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# **Dismantling the Terror Network: the Need for a Stronger Material Support Statute**

## **Executive Summary**

Terrorists cannot operate effectively without a support network that provides funding and logistical support for their efforts. One of the primary ways that our nation's law enforcers fight terrorism is to cut off the networks' sources of support and prosecute those who aid terrorist efforts. Prior to September 11, 2001, law enforcement could rely on a modest "material support" statute that enabled prosecution of those who facilitated terrorism. The USA PATRIOT Act strengthened that law by closing loopholes and ensuring that law enforcement could target more forms of terrorist financing. These changes have enabled law enforcement to break up terrorist cells across the nation, and are indispensable in the war on terror.

Yet recent court decisions have called into question whether the material support statute is sufficiently clear and narrow. The U.S. Court of Appeals for the Ninth Circuit has held that provisions of the statute may violate civil liberties, in particular First Amendment freedoms. The Department of Justice disagrees and is appealing those rulings, but the Senate should not entrust this important tool in the war against terror to appeals to the courts. Instead, the Senate should act to amend the material support statute to remove legal uncertainties and bolster our nation's ability to disrupt terrorist planning.

## **The Existing Law and How it Aids the War on Terror**

Current law grants the Department of Justice special tools to fight terrorism at the planning stages through the material support statutes, in particular 18 U.S.C. §§ 2339A and 2339B. Each statute addresses material support in a slightly different way:

- Section 2339A targets those who provide material support — such as financial backing, lodging, training, expert advice, weapons, etc., but not including medicine or religious materials — while knowing or intending that those resources are to be used in connection with particular terrorist acts.<sup>1</sup> (See footnote for exact text.)

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<sup>1</sup> Section 2339A makes it illegal to provide any material support or resources in connection with terrorist acts:

- Section 2339B prohibits “knowingly provid[ing]” material support to organizations designated by the Secretary of State as “terrorist organizations.”<sup>2</sup>

The head of the Department of Justice’s Criminal Division, Assistant Attorney General Christopher Wray, has testified that these material support statutes illustrate “the breadth of resources that terrorists may need to carry out a successful attack, and the many ways in which their supporters can contribute to the spread of violence. For example, terrorists need not only weapons, but also the training to use them, the money to buy them, and the personnel to wield them.”<sup>3</sup> But as Mr. Wray explained, material support need not be so direct: “Terrorists need safe places to stay, expert advice on targets and methods of attack, communications equipment to keep in touch with each other, means of transportation, and identity documents to cross borders.”<sup>4</sup>

The Department of Justice relies heavily on the material support statutes to prosecute the war on terror. Consider the following examples:

- In Lackawanna, New York, members of a terrorist cell traveled to Afghanistan after September 11th to attend an Al Qaeda-affiliated training camp. They later pleaded guilty to material support charges, agreed to cooperate with prosecutors, and are now serving prison terms ranging from 8 to 10 years.<sup>5</sup>
- In Portland, Oregon, members of another terrorist cell attempted to travel to Afghanistan after September 11th to fight on behalf of the Taliban. The Department of Justice charged them with conspiracy to provide material support to Al Qaeda and the Taliban, at which point they pleaded guilty to seditious conspiracy and other charges. The court then sentenced them to between 7 and 18 years in prison.<sup>6</sup>

(a) Offense. —Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a [terrorist act as defined by relevant statute], or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .

(b) Definition. — In this section, the term “material support or resources” means 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.

<sup>2</sup> Section 2339B addresses those persons who provide material support or resources to designated foreign terrorist organizations. The operative criminal provision, section 2339B(a)(1), provides:

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

“Foreign terrorist organizations” are those organizations so designated by the Secretary of State under section 219 of the Immigration and Nationality Act.

<sup>3</sup> Assistant Attorney General Christopher Wray, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1172&wit\\_id=3391](http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391).

<sup>4</sup> Wray Statement at 2.

<sup>5</sup> Wray Statement at 3.

<sup>6</sup> Wray Statement at 3.

- In northern Virginia this past March, several members of yet another terrorist cell were convicted of material support offenses after training in the United States in order “to fight jihad” in Afghanistan and Kashmir. Moreover, two defendants traveled to Pakistan after September 11 to train further in a terrorist training camp there. Both defendants have been sentenced to lengthy prison terms.<sup>7</sup>
- In Ohio, an American citizen was helping Al Qaeda by researching the capabilities of ultralight airplanes, extending the airline tickets of several Al Qaeda members, and surveying a potential target. Once caught, he pleaded guilty to material support charges and is serving a 20-year prison sentence.
- In New Jersey, Hemant Lakhani was arrested for “allegedly attempting to sell a shoulder-fired surface-to-air missile to an FBI cooperating witness for the purpose of downing a U.S. civilian airliner. Lakhani, charged with offenses that included attempting to provide material support to terrorists, faces as much as 25 years in prison.”<sup>8</sup>
- In San Diego, two men pleaded guilty to providing material support to Al Qaeda. They had “negotiated with undercover agents to buy four Stinger anti-aircraft missiles, which the defendants stated would be sold to associates of the Taliban and Al Qaeda in Afghanistan.” Each faces up to 15 years in prison.<sup>9</sup>

The Department of Justice has testified that it has “charged over 50 defendants in 17 different judicial districts” with violations of the material support laws.<sup>10</sup> Gary Bald, Assistant Director of the Counterterrorism Division of the FBI, told the Senate Judiciary Committee, “*It would be difficult to overstate the importance of the material support statutes to our ongoing counterterrorism efforts.*”<sup>11</sup>

## **The Legal Challenges to the Material Support Statute**

The material support statutes were written broadly to address the many ways that persons can aid terrorists. However, it is that same breadth that has caused a few federal courts to find parts of the statutes unconstitutional — in particular, the U.S. Court of Appeals for the Ninth Circuit and federal district courts in Los Angeles and Manhattan. While it is possible that these legal rulings will be overturned on appeal, it is important for the Senate to understand them in order to take the necessary statutory steps to eliminate the constitutional uncertainty.

### **Some Courts Have Held Parts of the Statutes to be Unconstitutionally Vague**

The Ninth Circuit concluded in *Humanitarian Law Project v. Reno*,<sup>12</sup> that the terms “personnel” and “training” as definitions of material support were unconstitutionally vague. The court concluded that a reasonable person examining the statute could conclude that the mere act of advocacy — engaging in pure speech, unaccompanied by any other conduct — could be deemed “material support.” The court reasoned, “Someone who advocates the cause of the PKK [the

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<sup>7</sup> Wray Statement at 3.

<sup>8</sup> Wray Statement at 3.

<sup>9</sup> Wray Statement at 3.

<sup>10</sup> Wray Statement at 2.

<sup>11</sup> Gary Bald, in a written statement presented to the Senate Judiciary Committee, May 6, 2004, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1172&wit\\_id=3393](http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3393).

<sup>12</sup> 205 F.3d 1130 (9<sup>th</sup> Cir. 2000).

Kurdistan Worker’s Party, an officially-designated foreign terrorist organization as defined by the Secretary of State] could be seen as supplying them with personnel” because by doing so, the speaker would be freeing up resources, “since having an independent advocate frees up members to engage in terrorist activities instead of advocacy.”<sup>13</sup> Advocacy, however, “is pure speech protected by the First Amendment.”<sup>14</sup> Likewise with “training,” the Ninth Circuit explained that a person who “wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such expression falls within the scope of the term ‘training.’”<sup>15</sup>

This holding has been followed and extended in federal courts in California and New York. A judge in Los Angeles held that the term “expert advice or assistance” is unconstitutionally vague because the statute fails to provide sufficient explanation of what kind of “advice” or “assistance” would qualify as material support.<sup>16</sup> And a federal district court in New York held that the term “communications equipment” was also unconstitutionally vague because the prosecutors argued that the mere “use” of communications equipment constituted the provision of material support.<sup>17</sup> The court concluded that defendants were not “put on notice that merely using communications equipment in furtherance of an FTO’s [foreign terrorist organization’s] goals constituted criminal conduct.”<sup>18</sup>

As one law professor testifying in the Senate Judiciary Committee has explained, other courts have disagreed and held that the definitions of such terms as “personnel” and “training” are sufficiently clear to put potential defendants on notice. The professor explained that courts have been “sharply divided on the issue of vagueness” and that the “confusion in this area seems to flow from the concern ... with the intentional broad phrasing of these definitional terms.”<sup>19</sup>

### **Some Courts Have Attempted to Rewrite the “Knowledge” Requirement in § 2339B**

In addition to the vagueness concerns, a few courts have expressed constitutional concerns about what a support-providing defendant is required to have known about an organization under § 2339B. That provision makes it a crime to “knowingly provide material support or resources to a foreign terrorist organization.” The Ninth Circuit has interpreted this language to require proof that a defendant “not only knew the identity of the organization to which aid was provided, but also that he or she knew the organization had been designated a foreign terrorist organization.”<sup>20</sup> Absent that specific knowledge, the court required the prosecutor to prove that the defendant “knew of the unlawful activities that caused it to be so designated.”<sup>21</sup> And a federal district court judge in Florida went a step further, holding that the government must prove beyond a reasonable doubt that the

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<sup>13</sup> *Id.* at 1137.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1138.

<sup>16</sup> *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, 1200 (C.D. Cal. 2004).

<sup>17</sup> *United States v. Sattar*, 272 F.Supp.2d 348 (S.D.N.Y. 2003).

<sup>18</sup> *Id.* at 358.

<sup>19</sup> Professor Robert M. Chesney, Wake Forest University School of Law, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1172@wit\\_id=3394](http://judiciary.senate.gov/print_testimony.cfm?id=1172@wit_id=3394).

<sup>20</sup> Chesney Statement at 5 (explaining decision in *Humanitarian Law Project v. Dep’t of Justice*, 352 F.3d 382 (9<sup>th</sup> Cir. 2003)).

<sup>21</sup> *Humanitarian Law Project*, 352 F.3d at 400.

defendant knew: “the organization was a FTO or had committed unlawful activities that caused it to be so designated,” and that “the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.”<sup>22</sup>

The Department of Justice strongly objects to these judicially-imposed requirements, and has asked the Ninth Circuit to amend its opinion to “make clear that the material support statute ... requires only knowledge by the defendant of either the Foreign Terrorist Organization designation, or that the organization engages in terrorist activity.”<sup>23</sup> Prosecutors have not yet formally appealed the Florida decision, but given the court’s much more expansive approach, it is unlikely that the Department of Justice will allow the district court to have the last word on that subject.

## **The Senate Should Act to Strengthen the Material Support Statute**

It is widely acknowledged that the material support statutes are central to the war on terror, especially within our nation’s borders. Senator Leahy has observed that these laws “have become the weapon of choice for domestic anti-terrorism prosecution efforts.”<sup>24</sup> Yet as long as these court decisions stand, the Department of Justice must devote valuable resources litigating the meaning of statutory provisions. The constitutional rights involved are important and deserve serious consideration.

However, the Senate should not leave this debate to the courts. Instead, it should act deliberately to ensure that law enforcers have the tools they need to reach those who seek to aid terrorists. To that end, the Senate should work with the Department of Justice to refine the existing material support statutes. In doing so, the Senate should carefully weigh the concerns voiced by defendants in the above cases and craft rules that ensure that only genuine material support is targeted. The Senate will then be able to ensure that prosecutors have an enforceable law that will stand up in court while protecting defendants engaged in constitutionally-protected activities.

## **Conclusion**

The Senate should not wait to learn if these court decisions are reversed while terrorists continue to plot against our nation. Prosecutors need to know that the laws they rely on are secure and that the indictments they bring will hold up in court. The solution is for the Senate to act proactively and promptly.

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<sup>22</sup> *United States v. al-Arian*, 308 F.Supp.2d 1322, 1338-1339 (M.D. Fla. 2004).

<sup>23</sup> Assistant Attorney General Dan Bryant, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1172@wit\\_id=3392](http://judiciary.senate.gov/print_testimony.cfm?id=1172@wit_id=3392).

<sup>24</sup> Senator Patrick Leahy, May 5, 2004, in a written statement made part of the record in the Senate Judiciary Committee, May 5, 2004, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1172@wit\\_id=103](http://judiciary.senate.gov/print_testimony.cfm?id=1172@wit_id=103).