian Liberation Organization, or the ANC, groups with political agendas that use violent means among many others, Al Qaeda appears to do little more than plot, train for, and conduct terrorism. But if that is the case, we do not need guilt by association. It ought to be relatively simple to establish that when an individual affirmatively supports Al Qaeda, he intends to support its terrorist ends, because Al Qaeda has few if any other ends.”); see e.g., *United States v. Warsame*, 537 F. Supp. 2d 1005, 1015 (D. Minn. 2008) (“Al Qaeda is not a political advocacy group.”).

The link between material support and violence is true both when individuals go to trial and when they plead guilty, even when the plea does not reference Al-Qaeda. See *United States v. Arnaout (Arnaout II)*, 431 F.3d 994, 1002–03 (7th Cir. 2005) (finding that a statute on promoting or aiding terrorism applied broadly to activities involved in promoting terrorism crimes), *aff'd*, 323 F. App'x 458 (7th Cir. 2009); *United States v. Faris*, 388 F.3d 452, 457–58 (4th Cir. 2004) (upholding denial of motion to withdraw plea of materially supporting Al-Qaeda by attending military training camp), *vacated*, 544 U.S. 916 (2005); *United States v. Ali*, No. CRIM.A.1:05-53, 2006 WL 1102835, at *3–4 (E.D. Va. Apr. 17, 2006) (materially supporting Al-Qaeda), *rev'd*, 528 F.3d 210 (4th Cir. 2008); *United States v. Khan*, 309 F. Supp. 2d 789, 820 (E.D. Va. 2004) (conspiracy to provide material support to Al-Qaeda), *aff'd*, 461 F.3d 477 (4th Cir. 2006); *United States v. Goba (Goba II)*, 240 F. Supp. 2d 242, 244 (W.D.N.Y. 2003) (denying bail to “Lackawanna Six” defendants, who were charged with materially supporting Al-Qaeda on the basis of attending training camps in Afghanistan run by the group); *United States v. Lindh*, 212 F. Supp. 2d 541, 545–46 (E.D. Va. 2002) (summarizing allegations); Superseding Indictment at 3–4, *United States v. Hayat*, No. 05-240 GEB (E.D. Cal. Sept. 22, 2005); Eric Lichtblau, *Charity Leader Accepts a Deal in a Terror Case*, N.Y. TIMES, Feb. 11, 2003, at A1 (describing Arnaout's plea in which he denied all links to Al-Qaeda, despite the government's insistence that he served as a major financier of Osama Bin Laden and noting that hearsay linking Arnaout to Al-Qaeda was held inadmissible by the court); Jerry Markon, “*Va. Jihad*” *Case Hailed as Key in War on Terror*, WASH. POST, June 8, 2006, at A03 (describing the “paintball” case, a prosecution of American Muslims accused of training to fight with Lashkar-i-Taiba, a banned FTO, which contained allegations of conspiracy to materially support terrorists); Press Release, U.S. Department of Justice, *United States Attorney Eastern District of Virginia* (Apr. 26, 2005), available at <http://www.justice.gov/usao/vae/Pressreleases/04-AprilPDFArchive/05/42605TimimiPR.pdf> (detailing Ali Al-Timimi's conviction for attempting to aid the Taliban, among other things); see also Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, I.16 (Magazine), at 16 (reporting jury's verdict of guilty as to Hamid and declaration of a mistrial as to his father).

for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts. We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that AEDPA is not sufficiently tailored.²³²

Based on the Congressional record, the assertion that terrorist groups operate in a monolithic manner, to the degree that a dollar sent for peaceful or humanitarian activities frees up a dollar for violence, is questionable in and of itself.²³³ However, even assuming that the factual assertions behind the "money is fungible" theory are correct, § 2339B prosecutions, when raising the specter of despised and demonized terrorist groups, can threaten to take the theory well beyond even the outer limits of what is constitutional, thereby risking turning the courtroom into an arena for a referendum on questions of foreign policy.²³⁴

232. 205 F.3d 1130, 1136 (9th Cir. 2000) (internal citations omitted). See *United States v. Hammoud*, 381 F.3d 381, 329 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005), and *United States v. Marzook*, 383 F. Supp. 2d 1056, 1068 (N.D. Ill. 2005), for examples of later cases quoting *HLP I*. See also *United States v. Al-Arian*, 280 F. Supp. 2d 1345, 1351 (M.D. Fla. 2003) ("Thus, while these Defendants did not plan the attacks, the government argues they supported them, applauded the PIJ's tactics, promoted its activities and organization, raised monies to fund its terror operations, and gave succor to the families of bombers in order to encourage a policy designed to entice new human weapons.").

For similar reasoning in the context of a civil case construing the same statutory scheme, see *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) ("If Hamas budgets \$2 million for terrorism and \$2 million for social services and receives a donation of \$100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking \$100,000 out of its social services 'account' and depositing it in its terrorism 'account.' . . . Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), *cert. denied*, 130 S. Ct. 458 (2009).

233. Professor David Cole has been the most consistent and thorough critic of the material support ban in both his academic writings and legal advocacy. See Cole, *The New McCarthyism*, *supra* note 231, at 12 ("The legislative history of the material support law contains not one word of testimony about even a single terrorist organization's finances, much less all 'foreign organizations that engage in terrorist activity.' A congressional 'finding' that 'domestic political parties that engage in illegal conduct are so tainted by their criminal conduct that any contribution facilitates that conduct' surely would not authorize imposing guilt by association on support of domestic groups. . . . [I]t simply does not follow that all organizations that use or threaten to use violence will turn any donation that supports their lawful activities into money for terrorism.").

234. See, e.g., Rudolph Bush & Azam Ahmed, *Hamas Suspects Defended*, CHI. TRIB., Jan. 11, 2007, Metro, at 1 ("Wednesday's arguments by the defense attorneys were steeped in the history of the Palestinian-Israeli conflict and the hardships they say the Palestinians have endured. . . . Ashqar's attorney, William Moffitt, compared the struggle of Palestinians to historic fights against repression, from the American Revolution to the civil rights movement. He showed jurors a mock 'wanted' poster charging George Washington with

1. The Holy Land Foundation Prosecution

a. Background

The paradigmatic case of the “money is fungible” theory is the prosecution of the Holy Land Foundation for Relief and Development (HLF). HLF, a 501(c)(3) nonprofit headquartered in Texas, was first designated by the Treasury Department’s Office of Foreign Assets Control (OFAC) as a Specially Designated Global Terrorist in December 2001 on the basis that HLF raised and sent funds to Hamas, which itself had been previously designated as a terrorist organization by an executive order.²³⁵ The designation had the effect of freezing all of HLF’s assets, essentially shutting down its entire operation.²³⁶ In announcing HLF’s designation, President Bush directly linked violent acts by Hamas to money raised by HLF in the United States for purportedly humanitarian goals and highlighted that where money did not go directly to fund violence, it was used for purposes of terrorist indoctrination.²³⁷ HLF petitioned for relief from the designation on the grounds that OFAC did not consider all available evidence and that it was prevented from submitting evidence in its own defense.²³⁸ However, the trial court rejected HLF’s arguments and let stand the designation and the asset freeze, since, under the Administrative Procedure Act’s (APA) principles of limited review, OFAC’s administrative record was binding on the court and could not be challenged.²³⁹ Based on the administrative record, the court proceeded to reject HLF’s APA and constitutional claims, even though the group objected to the government’s use of foreign-derived evidence to support its designation, as well as what it deemed faulty translations and fundamental misconceptions of, for example, what the definition of the word “martyr” connotes; the government had contended that HLF’s support of families of martyrs meant individuals who died in

terrorism.”); Michael Fechter, *Defense: Al-Arian Exercised His Rights*, TAMPA TRIB., Nov. 9, 2005, Nation/World, at 1 (“It’s not a conflict, countered Linda Moreno, Al-Arian’s other defense attorney. It’s a war. And the brutal reality of occupation must be discussed to place Al-Arian’s actions in context. ‘If we wish to be free, we must fight,’ she said, quoting Patrick Henry. . . . ‘This is not a criminal case’ ‘This is a political case.’”).

235. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002), *aff’d in relevant part*, 333 F.3d 156 (D.C. Cir. 2003). It later surfaced that HLF was first implicated as a source of funds for Hamas based on statements made by Muhammad Salah, a Palestinian American under interrogation by agents of Israel’s General Security Services. See Jason Trahan, *Holy Land Investigation Dates Back to 1993*, DALL. MORNING NEWS, Nov. 25, 2008. For more on Salah’s case and his allegations of torture by Israel’s General Security Services, see Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 34–42 (2010).

236. See *Holy Land Found. for Relief & Dev.*, 219 F. Supp. 2d at 64.

237. Press Release, White House Office of the Press Secretary, President Announces Progress on Financial Fight Against Terror (Dec. 4, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/12/20011204-8.html> (stating that funds raised by HLF were “used by Hamas to support schools and indoctrinate children to grow up into suicide bombers” and to “recruit suicide bombers and to support their families”).

238. *Holy Land Found. for Relief & Dev.*, 219 F. Supp. 2d at 65.

239. *Id.* at 65, 66 n.7.

the commission of violent acts on behalf of Hamas, while HLF disputed that characterization.²⁴⁰

b. Criminal Prosecution

On July 26, 2004, HLF and several of its former officers and directors were indicted on charges of, *inter alia*, conspiracy to provide material support to Hamas in violation of § 2339B, as well as on various substantive material support counts.²⁴¹ Critical to the government's case were allegations that the defendants had financed Hamas via a series of zakat²⁴² committees—that is, local Palestinian organizations that collect charitable donations on behalf of the needy, which were really fronts for Hamas.²⁴³ The indictment originally alleged that the money the HLF sent to the zakat committees was “collected externally under humanitarian banners [and] routed to military and operational use, in addition to freeing up other funds for specific terrorist acts.”²⁴⁴ However, at trial, the government retreated from this position, arguing that the committees, which were not designated terrorist groups, were controlled entirely or partially by Hamas and that the legitimate humanitarian aid they provided generated support for the organization within the West Bank and Gaza Strip.²⁴⁵ This position represented a departure from the “money is fungible” theory. Instead of arguing that HLF's humanitarian donations were fungible, the government argued that HLF's humanitarian donations strengthened Hamas's image, presumably winning the group new recruits and community support.²⁴⁶

In addition to the extensive evidence presented regarding the legitimate and much needed humanitarian aid the HLF delivered, the jury heard evidence that several of the zakat committees the government named had received aid from the International Committee of the Red Cross, the United States Agency for International Development, the European Commission, and various United Nations agencies.²⁴⁷ Further, the jury heard testimony from the former consul general of the U.S. Consulate General in Jerusalem,²⁴⁸ the second-highest-ranking intelligence official in the State Department, that he received daily briefings from the CIA that

240. *Id.* at 66–84.

241. Superseding Indictment, *United States v. Holy Land Found. for Relief & Dev.*, 3:04-CR-240-G (N.D. Tex. July 26, 2004).

242. *Id.* ¶ 4 (“‘Zakat,’ which means ‘charity’ or ‘alms giving’ is one of the pillars of Islam and is an act incumbent on all practicing Muslims.”).

243. *Id.*

244. *Id.*

245. ACLU, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 61–62 (2009), *available at* <http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf>.

246. *Id.*

247. *Id.* at 62.

248. *See* DEPARTMENT OF STATE, CONSULATE GENERAL OF THE UNITED STATES, JERUSALEM, ABOUT THE CONSULATE, *available at* http://jerusalem.usconsulate.gov/about_the_embassy.html (“All Jerusalem offices are united under the authority of the U.S. Consul General, who heads an independent U.S. mission that is the official diplomatic representation of the United States in Jerusalem, the West Bank, and Gaza.”).

never mentioned Hamas control of the zakat committees, which he had personally visited on several occasions.²⁴⁹ On October 22, 2007, three months after it began, the first trial ended after the judge declared a mistrial following the jury's inability to reach a verdict on many of the charges against all defendants.²⁵⁰ The jury returned no convictions and several partial acquittals.²⁵¹

On November 24, 2008, after a retrial in which the parties presented essentially the same arguments, the HLF defendants were convicted on all charges.²⁵² While there were a few differences between the trials,²⁵³ the government's case tying the zakat committees to Hamas came down to an Israeli intelligence officer testifying anonymously that such a link existed.²⁵⁴ The HLF trial marked the second time in a federal prosecution that a foreign intelligence agent was allowed to testify under a pseudonym,²⁵⁵ but the trial was unique in that the agent was allowed to do so as an expert witness, with all the attendant testimonial privileges such a status entails.²⁵⁶ The intelligence officer, in his capacity as an expert, was permitted to testify that documents seized in military raids, which the defense was not allowed to see, as well as "unauthored and unsigned" documents purportedly from the Palestinian Liberation Organization, linked the zakat committees to Hamas.²⁵⁷ The prosecution

249. Jason Trahan, *Behind the Scenes: The CIA's Problem with a Holy Land Foundation Witness*, DALL. MORNING NEWS (Nov. 13, 2008, 2:40 PM), <http://crimeblog.dallasnews.com/archives/2008/11/behind-the-scenes-the-cias-pro.html>.

250. Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 23, 2007, at A1.

251. *Id.*

252. ACLU, *supra* note 245, at 63.

253. For example, the former United States Consul General for Jerusalem who testified for the defense in both trials was forbidden from mentioning the CIA during his testimony on retrial. *See* Trahan, *supra* note 249.

254. Jason Trahan, *Israeli Secret Agent Testifies in Holy Land Trial* [hereinafter Trahan, *Israeli Secret Agent*], DALL. MORNING NEWS, Aug. 15, 2007 (discussing the anonymous expert witness during the first trial in 2007); Jason Trahan, *Holy Land Prosecutors Rest Case; Defense Calls First Witness*, DALL. MORNING NEWS, Nov. 1, 2008 (discussing the anonymous expert witness during the retrial in 2008).

255. The first case was the Abu Marzook prosecution in the Northern District of Illinois in 2006, *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923–24 (N.D. Ill. 2006), although the prosecution of Omar Abu Ali permitted the introduction of videotaped depositions by Saudi intelligence officers. *See* Said, *supra* note 235, at 19–20, 35–36 (discussing the anonymous testimony in both cases prior to hearings on motions to suppress).

256. Trahan, *Israeli Secret Agent*, *supra* note 254 ("What makes Avi's testimony particularly groundbreaking is that he may be the first person in the U.S. legal system allowed to testify as an expert witness under an assumed name. U.S. District Judge A. Joe Fish certified him as such after a hearing Monday. 'I've never heard of an expert witness being granted anonymity from the defense,' said Southern Methodist University assistant law professor Jeffrey Kahn[.] 'The way you assess an expert's reliability and relevance is through his reputation, his writings, his professional experiences. How could you possibly impeach this witness, let alone test whether jurors should trust his opinions, without knowing basic facts about who he really is?"). For a discussion of the problems involved in permitting anonymous testimony by foreign agents in a criminal trial, see Said, *supra* note 235, at 31.

257. *See* Bob Ray Sanders, *Convictions Mark a Sad Day for America*, FORT WORTH

of HLF, formerly the largest Muslim charity in the United States, also featured the publication of a list of unindicted co-conspirators, which included the largest and most prominent American Muslim umbrella organizations and advocacy groups.²⁵⁸ Making the list public has had the effect of chilling and discouraging dealings with the groups and individuals named as unindicted co-conspirators.²⁵⁹ In total, the net effect of the prosecution and subsequent conviction of the HLF defendants has contributed to the criminalization of charitable donations to the West Bank and Gaza Strip.²⁶⁰

c. Implications and Repercussions

Given that a central truism underpinning § 2339B's ban on material support is the idea that money to charity frees up money for violence, it is perhaps not surprising, however inhumane, to criminalize charitable activity when it can be reasonably linked to terrorist violence. The real question is how to credibly link the charitable activity with violence. The government's theory of prosecution in HLF was predicated on the alleged link between Hamas and the zakat committees, which, it alleged, did not in fact free up money for violence but essentially served as a useful propagandistic tool for Hamas.²⁶¹

Even assuming the validity of this propagandistic theory, the evidence supporting it was troubling in several respects. First, the language of the indictment highlighted the zakat committees in the West Bank and Gaza Strip in their entirety as acting on behalf of Hamas's charitable network.²⁶² All zakat committees are charged as being part of a terrorist network, thereby rendering all Muslim charitable giving in the West Bank and Gaza Strip as inherently suspect. This is far too broad of an allegation, with obvious negative consequences for religiously observant Muslims wanting to provide for Palestinian humanitarian requirements.²⁶³

Second, the evidence tying the zakat committees to Hamas was both speculative and questionable. The intelligence agent expert witness was basically unaccountable in what he said on two fronts. His identity was unknown, and it is impossible to investigate an individual whose identity one does not know. Even if his identity were known and a subsequent investigation revealed that he perjured

STAR-TELEGRAM, Nov. 30, 2008, at D01 (noting also the chain-of-custody issues in the introduction of the documents).

258. Neil MacFarquhar, *Muslim Groups Oppose a List of 'Co-Conspirators,'* N.Y. TIMES, Aug. 16, 2007, at A19.

259. See ACLU, *supra* note 245, at 53–55.

260. See Wajahat Ali, *Perverse Justice: "The Holy Land Foundation" Convictions*, HUFFINGTON POST (Dec. 4, 2008), http://www.huffingtonpost.com/wajahat-ali/perverse-justice-the-holy_b_148315.html (quoting Professor John Turley as saying “‘For many Muslims, there is a state [of] fear that these prosecutions are designed to deter any charity going to the Palestinian areas’”).

261. See ACLU, *supra* note 245, at 61–63.

262. See Superseding Indictment at ¶ 4, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G (N.D. Tex. Nov. 30, 2005), ECF No. 233.

263. In a recent report, the ACLU discussed the HLF case as one of several high-profile examples that demonstrate how the “war on terror” is unfairly chilling Muslim charitable giving. See ACLU, *supra* note 245, at 61–67.

himself at trial, as a foreign citizen, U.S. courts would have no ability to compel his presence here to face any perjury-related charges.²⁶⁴

Perhaps more significant is the notion of what standards render a charitable institution part of an FTO. The legislative record in support of § 2339B's passage imagines an integrated terrorist movement, with a violent wing and a charitable wing of inextricably linked finances.²⁶⁵ But one can reasonably ask what standards justify declaring charitable groups as part of or controlled by an FTO. In this case, would one Hamas member on the board of a zakat committee presumptively make its activities material support of terrorism? If not, what is the magic number of members? Are there situations where a zakat committee could have no Hamas members on its board or staff, yet still provide banned material support? Could a group have a large number of Hamas members involved with it and still not fall afoul of the ban? It seems that in the absence of any standards, relying on a hostile intelligence agent testifying under a pseudonym to answer these questions in a self-serving manner is a dubious basis for drawing the link to a banned FTO.²⁶⁶

Finally, there is the question of designating the zakat committees at issue. The government did not designate them as terrorist organizations in advance of trial.²⁶⁷ In contrast, in *Al-Arian*, a similar case involving allegations of material support to an FTO but no allegations of direct links to violent activity, the government felt it had sufficient evidence of a charity serving as a front for an FTO and had the Treasury Department designate the charity as a front for an FTO.²⁶⁸ Even if the designation would not serve any prosecutorial goal in the HLF case, it would signal that the government views the committees as inextricably linked to Hamas and underscore the seriousness of the verdict. That it has not done so at least leaves open the possibility that the zakat committees are not an urgent target of United States counterterrorism efforts and may not really be linked to promoting terrorism.²⁶⁹

264. Cf. *United States v. Jefferson*, 594 F. Supp. 2d 655, 672 (E.D. Va. 2009) (citing *United States v. Mills*, 760 F.2d 1116, 1121 (11th Cir. 1985) (“[F]ugitive depositions are not only available but are sometimes wisely authorized despite their suspect veracity and the lack of a perjury sanction.”)).

265. See Chesney, *supra* note 13, at 15–18.

266. On a related note (but not a situation that has yet arisen in a § 2339B prosecution), there is the question of what happens to support given to a group once it is completely defeated in a military confrontation and thereby rendered incapable of carrying out violent activity. The defeat of the Liberation Tigers of Tamil Eelam (LTTE) by the government of Sri Lanka in 2009 is one such situation; even though the military wing of the LTTE is essentially incapable of violent activity, material support of its charitable activities would still fall afoul of § 2339B. See Mark Tran, *Tamil Tiger Leader Vows to Abandon Armed Struggle*, GUARDIAN (London) (July 23, 2009, 10:05 BST), <http://www.guardian.co.uk/world/2009/jul/23/tamil-tigers-abandon-armed-struggle> (discussing the LTTE's shift to a non-violent separatist movement and the Tamil diaspora's reaction).

267. Jason Trahan, *Summations Tell Jury: Don't Look at Politics*, DALL. MORNING NEWS, Nov. 11, 2008, at 3B (noting that even after retrying the defendants, the government had not designated the zakat committees).

268. Press Release, U.S. Dep't of the Treasury, Treasury Designates Charity Funneling Money to Palestinian Islamic Jihad—Action Marks 400th Designation of a Terrorist or Financier (May 4, 2005), available at <http://ustreas.gov/press/releases/js2426.htm>.

269. An amicus brief filed on behalf of the HLF defendants in support of their appeal

A review of the HLF prosecution reveals not so much a criminal case, but an argument about United States foreign policy. The trial itself signifies that, ultimately, when the government brings allegations of material support without a direct or significant link to violence, the stage is set for an extended discussion of foreign policy within the courtroom. Once all a defendant's legal challenges to the material support law have been defeated, with nothing left to litigate, his or her only recourse is to make arguments rooted in politics. The HLF prosecution featured extensive testimony and evidentiary exhibits as to the defendants' political views on Hamas and Israel, all of which were engineered to demonstrate knowledge of the illegal nature of the contributions to the zakat committees.²⁷⁰ This was true of the other two major federal prosecutions that sounded in similar allegations of providing aid to banned Palestinian FTOs on a "money is fungible" theory, *Al-Arian* and *Abu Marzook*.²⁷¹ Why those prosecutions produced acquittals on the major terrorism charges and HLF did not is not easily explained.²⁷²

Defendants in § 2339B prosecutions have repeatedly argued for a specific intent standard to be adopted, but they have been unsuccessful. Leaving to one side the moral arguments about the criminalization of material support for humanitarian aid in areas where an FTO controls its distribution, it is unrealistic to expect that a specific intent requirement will be adopted. The plaintiffs in the *HLP* litigation have repeatedly tried to carve out an exception to § 2339B's strictures, both on humanitarian grounds and on the basis of trying to steer an FTO away from terrorism.²⁷³ Those efforts have failed as well, most recently at the Supreme Court,

argues that the convictions violate due process since the trial court's jury instructions did not require the jurors to find that the defendants knew the zakat committees were controlled by Hamas. See Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, and Constitutional Rights Organizations in Support of Defendants and Urging Reversal of Convictions of Counts 2-10, http://www.charityandsecurity.org/system/files/Charities_Amicus_Brief.pdf.

270. Jason Trahan, *Holy Land Summations Begin Today*, DALL. MORNING NEWS, Nov. 10, 2008, at 1B.

271. See Meg Laughlin, *Evidence Is Lacking, Al-Arian Defense Says*, ST. PETERSBURG TIMES, Nov. 10, 2005, at 1B ("Yes, said Moffitt, Al-Arian was affiliated with the cultural, charitable arm of the PIJ, and he lied to the media about it because he was afraid WISE would be shut down. But he was never part of PIJ violence. He simply wanted, said Moffitt, to get money so WISE could keep telling 'the Palestinian story in the United States.'"); Rudolph Bush & Azam Ahmed, *Hamas Suspects Defended*, CHI. TRIB., Jan. 11, 2007, Metro, at 1 ("Wednesday's arguments by the defense attorneys were steeped in the history of the Palestinian-Israeli conflict and the hardships they say the Palestinians have endured. . . . Ashqar's attorney, William Moffitt, compared the struggle of Palestinians to historic fights against repression, from the American Revolution to the civil rights movement.").

272. See Laila Al-Arian, *Verdict Against Holy Land Charity Could Have a Chilling Effect on the Muslim Community*, ALTERNET (Nov. 26, 2008), http://www.alternet.org/story/108740/verdict_against_holy_land_charity_could_have_a_chilling_effect_on_the_muslim_community ("'Twelve good American citizens in the first trial didn't convict anyone of anything,' Linda Moreno, one of the defense attorneys on the case, told the Associated Press. 'And 12 good American citizens in the second trial convicted everyone of everything. If you can make sense of that explain it to me.'").

273. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010). In declining to review the mens rea issue, the Supreme Court left the Ninth Circuit's adoption of the knowledge standard intact in the Fifth Amendment due process context. The Court did

with the stated rationale being that it would be far too easy for terrorists to divert humanitarian funds to violence one way or another and, as a result, needlessly impede United States counterterrorism efforts.²⁷⁴

While the debate in academia and litigation regarding the proper personal guilt standards raises important and valid points,²⁷⁵ an effective safeguard needs to be enacted to prevent the “money is fungible” theory from being used to criminalize humanitarian aid that does not free up resources for violence. The HLF prosecution serves as the prime example of this trend in action.²⁷⁶ Prosecuting individuals criminally on such a basis under the knowledge standard does not meet the *Scales* Fifth Amendment due process standards.²⁷⁷ It is therefore time for the government to put the “money is fungible” theory to the test in litigation. Where the government makes allegations that humanitarian aid is being sent to an FTO, it should have to show how money or other material support frees up resources for violence on a structural and organizational basis. In the case of groups that have only violent or illegal goals, this should be relatively easy. Where groups are more multifaceted and complex, to the point where resources for charity may very well not free up resources for violence, the government needs to make a stronger

reject a similar specific intent requirement, however, in the First Amendment context. *See id.* at 2717–18.

274. *Id.* at 2725–26.

275. *See supra* notes 223, 230–33.

276. And, to a lesser extent, the Al-Arian prosecution falls into this category as well. *See* Meg Laughlin, *Prosecution Rests Case Against Al-Arian, Others*, ST. PETERSBURG TIMES, Nov. 9, 2005, at 3A (noting the government argued in closing that “[g]iving the money was a way to win the hearts and minds of the people . . . and get them close to the movement”).

277. *See* Amicus Brief, *supra* note 269, at 19–20, 23; Pendle, *supra* note 223, at 801–02 (“But it is possible that even seemingly harmless aid could have the effect of bolstering the organization’s reputation, which could thereby indirectly strengthen its ability to carry out terrorist attacks. However, by permitting membership, comparable reputational benefits could have accrued to the Communist Party through increasing the number of its official supporters. But the *Scales* Court determined that this ‘sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing’ was still too tenuous a relationship with the underlying substantive illegal conduct to justify imposing guilt without individual culpability. Similarly, any moral encouragement an FTO obtains from receiving training in international law, from knowing that the children under its control are being educated and fed, or from rejoicing that the wrongs its ethnic group has suffered at the hands of its government are being publicized internationally, is not sufficiently related to the promotion of international terrorism to justify imposing personal guilt on those who provided such support. This type of humanitarian conduct has neither the intent nor the substantive effect of strengthening international terrorism. Even if the donor knows the recipient is a designated FTO, a donation of this sort falls far short of some ‘significant action’ in support of the ‘criminal enterprise.’ In fact, unlike the defendant’s membership in *Scales*, which was held to be constitutionally protected, this type of humanitarian conduct may even fall short of a ‘mere . . . expression of sympathy with the alleged criminal enterprise.’ With this form of support, the donor may actually intend that the organization renounce its illegal objectives and pursue strictly nonviolent goals. Or the donor may want nothing to do with the objectives of the FTO, but merely intend to assist people who live under the FTO’s control in a time of need. Thus, the causal connection between the conduct and the crime, if existent, is weak.” (alternation in original) (footnotes omitted) (quoting *Scales v. United States*, 367 U.S. 283 (1961))).

showing that goes beyond illustrating mere enhancement of the group's image in the community in which it operates. This is less complicated than it seems. The government would need to show that there is some link between an FTO and the charity in question—for example, a joint bank account, FTO members involved with a charity in a certain capacity, or the FTO advertising its link with a charity. Linking to an FTO a nebulous series of ostensibly unrelated entities under a heading that implicates core religious obligations—zakat committees—cannot suffice to ground a conviction when the charity is established as legitimate. Without such a showing, a § 2339B prosecution risks violating the due process rights of a defendant, while at the same time turning the trial into a political argument over foreign policy.

Criminal prosecution for providing material support to an FTO translates the consequences of being on a list into direct action, effectively putting an FTO on notice that its members and supporters are fair game. When the link to violence—let alone violence against the United States—is attenuated and indirect, a § 2339B prosecution has little to do with United States national security, and it has much more to do with its foreign policy. A terrorism prosecution, much like commerce, diplomacy, or military action, thereby becomes a vehicle for United States foreign policy. If the government does not challenge that the money was sent for humanitarian purposes, it ordinarily attempts to demonstrate why the FTO has been designated as a terrorist organization, which it can do most directly by presenting evidence of violent attacks, in order to convince a jury of the FTO's dangerousness.²⁷⁸ This in turn legitimates an inquiry into a defendant's motivations behind the support. In situations where there is a valid humanitarian need for charitable contributions, a defendant can argue that United States foreign policy, in criminalizing charity, is unjust. Courts are not designed to engage in a referendum on American foreign policy, but § 2339B prosecutions illustrate how such referenda may take place, where a defendant has no other choice but to make a political argument.

The stakes involved cannot be underestimated when one takes into account what a sentence for a conviction on § 2339B charges can look like.²⁷⁹ In the HLF case, the sentences ranged from fifteen to sixty-five years.²⁸⁰ In the case of Mohammed al-Moayad, a Yemeni sheikh, and Mohammed Zayed, his assistant, the defendants were given sentences of seventy-five years and forty-five years, respectively, on account of charitable contributions to Hamas, despite the weakness and inflammatory nature of the evidence.²⁸¹ Mohamad Hammoud, a Lebanese national,

278. See, e.g., Michael Fechter, *Israeli Recounts Islamic Jihad Attack: Al-Arian Jury Hears Graphic Testimony*, TAMPA TRIB., Aug. 16, 2005, Metro, at 6 (describing testimony of survivor of terrorist attack).

279. § 2339B authorizes a sentence of up to fifteen years, or in the case of death resulting from the support provided, a sentence of “any term of years or for life.” 18 U.S.C. § 2339B(a)(1) (2006). There is also the possibility of a significant sentence enhancement for a “federal crime of terrorism” under *U.S. Sentencing Comm’n, Guidelines Manual* § 3A1.4(a) (2009).

280. See *supra* notes 6–7 and accompanying text.

281. *United States v. Al-Moayad*, 545 F.3d 139, 145, 159 (2d Cir. 2008) (overturning the convictions and sentences on account of cumulative and prejudicial errors at trial).

was given a sentence of 155 years for providing material support to Hizballah, despite doubts about the sufficiency of the evidence against him.²⁸² When contrasted with the sentence that al-Marri, the convicted al-Qaeda sleeper agent, was set to receive, the sentences meted out in the *HLF* case can seem excessive, and at the very least reveal the seriousness of a conviction on § 2339B grounds.

The debate over satisfying Fifth Amendment due process concerns in the § 2339B context has settled into a pattern, with courts generally upholding Congress's intent to enact a knowledge standard. While academic commentary on the issue has been varied and diverse, those courts examining the statute have accepted the "money is fungible" theory as a normatively correct basis for proceeding with a prosecution. However, the further the government strays from showing a link between material support and violence, the more difficult it becomes to justify use of the theory on personal guilt due process grounds. Additionally, as the designation debate has demonstrated, the further the link from violence, the more likely it is that a prosecution will turn into a battle over the correctness or justness of United States foreign policy. On a policy basis, it would probably be best for the government to refrain from bringing prosecutions like that of *HLF*, where the link to violence is remote at best, given that these prosecutions have the capacity to turn the courtroom into an arena for a foreign policy debate.²⁸³ Legally, without a stronger evidentiary showing, the "money is fungible" theory risks erroneously convicting individuals who are charged with charitable activity on behalf of a despised FTO.

CONCLUSION

Historically, the terrorism trial concerned itself with acts of violence with a United States nexus. In such a case, an inquiry as to underlying foreign policy was not legitimate, since what was being criminalized was actual violence. As the terrorism prosecution post-9/11 has focused on conduct further removed from violent activity, the question of what standards allow a group to be classified as terrorist becomes more relevant. When all nonstate violence can be deemed terrorist, it is legitimate to require the government to articulate standards for groups

282. See *United States v. Hammoud*, 381 F.3d 316, 327 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005). For a comment on the weakness of the evidence in *Hammoud*, see *id.* at 384 (Gregory, J., dissenting). While Hammoud's sentence was overturned in light of the Supreme Court's decision in *Booker v. Washington*, 543 U.S. 220 (2005), see *Hammoud*, 543 U.S. 1097 (2005), the Federal Bureau of Prisons website still shows his release date as 2135, indicating a sentence of more than one hundred years. Federal Bureau of Prisons Inmate Locator: Mohamad Youssef Hammoud, <http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingMoreList=false&FirstName=mohamad&Middle=youssef&LastName=hammoud&Race=U&Sex=U&Age=&x=0&y=0>.

283. Cf. Peterson, *supra* note 167, at 353–54 (discussing taking into account foreign policy considerations of bringing a § 2339B action, especially when targeting groups that have significant non-violent components).

to follow if they are to overcome their designated FTO status. While this may seem unrealistic, if the United States were to articulate such standards, the standards would make a significant contribution to clarifying when and under what circumstances the use of political violence might be permissible. Perhaps doing so would not be politically expedient, but it is necessary in light of the fact that designations serve as the basis for most of the significant terrorism prosecutions. In addition, the government should be required to set forth its evidentiary basis for how support for charity frees up resources for violence, especially in those cases with a serious humanitarian aspect. Otherwise, without such an evidentiary showing, the government risks cynically criminalizing humanitarian aid in zones where it is genuinely needed and guarantees the transformation of a § 2339B prosecution into a trial on foreign policy grounds.