Notre Dame Law Review

Volume 80
Issue 2 *Competing and Complimentary Rule Systems: Civil Procedure and ADR*

Article 9

1-1-2005

Preventing Terrorism by Prosecuting Material Support

Brian P. Comerford

NOTES

PREVENTING TERRORISM BY PROSECUTING MATERIAL SUPPORT

*Brian P. Comerford**

The most important aspect of the war on terror is the application of the rule of law to break the backs of terrorist organizations.[1]

INTRODUCTION

In the years since September 11, federal prosecutors have intensified their efforts to bring criminal prosecutions as part of the war on terror. An essential tool in these efforts is the material support statute, 18 U.S.C. § 2339B, which prohibits the provision of material support to designated foreign terrorist organizations.

Using the material support statute, the government has charged a number of defendants in the war on terror, including John Walker Lindh and the "Lackawanna Six" defendants. Although often described as a terrorist financing law,[2] recent cases illustrate the importance of the material support statute not just to restrict terrorist fundraising, but to combat all types of support to terrorist organizations. The material support statute is essential to fighting terrorism because it allows prosecutors to act before a terrorist plot has been initiated and eliminate potential terrorist threats.

Critics have challenged the constitutionality of the material support statute on a variety of theories, and some courts have been recep-

* Candidate for Juris Doctor, Notre Dame Law School, 2005; B.S., Computer Science, Cornell University, 2001. I would like to thank Professor Jimmy Gurulé for his comments and suggestions, and the members of the *Notre Dame Law Review* for their hard work on this Note.

1 Ambassador Francis X. Taylor, Speech at Notre Dame Law School (Feb. 2, 2004).

2 *See, e.g.*, *Terrorist Financing*, U.S. ATT'YS BULL. (Executive Office for U.S. Attorneys, Office of Legal Educ., Washington, D.C.), July 2003, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5104.pdf.

tive.[3] The majority of courts, however, have upheld the material support statute in criminal cases against those accused of aiding terrorist organizations.[4]

Despite the controversy that generally surrounds material support prosecutions, courts have largely upheld the statute and have permitted the federal government to go forward with prosecutions of great importance to the war on terror.[5] If the rule of law is to be successful in fighting the war on terror, it is necessary that tools such as the material support statute be available to federal prosecutors in their efforts. Without the material support statute, prosecutors would be unable to combat many terrorist threats. They would be confined to prosecuting acts of, and conspiracies to commit, terrorism. Prosecutors must be equipped with adequate tools to *prevent* acts of terrorism and respond to *all* terrorist threats.

In this Note, I first explain the elements of the material support statute and the process by which terrorist groups are officially designated. I then illustrate how the statute is used and why it is necessary by recounting a recent material support case involving the "Lackawanna Six." Finally, I summarize the reported cases where defendants have challenged § 2339B's constitutionality and attempt to find some common ground among the differing applications of the statute.

I. 18 U.S.C. § 2339B: THE MATERIAL SUPPORT STATUTE

Eighteen U.S.C. § 2339B (the material support statute) prohibits the provision of material support to designated foreign terrorist organizations.[6] The statute was originally enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996[7] (AEDPA), and was

3 *See, e.g.*, Humanitarian Law Project v. United States Dep't of Justice (Humanitarian Law Project III), 352 F.3d 382, 385 (9th Cir. 2003) (holding § 2339B impermissibly vague); United States v. Rahmani, 209 F. Supp. 2d 1045, 1058–59 (C.D. Cal. 2002) (finding the designation statute unconstitutional and holding that no § 2339B prosecution can therefore rely on it as a predicate).

4 *See, e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322, 1343 (M.D. Fla. 2004); United States v. Goba, 220 F. Supp. 2d 182, 193 (W.D.N.Y. 2002); United States v. Lindh, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002).

5 *See, e.g.*, *Al-Arian*, 308 F. Supp. 2d at 1343; *Goba*, 220 F. Supp. 2d at 193; *Lindh*, 212 F. Supp. 2d at 546. In addition, several courts have applied the material support statute in unreported cases. *See Terrorist Financing*, *supra* note 2, at 33 (referring to approximately twenty cases prosecuted under the material support statute).

6 18 U.S.C. § 2339B (2000).

7 Pub. L. No. 104-32, 110 Stat. 1214.

intended to combat terrorist financing and support in the United States.[8]

Under the material support statute, it is unlawful to "knowingly provide[ ] material support or resources to a foreign terrorist organization."[9] "Material support or resources" are defined as

> currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.[10]

A "foreign terrorist organization" is an organization designated as such by the Secretary of State under 8 U.S.C. § 1189 (the designation statute). Under the designation statute, the Secretary of State is authorized to designate a group as a terrorist organization after finding that the group engages in terrorist activity and is a threat to the United States.[11] The designation may be reviewed if challenged by the organization within thirty days.[12]

Although it has been on the books since AEDPA was enacted in 1996, the material support statue was not used until 2002, when the government charged defendants in Charlotte, North Carolina, with funneling the profits of their illegal cigarette smuggling ring to the terrorist group Hezbollah.[13] Since then, prosecutors have charged material support in about twenty criminal cases,[14] including the John Walker Lindh case[15] and the "Lackawanna Six" case.[16]

II. Material Support in Action

The first priority of the government in fighting terrorism is prevention.[17] The material support statute is an essential tool in the war on terror because it allows federal prosecutors to bring a case before

---

8 *Id.* § 301(b), 110 Stat. at 1247.

9 18 U.S.C. § 2339B(a)(1).

10 *Id.* § 2339A(b).

11 8 U.S.C. § 1189(a)(1) (2000).

12 *Id.* § 1189(b)(1). This challenge must be brought within thirty days in the Federal Court of Appeals for the District of Columbia Circuit. *Id.*

13 *See Terrorist Financing, supra* note 2, at 28–29.

14 *Id.*

15 United States v. Lindh, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002).

16 United States v. Goba, 220 F. Supp. 2d 182, 193 (W.D.N.Y. 2002).

17 U.S. Att'y Gen. John Ashcroft, Remarks on FBI Reorganization (May 29, 2002), *available at* http://www.usdoj.gov/ag/speeches/2002/052902agtranscriptsredesigningfbi.htm.

any acts of terrorism have been committed. By allowing prosecutors to act when there is a definite threat of terrorism, but before a terrorist plot is initiated, the material support statute empowers federal prosecutors to *prevent* terrorism and not merely prosecute terrorist acts. To understand the importance of the § 2339B material support statute, it helps to closely examine the facts of an actual § 2339B case. Following is a description of the facts surrounding *United States v. Goba* (the "Lackawanna Six" case), which involved several Muslim men from Lackawanna, a suburb of Buffalo, New York. The men traveled to Afghanistan, trained at an al-Qaeda training camp, returned to the United States, and were subsequently convicted of providing material support to a designated foreign terrorist organization. To appreciate the importance of § 2339B, consider the potential threat posed by the Lackawanna defendants and the inability of other statutes to deal with that threat absent additional evidence that was not available and would have required waiting for the terrorist suspects to take further action.

A. The Lackawanna Defendants

Kamal Derwish was born in Buffalo, New York, in 1973.[18] His family later moved and he was raised in Saudi Arabia.[19] In 1997, the Saudi government deported Derwish for extremist activities[20] and he returned to the Buffalo area.[21] Upon returning, Derwish began preaching a strict form of Islam to the local community of approximately 3000 Yemeni Muslims.[22] Although many Muslims in the community did not agree with his conservative teachings, he found support among a group of young Muslim men,[23] for whom he held regular meetings in his apartment.[24] In the spring of 2000, Derwish recruited some of these young men to make a "religious pilgrimage" abroad.[25]

---

18 James Sandler, *Kamal Derwish: The Life and Death of an American Terrorist*, PBS, Oct. 16, 2003, *at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/derwish.html.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 Jason Felch, *"The Closer": An Al Qaeda Recruiter in the United States*, PBS, Oct. 16, 2003, *at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/juma.html.

24 Sandler, *supra* note 18.

25 *Id.*

In the spring of 2001, Derwish invited Juma al-Dosari (a visiting Imam from a mosque in Bloomington, Indiana) to give a sermon to the local Muslim community in Lackawanna, New York.[26] In his sermon, al-Dosari spoke about the political struggles of Muslims around the world.[27] Al-Dosari's radical message offended leaders of the local Muslim community, but he was welcomed to attend the meetings of Derwish and his followers.[28] Shortly after al-Dosari's arrival, several of Derwish's followers agreed to travel to Afghanistan to attend a military training camp.[29] Sahim Alwan, one of the Lackawanna defendants, would later explain he traveled to the camp because he wanted to see the "warrior part" of Islam—he felt the need to prepare in case he was called to go to war for jihad.[30] Although Alwan denies that he knew about their ultimate destination, several of the Lackawanna men have since admitted that they knew they were traveling to an al-Qaeda training camp.[31]

The men first agreed on a cover story that they were traveling to Pakistan for religious training.[32] The men paid for their plane tickets with cash[33] and then split into two groups for the journey to Afghanistan.[34] The first group (Yasein Taher, Faysal Galab, and Shafal Mosed)[35] flew to Karachi, Pakistan, and traveled to the al-Farooq training camp in Afghanistan a few days later.[36] The second group (Sahim Alwan, Jaber Elbaneh, Mukhtar al-Bakri, and Yahya Goba) flew to Pakistan where they met up with Derwish.[37] After traveling from Pakistan to Afghanistan, two members of this second group, Alwan and Elbaneh, stayed at an al-Qaeda guest house where they met

---

26 Felch, *supra* note 23.

27 *Id.*

28 *Id.*

29 Al-Bakri Plea Agreement at 2, United States v. Goba, 240 F. Supp. 2d 242 (W.D.N.Y. 2002) (No. 02-CR-214-S).

30 Interview by Lowell Bergman with Sahim Alwan, defendant in the Lackawanna case (July 24, 2003) [hereinafter Interview with Sahim Alwan], *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/alwan.html.

31 *Frontline: Chasing the Sleeper Cell* (PBS television broadcast, Oct. 16, 2003).

32 Interview with Sahim Alwan, *supra* note 30.

33 Decision and Order at 15, *Goba*, 240 F. Supp. 2d 242 (No. 02-M-107).

34 Al-Bakri Plea Agreement at 2, *Goba*, 240 F. Supp. 2d 242 (No. 02-CR-214-S).

35 *Chronology: The Lackawanna Investigation*, PBS, Oct. 16, 2003 [hereinafter *Chronology*], *at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/cron.html.

36 Criminal Complaint and Affidavit at 7–10, *Goba*, 240 F. Supp. 2d 242 (02-M-107).

37 *Chronology*, *supra* note 35.

personally with Osama bin Laden.[38] Eventually, both of the Lackawanna groups arrived at the al-Farooq training camp.[39]

Al-Farooq was a terrorist training camp run by al-Qaeda in Afghanistan.[40] When the Lackawanna groups traveled there in 2001, there were approximately 200 men training at the camp.[41] While at the camp, the Lackawanna men were given code names and received training on the use of firearms and explosives.[42] The Lackawanna men joined other al-Farooq trainees to attend speeches given by Osama bin Laden.[43] Although one of the Lackawanna men, Alwan, left the camp after only ten days, the rest continued their training for several weeks.[44] After leaving the camp, the Lackawanna men returned to the United States, with the exception of Derwish and Elbaneh, who remained overseas.[45]

B. The Investigation

While the Lackawanna men were still training at the al-Farooq camp in Afghanistan, the FBI field office in Buffalo, New York, received a hand-written letter from an anonymous individual in the Lackawanna Yemeni community.[46] The letter alleged that several men had traveled to Afghanistan to train with al-Qaeda and meet with Osama bin Laden.[47] The FBI investigated and interviewed some of the Lackawanna men, who denied traveling to Afghanistan and claimed they had traveled to Pakistan for religious training.[48]

Two weeks after September 11, 2001, Juma al-Dosari (who had helped recruit the Lackawanna men) left Buffalo to fight with the Taliban in Afghanistan. Shortly thereafter, he was captured by U.S. forces, detained as an enemy combatant, and transferred to Guantanamo Bay, Cuba.[49] While under interrogation at Guantanamo Bay, al-

38 Alwan Plea Agreement at 2–3, *Goba*, 240 F. Supp. 2d 242 (No. 02-CR-214-S).

39 *Chronology*, *supra* note 35.

40 The al-Farooq training camp has since been destroyed. *See* Phil Hirschkorn, Cable News Network, L.P., *Buffalo Terror Suspect Admits al Qaeda Training*, *at* http://www.cnn.com/2003/LAW/05/20/buffalo.terror (May 20, 2003).

41 Criminal Complaint and Affidavit at 8, *Goba*, 240 F. Supp. 2d 242 (02-M-107).

42 Al-Bakri Plea Agreement at 3, *Goba*, 240 F. Supp. 2d 242 (No. 02-CR-214-S).

43 Alwan Plea Agreement at 3, *Goba*, 240 F. Supp. 2d 242 (No. 02-CR-214-S).

44 *Id.*

45 *See Frontline: Chasing the Sleeper Cell*, *supra* note 31.

46 *See Chronology*, *supra* note 35.

47 *Id.*

48 Criminal Complaint and Affidavit at 5–6, *Goba*, 240 F. Supp. 2d 242 (02-M-107).

49 *See Chronology*, *supra* note 35.

Dosari revealed to federal agents that the Lackawanna men had traveled to a terrorist training camp in Afghanistan.[50]

In the spring of 2002, the FBI intercepted communications between Derwish (the Lackawanna preacher who recruited the Lackawanna men) and several important al-Qaeda figures, including Osama bin Laden's son. This connection between the Lackawanna men and the al-Qaeda hierarchy concerned government investigators, who feared that they had uncovered a sleeper cell awaiting instructions from al-Qaeda.[51] Throughout the summer of 2002, the FBI carefully watched the Lackawanna suspects.[52] They were reluctant to immediately arrest the suspects because delaying "allowed [them] to launch the investigation for a much longer period of time, and hopefully identify other [al-Qaeda] throughout the United States and overseas."[53] During this time, the President was updated on the Lackawanna investigation virtually every day.[54]

Late in the summer of 2002, the CIA intercepted an e-mail sent by al-Bakri (one of the Lackawanna trainees) to his brother.[55] The e-mail, as translated by the FBI, stated:

> How are you, my beloved? God willing, you are fine. I would like to remind you, the next meal will be very huge. No one will be able to withstand it, except for those with faith. There are people here who had visions, and their visions were strong. Their visions were explained that this will be very strong. No one will be able to bear it.[56]

Al-Bakri later admitted to investigators that in this e-mail the "meal" was a code, and referred to "a large explosion that was being planned by al-Qaeda against Americans."[57]

---

50 Interview by Lowell Bergman with Dale Watson, Assistant Director, FBI Counterterrorism Division, in Washington, D.C. (Apr. 29, 2003) [hereinafter Interview with Dale Watson], *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/watson.html.

51 *See Chronology*, *supra* note 35.

52 *Id.*

53 *See* Interview with Dale Watson, *supra* note 50.

54 *Frontline: Chasing the Sleeper Cell*, *supra* note 31 (airing a statement by Director of Homeland Security Tom Ridge).

55 Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, § 1 (Magazine), at 1.

56 Susan Candiotti, Cable News Network, L.P., *Prosecutors: No Bail for Six Accused of Helping al Qaeda*, *at* http://www.cnn.com/2002/LAW/09/18/buffalo.terror.probe/ (Sept. 19, 2002). Al-Bakri's brother, appearing as though he did not understand the code, replied: "Anyway, what meal are you talking about? I swear I don't understand anything. Is it a hamburger meal or what?" Purdy & Bergman, *supra* note 55.

57 Candiotti, *supra* note 56.

Around this time, some at the CIA labeled the Lackawanna group "the most dangerous terrorist group in the United States,"[58] and FBI officials began to worry whether the covert operation could *guarantee* the Lackawanna group was not preparing to launch a terrorist attack.[59] These concerns culminated on the anniversary of the September 11 attacks, when federal authorities decided to take overt action against the men from Lackawanna.[60]

On September 11, 2002, al-Bakri was at his wedding in the Persian Gulf country of Bahrain.[61] At the request of the CIA, al-Bakri was detained by police in Bahrain.[62] During FBI interrogation, al-Bakri identified the other Lackawanna men who had trained in Afghanistan. On September 13, 2002, federal agents in Buffalo, New York, arrested Alwan, Galab, Goba, Mosed, and Taher (the other Lackawanna trainees).[63] They were arraigned on September 14 and charged under § 2339B with providing material support to al-Qaeda. All six of the Lackawanna defendants have since pleaded guilty to providing material support.[64]

Derwish (the preacher who recruited the Lackawanna men) was killed in Yemen when a CIA Predator drone destroyed the car he was traveling in with other suspected al-Qaeda terrorists.[65] Elbaneh (the Lackawanna trainee who remained overseas) was arrested in Yemen in January 2004, and is currently in the custody of Yemeni authorities.[66] Al-Dosari (the al-Qaeda recruiter/Taliban fighter) is reportedly still under detention as an enemy combatant at Guantanamo Bay.[67]

---

58 Purdy & Bergman, *supra* note 55.

59 *See* Interview with Dale Watson, *supra* note 50 (stating that "there are no guarantees in this business").

60 Purdy & Bergman, *supra* note 55.

61 *Id.*

62 *Id.*

63 Dan Herbeck, *Sentencing Debate Rages Over 'Lackawanna Six,'* BUFF. NEWS, Dec. 1, 2003, at A1.

64 *See* Al-Bakri Plea Agreement at 2, United States v. Goba, 240 F. Supp. 2d 242 (W.D.N.Y. 2002) (No. 02-CR-214-5); Alwan Plea Agreement at 1, *Goba*, 240 F. Supp. 2d 242 (No. 02-CR-214-5).

65 *See* Purdy & Bergman, *supra* note 55.

66 Dan Herbeck, *Kin, Officials Sure of Elbaneh Jailing in Yemen*, BUFF. NEWS, Feb. 22, 2004, at C3. The FBI website, however, still lists him as wanted. *See FBI Seeking Information—Jaber A. Elbaneh, at* http://www.fbi.gov/terrorinfo/elbaneh.htm (last visited Jan. 27, 2005).

67 Dan Herbeck, *Fifth Member of Six Gets Seven Years in Prison*, BUFF. NEWS, Dec. 17, 2003, at B1.

C. *The Need for the Material Support Statue*

Consider the options available to the federal government in late summer 2002. Several individuals had confirmed that the Lackawanna suspects secretly traveled to Afghanistan to train with al-Qaeda and meet with Osama bin Laden. The FBI and CIA then intercepted suspicious communications from the Lackawanna suspects raising concerns of a potential terrorist attack. While the government viewed the Lackawanna suspects as a definite terrorist threat, they lacked evidence of a specific terrorist plot and could not successfully charge the group with conspiracy or attempt of a substantive terrorist crime. Without the material support statute, federal prosecutors would have been powerless to incapacitate what they viewed as a definite terrorist threat. The government would have been forced to "wait and see" if the suspects were, in fact, planning to commit a terrorist attack.

Using the material support statute, however, federal prosecutors were able to charge the Lackawanna defendants with providing material support to al-Qaeda. To obtain a conviction, federal prosecutors had to prove only that the defendants had provided this "material support" to al-Qaeda and that al-Qaeda was a designated foreign terrorist organization.[68] Section 2339B allowed federal authorities to take the potentially dangerous Lackawanna defendants into custody—and prevent the possibility of them committing a terrorist attack—based on the limited information available to them. Without this statute, federal officials would have been forced to wait for the Lackawanna defendants to take action and potentially endanger the local community. FBI director Robert Mueller dismissed this "wait-and-see" option, as he explained:

> Do you and the American people want us to take the chance, if we have information where we believe that a group of individuals is poised to commit a terrorist act in the United States that'll kill Americans? Should we take the chance where we believe we have intelligence, we have information, we have evidence, that they're poised to commit an attack, and we just should let it go and wait for the attack, and then conduct our investigation after the fact? I think not. I think the American people expect us to investigate, to develop the intelligence, and to prevent the next attack.[69]

As illustrated by its use in the Lackawanna case, the § 2339B material support statute plays an essential role in the war on terrorism.

---

68 *See* 18 U.S.C. § 2339B (2000).

69 Interview by Lowell Bergman with Robert Mueller, Director of the FBI (Sept. 12, 2003), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/mueller.

By charging defendants under § 2339B, the government can counter the threat of a suspected sleeper cell without waiting for the group to take action (with potentially devastating consequences). Although the material support statute was originally intended to fight terrorist funding, it serves an equally important purpose in allowing federal prosecutors to charge those who support terrorist organizations by other means.

D. A RICO Analogy

One way to understand the need for the material support statute in fighting terrorism is to analogize it to the federal RICO laws. The Racketeer Influenced and Corrupt Organizations (RICO) statute was passed as Title IX of the Organized Crime Control Act of 1970.[70] Prior to the passage of RICO, prosecutors were unable to effectively combat the mob.[71] Organized crime groups were involved in narcotics trafficking, illegal gambling, prostitution, extortion, public corruption, and many other criminal offenses. While there were statutes prohibiting each of these criminal acts, prosecutors could generally only convict the low-level mobsters who committed these acts and not the upper-level kingpins who managed and profited from the criminal activity.[72] If convicted, these low-level offenders were quickly replaced and the organized crime group continued with little disruption.[73] RICO solved this problem by criminalizing the organized crime group itself. Under RICO, federal prosecutors could join all of the defendants in a criminal organization and try them for conducting an enterprise through a pattern of racketeering activity.[74] RICO responded to an evolved form of crime that traditional laws were inadequate to handle.

Like RICO, the material support statute also responds to an evolved form of crime: terrorism. Terrorism is different from traditional crime because it is uniquely destructive and the perpetrators often do not live to be punished. Any response to terrorism must focus on prevention of future terrorist acts. If terrorism were a typical crime, the government might consider preventing terrorism through deterrent measures, such as tougher penalties and stricter enforce-

70 Pub. L. No. 91-452, 84 Stat. 922 (1970).

71 *See* Benjamin Scotti, Comment, *RICO vs. 416-BIS: A Comparison of U.S. and Italian Anti-Organized Crime Legislation*, 25 LOY. L.A. INT'L & COMP. L. REV. 143, 147–50 (2002).

72 *Id.*

73 *Id.*

74 *See* 18 U.S.C. § 1962(c) (2000).

ment. Terrorists, however, cannot be deterred; if an offender is willing to die for his actions, no fear of punishment will discourage him. The only option is to incapacitate terrorists *before* a plot has been initiated and *before* members of the public are harmed. Statutes that merely criminalize terrorist acts are inadequate because they target completed crimes. Prohibiting attempt and conspiracy to commit terrorist acts is only marginally better because the public is put at great risk when prosecutors wait until an act of terrorism is sufficiently close to commission. The only acceptable response to terrorism is to criminalize *support* of the terrorist group. This allows prosecutors to act when an offender trains with, joins, and potentially lies in wait for instructions from, a foreign terrorist organization.

III. CHALLENGES TO 18 U.S.C. § 2339B

Federal prosecutions under the material support statue have been highly controversial. Academic commentators and defense lawyers have lodged serious challenges to the material support statute and the corresponding designation statute (8 U.S.C. § 1189). Their arguments have included challenges for vagueness and overbreadth in violation of the First and Fifth Amendments, challenges that the statute imposes guilt by association, challenges that the statutes violates due process by not requiring personal guilt and not providing for meaningful review of designation, and finally challenges that prosecution under § 2339B violates the Geneva Convention. Although some challenges have been successful, courts have upheld § 2339B in cases where the government is prosecuting defendants for providing substantial support to a foreign terrorist organization. Following is a detailed analysis of these challenges and how courts have reacted to them in recent § 2339B cases.

A. Does § 2339B Impose Guilt by Association in Violation of the First Amendment?

Academics and criminal defendants have challenged § 2339B on the grounds that it imposes guilt by association in violation of the First Amendment. Some have even likened the law to the anti-Communist legislation of the McCarthy era.[75] The government has responded

75 David Cole, Editorial, *Fight Terrorism Fairly*, N.Y. TIMES, Oct. 19, 2002, at A17; Interview by Lowell Bergman with David Cole, Professor, Georgetown University Law Center (Sept. 12, 2003), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/cole.html.

> The material support for terrorist organization statute, which the Lackawanna people were, pled guilty to, is an extremely broad statute. In my

that the law does not criminalize *association with*, but rather *support of*, terrorist organizations.[76]

While the Supreme Court has recognized that the First Amendment protects the right to associate, "[n]either the right to associate nor the right to participate in political activities is absolute."[77] The Court has explained that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[78]

1. *United States v. Lindh*[79]

In *Lindh*, the defendant, John Walker Lindh, challenged his § 2339B indictment on the ground that it violated his First Amendment right to freedom of association.[80] Lindh's argument was essentially that he had a constitutional right under the First Amendment to associate with foreign groups and that the § 2339B indictment infringed on this right.[81] The court easily dispensed of this argument, stating:

> Lindh is not accused of merely associating with a disfavored or subversive group whose activities are limited to circulating inflammatory political or religious material exhorting opposition to the government. Far from this, Lindh is accused of joining groups that

---

> view, it's essentially a resurrection of guilt by association, the watchword of the McCarthy era. . . . The government does not have to show that the individual intended to further any terrorist activity in the organization. They don't have to show any link between what the individual did and any terrorist or otherwise violent action of the recipient group.

Id.

76 Interview by Lowell Bergman with Alice Fisher, Deputy Assistant Attorney General (June 30, 2003) (explaining that the Lackawanna case was more than mere association), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/fisher.html.

> Well, it's not their association with an organization alone. You have to look at all the facts that they pled guilty to. And in this case they left America, they went abroad, they trained in Al Qaeda camp, which they knew to be an Al Qaeda camp. They watched videos of the Al Qaeda attack on the USS Cole, which killed many of our soldiers. They listened to bin Laden. They talked about attacks on America. And then they came back.

Id.

77 Buckley v. Valeo, 424 U.S. 1, 25 (1976) (quoting United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973)).

78 *Buckley*, 424 U.S. at 25 (internal quotation marks omitted).

79 212 F. Supp. 2d 541 (E.D. Va. 2002).

80 *Id.* at 569–70.

81 *Id.* at 569.

> do not merely advocate terror, violence, and murder of innocents; these groups actually carry out what they advocate and those who join them, at whatever level, participate in the groups' acts of terror, violence, and murder.[82]

The court concluded by holding that the First Amendment guarantee of free association does not extend to providing material support to designated foreign terrorist organizations.[83]

2. Humanitarian Law Project

In the *Humanitarian Law Project* line of cases, the plaintiffs—legal and social service organizations—sought to provide funding and legal counseling to "the non-violent humanitarian and political activities" of two designated foreign terrorist organizations.[84] Fearing criminal liability if this aid was considered material support under § 2339B, the plaintiffs sued to enjoin the Justice Department from enforcing § 2339B against them.[85] In *Humanitarian Law Project I*,[86] the plaintiffs argued for an injunction on the theory that § 2339B imposed guilt by association in violation of the First Amendment.

The *Humanitarian Law Project I* court dismissed the plaintiffs' argument that § 2339B imposed guilt by association. The court clarified that "[§ 2339B] only limits the permissible *ways* in which Plaintiffs can associate with [designated foreign terrorist organizations], rather than punishing Plaintiffs' ability to exercise their First Amendment right to associate with [designated foreign terrorist organizations] altogether."[87] The court further reasoned that the government had a substantial interest in maintaining national security, and that § 2339B restricted conduct no more than was necessary to protect that interest.[88] The court concluded § 2339B was not an unconstitutional limitation on the First Amendment freedom of association.[89]

To summarize, although "guilt by association" is a popular criticism of § 2339B, it has not been effective in practice. Courts have been unwilling to characterize § 2339B as criminalizing mere associa-

---

82 *Id.*

83 *Id.* at 569–70.

84 Humanitarian Law Project III, 352 F.3d 382, 385 (9th Cir. 2003).

85 *Id.*

86 Humanitarian Law Project v. Reno (Humanitarian Law Project I), 9 F. Supp. 2d 1205 (C.D. Cal. 1998).

87 *Id.* at 1212.

88 *Id.*

89 *Id.* at 1212–13.

tion with a designated terrorist group.[90] Furthermore, to the extent that § 2339B does implicate First Amendment association rights, courts have found that § 2339B serves a substantial government interest in protecting national security and is sufficiently tailored to that interest.[91] Despite condemnation by civil libertarians,[92] § 2339B has effectively withstood the challenge that it imposes guilt by association in violation of the First Amendment.

B. Is § 2339B Impermissibly Vague in Violation of the First and Fifth Amendments?

Another common criticism of § 2339B is that it is unconstitutionally vague in violation of the First and Fifth Amendments. Critics have specifically pointed to the prohibitions on providing support in the forms of "personnel," "training," and "communications equipment," arguing that the terms are so vague that a defendant does not have fair notice of what conduct is criminalized and what conduct is not.

In explaining the reasoning behind a vagueness challenge, the Supreme Court has stated: "Because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[93] Courts have held that this requirement of sufficient clarity derives from the Due Process Clause of the Fifth Amendment.[94] (The First Amendment is implicated when the law is so vague that it threatens the exercise free speech or association.)[95]

---

90 *See, e.g.*, United States v. Lindh, 212 F. Supp. 2d 541, 569 (E.D. Va. 2002) (recognizing that acts by the defendant were beyond mere association).

91 *Humanitarian Law Project I*, 9 F. Supp. 2d at 1212.

92 *See* Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15. ("Civil libertarians and defense lawyers . . . are increasing their criticism of [§ 2339B] and the [Justice] department's aggressive use of it, saying the prosecutions smack of a McCarthylike notion of guilt by association.").

93 Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

94 United States v. Makowski, 120 F.3d 1078, 1080 (9th Cir. 1997).

95 *Vill. of Hoffman Estates*, 455 U.S. at 498–99 ("Perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.").

1. *Humanitarian Law Project*

Several courts have considered vagueness challenges to § 2339B. In the *Humanitarian Law Project* line of cases, the plaintiffs sought a preliminary injunction barring the enforcement of § 2339B on the grounds that it was impermissibly vague. The district court (in *Humanitarian Law Project I*) granted the plaintiffs' motion, and enjoined the Justice Department from enforcing § 2339B against the named plaintiffs.[96] The court held that the "[p]laintiffs [had] demonstrated a [probability] of success on the merits and irreparable injury based on their claim that [§ 2339B] is impermissibly vague because it fails to provide adequate notice as to what constitutes 'material support or resources.'"[97] The court further reasoned that the terms "personnel" and "training" were not sufficiently clear to give fair notice to of what conduct was prohibited. The court elaborated that it was uncertain whether § 2339B would extend to the type of support plaintiffs sought to provide, namely distribution of literature and training in international human rights law.[98]

In *Humanitarian Law Project II*,[99] the Justice Department appealed the district court injunction to the Ninth Circuit Court of Appeals. On the issue of vagueness, the government urged the court to construe the "personnel" prohibition to require an element of direction or control. The court rejected this construction, holding: "While we construe a statute in such a way as to avoid constitutional questions . . . we are not authorized to rewrite the law so it will pass constitutional muster."[100] The court also upheld the district court's holding with respect to the "training" prohibition—explaining that "training" was so vague as to possibly encompass counseling on international human rights law. The court explained (and perhaps instructed), however, that there would not be a vagueness problem if the term were limited to "military training or training in terrorist activities."[101]

2. *United States v. Lindh*

In *Lindh*, the defendant, John Walker Lindh, challenged his § 2339B indictment on the ground that § 2339B was unconstitutionally vague with respect to the meaning of "personnel." To make this

96 *Humanitarian Law Project I*, 9 F. Supp. 2d at 1204–05 & n.31.

97 *Id.* at 1213.

98 *Id.*

99 Humanitarian Law Project v. Reno (Humanitarian Law Project II), 205 F.3d 1130 (9th Cir. 2000).

100 *Id.* at 1137–38.

101 *Id.* at 1138.

argument, Lindh relied heavily on the *Humanitarian Law Project II* holding discussed above.[102] The *Lindh* court explained the plain meaning of "personnel" to be "an employment or employment-like relationship between the persons in question and the terrorist organization."[103] In so doing, the *Lindh* court rejected the analysis of *Humanitarian Law Project II*, reasoning that § 2339B was aimed at stopping terrorist groups from obtaining human resources and not the "independent advocacy" of an organization's agenda.[104] The court concluded that § 2339B gave fair notice of what conduct was prohibited, and was therefore not unconstitutionally vague.[105]

3. The Lackawanna Case: *United States v. Goba*[106]

In *Goba*, (the Lackawanna case discussed in Part I), the defendants challenged their § 2339B indictment for vagueness and argued that the district court should follow the holding of *Humanitarian Law Project II*, specifically that §2339B was unconstitutionally vague with respect to its prohibition on the provision of personnel. The government responded by citing the holding in *Lindh* (which rejected *Humanitarian Law Project II*'s finding of vagueness).[107] The court distinguished *Humanitarian Law Project II* from *Lindh* on the basis that the former was a civil case seeking injunctive relief, while the latter involved a criminal prosecution for a § 2339B violation.[108] Finding the *Lindh* precedent more compelling, the *Goba* court rejected the defendants' argument that § 2339B was unconstitutionally vague.[109]

4. *United States v. Sattar*[110]

In *Sattar*, the government charged the defendants under § 2339B for providing a "communications pipeline" for the imprisoned Sheikh Abdel Rahman (convicted for the 1993 World Trade Center bombing).[111] The defendants—including Lynne Stewart, Sheikh Abdel Rahman's lawyer—had allegedly transmitted messages in the form of phone calls and press statements from the Sheikh to members of

102 *See* United States v. Lindh, 121 F. Supp. 2d 541, 573 (E.D. Va. 2002).
103 *Id.* at 574.
104 *Id.*
105 *Id.*
106 220 F. Supp. 2d 182 (W.D.N.Y. 2002).
107 *Id.* at 194.
108 *Id.* at 193–94.
109 *Id.* at 194.
110 272 F. Supp. 2d 348 (S.D.N.Y. 2003).
111 *Id.* at 352–53.

Gama'a al-Islamiyya, a designated foreign terrorist organization.[112] The defendants challenged § 2339B on the ground that it was unconstitutionally vague in violation of the First Amendment,[113] specifically the prohibitions on providing material support in the form of "communications equipment" and "personnel."[114]

First, the *Sattar* defendants challenged on vagueness grounds § 2339B's prohibition on the provision of "personnel."[115] The *Sattar* court rejected the *Lindh* precedent and found that it was *not* sufficiently clear from the text of the statute what exactly constituted provision of personnel. Specifically, the *Sattar* court was troubled by the constitutional implications if "provision of personnel" extended to include a lawyer acting on behalf of her client—in this case Lynne Stewart acting on behalf of her client Sheikh Abdel Rahman, the leader of a foreign terrorist organization.[116] The court was concerned that in the absence of clear statutory limits on what conduct was criminalized, the standards would be left to be developed by the government.[117]

Second, with respect to the prohibition on providing material support in the form of communications equipment, the *Sattar* court considered the legislative history of § 2339B and found that Congress did not intend for simply making a telephone call to be criminalized under § 2339B.[118] Therefore, "by criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application."[119] The court criticized the government for "evolving" its definition of "communications equipment" throughout the case, and stated that this evolution illustrated the lack of prosecutorial standards alleged in a vagueness challenge.[120] The *Sattar* court held that § 2339B was void for vagueness as applied to the prohibition on providing material support in the form of "personnel" and "communications equipment."[121]

5. Reconciling the Contrary Holdings on Vagueness

As illustrated above, the litigation as to whether § 2339B is impermissibly vague in violation of the Constitution has been extensive.

112 *Id.* at 356–57.
113 *Id.* at 356.
114 *Id.*
115 *Id.* at 358.
116 *Id.* at 359.
117 *Id.* at 359–60.
118 *Id.* at 357–58.
119 *Id.* at 358.
120 *Id.*
121 *Id.* at 361.

Courts have differed on how the terms "personnel," "training," and "communications equipment" should be viewed. The *Goba* and *Lindh* courts have been willing to construe § 2339B such that it is constitutional. (Specifically, they have interpreted "personnel" as meaning an employment or employment-like relationship.) The *Humanitarian Law Project* and *Sattar* courts, however, have held that § 2339B's prohibitions fail to give a defendant fair notice of what conduct is criminalized and what is not.

One could argue that the distinction in these cases has less to do with the law than with the facts surrounding the particular parties. The *Goba* and *Lindh* defendants were accused of traveling to the Middle East and training at al-Qaeda terrorist camps. In contrast, the plaintiffs in *Humanitarian Law Project* were social service organizations seeking to provide funding and counseling to the humanitarian and political activities of a designated organization. Likewise, the defendants in *Sattar* were accused only of passing messages—via press releases and phone calls—from an imprisoned sheikh to a designated organization. Critics may contend that these cases differ solely because of the publicity that surrounded the *Goba* and *Lindh* cases and public opinion that the defendants in these cases posed a real terrorist threat. Given this public awareness and perception, these critics may assume that the *Goba* and *Lindh* courts were unwilling to recognize any constitutional challenges to the validity of the statue.

There is, however, a more legitimate way to distinguish the contrary holdings on vagueness. The Supreme Court has explained that a more stringent standard of vagueness should apply where constitutionally protected rights are threatened.[122] The *Humanitarian Law Project* and *Sattar* courts were concerned with the threatening of particular constitutional rights in the context of the individual cases. In *Humanitarian Law Project*, the court was concerned that § 2339B could extend to criminalize counseling on human rights law—presumably in violation of the First Amendment.[123] Likewise, in *Sattar*, the court was concerned that § 2339B could prohibit serving as counsel to a member of a terrorist organization in a criminal case.[124] In contrast, the defendants in *Goba* and *Lindh* could not successfully argue the existence of a constitutional right protecting their participation in and support of a terrorist organization.

122 Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

123 Humanitarian Law Project II, 205 F.3d 1130, 1138 (9th Cir. 2000).

124 *Sattar*, 272 F. Supp. 2d at 359.

Because the *Humanitarian Law Project* and *Sattar* courts found constitutionally protected rights were threatened by the application of § 2339B to their defendants, they applied a more stringent standard of vagueness than the *Goba* and *Lindh* courts. Under a more stringent standard, and in light of potential criminalization of constitutionally protected conduct, the *Humanitarian Law Project* and *Sattar* courts justifiably found vagueness. In contrast, the *Goba* and *Lindh* defendants could not successfully argue that their conduct was constitutionally protected, and thus the more lenient standard for vagueness applied. Under that more lenient standard, the *Goba* and *Lindh* courts found a clear application where § 2339B was not impermissibly vague—specifically the provision of personnel by participating in a terrorist training camp—and found no impermissible vagueness.[125]

C. *Is § 2339B Unconstitutionally Overbroad?*

Some defendants have challenged § 2339B on the theory that it is unconstitutionally overbroad. A statute is void for overbreadth if it prohibits a broad range of constitutionally protected conduct.[126] The Supreme Court has held that to succeed in a facial challenge for overbreadth "'it is not enough for a plaintiff to show "some" overbreadth.'. . . Rather, 'the overbreadth of a statute must not only be real, but substantial as well.'"[127]

1. *United States v. Lindh*

In *Lindh*, the defendant, John Walker Lindh, raised the defense that section § 2339B was unconstitutionally overbroad in its prohibition on the provision of "personnel."[128] Lindh argued that the prohibition against providing "personnel" encompassed a substantial amount of conduct constitutionally protected under the First Amendment freedom of association. The court dismissed Lindh's overbreadth challenge, holding that when "personnel" was construed to mean employees or quasi-employees, there was no legitimate danger of infringing upon the First Amendment freedom of association.[129]

125 *See* United States v. Goba, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002); United States v. Lindh, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002).

126 Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984).

127 Ashcroft v. ACLU, 535 U.S. 564, 584 (2002) (internal citations omitted) (quoting Reno v. ACLU, 521 U.S. 844, 896 (1997); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

128 *Lindh*, 212 F. Supp. 2d at 572.

129 *Id.* at 573.

2. *United States v. Sattar*

In *Sattar*, the defendants asserted that § 2339B was unconstitutionally overbroad in violation of the First Amendment, particularly with respect to the prohibitions on providing material support in the form of "communications equipment" and "personnel."[130] The *Sattar* court applied the substantial overbreadth standard after finding that the statute was aimed not at regulating speech, but conduct.[131] Finding that Congress had a legitimate interest in prohibiting terrorist fundraising, the *Sattar* court rejected the defendants' overbreadth challenges.[132]

Due to the difficulty in establishing substantial overbreadth and Congress's strong interest in stopping terrorist funding and protecting national security, defendants have not successfully argued that § 2339B is unconstitutionally overbroad. In addition, the Justice Department has exercised caution in bringing material support of terrorism cases. Like RICO prosecutions (which must withstand an extensive approval process to avoid the development of overly restrictive case law that could result from the prosecution of constitutionally suspect cases),[133] charges under § 2339B must receive approval from the Justice Department's Counterterrorism Office prior to being prosecuted.[134] By cautiously selecting § 2339B cases, the government has ensured the viability of the material support statute against arguments that it is unconstitutionally overbroad.

D. Does the Material Support Statute Violate the Fifth Amendment by Not Requiring Proof of Personal Guilt?

Several defendants have argued that § 2339B violates the Fifth Amendment because it does not require the government to prove an element of personal guilt.[135] The Supreme Court considered the issue of personal guilt in *Scales v. United States*.[136] In *Scales*, the defendant was charged with violating the membership clause of the Smith

130 United States v. Sattar, 272 F. Supp. 2d 348, 361–62 (S.D.N.Y. 2003).

131 *Id.* at 362 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

132 *Id.*

133 ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS 217–19 (2000), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf.

134 U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-91.100 (2001), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/91mcrm.htm.

135 *See, e.g.*, Humanitarian Law Project III, 352 F.3d 382 (9th Cir. 2003); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

136 367 U.S. 203, 205 (1961).

Act,[137] which criminalized knowing membership in an organization which advocated the overthrow of the U.S. government—specifically the Communist Party.[138] The Court, finding an implied intent requirement in the statute,[139] upheld the constitutionality of the Smith Act's membership clause.[140] The Court reasoned that a defendant who "actively and knowingly works in the ranks of [an] organization" to promote the criminal ends of that organization is no more immune from prosecution than a defendant who actually carries out the substantive criminal acts of the organization.[141]

1. *Humanitarian Law Project*

The Ninth Circuit relied on the *Scales* opinion in *Humanitarian Law Project III*.[142] The plaintiffs challenged the constitutionality of the material support statute, alleging in part that it violated the Fifth Amendment Due Process Clause's requirement of proof of personal guilt.[143] The Ninth Circuit stopped short of addressing this constitutional challenge by construing § 2339B "to require proof that a person charged with violating the statute had knowledge of the organization's designation or knowledge of the unlawful activities that caused it to be so designated."[144]

To reach this construction, the Ninth Circuit relied on the *Scales* opinion. The Ninth Circuit reasoned that it was constitutional to infer a defendant's guilty intent where the defendant had knowledge of the organization's criminal activities or designation as a foreign terrorist organization.[145] Thus, by construing the statute to require knowledge of the foreign terrorist organization's designation or terrorist activities, the Ninth Circuit satisfied the *Scales* requirement of knowledge.[146]

---

137 18 U.S.C. § 2385 (2000).

138 *Scales*, 367 U.S. at 205. Scales also challenged his conviction on the theory that membership in the Communist Party was constitutionally protected speech under the First Amendment. The Court rejected this argument, citing *Dennis v. United States*, 341 U.S. 494, 516 (1951), and reaffirming that this type of advocacy was not constitutionally protected speech. *Scales*, 267 U.S. at 228–29.

139 *Id.* at 221–22.

140 *Id.* at 228.

141 *Id.* at 226–27.

142 352 F.3d 382 (9th Cir. 2003).

143 *Id.* at 385.

144 *Id.*

145 *Id.* at 394–95.

146 *Id.*

The Ninth Circuit held that such a construction was necessary where the statute criminalized "knowingly" providing material support to a designated foreign terrorist organization.[147] Without this construction,

> a woman who buys cookies from a bake sale outside of her grocery store to support displaced Kurdish refugees to find new homes could be held liable so long as the bake sale had a sign that said that the sale was sponsored by the [Kurdistan Workers Party, a designated foreign terrorist organization] without regard to her knowledge of the [group's] designation or other activities.[148]

2. *United States v. Al-Arian*[149]

In *Al-Arian*, the court reviewed the *Humanitarian Law Project III* holding and found that more construction was necessary for § 2339B to conform to the Constitution.[150] The court reasoned that the construction in *Humanitarian Law Project III* failed to comply with the Supreme Court's holding in *United States v. X-Citement Video, Inc.*[151] that a mens rea should apply to each element of the offense.[152] Accordingly, the *Al-Arian* court construed § 2339B such that "knowingly" applied to both the terrorist organization element (which was the construction in *Humanitarian Law Project III*) and the material support element.[153]

The court explained that requiring a mens rea for material support resolved not only the personal guilt problem, but also vagueness

---

147 *Id.* at 402–03.

148 *Id.* at 402.

149 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

150 *Id.* at 1339.

151 513 U.S. 64 (1994).

152 *Al-Arian*, 308 F. Supp. 2d at 1337.

153 *Id.* at 1338–39. The *Al-Arian* court specifically stated this construction as requiring the following:

> [T]o convict a defendant under Section 2339B(a)(1) the government must prove beyond a reasonable doubt that the defendant knew that: (a) the organization was a [Foreign Terrorist Organization] or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was "material support." To avoid Fifth Amendment personal guilt problems, this Court concludes that the government must show more than a defendant knew something was within a category of "material support" in order to meet (b). In order to meet (b), the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.

Id.

problems.[154] (The court presumably reasoned that if a prosecutor proved a defendant *knew* his conduct was "material support," that defendant could not then establish that "material support" was so vague it was unclear what conduct was included within the term.)

3. The Conflicting Constructions

The *Al-Arian* court held that *Humanitarian Law Project III* did not go far enough in applying the "knowledge" requirement to the elements of § 2339B. *Al-Arian* attempted to correct this problem by holding that the government must establish (1) that the defendant "*knew* . . . what he was furnishing was material support" and (2) that the defendant "had a *specific intent* that the support would further the illegal activities of a [foreign terrorist organization]."[155] The *Al-Arian* court justified this construction by relying on *X-Citement Video*.

In *X-Citement Video*, the Supreme Court held that the term "knowingly" should apply to both elements of an obscenity law (those elements being the age of performers and the explicit nature of the material).[156] *X-Citement Video* did *not* require a specific intent be applied to those elements. By requiring that the government prove a specific intent on the part of a defendant to "support the illegal activities" of a designated foreign terrorist organization, the *Al-Arian* court went too far in its construction. Under the *X-Citement Video* analysis, all that is required is that the defendant have *knowledge*, not specific intent.

In contrast to *Al-Arian*, the *Humanitarian Law Project III* court saw no need to construe the "providing material support" portion of the statute because the "knowingly" element was already included. Section 2339B clearly states that "[w]hoever . . . *knowingly provides material*

154 *Id.* at 1339. Curiously, the court thought it would not be difficult for a prosecutor to establish a defendant's knowledge that particular conduct was material support:

> Often, such an intent will be easily inferred. For example, a jury could infer a specific intent to further the illegal activities of a FTO when a defendant knowingly provides weapons, explosives, or lethal substances to an organization that he knows is a FTO because of the nature of the support. Likewise, a jury could infer a specific intent when a defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses. That is, by its nature, money carries an inherent danger for furthering the illegal aims of an organization.

Id.

155 *Id.* at 1339.

156 *X-Citement Video*, 513 U.S. at 78.

support or resources to a foreign terrorist organization" falls under the proscription of § 2339B.[157] If the term "knowingly" was not intended to apply to the provision of material support, then why is it in the statute?

The *Al-Arian* holding imposes an unnecessary specific intent element on § 2339B. While the *Al-Arian* court is confident this intent will usually be "easily inferred,"[158] this is uncertain and the construction is an unwarranted limitation on the legislation Congress intended.

E. Does the Designation Statute (8 U.S.C. § 1189) Violate the Due Process Clause by Failing to Provide for Meaningful Review?

Before a defendant can be prosecuted for providing material support to a designated foreign terrorist organization, that organization must be designated as such by the Secretary of State.[159] Some defendants have challenged § 2339B prosecutions by collaterally attacking the designation process as unconstitutional and arguing that because of that constitutional defect, designation cannot serve as a predicate to the § 2339B offense.

1. *United States v. Rahmani*[160]

In *Rahmani*, the government charged multiple defendants with conspiracy to provide material support to the Mujahedin-e Khalq (MEK), a designated foreign terrorist organization.[161] The government alleged that the defendants had raised money for and made donations to MEK in violation of § 2339B.[162] The defendants challenged the constitutionality of their indictment on the ground that the designation of MEK as a foreign terrorist organization under 8 U.S.C. § 1189 violated the Fifth Amendment Due Process Clause and could therefore not be used as a predicate in their case.

The defendants faced several obstacles in contesting the constitutionality of MEK's designation as a foreign terrorist organization. First, the government argued that by the terms of the designation statute, only the United States Court of Appeals for the District of Columbia (or the United States Supreme Court) could review the

157 18 U.S.C. § 2339B (a)(1) (2000).

158 *Al-Arian*, 308 F. Supp. 2d at 1339–40.

159 For an explanation of the statutory designation scheme, see *supra* text accompanying notes 11–12.

160 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

161 *Id.* at 1047.

162 *Id.*

constitutionality of a designation under § 1189.[163] The *Rahmani* court, however, reasoned that while § 1189 *provided* for an organization to review its designation in the Court of Appeals for the District of Columbia Circuit, the statute did not expressly *preclude* consideration of the issue in the other federal courts.[164] To support this reasoning, the *Rahmani* court cited to the *Johnson v. Robison*[165] principle that a statute restricting access to judicial review must do so by "clear and convincing evidence of Congressional intent to impose such a restriction."[166] Therefore, the *Rahmani* court held it could properly consider the constitutionality of a designation under § 1189.[167]

The second obstacle for defendants was the express language of § 1189 precluding the use of "unconstitutional designation" as a defense. Specifically, § 1189 provides: "If a designation under this subsection has become effective . . . 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."[168]

The *Rahmani* court rejected this limitation, and refused to "turn a blind eye to the Constitutional infirmities of § 1189 when it supplies a necessary predicate to the charged offense."[169] The court further held that § 1189 was an impermissible restriction on the court's ability to consider constitutional challenges.[170]

The *Rahmani* court was now prepared to consider the defendants' argument that designation of the MEK as a foreign terrorist organization violated due process and therefore could not serve as the predicate to a § 2339B indictment. The court considered the procedures specified in § 1189 for judicial review of a designation—specifically that any review was based solely on the record compiled by the State Department and that the designated organization had no right to notice or participation in the review. The *Rahmani* court held that because an organization designated under § 1189 had no opportunity to participate in meaningful review of the designation, *any* designation under § 1189 violated Due Process and § 1189 was unconstitutional on its face.[171]

---

163 *See* 18 U.S.C. § 1189(b)(1) (2000).
164 *Rahmani*, 209 F. Supp. 2d at 1053.
165 415 U.S. 361 (1974).
166 *Rahmani*, 209 F. Supp. 2d at 1053 (citing *Johnson*, 415 U.S. at 373–74).
167 *Id.* at 1053.
168 18 U.S.C. § 1189(a)(8) (2000).
169 *Rahmani*, 209 F. Supp. 2d at 1054.
170 *Id.* at 1054.
171 *Id.* at 1058.

The *Rahmani* court concluded that because the designation of MEK as a foreign terrorist organization was unconstitutional, that designation could not function as the predicate for a § 2339B indictment. Consequently, the court granted the *Rahmani* defendants' motion to dismiss.[172]

2. *United States v. Sattar*

Relying on the favorable holding in *Rahmani*, the *Sattar* defendants urged the court to dismiss their § 2339B indictment on the theory that it was predicated on an unconstitutional designation. The *Sattar* court dismissed the *Rahmani* holding as unpersuasive.[173] The *Sattar* court held that the defendants lacked standing to raise the due process rights of a third party (the designated foreign terrorist organization).[174]

The court further recognized that while some meaningful review of an administrative proceeding (such as designation) was necessary under due process in a criminal case,[175] that review was provided for in the statute.[176] In the statute, it is clear that Congress intended for review only where the organization challenged the designation before the Court of Appeals for the District of Columbia Circuit within the allotted time.[177] The *Sattar* court concluded by denying the defendants' motion to dismiss (as to the theory that the indictment was predicated on an unconstitutional designation).[178]

3. *United States v. Al-Arian*

Also relying on the *Rahmani* decision, the defendants in *Al-Arian* challenged their § 2339B indictment on similar grounds.[179] The *Al-Arian* defendants were accused of providing funding and organizational support to the Palestinian Islamic Jihad (PIJ).[180] The defend-

172 *Id.* at 1059.

173 United States v. Sattar, 272 F. Supp. 2d 348, 364 (S.D.N.Y. 2003).

174 *Id.* (citing Center for Reprod. Law and Policy v. Bush, 204 F.3d 183, 196 (2d Cir. 2002)).

175 *Id.* at 363–65 (citing United States v. Mendoza-Lopez, 481 U.S. 828 (1987)).

176 *Id.* at 367 (citing 8 U.S.C. § 1189(b) (2000)). "Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit." 8 U.S.C. § 1189(b)(1) (2000).

177 *See* 8 U.S.C. § 1189(b)(1).

178 *Sattar*, 272 F. Supp. 2d at 383–84.

179 United States v. Al-Arian, 308 F. Supp. 2d 1322, 1344–45 (M.D. Fla. 2004).

180 *Id.* at 1327–28.

ants argued that the court should dismiss their indictment because PIJ had been denied due process in the designation process.[181]

Like *Sattar*, the court held that the defendants, as third parties to the designation, did not have standing to mount a collateral attack against that designation.[182] The court went further, stating that even if the defendants had standing to challenge the designation, PIJ's designation as a foreign terrorist organization did not violate the Fifth Amendment's Due Process Clause.[183] The court reasoned that because PIJ had no substantial connections to the United States, PIJ was not entitled to Fifth Amendment due process rights.[184] Like *Sattar*, the *Al-Arian* court rejected the defendants' unconstitutional designation argument and denied the motion to dismiss.[185]

Clearly, these two courts have not followed the *Rahmani* decision. On the contrary, they have found multiple reasons to reject defense arguments relying on *Rahmani* (i.e., lack of standing for a collateral attack and provision for meaningful review in the statute).

E. Is Lawful Combatant Immunity as Defined in the Geneva Convention a Valid Defense to a § 2339B Prosecution?

A final challenge, unique to the *Lindh* case, is lawful combatant immunity. This is not a constitutional objection, but is included here for its potential relevance if the government chooses to prosecute under § 2339B any of the Guantanamo detainees captured while fighting in Afghanistan. Lawful combatant immunity protects "lawful combatants" from criminal prosecution by hostile governments.[186]

In *Lindh*, the government charged the defendant, John Walker Lindh, with providing material support in the form of personnel (himself) to designated foreign terrorist organizations. Lindh, an American citizen, had traveled to Pakistan, trained in military camps run by Harakat ul-Mujahideen (HUM) (a designated foreign terrorist

181 *Id.* at 1344.

182 *Id.*

183 *Id.* at 1347.

184 *Id.*

185 *Id.*

186 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3384, 75 U.N.T.S. 135, 202 [hereinafter GPW]. GPW article 87 states: "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.* art. 87, 6 U.S.J. at 3384, 75 U.N.T.S. at 202.

organization), trained at the al-Farooq[187] camp run by al-Qaeda (a designated foreign terrorist organization), met personally with Osama Bin Laden, and fought for the Taliban on the front lines of the war in Afghanistan.[188]

Part of Lindh's defense strategy was to argue that he was a lawful combatant and was therefore entitled to immunity from prosecution under the international laws of war.[189] Lindh asserted this defense with respect to charges of aiding the Taliban, but not charges of aiding al-Qaeda.[190] The court, recognizing this, agreed that "there is no plausible claim of lawful combatant immunity in connection with al-Qaeda membership."[191]

With respect to the charges of aiding the Taliban, the *Lindh* court considered the defense of lawful combatant immunity in light of the requirements for lawful combatant status set forth in the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[192] Those requirements are

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.[193]

The court held that with the exception of carrying arms openly, Lindh and his fellow Taliban fighters failed to satisfy the requirements of the GPW for lawful combatant status.[194] This is in agreement with the President's assertion on February 7, 2002, that the Taliban were not lawful combatants and not entitled to the protections of the GPW.[195]

---

187 Recall that Al-Farooq is the same training camp attended by the Lackawanna defendants.

188 United States v. Lindh, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002).

189 *Id.* at 552–54.

190 *Id.* at 553.

191 *Id.* at 553 n.16.

192 GPW, *supra* note 186.

193 *Id.* art. 4(a)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

194 *Lindh*, 212 F. Supp. 2d at 557–58.

195 *See* Press Release, Office of the White House Press Secretary, Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html. While the court gave some deference to the President's classification of the Taliban as unlawful combatants, it did not find this controlling. The court held that the Taliban's status as lawful or unlawful combatants was a justiciable question. *See Lindh*, 212 F. Supp. 2d at 554–56.

A similar holding will likely result if the government charges additional Taliban fighters with material support of a terrorist organization.[196] Because the Taliban does not conform to the requirements set forth in the GPW, defendants will not be entitled to lawful combatant immunity.

F. Summary of Challenges to Material Support Prosecutions

Defendants have not been successful in challenging the material support statute on the theory that it imposes guilt by association in violation of the First Amendment.[197] While the Constitution does guarantee the right to associate, courts have found that § 2339B criminalizes more than mere association and serves an important national security interest.[198]

Defendants have similarly been unsuccessful in challenging the material support statute for overbreadth due to the Supreme Court's high standard and Congress's strong national security interest in stopping terrorist financing.[199]

On challenges for vagueness, courts have been less consistent. While some courts presented with unique facts (i.e., *Humanitarian Law Project III*, which dealt with a civil action for injunctive relief, and *Sattar*, which addressed a criminal action against a convicted terrorist's lawyer) have found material support provisions impermissibly vague, those courts dealing with clear aid to a terrorist organization (*Lindh* and *Goba*) have held that the statute gave fair notice. This is reasonable under Supreme Court precedent on vagueness because a less stringent standard applies when the conduct in question is not constitutionally protected (for instance, traveling to Afghanistan to serve in a terrorist organization).[200]

To comply with the Fifth Amendment requirement of personal guilt, some courts have construed the material support statute to require knowledge that the organization in question was connected to terrorism (*Humanitarian Law Project III*). This should not be an issue for the government to prove in most material support cases. For example, in *Lindh* and *Goba*, while the defendants were training at the al-Farooq camp, they clearly had knowledge that it was connected to

196 Although the Taliban itself is not a designated foreign terrorist organization, these fighters (like Lindh) may also be involved with al-Qaeda.

197 *Lindh*, 212 F. Supp. 2d at 569–70; Humanitarian Law Project I, 9 F. Supp. 2d 1205, 1212 (C.D. Cal. 1998).

198 *Lindh*, 212 F. Supp. 2d at 569–70.

199 United States v. Sattar, 272 F. Supp. 2d 348, 361 (S.D.N.Y. 2003); *Lindh*, 212 F. Supp. 2d at 572.

200 *See* discussion *supra* Part III.C.

terrorism. The court in *Al-Arian*, however, construed the material support statute to require a specific intent.[201] This is an unnecessary legal construction, goes well beyond Congress's intent in enacting the material support statute, and imposes a difficult hurdle for prosecutors in material support cases.[202]

Some defendants have challenged not only the material support statute (18 U.S.C. § 2339B), but the designation statute (8 U.S.C. § 1189) as well. In *Rahmani*, the court declared the designation statute facially unconstitutional in violation of due process and held that no material support prosecution could rely on an unconstitutional designation as a predicate.[203] This holding, however, has been rejected by other courts[204] and is currently on appeal to the Ninth Circuit. With the exception of *Rahmani*, most courts have found that the designation statute complies with due process and that defendants lack standing to collaterally attack designation.

A final challenge to the material support statute (currently unique to the John Walker Lindh case but potentially important if the government prosecutes more Taliban fighters) is the defense of lawful combatant immunity under the Geneva Convention. This was easily rejected by the *Lindh* court on a finding that the Taliban failed to comply with the Geneva Convention requirements for lawful combatant status.[205]

The material support statute has been considered in many courts in recent years, and despite some successful arguments by defendants, most courts have upheld § 2339B in cases where the defendants clearly aided a terrorist organization. The federal government should continue to exercise caution in approving § 2339B prosecutions to avoid the development of restrictive precedent. Based on recent court decisions, prosecutors should be able to continue using the material support statute as an effective tool in the war on terror.

IV. SENTENCING GUIDELINES

Defendants convicted under 18 U.S.C. § 2339B are sentenced under the Federal Sentencing Guidelines (the Guidelines). Pursuant to the Sentencing Reform Act of 1984,[206] and promulgated by the

201 *See* United States v. Al-Arian, 308 F. Supp. 2d 1332, 1337, 1339 (M.D. Fla. 2004).

202 *See* discussion *supra* Part III.D.

203 United States v. Rahmani, 209 F. Supp. 2d 1045, 1059 (C.D. Cal. 2002).

204 *See Al-Arian*, 308 F. Supp. 2d at 1346; *Sattar*, 272 F. Supp. 2d at 364.

205 *See Lindh*, 212 F. Supp. 2d at 554–55.

206 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017–34 (1992).

United States Sentencing Commission, the Guidelines provide a structured process for a sentencing judge to determine a defendant's sentencing range. (The judge then has discretion to sentence an offender to a definite term within that range.) The Guidelines are designed to ensure sentencing uniformity among similar criminal offenders and sentencing proportionality for crimes of varying severity.[207] Congress has specifically mandated that the sentences under the Guidelines take into account:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense; to promote respect for the law, and to provide just punishment for the offense;
> (B) to provide adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant . . . .[208]

Under the Guidelines, a sentencing judge first calculates the defendant's total offense level; this is based on the severity of the offense, specific characteristics of the offense, and other pre-determined adjustments (role in the offense, acceptance of responsibility, etc.).[209] Based on these calculations, the offense level is graded from one (least serious) to forty-three (most serious). A sentencing judge then determines a defendant's criminal history using a point system to account for prior offenses; criminal history is graded from I (no criminal history) to VI (most serious criminal history).[210] Based on these two numbers—offense level and criminal history—the sentencing judge determines the defendant's sentencing range.[211]

The base offense level for a § 2339B material support conviction is twenty-six (with specific offense enhancements if the offense involved dangerous weapons, explosives, or the provision of support with the intent to commit or assist in the commission of a violent act).[212] Hypothetically then, if an individual convicted under § 2339B had no criminal history, and was not subject to any enhancements or departures, the guideline range would equate to sixty-three to seventy-

---

207 U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, cmt. n.3 (2004).

208 18 U.S.C. § 3553 (2000).

209 JIMMY GURULÉ, COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME 694–97 (1996).

210 U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2004).

211 Note that other considerations may be brought into calculation, for instance relevant conduct or substantial assistance to federal agents.

212 U.S. SENTENCING GUIDELINES MANUAL § 2M5.3 (2004).

eight months (about five to six years).[213] Under the Guidelines however, individuals convicted under § 2339B are subject to a sentencing enhancement for a crime involving a "federal crime of terrorism."[214] This enhancement automatically increases the offense level for a § 2339B conviction by twelve levels[215] and raises the criminal history category to VI. Using this enhancement, that same defendant with a § 2339B conviction and no criminal history would face a sentencing range of thirty years to life.

No defendant would actually receive that sentence, however, because the statutory maximum for a § 2339B offense is fifteen years imprisonment.[216] How can the Guidelines sentence for a § 2339B conviction possibly be within the scope of Congress's intent when the minimum sentence for a typical offender with no criminal history is *double* the statutory maximum?

In *United States v. Meskini*,[217] the defendants were convicted of conspiring to provide material support to a terrorist *act* (a crime under 18 U.S.C. § 371)[218] for planning to bomb Los Angeles International Airport during the millennium celebrations in December 1999.[219] The defendants faced a terrorism sentence adjustment under Guidelines § 3A1.4 and challenged this enhancement as having no rational basis and violating due process. Defendants argued the enhancement impermissibly double-counted the same criminal act by increasing both the offense level and criminal history. The Second Circuit dismissed the defendants' argument, stating:

> Congress and the Sentencing Commission had a rational basis for concluding that an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists

---

213 *Id.* § 5A.

214 *Id.* § 3A1.4.

> Victim-related Adjustments . . . Terrorism:
>
> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Id.

215 If the resulting offense level is less than thirty-two, the court should increase the offense level to thirty-two. *Id.*

216 18 U.S.C. § 2339B(a)(1) (2000).

217 319 F.3d 88 (2d Cir. 2003).

218 *Id.* at 90.

219 *Id.* at 90–91.

> and their supporters should be incapacitated for a longer period of time. Thus, the terrorism guideline legitimately considers a single act of terrorism for both the offense level and the criminal history category.[220]

The Second Circuit dismissed the defendants' other challenges and affirmed the convictions.[221]

Although the Second Circuit has held that the § 3A1.4 sentencing enhancement does not violate due process, the Guidelines' scheme for a § 2339B offense is seemingly illogical. First, because it is a "federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5), the § 3A1.4 "adjustment" automatically applies to every § 2339B offense. In this sense, it is not an adjustment at all, but rather a new base offense level that also mandates the highest criminal history category. Second, Congress tasked the Sentencing Commission in designing the Guidelines to account for "the nature and circumstances of the offense *and the history and characteristics of the defendant.*"[222] This enhancement automatically sets the criminal history category to VI—for any defendant from a first-time offender to a life-long terrorist—completely disregarding the history and characteristics of the defendant.[223] Third, for the standard § 2339B defendant (not subject to any adjustment or departures) the *minimum* Guidelines sentence under § 3A1.4 is thirty years,[224] *double* the *maximum* statutory sentence of fifteen years. This considerable difference in sentences illustrates the substantial disconnect between § 2339B and Guidelines § 3A1.4.

One's first reaction may be that the application of the § 3A4.1 enhancement to § 2339B offenders is outside Congress's intent, because it automatically imposes a sentence in excess of the statutory maximum and disregards the defendant's actual criminal history. However, the application of the § 3A1.4 enhancement to federal crimes of terrorism (including § 2339B material support) was mandated by Congress in AEDPA—the very same law that created the § 2339B material support statute—so Congress's intent to apply Guidelines § 3A1.4 to § 2339B convictions is clear.[225]

---

220 *Id.* at 92.

221 *Id.* at 93.

222 18 U.S.C. § 3553 (2000) (emphasis added).

223 Defendants have raised this argument. *See Meskini*, 319 F.3d at 92.

224 *See supra* text accompanying notes 212–15.

225 Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 730, 110 Stat. 1214, 1303 ("Directions to the Sentencing Commission. The United States Sentencing Commission shall forthwith . . . amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal Crimes of terrorism, as defined in 2332b(g) of Title 18, United States Code.").

Surely Congress has a substantial interest in providing severe punishments for crimes related to terrorism; however, there should be some consistency in sentencing policy between the offense statute and the related guidelines. If Congress truly desires to apply Guidelines § 3A1.4 to all § 2339B offenders, they should increase the statutory maximum under § 2339B. That increase, however, would result in enormous thirty year sentences for first-time offenders. It would be more appropriate (and more consistent with the goal of the Sentencing Guidelines to account for a defendant's history and characteristics), for Congress to direct the Sentencing Commission to develop an enhancement for crimes related to terrorism that did not automatically place the typical offender so far outside the fifteen year statutory maximum. Or alternatively, simply adjust the base offense levels for federal terrorism crimes—because having an adjustment that automatically applies to every offender seems unnecessarily redundant.

The application of the Guidelines is an important part of any § 2339B prosecution—the goals of the material support statute cannot be accomplished if offenders are not eventually incarcerated. Given the importance of this statute to the war on terrorism and terrorist funding, it is essential that the Guidelines applying to a § 2339B conviction make sense—and are not in danger of a due process challenge for lacking a rational basis. Although the *Meskini* court rejected the defendants' due process challenge, there is a definite disconnect between the material support statute and the Sentencing Guidelines. To ensure the continued viability of § 2339B, Congress should direct the Sentencing Commission to amend the § 3A1.4 enhancement (or the § 2339B base offense level) to account for an offender's actual criminal history and so that the Guidelines' sentencing range is not automatically outside the statutory maximum. This modification need not result in shorter sentences for alleged terrorists (an obvious political loser), but it would provide for a more sensible and consistent sentencing policy with respect to § 2339B material support offenses.

CONCLUSION

If the rule of law is to be effective in fighting the war on terror, prosecutors must have effective and viable legislation available to prosecute those who support terrorist organizations. The material support statute fulfills this need; it has been used in several successful prosecutions of individuals who supported terrorist organizations through a variety of means. The statute's power lies in its flexibility—the material support statute applies not only to offenders who provide funding to a terrorist organization, but also to those who support the organiza-

tion by serving in its ranks and training in its camps. Without § 2339B, prosecutors may be faced with the troubling prospect of identifying a terrorist threat but lacking the ability to charge the suspects. The material support statute allows prosecutors to incapacitate a potential terrorist cell that supports a terrorist organization without having to wait for an actual terrorist plot by that cell to take shape or be enacted. Section 2339B empowers federal prosecutors to *prevent* terrorism by incapacitating those who support terrorist organizations and eliminating terrorist threats.

Although courts have found some constitutional issues (primarily in cases where the material support statute has been applied to unique circumstances), the law has been (and should continue to be) upheld when applied to clear cases of support of a terrorist organization. The Justice Department should continue to exercise restraint in bringing § 2339B cases to avoid the development of negative precedent and overly restrictive case law. One area where revision may be necessary is not within the material support statute itself, but rather the Guidelines applicable to material support conviction. To reflect a more unified sentencing policy, Congress should direct the Sentencing Commission to reconcile the inconsistencies between the statutory maximum in the material support statute and the terrorism sentencing enhancement that automatically applies to a material support conviction.

The material support statute is a controversial but essential tool in the war on terror. For the rule of law to prevail in the fight against terrorism, the federal government must continue to prosecute terrorist supporters under the material support statute and ensure its continued viability before the courts.