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I. INTRODUCTION

American foreign policy is incredibly complex. Every major university offers courses and majors in international relations, comparative law, and diplomacy. Historically, American foreign relations have been problematic regarding countries that have been sponsors of terrorism and terrorist organizations operating independently within those countries. Countries and organizations that were once American allies have become enemies and vice versa based on prevailing national interests. Among the first legislation that the United States Congress enacted provided ransom to the Barbary Coast Pirates for the safe passage of commerce.\(^1\) In more recent United States history, the United States funneled money and munitions to the Mujahedeen to fight the Soviets in Afghanistan, which coordinated with many known terrorists such as Osama Bin Laden.\(^2\) One of the justifications given for invading Iraq was that Saddam Hussein used chemical weapons against his people, but the gas used was manufactured in Rochester, New York, and provided to Saddam Hussein by the Central Intelligence Agency.\(^3\) These activities were overt and meant to further national security interests abroad. A reasonable American citizen could identify the blatant activities of the Barbary Pirates, the expansion of the Soviet Union, and Saddam Hussein gassing the Kurds as a national security concern. However, what are the

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\(^2\) BBC News, Who is Osama Bin Laden?, September 18, 2001 http://news.bbc.co.uk/2/hi/south_asia/155236.stm; See generally CHARLIE WILSON’S WAR (Universal Studios 2007) (Based on the true story of the twelve term United States Congressmen Charles Wilson’s support of funneling of money and arms directly to the Mujahedeen in Afghanistan to fight the occupying Soviet Union which was estimated to be over 3 Billion dollars over the course of the entire campaign); See Also Samuel P. Huntington, THE CLASH OF CIVILIZATION’S AND THE REMAKING OF THE WORLD ORDER 247 (1st Touchstone ed. 1998)(Discusses how at the end of the Soviet-Afghanistan conflict that there was between 300-500 unaccounted for stinger missiles and highly trained fighters which are now being directed against the United States).

ramifications when a reasonable person might not be able to distinguish between overt and implicit activities. Is a domestic doctor or nonprofit organization providing material support to terrorists by helping desperate refugees of a country controlled by terrorists? What if an American tourist buys a Real Irish Republican Army t-shirt? What if a nonprofit organization works to bring popularly elected governments towards the peace process with terrorist ties? The answer to these hypotheticals and many others discussed in this comment is that there has been a violation of the United States Terrorism Material Support Statute.

This comment explores both the practical and theoretical implications of the *Holder v. Humanitarian Law Project* decision and why cases like *US v. Lindh*, *Hamdi v. Rumsfeld* and *Humanitarian Law Project* will likely challenge the Supreme Court to constantly redefine what constitutes “material support.” Part II gives a brief background into the origin of the material support statute and its early applications. Part III analyzes the Court’s reasoning in *Humanitarian Law Project* and discusses unanswered questions. Part IV discusses the *Humanitarian Law Project* doctrinal and policy implications in light of the growing trend in both Congress and the courts to defer to the Executive Branch.

II. A BRIEF REVIEW OF UNITED STATES TERRORISM MATERIAL SUPPORT STATUTE LAW

Section A provides for some American historical context and perspective that have given rise to 18 U.S.C. §2339B. Section B provides a chronological account of the evolution of 18 U.S.C. §2339B. Section C looks at the process in which the United States State Department classifies

FTO’s and some initial thoughts of the problematic issues arising from an organization being labeled with this designation. Section D discusses the different ways courts have interpreted 18 U.S.C. §2339B and the corresponding tests they employed. Section E thoroughly discusses the State Department’s test case for charging someone under 18 U.S.C. §2339B in the war on terror.

A. The American Historical Background

Throughout history nations have been faced by threats that were perceived as real, imminent, and distinguishable from previous national security threats. Governments continuously state that the imminent threats they face are unlike anything that has been seen before. Since the founding of this country, when the United States government was faced with issues implicating national security, the default position has always been to give the executive branch expanded discretion under the Presidential war powers. The most known Congressional Acts and Executive Orders that expanded the executive’s war powers include The Alien and Sedition Acts, Civilian Exclusion Order #34, the Patriot Act, and the Authorization for Use of Military Force.

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8 The Alien Act, July 6, 1798; Fifth Congress; Enrolled Acts and Resolutions; General Records of the United States Government (Concerned with a potential war with France, Congress in 1798 passed four laws known collectively as the Alien and Sedition Acts, which were used to quash dissent for the Federalist’s policies).

9 Civilian Exclusion Order #34 (As a response to the Japanese attack on Pearl Harbor, Franklin D. Roosevelt required that after May 9, 1942 all persons of Japanese ancestry would report to and remain in an internment camp for an indefinite period of time).

10 PL 107-56 UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (Greatly expanded law enforcements ability to search phone records, email communications, financial reports, library records etc. Section 213, one of the more controversial provisions, allowed for law enforcement officers executing a warrant to physically enter into private premise without the owner’s permission and to search the premises without the owners knowledge).

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followed. Courts have traditionally given great deference to the executive branch when national security has been implicated. The Supreme Court doesn’t want to be perceived as tying the hands of law enforcement nor enabling terrorist attacks. Many of the amici briefs for the respondents in *Humanitarian Law Project* cite the Founding Fathers and constitutional framers desire to provide protection for America’s security;

These powers are to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extant and variety of the means, which are necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can be wisely imposed on the power to which the care of it is committed.  

It is easy for litigants on both sides to place the Founding Fathers in a vacuum and presume how they would resolve certain problems. However, every analysis requires context. For instance, the preceding John Adam’s quote was used to bolster the government argument made for supporting the *Alien and Sedition Act* which has uniformly been considered one of the gravest Constitutional violations in American history. When a national security threat is perceived as real it has been accepted that citizens voluntarily give up freedoms and liberties for

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11 P.L. 107-243 AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002 (Justified under the guise of an Al-Qaeda/Iraq/ 9-11 connection that gave President George W. Bush Carte blanche in the prosecution of the Iraq War with the objective of seizing supposed weapons of mass destruction).


14 New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history); Watts v. United States, 394 U.S. 705, 710 (1969)(J. Douglas Concurrence; “The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever ... Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.”).
a sense of security, whether real or false. Another Founding Father, Benjamin Franklin, profoundly stated “Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.”

15 The Supreme Court has reminded us that invoking national security as a compelling government interest in supporting policies does have some limits.

16 Since the attacks on September 11th, 2001 the war on terrorism seems like a much more real threat than the Cold War era. The potential physical targets of the war on terrorism have been transit, infrastructure, water treatment plants, nuclear power plants, potential biological agents and a “dirty bomb.”

17 However, these threats are no greater than when the Soviet Union had Intercontinental ballistic missiles targeted at the United States. At the time, the Soviets had a whole arsenal of weapons including the SS-18 Satan, which could carry a 50 megaton nuclear warhead; to put this in perspective, the nuclear bomb dropped on Hiroshima was only 15 kilotons.

18 The “McCarthy Era” in the American saga was premised on the notion that communist operatives were being directed by the Soviet Union and were operating in the United States. In Scales v. United States the Supreme Court determined that advocating for the overthrow or

15 Benjamin Franklin and William Temple Franklin, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (British and Public Foreign Library 1818).
17 Tony Karon, The “Dirty Bomb” Scenario, Time Magazine June 10, 2002 (A Dirty Bomb is understood to be a makeshift radioactive bomb that could be detonated with conventional explosives and could be easily transported).
18 David K. Stump, Titan II: A HISTORY OF A COLD WAR MISSILE PROGRAM, University of Arkansas Press, 2002, 288, See Also General Principles of Nuclear Explosions 1.2, http://www.cedc.vt.edu/host/atomic/mukefct/env77a.html (“A 1-kiloton nuclear weapon is one which produces the same amount of energy in an explosion as does 1 kiloton (or 1,000 tons) of TNT. Similarly, a 1-megaton weapon would have the energy equivalent of 1 million tons (or 1,000 kilotons) of TNT”).
destruction of the government in and of itself isn’t sufficient enough to withstand attack under the due process clause.\textsuperscript{19} \textit{Scales} is an important case because the Supreme Court established the test to determine if a person is culpable for their relationship with an organization comports with due process. \textsuperscript{20} The \textit{Scales} test is “[t]hat relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause.”\textsuperscript{21} In subsequent cases most rulings emphasized that there had to be another step beyond advocating on behalf of a group, and that mere membership was insufficient to show guilt. Specifically, there must be a substantial connection between the conduct and the evil intent.\textsuperscript{22} The pure political speech argument made by the petitioners of the \textit{Humanitarian Law Project} was so similar to arguments made during the McCarthy Era that several citizens who were persecuted by the House Un-American Activities Committee (HUAC) filed an amicus brief on behalf of the petitioners of the \textit{Humanitarian Law Project}.\textsuperscript{23} The amicus brief for “Victims of the McCarthy Era, In Support of Humanitarian Law Project’s,” main argument was that “punishing speech without showing incitement to crime, and punishing association without showing specific intent

\textsuperscript{20} Norman Abrams, \textsc{Anti-Terrorism and Criminal Enforcement}, 126 (3\textsuperscript{rd} ed., Thompson West 2008), \textit{See also} 18 U.S.C. § 2385 The Alien Registration Act (Smith Act)(“Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof - Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.” The Smith Act was used to convict many supposed members of the Communist Party and is still good law, however the Supreme Court has held many provisions unconstitutional including that advocacy by itself insufficient to be criminalized).
\textsuperscript{21} \textit{Scales}, 367 U.S. at 203.
\textsuperscript{22} Brown v. United States, 334 F.2d 488,496 (9\textsuperscript{th} Cir. 1964).
to further illegal ends, penalizes innocents and chills political freedoms at the very core of our democracy.”

Probably the most infamous case of the McCarthy Era, involved the prosecution, of Julius and Ethel Rosenberg who were executed in 1953 for conspiracy to commit espionage against the United States. The charges and claims surrounding this controversial case still resonate almost 60 years later. Those supporting the Rosenberg’s believe that the couple was punished for a crime that never occurred. The government had no definitive, admissible proof against Ethel. The reason she was charged, convicted and sentenced to death was to leverage a confession from her husband.

Two new books, reviewed in the New York Times, Sunday Book Review with the benefit of relatively new information, again tackles the issue of the Rosenberg’s guilt or innocence. One of the books, “Final Verdict: What Really Happened in the Rosenberg Case,” reveals that while Julius was a Soviet spy, Ethel probably only aspired to espionage. “What Ethel Rosenberg’s brother stole from Los Alamos was not “the secret” to the atomic bomb, but was nonetheless classified information… The law under which the charges were brought provided that prosecutors had to prove only that there was a plot-not necessarily that any secrets were

24 Id.
25 Zinn, supra note 3, at 432.
27 Id.
29 See Generally Walter Schneir, FINAL VERDICT: WHAT REALLY HAPPENED IN THE ROSENBERG CASE (Melville House Publishing 2010).
delivered.”30 Ethel and Julius Rosenberg maintained their innocence until the day of their execution.31

Throughout American history citizens have given over many of their constitutional rights in the name of national security. American’s have, in most part, voluntarily relinquished these rights and granted broader executive power. Once Americans lose these rights under the guise of national security it has historically been shown these rights are not restored and the president unwilling to relinquish these newly granted powers.32

B. A BASIS AND HISTORICAL FOUNDATION OF 18 U.S.C. §2339B

President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which included 18 U.S.C. §2339B under § 303. 18 U.S.C. §2339B allows the Secretary of State to designate an organization as a Foreign Terrorist Organization (hereinafter as FTO) and make it a crime with a maximum penalty of life imprisonment to provide material support to an FTO.”33 Congress amended 18 U.S.C. §2339B when it passed the Uniting and Strengthening America by Providing Appropriate Tools Requirement to Intercept and Obstruct

30 Id. (The prosecution relied on Ethel’s brother, David Greenglass, an Army machinist assigned to Los Alamos. The other was Harry Gold, an indefatigable courier for the Soviets who presumably knew of Ethel’s innocence).
31 THE ROSENBERG LETTERS: A COMPLETE EDITION OF THE PRISON CORRESPONDENCE OF JULIUS AND ETHEL ROSENBERG, The Final Letter from Ethel and Julius Rosenberg to their Children (June 19, 1953) 703 (New York Garland, 1994). (In part the final letter to their 6 and 10 year old sons stated “Your daddy who is with me in the last momentous hours, sends his heart and all the love that is in it for his dearest boys. Always remember that we were innocent and could not wrong our conscience…”)
32 Peter Finn and Anne E. Kornblut, Indefinite detention possible for suspects at Guantanamo Bay, WASH POST, December 22, 2010 available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/12/21/AR2010122105523.html (Provides a contemporary example of President Obama keeping close to a quarter of the prisoners in Guantanamo Bay indefinitely on the fear that they might commit future crimes against the United States similarly to President George W. Bush).
33 Humanitarian Law Project v. U.S. Department of Justice, 352 F.3d 382 (9th Cir. 2003)(vacated by 393 F.3d 902).
Terrorism Act of 2001 (USA PATRIOT Act) and added, “expert advice or assistance.”\textsuperscript{34} Congress again amended 18 U.S.C. §2339B under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRPTA) to clarify the intent requirement as “knowingly.” “Material Support and Resources” are “Currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”\textsuperscript{35} 18 U.S.C. §2339A deals with providing material support in aid of terrorist offenses and 18 U.S.C. §2339B, which is the focus of this paper, utilized the provision of material support to a foreign terrorist organization. 18 U.S.C. §2339B has been charged more than any other post-9/11 terrorism related offenses.\textsuperscript{36} The mens rea requirement of 18 U.S.C. §2339B is to knowingly provide material support. It doesn’t matter if the offender purposefully sought to achieve the stated goals of the designated foreign terrorist organization.\textsuperscript{37}

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization…\textsuperscript{38}


\textsuperscript{35} Abrams, supra note 20, at 116.

\textsuperscript{36} Id. at 113.

\textsuperscript{37} Id. at 114.

\textsuperscript{38} 18 U.S.C. §2339B(a)(1).
Provision (i) of 18 U.S.C. §2339B is important in our analysis of whether 18 U.S.C. §2339B has a chilling effect on pure political speech. 18 U.S.C. §2339B (i) states the rule of construction as; “Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States”\(^\text{39}\) The courts have looked at this dichotomy between political speech and providing material support on a case by case basis which has recently culminated in *Holder v. Humanitarian Law Project*\(^\text{40}\)

Some analysts believe that 18 U.S.C. §2339A and 18 U.S.C. §2339B are the most significant doctrinal criminal law development since the *Racketeer Influenced and Corrupt Organizations* Act (RICO)\(^\text{41}\). Prosecution of these statutes have been used in the following contexts; Participation in a terrorist group's training camp\(^\text{42}\), attempts to set up a terrorist training camp in the United States\(^\text{43}\), individuals and charitable entities transfer of funds to a terrorist organization\(^\text{44}\), An attorney representing a convicted terrorist facilitates the passing of information to terrorist confederates on the outside of the prison\(^\text{45}\).

C. NO RECURSSE FOR STATE DEPARTMENT IDENTIFICATION

The United States State Department through many of its intelligence gathering agencies creates a comprehensive packet of information for the Secretary of State in its determination of

\(^{39}\) 18 U.S.C. §2339B (i).
\(^{40}\) *Holder v. Humanitarian Law Project* 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010).
\(^{42}\) *Id.*
\(^{43}\) *Id.*
\(^{45}\) *Id.* (citing United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004)).
whether to classify a group as a Foreign Terrorist Organization (hereinafter as FTO). The initial burden falls on the prospective FTO to prove that they are a legitimate foreign organization. The process is as follows:

Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary’s intent to designate the organization and given seven days to review the designation. Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect. By law an organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the Federal Register.46

In theory, after a failed appeal, a wrongfully classified group would have to wait two years before filing for a revocation of status and rebut the presumption that they are still engaged in terrorist activities.47 The United States Department of State requires banks to seize assets of any designated FTO’s. If the State Department starts freezing the assets of recognized governments throughout the world then the act may be perceived internationally as a provocation of war.48

Another problem is that terrorist activity as defined by the State Department is any activity that “threatens the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.”49 National defense, foreign relations, or the economic interests can be broadly construed to make any

47 Id.
48 Id.
49 Id.
international activity terrorist related. Oil and mineral resources, water rights, actions of minority political parties, foreign alliances, etc. could all fall under the umbrella of terrorist activity. “Because the definition of “material support” is so incredibly broad, once an organization is listed, almost all interaction with it is criminal.” If an individual were prosecuted for providing material support to an FTO then that individual couldn’t raise as a defense that the State Department’s FTO designation wasn’t well founded.

If the government finds the involvement of an individual or group’s relationship with an FTO undesirable then the government has multiple avenues to prosecute. If the government isn’t able to fit the individuals conduct as material support under 18 U.S.C. §2339B, then they can attack the activity as an inchoate offense. If the government can’t make a direct link that an individual knowingly provided material support, then the government can try to prove that the individual was working through an intermediary, and conspired to further the goals of the FTO. A conspiracy to provide material support is a crime under 18 U.S.C. §371 (2000).

The two dominant frameworks for conspiracy are the “wheel” and “chain” conspiracies. The wheel is where a single person or group (the “hub”) is dealing individually with two or more other persons or groups (the “spokes”). The “chain” conspiracy is where successive communication and cooperation is much the same way as with legitimate business.

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51 United States v. Afshari, 392 F.3d 1031 (9th Cir. 2004).
53 *Id.*
operations between manufacturer and wholesaler, then wholesaler and retailer, and then retailer and consumer.”

“Many terrorist organizations engage in humanitarian efforts, and they have developed sophisticated ways to move money and assets to hide their ultimate purpose.” The State Department must make an inquiry to determine the closeness or the group’s relationship. “It then would be necessary to determine whether the separate organization was sufficiently independent to avoid being designated an FTO in its own right, or whether it was simply the alter ego of the original organization.”

Sometimes a terrorist organization sets up a separate organization that the group will use as a charitable front to funnel money and resources to the terrorist organization. A familiar example of this group connection includes Sinn Féin's relationship to the military arm of the Provisional Irish Republican Army (PIRA). Sinn Féin in the recent 2010 elections received more votes than any other political party in all of the six counties and is the second largest party in Northern Ireland. Sinn Féin’s goal is the reunification of Northern Ireland with The Republic of Ireland however the party’s platform also includes; universal early childcare, affordable quality housing, social welfare entitlements for women, and many other programs that espouse social justice.

There was a close relationship between PIRA and Sinn Féin where former PIRA members who now hold political office under the Sinn Féin party. Sinn Féin denies that money and resources that is given to the party is diverted to PIRA paramilitary operations for the purpose of

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54 Id.
55 Peterson, at 337.
56 Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004).
accelerating reunification. “Both Sinn Féin and the PIRA played different but converging roles in the war of national liberation. The Irish Republican Army waged an armed campaign... Sinn Féin maintains the propaganda war and is the public and political voice of the movement.” PIRA came to the negotiating table and has maintained a ceasefire however many dissatisfied PIRA members have created a splinter group called the Real IRA which is currently an American designated FTO. It is unclear what the true current relationship is between the Real IRA and the Sinn Féin party.

Another conspicuous example of an organization utilizing humanitarian efforts to shield its terrorist activities is Hamas, which translated means the “Islamic Resistance Movement.” Founded in 1987, it has become the preeminent terrorist organization in the Middle East, principally in Palestine. But its roots were established in the provision of social welfare and education to Palestinians. Hamas is particularly popular among Palestinians in the Gaza Strip, though it also has a following in the West Bank. Its popularity stems in part from its welfare and social services to Palestinians in the occupied territories, including school and hospital construction. Hamas devotes up to 90 percent of its estimated $70 million annual budget to an extensive social services network, running many relief and education programs, and funds

63 Id. at 3
64 Farrell at 305.
schools, orphanages, libraries, education centers for women, mosques, healthcare clinics, soup kitchens and sports leagues. The Palestinian Authority does not generally provide such services. Those utilizing the Hamas services are required to sign oaths of allegiance. The Hamas Party is also known to support families of those who have been killed (including suicide bombers) wounded or imprisoned by Israel, including providing an allowance of $100.

The dark side to all this largesse is, of course, their chartered goal to destroy the State of Israel and replace it with a Palestinian Islamic state. Hamas tactics have included rocket attacks killing Israeli civilians and soldiers. Suicide bombings have been directed at Israel, Egypt and rival movements in the West Bank and Gaza. Military arsenals have been placed beneath schools and hospitals. In the January 2006 Palestinian parliamentary elections Hamas won a decisive majority in the Palestinian Parliament defeating the PLO-affiliated Fatah party. Following the elections, the United States and the European Union halted financial assistance to the Hamas-led administration.

Looking at how the State Department classifies FTO it is now important to see how the Justice Department prosecutes organizations and individuals who provide material support to these terrorist organizations. In the determination of whether there has been a violation of 18 U.S.C. §2339B the government has employed various methods of statutory interpretation.

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66 Ross at 163.
D. Previous Tests to be Utilized in Analyzing 18 U.S.C. §2339B

Congress has struggled to define what level of involvement is appropriate and at what point the involvement constitutes material support. Congress’s intent on what constitutes material support has evolved through the amendments to 18 U.S.C. §2339B. Congress has attempted three different approaches to determine criminal liability. These approaches are the “nexus” test, the material support “enumerated list,” and the material support “inclusive list” approach.\(^67\) The nexus test “requires that in order to establish criminal liability, the support given must advance the preparation for, or the carrying out of a terrorist act in some way.”\(^68\) “In this nexus approach, if the support given advanced the terrorist activity in some way - if there was some link between the aid and terrorism - then that support was “material.”\(^69\) If the offense was clearly enumerated in the statute then there could be no nexus and the court couldn’t look beyond the enumerated list of activities to determine if the defendant was intending to advance the agenda of the FTO. The determination if material support has been given to an FTO, under the nexus approach, requires a case-by-case analysis that is examined by the fact finder. The government has abandoned the nexus approach because it created the burden on the government to show that activity was material.\(^70\) The enumerated list approach looks to what specific offenses were spelled out in 18 U.S.C. §2339B, and if the offense was listed it was material. If something was not listed, it was

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\(^{67}\) Peterson, supra note 48, at 305.

\(^{68}\) Id.

\(^{69}\) Id. at 314.

\(^{70}\) Id at 306.
not material support.\textsuperscript{71} The major problem with the enumerated list approach is that terrorist activities are always evolving and finding new mediums to cause harm. The enumerated list approach required a textualist interpretation of the defendant’s actions and what activities are listed in the statute. After time without a congressional amendment to the list of terrorist activities there might exist serious pitfalls that undermine the intent of the statute.\textsuperscript{72} The inclusive list approach looks to see if the offense was enumerated, and if it weren’t, then a jury would determine if the involvement constituted material support.\textsuperscript{73} The inclusive list approach is a hybrid of the nexus test and enumerated list approach. The inclusive list approach provides broad judicial discretion in interpreting the statute and to look beyond the activities listed.

After discussing the various tests for interpreting 18 U.S.C. §2339B it is important to see how the government prosecuted someone under the statute. U.S. v. Lindh\textsuperscript{74} was the government’s test case for prosecuting an individual under 18 U.S.C. §2339B. After 9/11 Attorney General John Ashcroft nor the American people were willing to show much compassion for individuals accused of being involved in planning the attacks.

\begin{itemize}
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. at 334.
\item \textsuperscript{73} Id. at 306.
\item \textsuperscript{74} Lindh, supra note 5, at 541.
\end{itemize}
E. THE MODERN UNITED STATES TEST CASE; U.S. v. LINDH

“Make him leave his hair the way it is and his face as dirty as it is and let him go wandering around the country and see what kind of sympathy he would get... I am so sick of these Marin hot-tubbers.”

President George H.W. Bush

John Philip Walker Lindh was born in 1981, and grew up in the affluent Silicon Valley in Northern California. While attending high school, he studied world culture including Islam and the Middle East, becoming fascinated with those subjects. He left formal high school and later earned his diploma by passing the California High School Proficiency Exam at the age of 16. In 1997, Lindh officially converted to Islam and regularly attended mosques in the Mill Valley and San Francisco areas.

Lind wanted to test himself the way tens of thousands of other young Muslims had been tested-through jihad. Lind joined a group called Harkat ul-Mulahideen (HUM) whose members, unbeknownst to Lindh, were deployed in Kashmir to execute foreign tourists. Lindh claims to have been told that he would be trained to support the independence of Kashmir, but wasn’t given specifics about how this would be accomplished. Lindh was involved with HUM before the US State Department formally declared them an FTO under 18 U.S.C. §2339B. The US

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76 Id. at 140.
77 Mark Kukis, MY HEAR BECAME ATTACHED: THE STRANGE JOURNEY OF JOHN WALKER LINDH, 8 (Brassey’s Inc, 2003).
78 Id.
79 Id.
80 Mahoney, at 217.
government refused to link HUM’s economic or military aid to terrorist activity because the US wanted to maintain good relations with Pakistan so it didn’t list HUM as a terrorist organization until after 9/11. This is important is because Lindh joined HUM for 3 weeks between May and June of 2001, and therefore couldn’t have provided “material support” as prescribed under 18 U.S.C. §2339B.

Lindh was assigned to a training camp that was the preparation grounds for various government and terrorist organizations including Al-Qaeda. The boot camp consisted of two tracts; 1) for creating traditional soldiers to support the Taliban by fighting the Northern Alliance or 2) an Al Qaeda special terrorist operations force. FBI officials said that Lindh solely participated in the first tract. As stated in the subsequent indictment against Lindh, he took part in the boot camp training that consisted of weapons, orienteering, navigation, explosives and battlefield combat. This training included the use of “shoulder weapons, pistols and rocket-propelled grenades, and the construction of Molotov cocktails.” During his stay at the training camp Lindh met with Osama bin Laden, “where bin Laden thanked Lindh and other trainees for taking part in jihad.”

Lindh heard Osama bin Laden’s lectures one time and said; “To tell you the truth he was really boring and I actually dozed off.” Lindh was seen as an undesirable within the boot camp and among Al Qaeda operatives. Al Qaeda trainers felt Lindh didn’t have the qualifications or

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82 Lindh, supra note 5, at 541.
83 Id.
84 Id.
85 Mahoney, at 215.
skills to be an efficient terrorist. Once Lindh made it to the front lines, the Taliban transferred him to other assignments because of his difficulty in speaking Arabic, rather than his importance as an operative. 86 The one skill that the Taliban exploited of Lindh’s was his ability to cook instant noodles, macaroni and cheese, and omelets.87 However, under 18 U.S.C. §2339B, “Material support” is material support, no matter how effective. None of the facts about the useful information provided by Lindh to the US government, or his ability to convince several Taliban fighters to surrender were helpful in mitigating his sentence. Lindh convinced several of the Taliban to surrender soon after the US invaded Afghanistan. Lindh also worked with the FBI in disclosing all he knew regarding the whereabouts of Taliban and Al-Qaeda operatives. Lindh provided information on who was in the Taliban and the Al-Qaeda chain of command, how they recruited and trained, and the identities of other recruits.88

At the time, the Taliban government was the ruling government in Afghanistan, but was not classified by the US State Department as a terrorist organization, but rather an unrecognized regime.89 This didn’t stop the US government from awarding a $43 million dollar grant to the Taliban for opium eradication.90

Lind was charged in a ten-count indictment with the initial five counts being associated with 18 U.S.C. §2339B. 18 U.S.C. §2339B which utilizes the concept of material support under §2339A(b) defines “Material Support and Resources” as “Currency or monetary instruments or

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86 Id. at 161.
87 Romero, at 25.
89 Kukis, supra note 75, at 176. See also U.S. State Dep’t Foreign Terrorist Organizations, http://www.state.gov/s/ct/rls/other/des/123085.htm (last visited February 7, 2011) ( The Taliban are still not classified as an FTO).
90 Romero, at 20.
financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 91

The Justice Department enthusiastically set out to make Lindh look like a key terrorist in the September 11th attacks. 92 The United States Attorney General, John Ashcroft, went on television several times to demonize Lindh and bolster his terrorist credentials to make it look as if the Bush administration had captured a high value Al-Qaeda operative. Lindh was placed in the same light as Osama Bin Laden, Mullah Omar, Richard Reid, and Jose Padilla. Public opinion was not sympathetic towards Lindh, and he was labeled a US traitor.

The government indicted Lindh two months after his capture. The government formally pressed charges, which if convicted, would result in life imprisonment. Although Lindh lived in the liberal leaning 9th Circuit Court of Appeals where it was presumed to be the most appropriate venue, the Justice Department filed the case in the most conservative 4th Circuit. 93

Lindh’s attorney James Brosnahan (hereinafter as Brosnahan) was not able to call CNN correspondents or fellow Taliban soldiers that were held at Guantanamo Bay as witnesses in his defense. Additionally most of the physical evidence that Brosnahan wanted to present was either destroyed by US bombardment or withheld by the US government under the guise of national security. During a hearing regarding the defense’s access to all relevant Lindh investigation records, the government made the stunning concession that they didn’t have any evidence that

91 Abrams, supra note 20, at 116.
92 Id. at 81.
93 Romero, at 140.
Lindh tried to kill American citizens.\textsuperscript{94} However, the judge dismissed the motion citing conspiracy didn’t require the exact level of specificity that the defense was asking for. Additionally, contrary to what the US Attorney General Ashcroft stated, the US government conceded during an evidentiary hearing that they had no evidence connecting Lindh to Al-Qaeda.

The government claimed that Lindh was on the battlefield for two months after the US invaded Afghanistan. Lindh claimed that he was fighting against the Northern Alliance until the US invaded and he would have been killed by the Taliban had he fled. The intent requirement under 18 U.S.C. §2339B says in part; “Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so…” The government concluded that Lindh had satisfied the requirement by “knowingly” providing material support to a known enemy after 9/11. Brosnahan argued that the government was construing the statutory language of 18 U.S.C. §2339B broader than it was intended. Brosnahan argued that it was impossible for an individual to provide himself as “personnel” under 18 U.S.C. §2339B if you apply a plain language construction. Lindh offered himself to the Taliban and the literal application of “providing personnel” insinuates Lindh would have had to provide additional soldiers. The government contended, and the Court agreed with, the Congressional legislative intent was to refer to “individuals engaged in, preparing for or carrying out…”\textsuperscript{95}

The subsequent plea bargain was more politically motivated in guaranteeing a conviction than accounting for Lindh’s helpful information. It was noted that the Bush Administration feared that a protracted Lindh trial would potentially open the door to questions regarding Guantanamo Bay,

\textsuperscript{94} Mahoney, supra note 73, at 217.
\textsuperscript{95} Abrams, supra note 20, at 118.
torture, intelligence warnings of the 9/11 strike, and unfavorable connections between the administration and the Arab “House of Saud.”

We will never know how the court would have determined whether Lindh was truly guilty of providing material support and conspiracy. Lindh ultimately entered into a plea agreement and received 20 years in prison, which could be reduced to 17-years for good behavior, with no chance of parole. The plea agreement consisted of the government dropping all but one of the counts against Lindh as long as he pled guilty to providing services to the Taliban and carrying a rifle and two grenades. Since the Taliban was not an enumerated terrorist organization or recognized government, the Justice Department stated that Lindh violated the anti-Taliban economic sanctions that were imposed by President Clinton. Nothing in the plea agreement ever stated any connection to Al-Qaeda or the 9/11 attacks. As part of the plea agreement Lindh had to retract all allegations of mistreatment by the US military. The only way for Lindh to be released early would be through Presidential clemency which President George W. Bush refused to grant and President Obama will most likely refuse to consider in fear of a political backlash. Since Lindh’s conviction, his father, Frank has been a constant advocate on behalf of his son. Frank has been diligently working to rehabilitate his son’s reputation. He convinced his son that the country is forgiving and will view Lindh in a positive light through the passage of time. Frank pointed out that Nelson Mandela, who organized bombing campaigns on the civilian  

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96 Mahoney, at 224.  
97 Id. at 226.  
98 Romero, at 188.  
99 Mahoney, at 226.  
100 Kukis, supra note 75, at xi.
population and used other guerilla warfare techniques to end apartheid in South Africa, spent 26 years in prison and was restored to respectability upon his release.

III. HOLDER v. HUMANITARIAN LAW PROJECT

On June 21st, 2010 the Supreme Court in Holder v. Humanitarian Law Project upheld the prohibitions on providing material support to designated terrorist groups by the State Department, without due process - even when the support is innocently rendered in the form of advice on peaceful conflict resolution and other human rights advocacy.\(^\text{101}\) The Supreme Court upheld the enumerated list of what constitutes material support in 18 U.S.C. §2339B which included; “training,” “expert advice or assistance,” “service,” and “personnel.” The majority in Humanitarian Law Project found that the list of what constitutes material support doesn’t violate the 5th Amendment Due Process Clause because these activities are not unduly vague. The Court determined that any vagueness of 18 U.S.C. §2339B had been eliminated when Congress passed the Intelligence Reform and Terrorism Protection Act of 2004 (IRTPA). The amendments in IRPTA made to 18 U.S.C. §2339B narrowed the “knowingly” requirement to “what a person of ordinary intelligence and fair notice of what is prohibited would believe.” The Plaintiff’s argued that the language of 18 U.S.C. §2339B was open-ended and an ordinary citizen wouldn’t realize that providing humanitarian aid in certain war torn countries, or advocating for non-violent solutions among designated groups could be a violation of the statute. The Congressional legislative history of 18 U.S.C. §2339B, which the Court upheld, states that; “foreign

organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” 102  The Court refused to distinguish terrorist groups activities in analyzing when a person contributes “training, expert advice, assistance, personnel, and other physical assets” to whether this assistance helped or hurt the organization. Assistance even includes any humanitarian efforts to reduce terrorist group’s violence because the Court determined that it would legitimatize terrorist organizations. The government’s argument accepted that material support is fungible and an outright ban on all forms of “support” is the most narrowly tailored way to further congresses intent.

The Supreme Court also agreed with Congress that any humanitarian aid to terrorist organizations would “undermine cooperative international efforts to prevent terrorism and strain the United States’ relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups.” 103  In analyzing the Humanitarian Law Project decision there seems to be tension between the majority who emphasized national security concerns and looked at material support in a vacuum and the dissent that stressed that threats of terrorism shouldn’t be the dominant factor in determining the constitutionality of the statute. However, the Court was misguided in not discussing two additional factors; (1) Most countries where relief is required are Third World countries that lack a strong centralized government and (2) Humanitarian aid to refugees isn’t always a zero sum game.

103  Humanitarian Law Project, supra note 4, at 2705.
In many Third World countries federalism is fragile and large segments of the countryside are controlled by warlords/tribal leaders. Providing medical aid and supplies to refugees is premised on the idea that an FTO’s resources always support the local population. Humanitarian groups are forced to deal directly with these warlords and tribal leaders since they control the infrastructure including schools, hospitals, and refugee camps. In *Humanitarian Law Project* the Liberation Tigers of Tamil Eelam (LTTE) were in charge of a huge part of north and east Sri Lanka.\(^{104}\) The LTTE were an FTO and the petitioners wanted to provide relief to victims after a tsunami ravaged a large portion of the country. The petitioners didn’t provide aid to the region that was controlled by the LTTE for fear of violating 18 U.S.C. §2339B.\(^{105}\) Just because an FTO has taken control in a region doesn’t necessarily equate to the FTO providing food, medical supplies, medical care etc. As seen in countries like Sudan and Eritrea, warlords torment local populations. Petitioner’s relief organizations intent is to provide relief in the form of aide for local ravaged population. For relief workers it wouldn’t be hard to distinguish the LTTE from non LTTE members since most of the LTTE leadership held themselves out as members and wore uniforms.

In *Humanitarian Law Project* the same issues regarding the LTTE were raised with the Kurdistan Workers' Party (PKK). The PKK is an FTO that wants to create a separate country called Kurdistan that would encompass part of Turkey, Syria, Iran and Northern Iraq. Then-Senator Joseph Biden during the 2008 Presidential elections had gained support for the idea of Iraq becoming a loose federation of states including Kurdistan. In Northern Iraq most residents

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\(^{104}\) [Liberation Tigers of Tamil Eelam (LTTE) Location/ Area of Operation](http://www.globalsecurity.org/military/world/para/ltte.htm) (Last Visited Dec. 15, 2010).

\(^{105}\) *Humanitarian Law Project*, at 2705.
consider themselves Kurds, not Iraqis, and have a separate identity, language, and culture that are distinct from the rest of Iraq.

Both the LTTE and PKK have committed terrorist acts, however, the petitioner wants to engage these groups peaceably and educate them to petition the United Nations for relief. The petitioners advocated that it was their First Amendment right to engage these groups for the purpose of bringing a peaceful resolution to their acts and provide relief for local bystanders. The petitioners argued that 18 U.S.C. §2339B was an infringement on pure political speech. The majority disagreed with this argument that 18 U.S.C. §2339B by holding that the issue is about conduct versus speech. “So members of the Humanitarian Law Project legally can stand on a street corner and praise the PKK for carrying out terrorist acts, but they cannot work with the PKK in an effort to stop the violence.”

Under the government’s analysis “if a woman buys cookies from a bake sale to support displaced Kurdish refugees, she could be held liable if there was a sign that said the event was sponsored by the PKK.” The proper analysis of the knowingly mens rea requirement of 18 U.S.C. §2339B should be if a person recognizes that an organization is an FTO or engages in acts of terrorism.

107 Abrams, supra note 20, at 129.
108 Id. at 131.
IV. ANALYSIS

Section A will provide an example of the overbreadth of 18 U.S.C. §2339B and how a textualist statutory interpretation could exclude supporting emerging democracies throughout the world, suppressing the flow of humanitarian aid, and providing a chilling effect on speech under the 1st Amendment. Section B discusses how 18 U.S.C. §2339B can be used by the government as a “catch all” prosecutorial device that provides for a wide spectrum of activities as constituting material support. Section C looks at the proper way to interpret 18 U.S.C. §2339B so as to strike the appropriate balance between individual liberties and national security.

A. WHY THE REASONABLE PERSON STANDARD IS NOT SO REASONABLE

President Jimmy Carter has been the most internationally active former President in American history. President Carter made humanitarian rights issues and nuclear non-proliferation a cornerstone of his administration. After Carter left office, he and his wife Rosalynn started a nonprofit organization called the Carter Center which works to alleviate human suffering throughout the world. The Carter Center has monitored and overseen democratic elections in over 80 countries through the world. The Carter Center continuously provides “training, expert advice or assistance, and personnel” to Third World countries with questionable human rights

109 See http://www.cartercenter.org/about/history/chronology.html (The list of President Carter’s post-Presidency accomplishments include advancing human rights and democratic elections throughout the world, disease eradication, poverty reduction, increased awareness of mental health issues, and the opening of political dialogue with adversarial countries.

records. Recently, the Carter Center worked in Sudan providing humanitarian relief even though many government officials, including the Sudanese President, who has been charged by the International Criminal Court with war crimes stemming from a protracted ethnic cleansing campaign had objected. Carter has personally met with many leaders of countries the United States State Department has deemed undesirable including; Hugo Chavez of Venezuela, and Kim Jong Ill of North Korea. Carter always claims that he is participating in a “personal humanitarian mission.” Carter “knowingly” provided “training, expert advice or assistance, and personnel” to Hamas, an FTO. Carter has provided election monitoring support, personally met with high ranking Hamas officials, wrote a book supporting Hamas, and has written an Op-ed in the Washington Post in an effort to bring their popularly elected Hamas government to the negotiating table. In Boim v. Holy Land Foundation for Relief and Development, it was held that “anyone (emphasis added) who knowingly contributes to the non-violent wing of an organization that he knows engages in terrorism is contributing to their terrorist activities.” However in Scales v. United States, the court was concerned that “A blanket prohibition of association with a group having both legal and illegal aims would create a real danger in that legitimate political

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111 Id. (To name a few of the countries that the Carter Center is currently working in; Somalia, Sudan, Chad, North Korea, Sri Lanka) (human rights offenses according to Amnesty International http://www.amnestyusa.org/all-countries/page.do?id=1041024).


115 Boim v. Holy Land Foundation for Relief and Development, 548 F.3d 685, 698 (7th Cir. 2008).
expression or association would be impaired." Should the Justice Department allow a former President to be above the law and provide material support to a state department designated foreign terrorist organization? What about the notion of Nemo Est Supra Legis (nobody is above the law) when applying the terrorism material support statute?

Is former President Jimmy Carter a terrorist? Absolutely not. Jimmy Carter won the Nobel Peace Prize in 2002 for “his decades of untiring efforts to find peaceful solutions to international conflicts, to advance democracy and human rights, and to promote economic and social development.” However, under 18 U.S.C. §2339B, Carter would be guilty on multiple counts of providing material support to terrorist organizations. Then Solicitor General Elena Kagan, during the Humanitarian Law Project oral argument said that “Hezbollah (an FTO) builds homes, and when you are helping Hezbollah build homes, you are also helping Hezbollah build bombs.” Kagan also said that there should be some level of prosecutorial discretion in determining whether or not to charge certain cases. However, this discretion will inevitably become politically volatile. Where will the line in the sand be drawn, the Gates Foundation or the local church that wants to provide Third World relief?

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116 Scales, supra note 19, at 229.
119 Id. at 57:01.
B. THE CONTINUING FEDERAL TREND TO EXPAND WHAT CONSTITUTES MATERIAL SUPPORT

After the September 11th attacks, Congress passed the Authorization for Use of Military Force (AUMF) which gave the President broad discretion in how to fight the war on terrorism.\textsuperscript{120} In Justice Jackson’s famous concurrence in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, he stated that “Presidential power is at its greatest when acting with congressional approval.”\textsuperscript{121} President Carter knows that a president’s powers have limits, even when acting pursuant to a Congressional act. In \textit{Dames & Moore v. Reagan, Secretary of Treasury}, President Carter acting pursuant to the International Emergency Economic Powers Act (IEEPA), froze Iranian assets in the United States after American were taken hostage in Tehran.\textsuperscript{122} The Court held that the President doesn’t have plenary power to settle claims against foreign governments through economic agreement however in that case congress implicitly allowed for the President to settle claims.\textsuperscript{123}

Even with the two post 9/11 congressional amendments, the ambiguous issues of 18 U.S.C. §2339B haven’t been resolved. It is inevitable that the expansion of categories of activites that constitute support will occur until the Supreme Court determines that the prosecuted activity is so attenuated from providing support that the government can’t hide under the guise of national security. Since the State Department has found it acceptable to add popularly elected

\textsuperscript{120} Congress passed legislation, S.J.Res. 23, on September 14, 2001, authorizing President George W. Bush to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons....” President Bush signed this legislation into law on September 18, 2001 (P.L. 107-40, 115 Stat. 224 (2001)).
\textsuperscript{121} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952)(Jackson J., concurrence).
\textsuperscript{123} \textit{Id.}
governments, like Hamas, to the list of FTO’s, I believe it is inevitable that the terrorist watch list will also expand. The FTO’s will include not just organizations operating within countries, but also include countries themselves. The expansion will be justified on the grounds that these government’s sponsor terrorism or are complicit in their actions. In Regan v. Wald, the Supreme Court upheld the State Departments power to halt travel to certain foreign countries as a way of curtailing currency that could be used in supporting that country.\textsuperscript{124}

WikiLeaks is a website that “publishes material of ethical, political and historical significance while keeping the identity of sources anonymous.”\textsuperscript{125} The website is headed by Julian Assange who has won several awards for exposing governmental injustices throughout the world.\textsuperscript{126} Currently there is no American law that makes the posting of sensitive documents a crime. The Supreme Court held that publication of illegally obtained information that was transferred to another party legally and then published doesn’t remove the 1\textsuperscript{st} Amendment shield from speech as a matter of public concern.\textsuperscript{127} Many prominent politicians want Julian Assange designated as an FTO and Wikileaks shut down. The Wikileaks opponents argue that the disclosure of secret documents is an attack on America's foreign policy interests and puts overseas troops and diplomats in harms way.\textsuperscript{128} Peter King, the chairman of the House Homeland Security

\textsuperscript{125} Wikileaks.org (The website was taken down after receiving intense political pressure from many politicians including Senate Homeland Security Committee Chairman Joseph Lieberman and Senator Susan Collins, however there are several “mirror” sites available if you do a search on google.com).
\textsuperscript{126} Julian Assange was awarded the Sydney Peace Medal, Wikileaks has awarded the 2008 Economist Index on Censorship Freedom of Expression award, the 2009 Amnesty International human rights reporting award (New Media), and has recently been nominated for the Nobel Peace Prize for 2011.
Committee, is actively putting pressure on the United States State Department for the reclassification of WikiLeaks as an FTO.\(^\text{129}\) The ramifications of classifying websites and their respective domain owners as FTO’s could have a serious chilling effect on free speech and further support the notion the 18 U.S.C. 2339B is the catchall charge when no other law currently exists. The expansion of FTO to entire countries or individuals could add wholly unthinkable categories to what constitutes material support. Categories could include “potential guilt by association” claims or even if a United States citizen is categorized as an enemy combatant. “If a terrorist was arrested in the United States, who was a member of an FTO, would they be barred under 18 U.S.C. §2339B from serving as their own attorney?”\(^\text{130}\) This question was asked to then-Solicitor General Elena Kagan, during the Humanitarian Law Project oral argument, but deflected on the grounds that the ramifications bring up all types of complex constitutional dimensions beyond the scope of Humanitarian Law Project case. Other examples include; “a cab driver who is knowingly giving a ride to a member of an FTO, or a hotel clerk booking a room for someone who they know is a member of an FTO.”\(^\text{131}\) These are just a few examples of possible scenarios that might arise. It is uncertain what hypothetical for providing material support the Supreme Court would deem utterly ridiculous. What is for certain is that because of the decision in Humanitarian Law Project there will be less oversight on the State

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\(^\text{131}\) Abrams, *supra* note 20, at 132.
Department's analysis and classification of terrorist groups, greater restriction on freedom of association, and an increased deference to the Executive Branch.

C. HOW TO RESOLVE THE ISSUES SURROUNDING 18 U.S.C. §2339B

Congress has greatly expanded the breadth of 18 U.S.C. §2339B. The best way to follow the spirit of the law is to re-embrace the nexus test. The enumerated list approach doesn’t adapt to FTO’s ever changing operations and ways of conducting acts of terrorism. A nexus approach would allow a judge or jury in their roles as fact finders to make the determination if the accused knowingly provided material support to the FTO. Instead of having a list of what constitutes material support, the court will have to look at the motive of the accused, and did they have an evil intent. The government would have to prove that the support provided by the accused was of such a nature so as to embolden a known FTO. A judicial determination by the fact finder will not constrain them only the enumerated offenses of 18 U.S.C. §2339B. Additionally the nexus test will eliminate a “one size fits all” approach to material support and not hamper the special needs of law enforcement. This will allow humanitarian and advocacy groups to still pursue their just goals without worrying about being in violation of the material support statute.

V. CONCLUSION

The greatness of America is the freedoms and liberties granted to us under the Constitution. The openness provided to citizens in this founding document are a great blessing but is also used
by American enemies as a tool for vulnerability. In a post September 11th world this clash between personal liberty and national security has become intensified. In some cases, the benefits to society outweigh the individual’s private interests. However society should respond to emerging threats of terrorism appropriately and reasonably. Citizens should not allow government to utilize the omnipresent threat of terrorism to take individual liberties. A statutory interpretation of 18 U.S.C. §2339B that re-embraces the nexus test is the only way to make sure that the liberty/security balance is reasonably maintained. Future cases similar to *US v. Lindh*, *Hamdi v. Rumsfeld*, and *Holder v. Humanitarian Law Project* will likely force the Supreme Court to constantly redefine what constitutes “material support.” It will be interesting to see how the Court responds to future cases in regards to the extent of what constitutes material support and where the line of demarcation is for actions that constitute pure political speech.