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Material Support: Terrorist Television in the United States, 47 J. Marshall L. Rev. 1533 (2014)

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MATERIAL SUPPORT: TERRORIST TELEVISION IN THE UNITED STATES

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I. INTRODUCTION

American television stations are broadcasting transmissions from pro-Hamas and pro-Hezbollah television channels, which show programs inciting hatred and violence and glorifying martyrdom.¹ Hezbollah's television station, al-Manar, was founded in 1991 in Lebanon and started broadcasting by satellite in 2000.² The television station glorifies martyrdom and disseminates anti-American and anti-Semitic messages; Al-Manar's former programming director, Sheikh Nasir al- Akhdar has stated that

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¹ See Charles C. Johnson, *Pro-Hezbollah, Pro-Hamas Stations Broadcasting In America In Possible Violation Of The Law*, BLAZE (May 1, 2013), <http://www.theblaze.com/contributions/pro-hezbollah-pro-hamas-stations-broadcasting-in-america-in-possible-violation-of-the-law/> (discussing the operations of the ArabTV4ALL and NileSat IPTV and specific instances of violent media content).

² Avi Jovisch, *Al-Manar: Hizbullah TV, 24-7*, 11 MIDDLE EAST QUARTERLY 17 (2004), available at www.meforum.org/583/al-manar-hizbullah-tv-24-7; see also ANTI-DEFAMATION LEAGUE, HEZBOLLAH 15 (2013), available at <http://www.adl.org/assets/pdf/combating-hate/Hezbollah-backgrounder-2013-1-10-v1.pdf> (outlining origins of the Hezbollah television station).

the mission of the network is to wage psychological warfare.³ Al-Aqsa is a Hamas-run television station founded by Hamas Interior Minister Fathi Ahmad Hammad that began broadcasting from Gaza in 2006.⁴ Like al-Manar, al-Aqsa advocates violence by using music and videos geared towards children.⁵

Formed in April 2013, SHAM IPTV is an internet television company located in North Bergen, New Jersey.⁶ In exchange for subscription fees, SHAM IPTV provides customers with an internet protocol television (“IPTV”) box that is connected to the internet and TV. This box offers United States consumers to access satellite channels that may otherwise be unavailable.⁷ The connected IPTV box supplies Arabic satellite channels, including al-Aqsa and al-Manar, directly through the internet.⁸

This Comment analyzes whether SHAM IPTV could be held criminally liable for providing “material support” to a foreign terrorist organization. It also reviews whether the Office of Foreign Assets Control (“OFAC”) regulations limiting the exchange of telecommunications should be enforceable. This issue

³ See *id.* at 15-16 (quoting former programming director and propagandizing of suicide bombing). See also *U.S. to name Hezbollah TV a terrorist organization*, CNN, (Dec. 15, 2004, 10:57 PM), <http://www.cnn.com/2004/WORLD/meast/12/15/hezbollah.tv/> (detailing the television station’s website and imagery from broadcasts).

⁴ See *Al Aqsa TV*, ANTI-DEFAMATION LEAGUE (May 13, 2013), <http://www.adl.org/combating-hate/international-extremism-terrorism/c/al-aqsa-tv-hamas.html> (detailing foundation of the al-Aqsa television station). See also *Spotlight On Al-Aqsa Television*, ANTI-DEFAMATION LEAGUE, (May 13, 2013), <http://blog.adl.org/international/spotlight-on-al-aqsa-television> (describing similarities between the two stations and that al-Aqsa is modeled after al-Manar).

⁵ See H.R. RES. 1069, 110th Cong. (2008). (describing specific instances of children’s television shows glorifying violence with anti-Semitic and anti-American messages). See also *Hamas Has Been Dealt Blow to its Terrorist TV Station*, FOUNDATION FOR DEFENSE OF DEMOCRACIES, (Jun. 9, 2010), <http://www.defenddemocracy.org/media-hit/hamas-has-been-dealt-blow-to-its-terrorist-tv-station/> (quoting al-Aqsa founder Hammad stating that the message of al-Aqsa TV is a jihadist message, and that “[t]he mission of Al-Aqsa TV is to inform the world of the strong points about jihadist activity”).

⁶ SHAM IPTV, <http://www.shamiptv.com/contacts> (last visited Oct. 3, 2013); SHAM IPTV Certificate of Formation, New Jersey Department of the Treasury, *available at* <http://www.njportal.com/DOR/BusinessNameSearch/default.aspx>.

⁷ See Nate Anderson, *An introduction to IPTV*, ARS TECHNICA (Mar. 12, 2006), <http://arstechnica.com/business/2006/03/iptv/> (explaining technical function of IPTV services); See also Brian G. Hughes, *IPTV: How it works?*, WORLEY CONSULTING (2007), <http://www.worleyconsulting.com/publications/2007/IPTVhowItWorks.pdf> (explaining the key steps and technical processes involved in delivering IPTV to the end consumer); SHAM IPTV, <http://www.shamiptv.com/faq> (last visited Oct. 3, 2013) (offering explanations about IPTV as they relate specifically to SHAM IPTV’s services).

⁸ SHAM IPTV, <http://www.shamiptv.com/All-Channels> (last visited Apr. 5, 2014).

is particularly important in light of the clear legislative intent of the International Emergency Economic Powers Act (“IEEPA”), as reflected by both the Berman Amendment and Free Trade in Ideas Amendment. Part II provides a brief history of Executive Branch authority under the IEEPA and the delegation of that authority to the Secretary of the Treasury and the Director of OFAC. This Part also addresses sections within the Code of Federal Regulations and the United States Code that prohibit and criminalize the providing of material support to terrorist organizations. Part III examines Congressional intent behind the Berman and Free Trade in Ideas Amendments to the IEEPA and how these amendments affect the validity of OFAC regulation in light of the First Amendment. This section also analyzes criminal liability under § 2339B, juxtaposed with protections under the First Amendment. Part V concludes that while OFAC regulations limiting the exchange of telecommunications should be unenforceable, the First Amendment does not protect SHAM IPTV. Accordingly, SHAM IPTV could be held liable under § 2339B.

II. BACKGROUND

A. *The International Emergency Economic Powers Act*

The IEEPA, enacted in 1977, codified presidential national emergency powers to investigate and impose controls on transactions. The Act also allows the President to freeze foreign assets under the jurisdiction of the United States.⁹ The IEEPA sought to ensure that American citizens would not, in any way, assist enemies of the United States.¹⁰ Criminal liability provisions are specifically found in Section 1705 of the IEEPA.¹¹ This section

⁹ See S. REP. NO. 110-82, at 1-2 (2007) (detailing history and purpose of the act); see also David Klass, *Asset Freezing of Islamic Charities Under the International Economic Emergency Powers Act: A Fourth Amendment Analysis*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 155, 157 (2007) (describing OFAC’s power to block assets by imposing an across-the-board prohibition against transfers or dealings of any kind with regard to the property); Joan M. O’Sullivan-Butler, *Combatting Money Laundering and International Terrorism: Does the USA Patriot Act Require the Judicial System to Abandon Fundamental Due Process in the Name of Homeland Security?*, 16 ST. THOMAS L. REV. 395, 410 (2004) (noting intent of Congress for the President to have sweeping regulatory powers with respect to questionable property during times of national emergency).

¹⁰ See Bruce Craig, *Sleeping with the Enemy? OFAC Rules and First Amendment Freedoms*, AM. HIST. ASSOC. (Jan. 22, 2008, 2:17 PM), <http://www.historians.org/perspectives/issues/2004/0405/0405nch1.cfm> (providing details of IEEPA intent at inception and later Berman Amendment stipulations).

¹¹ 50 U.S.C. § 1705 (2001). See Robert M. Chesney, 11 LEWIS & CLARK L. REV. 851 (focusing on the legal effect of powers granted to the Executive under Section 1705); Charles A. Flint, *Challenging the Legality of Section 106 of the*

essentially prohibits transactions with entities subject to embargoes by the President or his designees.¹² To accomplish this, the Act vests the President with, among other powers, authority to regulate and prohibit foreign exchange transactions, bank payments, or credit transfers.¹³

The IEEPA also authorizes the President to declare a national emergency in response to an extraordinary threat to the United States originating in substantial part in a foreign state.¹⁴ As set forth in 50 U.S.C. § 1702, declaring an emergency gives the President broad authority. This power includes regulating, preventing or prohibiting any use, transfer, transportation, importation or exportation of, or dealing in, or transactions involving, any property in which any foreign country or national has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.¹⁵

After the President has made such a declaration, he or she may investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Although the IEEPA vests authority in the President to carry

USA Patriot Act, 67 ALB. L. REV. 1183, 1201 (2004) (noting that the emergency measures of the IEEPA allow the President to criminally punish American citizens who disregard relevant regulated trade).

¹² 50 U.S.C. § 1705 (2001).

¹³ 50 U.S.C. § 1705 (2001). *See* S. REP. NO. 110-82, at 2 (providing background of executive authority to control certain financial transactions under the IEEPA); *see also* Chesney, *supra* note 11, at 855 (describing the function of prosecutions under 50 U.S.C. § 1705).

¹⁴ *See* Holy Land Found. For Relief & Dev. V. Ashcroft, 333 F.3d 156, 159 (D.C. Cir. 2003) (providing background on IEEPA's grant of presidential powers as they relate to ability to block property interests); *see also* 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, 1357 (2004) (describing the Supreme Court's recognition of broad Presidential power under IEEPA, including the authority to regulate interests in foreign property).

¹⁵ 50 U.S.C. § 1702(a)(1)(B) (2001). *See* Al-Aqeel v. Paulson, 568 F. Supp. 2d 64, 66-67 (D.D.C. 2008) (listing Presidential powers granted in response to declaring national emergency); *see also* Dames & Moore v. Regan, 453 U.S. 654, 656 (1981) (describing one of many uses of the blocking orders the President is authorized to enact under the IEEPA as a "bargaining chip" to be used by the Executive when negotiating with a hostile entity); *United States v. Groos*, 616 F. Supp. 2d 777, 784 (N.D. Ill. 2008) (identifying that the President is authorized to create regulations to exercise and enforce the authority granted by the IEEPA).

out the powers detailed in the Act, the United States Code enables him to delegate that power to the head of any agency or department in the Executive branch.¹⁶

B. Executive Order 13224

On September 23, 2001, President George W. Bush responded to the September 11th terrorist attacks by invoking his power under the IEEPA¹⁷ to sign Executive Order 13224.¹⁸ Executive Order 13224 declared a national emergency to deal with the “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”¹⁹

The order designated twenty-seven organizations as Specially Designated Global Terrorists (“SDGTs”), and authorized the Secretary of the Treasury to designate any additional entities as SDGTs.²⁰ The order imposes economic sanctions on SDGTs, and other parties who have supported, committed, or pose a significant risk of committing acts of terrorism.²¹ The order blocks the entry of property and interests in property belonging to SDGTs that are in or later come within the United States, or the possession or

¹⁶ 3 U.S.C. § 301 (2013); 50 U.S.C. 1702(a)(1). Josh D. Friedman, *Solving the Necessity Conundrum: What the Drug War Can Teach Us About Due Process for U.S. Charities in the Fight Against International Terrorist Financing*, 10 INT’L J. NOT-FOR-PROFIT L. 16, 29 (2007) (pointing out the delegation abilities of the President to effectively carry out IEEPA powers).

¹⁷ See Exec. Order No. 13224, 66 FR 49079 (Sept. 23, 2001), available at <http://www.state.gov/j/ct/rls/other/des/122570.htm#> (synopsizing order and explaining legal consequences and other effects).

¹⁸ See *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 865-66 (N.D. Ohio 2009) (outlining statutory framework of Executive Order 13224); see also Nina J. Crimm, *The Moral Hazard of Anti-Terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577, 603-04 (2008) (positing that the issuance of Executive Order 13224 helped shaped the global war on terrorism).

¹⁹ See John Roth et al., *Staff Report to the National Commission on Terrorist Attacks Upon the United States*, MONOGRAPH ON TERRORIST FINANCING 76 (2004), available at http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf (providing that the President's declaration of a national emergency is the source of OFAC's authority to impose economic sanctions); see also *U.S. DEPT OF STATE*, *supra* note 16.

²⁰ See Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, 66 Fed. Reg. 49,079 (Sep. 23, 2001) (providing presidential document text for enacting Executive Order 13224); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 67 (D.D.C. 2008) (exhibiting authority vested in Secretary of Treasury to designate additional entities); see generally Audrey K. Cronin, CONG. RESEARCH SERV., RL32120, THE “FTO LIST” AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS (2003) (describing the process by which Secretary of Treasury designates and adds additional entities to list of SDGTs).

²¹ 31 C.F.R. § 594.701 (2008).

control of people within the United States.²² Executive Order 13224 further prohibits transactions that include “the making or receiving of any contribution of funds, goods, or services to or for the benefit” of SDGTs.²³ The intended effect of the sanctions is to disrupt SDGTs’ funding and business activities, thus limiting their operational capacity.²⁴

C. OFAC and Global Terrorism Sanctions Regulations

Executive Order 13224 further delegated the Secretary of the Treasury’s authority to designate SDGTs to the Director of the Office of Foreign Assets Control (“OFAC”).²⁵ Since this delegation, OFAC has been primarily responsible for designating SDGTs, implementing sanctions on SDGTs, and preventing SDGTs from engaging in prohibited transactions.²⁶ For example, on March 23,

²² 31 C.F.R. §§ 594.701(a)(2), 595.701(a)(2). See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 46 (D.D.C. 2005) (confirming government’s statutory authority to block assets of SDGTs where President makes required finding that state of national emergency exists); see also Robert E. O’Leary, *Improving the Terrorist Finance Sanctions Process*, 42 N.Y.U. J. INT’L L. & POL. 549, 557 (2010) (providing that willful violations of OFAC prohibitions of transfers of blocked property or interests in property to an SDGT are punishable by a fine of up to \$1,000,000 and imprisonment of up to 20 years); U.S. DEP’T OF STATE, *supra* note 16.

²³ Joseph W. Younker, *The “U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best-Practices for U.S.-Based Charities”*: *Sawing A Leg Off the Stool of Democracy*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 865, 874 (2004); U.S. DEP’T OF STATE, *supra* note 16; see also Gene Takagi, *Executive Order 13224*, NONPROFIT L. BLOG (May 6, 2006), http://www.nonprofitlawblog.com/home/2006/05/executive_order.html (examining legal consequences of Executive Order 13224 in response to description of order by U.S. Department of State).

²⁴ See *What anti-terrorism actions and policies of the U.S. Government relate to international grantmaking?*, U.S. INT’L GRANTMAKING, <http://archive.today/qhN2D> (discussing purpose of Executive Order 13224 as it relates to asset blocking); see also Rudolph Lehrer, *Unbalancing the Terrorists’ Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT’L & COMP. L. 333, 335 (2002) (opining that the expansion of the SDGT list has been in an effort to disrupt financial networks of the designated terrorist organizations); U.S. DEP’T OF STATE, *supra* note 16.

²⁵ 31 C.F.R. § 594.802 (2012). See *Zarmach Oil Servs., Inc. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 152 (D.D.C. 2010) (discussing OFAC regulations enacted validly pursuant to IEEPA and authority delegated by the Secretary of the Treasury).

²⁶ See Danielle Stampley, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 691 (2008) (examining the Secretary of Treasury’s delegation of authority to implement economic sanctions); see also *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 500 (S.D.N.Y. 1997) (characterizing OFAC as having broad authority to regulate the transactions of designated and sanctioned organizations and otherwise prohibited transactions); Lehrer, *supra* note 24,

2006, OFAC named al-Manar an SDGT for inciting terrorism and providing material support to terrorists.²⁷ Additionally, on March 18, 2010, OFAC designated al-Aqsa as an SDGT because it is owned and controlled by the Hamas terrorist group. Both television stations still have SDGT designations today.²⁸

Through the authority granted by Executive Order 13224, OFAC enacted the Global Terrorism Sanctions Regulations to regulate interactions with designated SDGTs.²⁹ According to the Order, United States persons are prohibited from assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of any person whose property or interests in property are blocked.³⁰

The Global Terrorism Sanctions Regulations also define various statutory terms of art. "U.S. person" is broadly defined under 31 C.F.R. § 594.315 to include any "entity organized under the laws of the United States . . . or any person in the United States."³¹ Material or technological support under 31 C.F.R. § 593.317 "means any property, tangible or intangible, including but not limited to currency . . . communications equipment . . . [or] technologies."³² The regulations define "services" broadly and include service performed in the United States on behalf of, or for the benefit of, designated entities.³³

Importantly, the term "provides" is not defined in section

at 336 (indicating that OFAC is responsible for carrying out the "bulk of the administrative work" related to effecting Executive Order 13224).

²⁷ Casey L. Addis, CONG. RESEARCH SERV., R40054, LEBANON: BACKGROUND AND U.S. RELATIONS (2009); *see also* Angela A. Barkin, *Corporate America-Making A Killing: An Analysis of Why It Is Appropriate to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism*, 40 CAL. W. L. REV. 169 (2003) (providing brief background on al-Manar and associated Hezbollah designation by American government).

²⁸ OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST, 24, 37 (Sep. 6, 2013), *available at* <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>.

²⁹ 31 C.F.R. § 594 (2013). *See* Humanitarian Law Project v. U.S. Dep't of Treasury, 484 F. Supp. 2d 1099, 1106 (C.D. Cal. 2007) (holding that to be "otherwise associated with" an SDGT can be validly construed to mean that a person owns or controls an SDGT, or attempts or conspires to provide financial, material, or technological support for an SDGT).

³⁰ 31 C.F.R. § 594.201(a)(4)(i). *See* Peter D. Trooboff, *Antiterrorism Measures*, THE NAT'L LAW J., Dec. 17, 2001, *available at* <http://www.cov.com/files/Publication/ee7bbecf-1b76-4421-a883-f5dbb79c4d7b/Presentation/PublicationAttachment/1a94722a-1db2-4b23-9ae1-fa3f450225eb/oid6607.PDF> (analyzing Sec. 1(d) of Executive Order 13224).

³¹ 31 C.F.R. § 594.315 (2006). *See* Global Terrorism Sanction Regulations, 68 Fed. Reg. 34,196, 34,201 (Jun. 6, 2003) (discussing contents and details of the part 594 addition to chapter V of 31 C.F.R.).

³² 31 C.F.R. § 593.317 (2006). *See* OFAC Amends Global Terrorism Sanctions Regulations (31 CFR 594), 74 Fed. Reg. 61036 (Nov. 23, 2009) (clarifying the technologies definition as used in section 34 of the C.F.R.).

³³ 31 C.F.R. 594.406(a)-(b).

2339A or 2339B. However, where words within a statute are not defined, they must be given their ordinary meaning.³⁴ Therefore, “provides” in the statute would mean “furnish[es]; suppl[ies]” and “make[s] available; afford[s].”³⁵

D. Criminal Sanctions and Material Support: §§ 2339A and 2339B

Criminal sanctions for providing material support to terrorists were established in the mid-1990s by 18 U.S.C. §2339A and §2339B.³⁶ Congress enacted section 2339A as part of the Violent Crime Control and Law Enforcement Act of 1994.³⁷ Soon thereafter, Section 2339A was supplemented with Section 2339B. This occurred with the 1996 enactment of the Antiterrorism and Effective Death Penalty Act in the wake of the 1995 Oklahoma City bombing.³⁸ Section 2339B is broader and more frequently used in antiterrorist criminal proceedings and relies on a list-based approach to criminalize support to terrorists.³⁹ This section

³⁴ See *Chapman v. United States*, 500 U.S. 453, 462, (1991) (holding that statute failing to define terms “mixture” and “substance” must be given their ordinary meaning in light of the fact that they have no established common-law meaning).

³⁵ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1411 (4th ed. 2000); see also *United States v. Sattar*, 314 F. Supp. 2d 279, 297 (S.D.N.Y. 2004) (analyzing definition of provide in an 18 U.S.C. § 2339A context).

³⁶ 18 U.S.C. § 2339 (2009); CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B (2010); see also Noah Bialostozky, *Material Support of Peace? The on-the-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision*, 36 YALE J. INTL. L. ONLINE 59, 62 (2011) (describing 2339A and 2339B as primary prosecutorial tools in U.S. counterterrorism efforts).

³⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 100-418, § 120005(a), 108 Stat. 1796, 2022 (1994) (codified as amended at 18 U.S.C. § 2339A). See *United States v. Shah*, 474 F. Supp. 2d 492, 495 (S.D.N.Y. 2007) (discussing creation of section 2339A and identifying meaning of term “material support or resources” as it exists in that section).

³⁸ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996). See Philip Shenon, *Threats and Responses: The Law; 6 Suspects Charged Under Broadly Worded Act*, N.Y. TIMES, (Sep. 27, 2002), available at <http://www.nytimes.com/2002/09/17/nyregion/threats-and-responses-the-law-6-suspects-charged-under-broadly-worded-act.html> (providing background of AEDPA inception and discussion of the broad application of material support); see also Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 B.Y.U. L. REV. 1455, 1487 (2011) (identifying 2339B's creation two years after 2339A and one year after the Oklahoma bombing as intended to fill a gap left open by 2339A, specifically targeting material financial support to FTOs for any reason, including humanitarian, violent, or otherwise).

³⁹ See generally Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POLY 297 (2008) (exploring the legal concepts driving the 2339A and 2339B counterterrorism statutes); see also *Boim v. Quranic*

embodies an approach to antiterrorism focused on disrupting the finances of terrorist organizations, whereas 2339A reflects an earlier antiterrorist focus on direct, substantial support such as assassinations or bombings.⁴⁰ Importantly, Section 2339B only applies to material support provided to foreign terrorist organizations (“FTOs”) designated by the Executive Branch and its appropriate delegates.⁴¹

Section 2339B outlaws attempting to provide, conspiring to provide, or actually providing material support or resources to an FTO knowing that the organization has been designated an FTO, or knowing that it engages, or has engaged, in terrorism or terrorist activity.⁴² Material support includes, but is not limited to, services, currency, or monetary instruments or financial securities, and financial services.⁴³

Section 2339B also includes a scienter requirement.⁴⁴

Literacy Inst., 127 F. Supp. 2d 1002, 1016 (N.D. Ill. 2001) (supporting position that Congress viewed the provision of material support and resources to terrorists or terrorist organizations as international terrorism in and of itself).

⁴⁰ See James J. Ward, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471, 477-78 (2008) (differentiating between the focus of 2339A and 2339B); see also *United States v. Mostafa*, 965 F. Supp. 2d 451, 458-59 (S.D.N.Y. 2013) (holding that the creation of a jihad training camp by a support of al Qaeda, designated as an FTO, and the stockpiling of weapons in connection with the same, are sufficient to state a claim for the provision of material support and resources to terrorists under 2339A); see also Brief of John D. Altenburg, et al. in Support of Petitioners and Cross-Respondents at 21, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (providing that direct support under § 2339A includes activities “if and only if: (1) they involve direct interaction with an FTO (as opposed to independent activities designed to support the FTO or its goals); (2) they benefit the FTO in some way; and (3) the benefit provided is significant.”).

⁴¹ See *Holder v. Humanitarian Law Project*, 56 U.S. 1, 34-35 (2010) (noting the scope of Congressional action as it corresponds to the number of FTOs designated by the Executive Branch); see also David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 779-82 (2007) (describing the FTO designation process and analyzing legislative intent behind creation of § 2339B in response to shortcomings of § 2339A).

⁴² See Doyle, *supra* note 36 (deconstructing the language of 18 U.S.C. § 2339B). See also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 18 (2005) (analyzing section 2339B as both narrower and broader than § 2339A with respect to its application and coverage of forbidden acts).

⁴³ See Robert M. Chesney, *supra* note 11, at 878 (analyzing core functions of § 2339B as diffused prevention amongst designated entities); see also 18 U.S.C.A. § 2339A (2009) (listing what constitutes “material support or resources” as it applies to both Sections 2339A and 2339B).

⁴⁴ See *United States v. Warsame*, 537 F. Supp. 2d 1005, 1020 (D. Minn. 2008) (finding that §2339B is not a strict liability statute and “requires the prosecution to prove that a donor provided material support to an organization *knowing* either that it was an FTO or that it engaged or engages in terrorist activity”) (emphasis in original); see also Wadie E. Said, *The Material Support*

Punishment only attaches when one providing material support to an FTO does so with knowledge that the organization is engaged or engages in terrorist activity or terrorism.⁴⁵ Notwithstanding the scienter requirement of the statute, a defendant will still be liable under 2339B for providing material support.⁴⁶

Opponents of the extremely broad reach of 2339B have labeled it unconstitutional because it imposes criminal liability through guilt by association. They claim that this violates the Fifth Amendment's due process clause.⁴⁷ The guilt by association concept rests on the fact that 2339B will punish a provider of material support even if it has no interest or intent in advancing any of the organization's illegal conduct.⁴⁸ However, the statute does not impermissibly criminalize association with groups

Prosecution and Foreign Policy, 86 IND. L.J. 543, 578 (2011) (stating that the term meaning of the term "knowingly" as it applies in Section 2339B derived from principle of statutory construction articulated by Supreme Court in favor of a scienter requirement to statutory elements that "would otherwise criminalize innocent conduct").

⁴⁵ See *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 179 (E.D.N.Y. 2008) (explaining that the scienter requirement of 2339B serves to eliminate a situation in which a defendant inadvertently stumbles into a violation); see also Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in A Comprehensive Antiterrorism Financing Strategy*, 32 W. NEW ENG. L. REV. 295, 313-14 (2010) (clarifying that intent to promote terrorism or terrorist activity is not necessary, but only knowledge of recipient's designated status, because Section 2339B does not require proof that the donor specifically intended that his support or resources be used for terrorist activity).

⁴⁶ See Benjamin Yaster, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 83 N.Y.U. L. REV. 1353, 1355 (2008) (noting the broad penal effect of 2339B's expansive language as it applies to potentially blameless individuals) see also *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1337-38 (M.D. Fla. 2004) (providing hypothetical case where a taxi driver subject would be subject to prosecution for providing services to FTO despite lack of intent to further FTO's illegal objectives).

⁴⁷ See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003) (characterizing section 2339B as an instance of guilt by association, imposing liability regardless of individual's intent or purpose, and instead based solely on connection to others); see also *Scales v. United States*, 367 U.S. 203, 224-25 (1961) (finding statute unconstitutional where it outlawed knowing membership in any organization that advocated the violent overthrow of the United States because "guilt is personal" and "[m]embership without more, in an organization engaged in illegal advocacy" is insufficient to satisfy personal guilt).

⁴⁸ See Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1432-33 (2003) (examining the material support provisions of 2339B and the extent to which they engender the guilt by association concept); see also Humanitarian Law Project v. U.S. Treasury Dep't, 578 F.3d 1133, 1150-51 (9th Cir. 2009) (holding that a provision exposing an individual to criminal liability only where the government can prove culpable intent, and in the case of AEDPA, knowledge, were constitutionally sound as it satisfies the requirement of "personal guilt" and eliminates due process concerns of guilt by association).

engaged in illegal conduct. Rather it imposes penal sanctions when one goes beyond mere organizational membership and actually provides material support.⁴⁹ A conviction for a violation of Section 2339B is punishable by imprisonment up to 15 years and/or a fine of up to \$250,000.⁵⁰

III. ANALYSIS

Part III of this Comment analyzes the legislative intent of amendments to the IEEPA and the scope of the informational materials exemption. Additionally, Part III analyzes the extent to which First Amendment freedom of association rights can protect from prosecution the provision of material support to terrorist organizations.

A. IEEPA Amendments and Congressional Intent

Despite the broad language of the IEEPA, an exemption outlined in two IEEPA amendments clearly limits the authority granted to the Executive Branch. According to one of these amendments, the Executive's authority "does not include the authority to regulate or prohibit, directly or indirectly" the trade of information and informational materials, "whether commercial or otherwise, regardless of format or medium of transmission."⁵¹ These amendments clearly show Congressional intent to limit the Executive Branch's broad regulatory powers regarding "informational materials."⁵² Case law has continually affirmed this

⁴⁹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010), quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) (deciding that section 2339B does not prohibit being a member of a designated terrorist group, or even "vigorously promoting and supporting its political goals," but instead outlaws the act of giving material support to those groups); see also *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004) (holding that punishing an individual for mere membership in an organization that has both legal and illegal goals would violate the First Amendment).

⁵⁰ 18 U.S.C. § 2339B; see also *United States v. Marzook*, 383 F. Supp. 2d 1056, 1069 (N.D. Ill. 2005) (analyzing penalties and *mens rea* component of Section 2339B).

⁵¹ 50 U.S.C. § 1702(b) (2001); see also *Kalantari v. NITV, Inc.* 352 F.3d 1202, 1205 (9th Cir. 2003) (examining legislative intent behind the exemptions of the Berman Amendment); see also *OFAC Lawsuit Background*, ASS'N AM. UNIV. PRESSES, <http://www.aaupnet.org/policy-areas/intellectual-freedom/suit-against-ofac-regulations/367-ofac-lawsuit-background> (last visited Apr. 5, 2014) (clarifying the informational materials limitation on executive power flowing from the Berman Amendment to the IEEPA).

⁵² See Jarred O. Taylor III, *Information Wants to Be Free (of Sanctions): Why the President Cannot Prohibit Foreign Access to Social Media Under U.S. Export Regulations*, 54 WM. & MARY L. REV. 297, 307 (2012) (noting that Congress first began to limit President's control over informational materials in 1988 with the Berman Amendment); see also *Kalantari*, 352 F.3d at 1209 (explaining that IEEPA exemption for informational materials is a general limitation on the President's authority); H.R. CONF. REP. NO. 103-482, at 239

limitation.

The informational material exemption first emerged with the Berman Amendment, adopted in 1988.⁵³ The Berman Amendment restricts the Executive Branch's authority to regulate the export or import of informational materials.⁵⁴ The Amendment was intended to prevent the Executive Branch from restricting the international flow of materials protected by the First Amendment.⁵⁵ Congress premised the Berman Amendment on a 1985 resolution by the American Bar Association's House of Delegates. This resolution suggested that prohibitions should not exist on imports protected by the First Amendment if their nature is ideological or informational.⁵⁶ After passage of the Berman Amendment, OFAC amended its regulations to conform with this new statutory language.⁵⁷ The new OFAC regulations exempted informational materials, "whether commercial or otherwise," from prohibition or regulation.⁵⁸

(1994) (stating that the amendments were intended to "facilitate transactions and activities incident to the flow of information and informational materials); Walsh v. Brady, 729 F. Supp. 118, 120 (D.D.C. 1989) (acknowledging that amendment was directed toward a perceived need to loosen regulation of informational materials generally).

⁵³ Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, § 2502, 102 Stat. 1107 (1988); see also *Capital Cities/ABC, Inc. v. Brady*, 740 F.Supp. 1007, 1009 (S.D.N.Y.1990) (emphasizing the informational materials exemption within the Berman Amendment); Tracy J. Chin, *An Unfree Trade in Ideas: How Ofac's Regulations Restrain First Amendment Rights*, 83 N.Y.U. L. REV. 1883, 1891 (2008) (examining the Berman Amendment as creating an informational material exemption to the OFAC's authority).

⁵⁴ See Laura A. Michalec, *Trade with Cuba Under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 *FORDHAM INT'L L.J.* 808, 816-17 (1992) (stressing that the legislative history of Berman Amendment provides that U.S. government "should not prohibit the import of informational materials protected by the First Amendment"); *United States v. Amirnazmi*, 645 F.3d 564, 583 (3d Cir. 2011) (positing that Congress structured the IEEPA to restrict the Executive branch from imposing certain sanctions on trade).

⁵⁵ See Taylor, *supra* note 52, at 307 (indicating that the legislative history alone offers few details about purpose of amendment). *But see Cernuda v. Heavey*, 720 F.Supp. 1544, 1548 (S.D.Fla.1989) (analyzing intent of Berman Amendment based on report from House Committee on Foreign Affairs); Morgan, Lewis & Bockius LLP, *Office of Foreign Assets Control Reviews Activities of Nonprofit Organizations in Sanctioned Countries 2-3* (2007), available at http://www.morganlewis.com/pubs/TaxExempt_LF_ForeignAssets-Nonprofit_31jul07.pdf (discussing Rep. Howard Berman's leadership and intent in passing the Berman Amendment as it pertains to informational materials).

⁵⁶ H.R. REP. NO. 100-40, pt. 3, at 113 (1987). See also *Cernuda*, 720 F. Supp. at 1548 (noting legislative intent of amendment may also be discerned from report by House Committee on Foreign Affairs).

⁵⁷ *United States v. Amirnazmi*, 645 F.3d 564, 584 (3d Cir. 2011).

⁵⁸ *Foreign Assets Control Regulations and Cuban Assets Control Regulations*, 54 Fed. Reg. 5229 (Feb. 2, 1989) (codified at 31 C.F.R. §§ 500.206,

Despite these amendments to IEEPA, OFAC nevertheless continued to take a narrow view of what constituted “informational materials.”⁵⁹ In its updated regulations, OFAC still reserved the right to regulate transactions related to “informational materials not fully created and in existence at the date of the transaction,” as well as those regarding “the substantive or artistic alteration or enhancement of informational materials.”⁶⁰ OFAC also excluded “intangible items, such as telecommunications transmissions” from the definition of “informational materials.”⁶¹

Courts, though, have supported the contention that the Berman Amendment reflects a Congressional response to OFAC’s overly restrictive interpretations of “informational materials.”⁶² In *Capital Cities/ABC, Inc. v. Brady*,⁶³ OFAC denied ABC’s specific license request to broadcast a sporting event from Cuba.⁶⁴ OFAC took a position, in light of the then-enacted Berman Amendment, that the informational material exemption only applied to physical works and did not extend to intangible property like broadcasting.⁶⁵ The United States District Court for the Southern District of New York held that OFAC’s interpretation of the informational material exemption was necessary to avoid a separation of powers problem.⁶⁶ In so holding, the court reasoned that the authority vested in the Executive to conduct foreign affairs could be impermissibly lessened by an overly expansive interpretation of the Berman Amendment.⁶⁷

The *Capital Cities* court further concluded that it was unclear

500.332).

⁵⁹ *Amirnazmi*, 645 F.3d at 584.

⁶⁰ Foreign Assets Control Regulations, *supra* note 58.

⁶¹ *Id.*

⁶² *See Chin*, *supra* note 53, at 1891-94 (identifying the “overall effect” of the two congressional acts as intending to “remove OFAC’s ability to regulate informational materials”).

⁶³ 740 F. Supp. 1007 (S.D.N.Y. 1990).

⁶⁴ *See id.* at 1010 (stating that the specific license request was denied because “the transaction would result in a substantial payment to Cuba, and was therefore contrary to the foreign policy of the United States) (internal quotations omitted).

⁶⁵ *See id.* at 1010-12, 1014-15 (affirming OFAC’s determination that broadcast of the 1991 Pan-American Games from Cuba was not exempted as informational material, thereby deferring to OFAC’s interpretation that informational materials exemption applied only to physical works in existence); *id.* at 1009 (citing the 31 C.F.R. §§ 515.332(b)(2) definition of informational materials as excluding “intangible items such as telecommunications transmissions”).

⁶⁶ *See id.* at 1013 (stating that “the Court must . . . be careful to balance the First Amendment constitutional issues that could arise from deference to the agency’s interpretation against those constitutional issues which may arise if insufficient latitude is given to the Executive in the conduct of foreign affairs”).

⁶⁷ *Id.*

whether OFAC's construction of the Berman Amendment violated the First Amendment and held that the interpretation of informational materials was a reasonable construction of the exemption.⁶⁸ The holding in *Capital Cities* paved the way for further Congressional legislation to shape what "informational materials" encompasses.⁶⁹

*Cernuda v. Heavey*⁷⁰ addressed an early conflict between the OFAC's narrow construction of the Berman Amendment's "informational materials" exemption and congressional initiative to keep "informational materials" broad. Agents of the U.S. Customs Service searched Ramon Cernuda's personal residence and his company's office and seized approximately 200 paintings of apparent Cuban origin.⁷¹ Cernuda's requested that the property be returned because its seizure was unconstitutional.⁷²

OFAC argued that the informational materials exemption did not apply to original artwork because it is not "informational" but merely aesthetic.⁷³ The court rejected the agency's interpretation and ordered Cernuda's property returned.⁷⁴ Agreeing with Cernuda's proposition that art is informational, the court found that artwork is within the ambit of speech receiving First Amendment protection. This further clarified that works of art convey information and, in fact, *are* information.⁷⁵

OFAC contended that art should not be exempted, because the amendment contained no specific exemptions from its prohibitions. The court responded by noting that Congressional intent called for a most "generous reading of the statute" and, thus, that the list seemed exemplary, not exclusionary.⁷⁶ The court noted that the case itself turned on the statutory construction and held that the exhibition or auction of paintings of Cuban origin was protected by the First Amendment and was intended to be exempt from regulation under the Berman Amendment.⁷⁷

Shortly after *Capital Cities* and *Cernuda*, Congress passed the Free Trade in Ideas Amendment of 1994 to clarify and reaffirm

⁶⁸ *Id.* at 1013-15.

⁶⁹ *See id.* at 1014 (holding that agency interpretations must be consistent with the plain language of the interpreted regulation); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 936 (2d Cir. 1986) (ruling that agency interpretations are "upheld only when consistent with the purpose and legislative history of the statute . . . and have a rational basis"); *see also* *Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461, 471 (S.D.N.Y. 1992) (supporting agency interpretation when "easily gleaned" from the plain words of the regulations).

⁷⁰ *Cernuda*, 720 F. Supp. 1544 (S.D. Fla. 1989).

⁷¹ *Id.* at 1546.

⁷² *Id.*

⁷³ *Id.* at 1549.

⁷⁴ *Id.* at 1554.

⁷⁵ *Id.* at 1550-51.

⁷⁶ *Id.* at 1549, 1551.

⁷⁷ *Id.* at 1554.

the legislative intent of the Berman Amendment.⁷⁸ Just as the Berman Amendment was a response to OFAC's overly narrow constructions of "informational materials," the Free Trade in Ideas Amendment represents an initiative by Congress to further limit OFAC's ability to narrowly construct the exemption.⁷⁹ The Free Trade in Ideas Amendment explicitly expanded the informational material exemption in the IEEPA.⁸⁰ The amendment clarified that the exemption applied to importation and exportation in any format or medium of transmission and also included new media types.⁸¹ The cumulative effect of the Berman and Free Trade amendments has been to limit OFAC's ability to regulate informational materials.⁸²

B. *Freedom of Association vs. Material Support*

Section 2339B, which prohibits the provision of material support to SDGTs, does not implicate First Amendment rights. Rather, the statute punishes conduct, not protected speech.⁸³ The

⁷⁸ Free Trade in Ideas Act, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (codified as amended at 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000)).

⁷⁹ See Chin, *supra* note 53, at 1893 (noting the explicit "informational materials" exemption within the Free Trade in Ideas amendment as it relates to Congress's stated intention behind the act to prevent the President from "restrict[ing] travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions, between the United States or any other country").

⁸⁰ See Allan Adler & Marc Brodsky, ASS'N OF AM. PUBLISHERS, INC., *OFAC's Interpretation of IEEPA's "Informational Materials" Exemption* (2004), available at http://www.pspcentral.org/commpublicaffairs/attachPubAff-PubIss/OFAC_background.doc. See also Taylor, *supra* note 52, at 308 (showing that Free Trade in Ideas Amendment was premised on First Amendment).

⁸¹ See *Kalantari*, 352 F.3d at 1205 (discussing how amendment was designed to further broaden the Berman Amendment as a result of narrow and restrictive interpretation by the Treasury Dep't); see also Gregory S. McNeal, *Fighting Back Against Terrorist Web Sites*, 13 J. INTERNET L. 1, 12 (2009) (referencing Conference Report on bill that passed the Free Trade in Ideas Amendment, stating that the language of the Berman Amendment was explicitly intended to have broad scope).

⁸² See Chin, *supra* note 53, at 1893 (quoting 138 Cong. Rec. 15,052 (1992) (statement of Representative Howard L. Berman)) (quoting Representative Berman, sponsor of both Berman Amendment and Free Trade in Ideas amendment, stating that the purpose of acts was to "ensure President's power to regulate economic relations with foreign countries is not used to inhibit communications with the people of those countries").

It is well established that, where the intent of Congress is clear, courts and relevant agencies must give effect to that unambiguously expressed intent. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984) (finding that statutory construction "must reject administrative constructions when contrary to clear congressional intent"); see also *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (holding that "when a statute speaks clearly to the precise question at issue, courts must rule in a way to give effect to the clearly expressed intent of Congress") (internal quotations omitted).

⁸³ See *Boim*, 291 F.3d at 1026 (7th Cir. 2002) (holding that "[c]onduct

Supreme Court has recognized in many contexts that the rights guaranteed by the First Amendment are not absolute.⁸⁴ In fact, in certain contexts, rights guaranteed by the First Amendment must give way to the greater public interest in protecting the citizenry.⁸⁵ Court interpretation has affirmed this understanding.

In *United States v. Hashmi*,⁸⁶ the defendant was charged with conspiracy to provide material support to an FTO in violation of Section 2339B. He was also charged with providing and attempting to provide such support in the form of military gear transported to Pakistan for al Qaeda's use in fighting the United States.⁸⁷ Hashmi argued that the Section 2339B counts should be dismissed because Section 2339B violated the First Amendment freedom of association and, thus, was unconstitutional.⁸⁸ The district court rejected this argument, noting that Hashmi was not accused of simply espousing beliefs of al-Qaeda, which would constitute protected political speech. Instead, he was providing the terrorist group with material support and resources.⁸⁹

In *United States v. Afshari*,⁹⁰ the Ninth Circuit held that Section 2339B does not violate First Amendment free speech rights.⁹¹ The defendants were charged with providing money to Mujahedin-e-Khalq ("MEK"), a designated FTO.⁹² The defendants argued that they sought to express their political views, not by

giving rise to liability under section 2339B . . . does not implicate associational or speech rights"); *see also* 18 U.S.C. § 2339B(i) (stating that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States").

⁸⁴ *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (noting the issue in the case as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use," and finding in the affirmative); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (rejecting idea that "it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities" thereby upholding section 2339B, criminalizing appellant's efforts to provide support to organizations considered by the government to be "foreign terrorist organizations"); *Beard v. Banks*, 548 U.S. 521, 533–35 (2006) (upholding prison regulation that prohibited inmates from having access to magazines, newspapers, or photographs).

⁸⁵ *See* *Marshall v. United States*, 176 F.2d 473, 474 (D.C. Cir. 1949) (concluding that rights guaranteed by the First Amendment are not absolute); *see also* *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (1961) (holding that liberty of speech is not an absolute right).

⁸⁶ *United States v. Hashmi*, 2009 WL 4042841 (S.D.N.Y. Nov. 18, 2009).

⁸⁷ *Id.* at *1.

⁸⁸ *Id.* at *5.

⁸⁹ *See id.* at *7 (holding section 2339B "prohibits the provision of material aid to FTOs like al Qaeda, not any expression, association, or advocacy on their behalf").

⁹⁰ *United States v. Afshari*, 426 F.3d 1150 (9th Cir. 2005).

⁹¹ *Id.* at 1159–62.

⁹² *Id.* at 1152, 1159–60.

supporting terrorism, but by exercising their First Amendment right to contribute money to it.⁹³ As in *Hashmi*, the court rejected this argument, finding that the defendants were not engaged “in anything close to pure speech.” Rather, the money sent to MEK constituted material support furnished to an FTO, not speech warranting First Amendment protection.⁹⁴

The court went on to distinguish the strict scrutiny standard applicable to speech regulations affecting donations to domestic political parties or candidates from the lower standard applicable to prohibitions barring the provision of money to FTOs.⁹⁵ The court reasoned that an FTO’s engagement in politics or espousal of political goals does not imply that all support for the FTO constitutes speech, or that the group achieves its goals purely with speech.⁹⁶ The court further noted that the two donation frameworks regarding domestic political parties and FTOs are incompatible, because an organization cannot be designated as an FTO unless it is foreign. This differentiates and removes domestic associations from the same scheme.⁹⁷

Finally, the case of Javed Iqbal offers as a prime example of how the lack of a specific intent requirement in Section 2339B allows for the prosecution of individuals with no interest or intent in furthering the illegal activity of a designated terrorist group.⁹⁸ Iqbal was an immigrant from Pakistan who had lived in the United States for over 20 years.⁹⁹ He operated a small company out of a Brooklyn storefront and his garage in Staten Island.¹⁰⁰

⁹³ *Id.* at 1159.

⁹⁴ See *id.* at 1156, 1160 (finding “[t]he fact that the support takes the form of money does not make the support the equivalent of speech,” and that “[i]n this context, the donation of money could properly be viewed by the government as more like the donation of bombs and ammunition than speech”).

⁹⁵ *Id.* at 1161.

⁹⁶ *Id.*

⁹⁷ *Id.*; see also *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134-35 (9th Cir. 2000) (finding that “the First Amendment protects the express component of seeking and donating funds, [but] expressive *conduct* receives significantly less protection than pure speech”) (emphasis in original).

⁹⁸ See Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, (Dec. 23, 2008), available at <http://www.nytimes.com/2008/12/24/nyregion/24plea.html> (reporting defendant Javed Iqbal’s guilty plea and circumstances leading up to the deal including attorney arguments); Press Release, United States Attorney Southern District of New York, *Staten Island Satellite TV Operator Pleads Guilty to Providing Material Support to Hizballah TV Station* (Dec. 23, 2008), available at <http://www.justice.gov/usao/nys/pressreleases/December08/iqbaljavedpleapr.pdf>.

⁹⁹ William K. Rashbaum, *Law Put to Unusual Use in Hezbollah TV Case, Some Legal Experts Say*, N.Y. TIMES, (Aug. 26, 2006), available at <http://www.nytimes.com/2006/08/26/nyregion/26hezbollah.html>.

¹⁰⁰ Timothy Williams and William K. Rashbaum, *Man on Staten Island Is*

Iqbal's business, HDTV Ltd., provided satellite television broadcast services to its customers in exchange for subscription fees.¹⁰¹ The satellite services Iqbal's company offered included broadcasts from al-Manar.¹⁰²

Due to al-Manar's designation by OFAC as an SDGT, Iqbal was indicted under 18 U.S.C. § 2339B for providing material support to an FTO.¹⁰³ The government's sentencing memorandum demonstrated that Iqbal knew that al-Manar was controlled by Hezbollah and further knew that Hezbollah had been designated as a foreign terrorist organization by the United States.¹⁰⁴ Iqbal had received numerous warnings about the relationship between al-Manar and Hezbollah and was informed of the designation of al-Manar as an SDGT in March 2006.¹⁰⁵ Nonetheless, Iqbal actively marketed his "Arabic [satellite TV] package," which included a variety of Middle Eastern channels, including al-Manar.¹⁰⁶ Iqbal ultimately pled guilty to only one count and received a sentence of 69 months.¹⁰⁷ SHAM IPTV is run by "experienced individuals" in the "Arabic IPTV industry" and, while it has no demonstrable specific intent to further an SDGT's terrorist agenda, the circumstances surrounding Iqbal's lack of intent and eventual guilty plea indicate that SHAM could easily be subject to a similar indictment.

IV. PROPOSAL

Part IV of this comment suggests an appropriate resolution between the tripartite conflict of OFAC regulations affecting telecommunications, First Amendment freedom of association rights, and § 2339B criminal sanctions. All three issues converge

Charged In Sale of Access to Hezbollah TV, N.Y. TIMES, (Aug. 25, 2006), available at

<http://query.nytimes.com/gst/fullpage.html?res=9E04E3DF103EF936A1575BC0A9609C8B63>.

¹⁰¹ Joseph Goldstein, *Staten Island Man Said To Broadcast Hezbollah Network*, N.Y. SUN, (Aug. 25, 2006), available at <http://www.nysun.com/new-york/staten-island-man-said-to-broadcast-hezbollah/38557/>.

¹⁰² *Id.*; ANTI-DEFAMATION LEAGUE, *supra* note 4.

¹⁰³ Indictment at P 9, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006), available at http://www.investigativeproject.org/documents/case_docs/339.pdf.

¹⁰⁴ See Weiser, *supra* note 98 (stating that Iqbal himself answered in the affirmative when "[t]he judge asked whether Mr. Iqbal knew that Hezbollah had been designated as a foreign terrorist organization by the United States" and if he was aware of Al Manar's relationship to Hezbollah"); Government Sentencing Memorandum at 2, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006), available at

http://www.investigativeproject.org/documents/case_docs/834.pdf.

¹⁰⁵ Government Sentencing Memorandum, *supra* note 104, at 4.

¹⁰⁶ Government Sentencing Memorandum, *supra* note 104, at 4, 6.

¹⁰⁷ Weiser, *supra* note 98.

in the potentially sanctionable conduct of SHAM IPTV. Section A proposes that the OFAC regulations should not extend to cover the exchange of telecommunications and that the al-Manar broadcasts should not be proscribed by this mechanism. Section B argues that the First Amendment provides no safe harbor to SHAM IPTV because only speech, not conduct, is protected. Finally, Section C predicts that, should SHAM IPTV be indicted, it will likely be criminally liable under § 2339B.

A. Validity of Global Terrorism Sanctions Regulations as to Controlling TV Broadcasts

Laws and regulations that go against clear congressional intent will either be struck down by courts as unconstitutional or be forced to undergo revision because they are unconstitutional¹⁰⁸ According to the United States Supreme Court, a court reviewing the validity of an agency's construction of a statute will utilize a two-part test.¹⁰⁹ The first part of the test is to determine whether Congress has spoken to the precise question at issue; if a court ascertains that Congress intended to address the precise question at issue, "that intention is the law and must be given effect."¹¹⁰

The enactment of the Global Terrorism Sanctions Regulations is facially valid through the authority granted by Executive Order 13224 and the IEEPA.¹¹¹ However, by using those regulations to prohibit United States persons from rebroadcasting television, under the guise of providing technical support, OFAC clearly contradicts legislative intent behind the informational material exemptions.¹¹² Juxtaposing precedent cases with Congressional

¹⁰⁸ See, e.g., *United States v. Stevens*, 559 U.S. 460, 462-66 (2010) (holding statute facially invalid under First Amendment protection of speech where statute criminalized creation and sale of media depicting animals being wounded or killed, in a non-cruel manner, while Court concluded Congress had no intent to restrict the creation, sale, or possession of depictions of hunting); *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1565 (D.C. Cir. 1985) (requiring severance of legislative veto provision of Airline Deregulation Act due to unconstitutionality as it was not a vital feature of the legislative intent in creating act to provide for airline employee protection).

¹⁰⁹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (providing framework for judicial review of agency construction of statutes in context of Court of Appeals analyzing EPA regulations).

¹¹⁰ *Id.*; *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973).

¹¹¹ See Daniel S. Meyers, *The Transatlantic Divide over the Implementation and Enforcement of Security Council Resolutions*, 38 CAL. W. INT'L L.J. 255, 277-78 (2008) (outlining sequential delegation of authority ultimately resulting in OFAC enacting Global Terrorism Sanctions Regulations).

¹¹² See Adler and Brodsky, *supra* note 80 (providing that the Free Trade in Ideas and Berman Amendments were unequivocally intended to correct overly narrow and restrictive interpretations by the Treasury Dept., and that they

intent found in the Berman and Free Trade in Ideas amendments, a reviewing court would find impermissible OFAC's use of the Global Terrorism Sanctions Regulations to ban rebroadcast of al-Manar or al-Aqsa television.¹¹³

B. First Amendment: No Quarter

Even without OFAC regulatory power under IEEPA, there is still recourse for barring the problematic action of SHAM IPTV without violating the First Amendment. Courts have expressly and consistently held that funding or supporting terrorism or terrorists does not constitute protected speech.¹¹⁴ Courts have routinely rejected claims by defendants who argue that liability under § 2339B violates the First Amendment.¹¹⁵

The analogous situation in the Iqbal litigation foreshadows a likely conclusion to the SHAM IPTV situation, should the company be criminally indicted.¹¹⁶ Count two of Iqbal's indictment stated that he had unlawfully and knowingly provided "material support or resources," as defined in 18 U.S.C. § 2339A(b), to an FTO.¹¹⁷ The indictment indicated that "satellite television broadcasting services" provided to an FTO sufficiently constituted "material support or resources."¹¹⁸ The court rejected the First Amendment challenges raised by Iqbal. Instead, the court ruled that the prosecution was based on conduct — specifically, that Iqbal had

further limited the President's IEEPA authority to control informational materials).

¹¹³ See *Cernuda*, 720 F. Supp. at 1554 (concluding that expression intended to be protected by the First Amendment and Berman Amendment was exempted and not subject to OFAC regulation).

¹¹⁴ See *Humanitarian Law Project*, 205 F.3d at 1135 (positing that the prohibition of material support is not aimed at interfering with the expressive component of an individual's conduct, but instead at targeting and blocking aid to terrorist organizations); *Boim*, 291 F.3d at 1026 (propounding that "there is no constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorist can purchase weapons and explosives"); *People's Mojahedin Org. of Iran v. Dept. of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (stating that the statute controls conduct and not communication).

¹¹⁵ See *id.* (holding that "[i]t is conduct and not communication that the statute controls."); see also *Boim*, 291 F.3d at 1026 (finding that "[c]onduct giving rise to liability under section 2339B . . . does not implicate associational or speech rights."); *Sattar*, 272 F. Supp. 2d at 367-68 (reasoning that section 2339B did not obstruct defendant's First Amendment rights because objective of material support restriction is not to interfere with the expressive component of defendant's conduct, but instead simply stopping aid to terrorist groups).

¹¹⁶ Government Sentencing Memorandum, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006), available at http://www.investigativeproject.org/documents/case_docs/834.pdf.

¹¹⁷ Indictment, *supra* note 103, at P9.

¹¹⁸ *Id.*

provided material support to a foreign terrorist group — rather than speech.¹¹⁹ The judge opined that he did not think the case revolved around protected speech or advocacy or that the defendants possessed the right to broadcast whatever they pleased.¹²⁰

The Iqbal case is analogous to SHAM IPTV because both involved conduct, not speech. Both Iqbal's company, HDTV Limited, and SHAM IPTV were or are involved in transmitting al-Manar television signals to their paying customers in the United States.¹²¹ SHAM's broadcast of Hezbollah satellite feeds to its American customers' internet TV boxes parallels Iqbal's satellite rebroadcasting of al-Manar.¹²² Just as with Iqbal, a court would reject any suggestion by SHAM IPTV that the packaged Hezbollah television feeds were protected by the First Amendment.¹²³

Therefore, while SHAM's al-Manar television is technically provided by internet and Iqbal had offered the terrorist network's media by satellite, a court would probably still find SHAM to have provided material support to a foreign terrorist organization.¹²⁴

C. § 2339B: End of the Road

Ultimately, by enabling the broadcasting of al-Manar television channels in the United States, SHAM IPTV is in violation of 18 U.S.C. § 2339B(a)(1).¹²⁵ In order to adequately establish the state-of-mind scienter requirement of 2339B, it need only be shown that SHAM IPTV had knowledge of al-Manar's

¹¹⁹ Weiser, *supra* note 98.

¹²⁰ *See id.* (quoting Judge Berman in his ruling as saying: "I don't think the case is about content[.] I don't think it's about protected speech or advocacy. I don't think it's about defendants' right to say what they wish, to write what they wish, to publish what they wish or even to broadcast what they wish. . . [the case is about] whether the defendants ran afoul of legitimate laws designed to help protect against terrorism.").

¹²¹ *Id.*; ANTI-DEFAMATION LEAGUE, *supra* note 4; SHAM IPTV, <http://www.shamiptv.com/channels> (last visited Nov. 13, 2013) (listing al-Manar as offered under its Arabic channels subsection).

¹²² *See* Walter Pincus, *New Yorker Arrested for Providing Hezbollah TV Channel*, WASH. POST, (Aug. 25, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082401461.html> (providing that confidential informant met with Iqbal personally and was offered satellite television service, including access to al-Manar broadcasts, and other Arabic channels); SHAM IPTV, <http://www.iptv.com/All-Channels> (last visited Nov. 13, 2013).

¹²³ *See* Weiser, *supra* note 98 (quoting Judge Berman as stating the case was not about protected speech or advocacy).

¹²⁴ Indictment at P 9, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006), *available at* http://www.investigativeproject.org/documents/case_docs/339.pdf (asserting that satellite television broadcasting services constituted material support or resources).

¹²⁵ 18 U.S.C. § 2339 (2009)(a)(1).

connection to terrorism by one of the three means enumerated in section 2339B(a)(1).¹²⁶ First, it is fairly common knowledge that Hezbollah owns and operates al-Manar, a designated SDGT.¹²⁷ Second, SHAM IPTV has “long experience” in the industry and is managed by “experienced individuals” in the “Arabic IPTV industry.” Finally, both al-Manar and al-Aqsa have been banned in other countries. Because of these indicators, it can be reasonably argued that SHAM knew or had reason to know of Hezbollah and al-Manar’s relationship and designated statuses.¹²⁸

SHAM IPTV’s material support in the form of television broadcasting services does not go directly to Hezbollah, an FTO, but instead to al-Manar, an SDGT. Nonetheless, SHAM may still face criminal liability under Section 2339B for such indirect material support to an FTO.¹²⁹ Indirect liability attaches in circumstances where an entity provides support to an alias or agent of an FTO.¹³⁰ Having held that the requisite relationship for alias status is established where one organization dominates and controls another in such a manner that the latter can no longer be considered meaningfully independent from the former, courts would likely find the relationship between Hezbollah-funded and -

¹²⁶ See *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 46 (D.D.C. 2010) (citing the Supreme Court’s discussion on the state-of-mind requirement, which emphasized that “Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”); see also 18 U.S.C. § 2339 (2009)(a)(1) (providing that “[t]o violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . [or] that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism”).

¹²⁷ See H.R. RES. 1308, 110th Cong. (2008) (describing Hezbollah as a “Foreign Terrorist Organization based in Lebanon and sponsored by Iran and Syria [that] launched the television station al-Manar in 1991 . . . intending to use it as a weapon to further its goals of violently combating the United States”).

¹²⁸ See SHAM IPTV, <http://www.shamiptv.com/why-us> (last visited Apr. 5, 2014) (stating that “SHAM IPTV© is an American company located in New Jersey, founded by experienced individuals who started in the Arabic IPTV industry as resellers for the most well[-]known IPTV companies in the industry. Based on Our [*sic*] long experience, we have seen and analyzed the issues consumers faced with option less alternatives”). See also Toby Dershowitz, *Bahrain blocks Hezbollah’s al Manar television website*, THE LONG WAR J., (Aug. 10, 2013), http://www.longwarjournal.org/archives/2013/08/bahrain_blocks_hezbo.php (listing France, Germany, Spain, the Netherlands, Brazil, Canada, and Australia as nations that have banned al-Manar broadcasts).

¹²⁹ See *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 432 (E.D.N.Y. 2009) (holding that “liability may be found under § 2339B even where support wasn’t provided directly to an FTO”).

¹³⁰ See *id.* (citing *Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152 (D.C. Cir. 2004)) (clarifying the sort of relationships that would justify a transfer of FTO status from one organization to another).

founded al-Manar and SHAM sufficient to substantiate a Section 2339B charge against SHAM.¹³¹ Iqbal's prosecution was based on his provision of a service – satellite television broadcasting – to a designated terrorist organization. He ultimately pled guilty to the count against him alleging provision of material support. Similarly, it is wholly reasonable that SHAM IPTV would be criminally liable under § 2339B for knowingly providing indirect material support to a FTO.¹³²

V. CONCLUSION

SHAM IPTV's potential criminal liability derives from a long line of delegated authority and regulation, beginning with the IEEPA. The broad powers bestowed on the President through the IEEPA to combat terrorism have seen such clever formulation that they can even be applied to ban certain artwork from hanging in American museums. Executive Order 13224's appointment of OFAC and creation of SDGTs further honed the executive's ability to counter terrorism.

¹³¹ See Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152, 157-58 (D.C. Cir. 2004) (stating "it [is] implausible to think that Congress permitted the Secretary to designate an FTO to cut off its support in and from the United States, but did not authorize the Secretary to prevent that FTO from marshaling all the same support via juridically separate agents subject to its control").

¹³² See Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 17-18 (2011) (discussing the Iqbal prosecution as exemplifying the "the possibility of using the offense of providing 'material support' for a terrorist organization with regard to any acts that facilitate the delivery of the messages (by various technologies)").