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Due Process, Judicial Review, the First Amendment, and the Anti-Terrorism and Effective Death Penalty Act of 1996

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DUE PROCESS, JUDICIAL REVIEW, THE FIRST AMENDMENT, AND THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

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I. INTRODUCTION

Broadly speaking, there are three ways to combat international terrorist activity.[1] The first seeks to prevent a terrorist attack before it takes place.[2] The second endeavors to contain and manage the terrorist incident as it occurs.[3] The third responds to a terrorist act after it takes place, typically by apprehending and prosecuting those involved in the terrorist act or retaliating with military force.[4]

In the case of the bombings of the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, in 1998, the response included both criminal prosecutions and military action.[5] Then, on September 11, 2001, terrorists attacked America's financial and military power centers by hijacking four commercial jetliners and crashing them into the World Trade Center in New York, the Pentagon in Virginia, and the Pennsylvania countryside.[6] These horrific attacks resulted in a broad government response. Three days after the assaults, Congress passed a joint resolution authorizing the use of military force[7] "against those responsible for the . . .

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1. *See* Stephen C. Warneck, Note, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 178-79 (1998); Irvin B. Nathan & Kenneth I. Juster, *Law Enforcement Against International Terrorists: Use of the RICO Statute*, 60 U. COLO. L. REV. 553, 554 (1989).

2. *See* Warneck, *supra* note 1, at 178; *see also* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 562 (1999) (discussing strategy that invokes "building new international norms and enforcement mechanisms through treaty agreements").

3. *See* Warneck, *supra* note 1, at 178.

4. *Id.* at 178-79; *see also* Wedgwood, *supra* note 2, at 560, 563.

5. *See* Munir Ahmed, *Bin Laden Moved After Attack*, ASSOCIATED PRESS, Sept. 14, 2001; *A Verdict Against Terrorism*, WASH. POST, May 30, 2001, at A18; *The Embassy Bombings Trial*, N.Y. TIMES, Feb. 6, 2001, at A18.

6. Michael Grumwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1.

7. It has been reported that under this new campaign, the government will target terrorists involved in prior attacks on America such as, for example, the bombing of the Kobar Towers military barracks in Saudi Arabia in 1996. *See* Rowan Scarborough, *U.S. Plans War on Terrorists, Not Infrastructure*, WASH. TIMES, Sept. 14, 2001, at A13. In June 2001, in connection with that

attacks launched against the United States"[8] and providing $40 billion to help cover the cost of rebuilding and military action.[9] On September 20, 2001, in an address to the nation, President George W. Bush announced the creation of a new office reporting directly to him—the Office of Homeland Security.[10] On October 26, 2001, President Bush signed the "USA Patriot Act of 2001" into law,[11] legislation intended to assist authorities in tracking and disrupting the activities of suspected terrorists in the United States.[12]

The government also undertook a concerted diplomatic effort to enlist the cooperation and support of other countries in responding to the terrorist attacks.[13] On January 29, 2002, in his first State of the Union address, President Bush expanded the scope of the campaign to include "preventing 'the terrorists and regimes who seek chemical, biological, or nuclear weapons from threatening the United States and the world.'"[14] In March 2002, President Bush asked Congress for an additional $27.1 billion for

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bombing, a forty-six count indictment was returned against thirteen members of the pro-Iranian Saudi Hizballah or "Party of God" in the Eastern District of Virginia charging, in part, conspiracy to kill Americans and employees of the United States, to use weapons of mass destruction, and to destroy United States property. Press Release, U.S. Dep't of Justice, Khobar Towers Release *available at* http://www.fbi.gov/ (June 21, 2001).

8. *Text of Joint Resolution*, WASH. POST, Sept. 15, 2001, at A4; Neil A. Lewis, *Measure Backing Bush's Use of Force is as Broad as a Declaration of War, Experts Say*, N.Y. TIMES, Sept. 18, 2001, at B7.

9. John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4.

10. *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4 [hereinafter *Bush's Address on Terrorism*]. Former Pennsylvania Governor Tom Ridge was chosen to head the new office. Christopher Marquis, *Bush Chooses Old Ally for Cabinet-Level Post*, WASH. POST, Sept. 21, 2001, at B5. On October 8, 2001, Ridge was sworn in as director of the Office of Homeland Security. Eric Pianin, *Ridge Assumes Post Amid Warnings of Possible Attacks, FBI Warns Public, Private Entities to Observe "Highest State of Alert,"* WASH. POST, Oct. 9, 2001, at A6.

11. Pub. L. No. 107-56, 115 Stat. 272 (2002).

12. *See* Jonathan Krim & Robert O'Harrow Jr., *Bush Signs into Law New Enforcement Era*, WASH. POST, Oct. 27, 2001, at A6.

13. Karen DeYoung, *Bush Urges Coalition to Fulfill Its 'Duties'; $1 Billion Aid for Pakistan Announced*, WASH. POST, Nov. 11, 2001, at A1; David E. Sanger & Michael R. Gordon, *A Nation Challenged; The White House; U.S. Takes Steps to Bolster Bloc Fighting Terror*, N.Y. TIMES, Nov. 7, 2001, at A1; Brent Scowcroft, *Build a Coalition*, WASH. POST, Oct. 16, 2001, at A23; Jane Perlez, *A Nation Challenged: Europeans; Blair and Chirac Head to U.S. for Talks and a Show of Unity*, N.Y. TIMES, Sept. 18, 2001, at B2; Ben Barber, *Powell Sets Up Global Anti-Terror Coalition U.S. Eyes Strikes at Training Camps*, WASH. TIMES, Sept. 13, 2001, at A1.

14. *See* William Kristok, *Taking the War Beyond Terrorism*, WASH. POST, Jan. 31, 2002, at A25; *see also* Charles Krauthammer, *Redefining the War*, WASH. POST, Feb. 1, 2002 (noting that President Bush's State of the Union address will be remembered because "[i]t redefined the war"); Amy Goldstein & Mike Allen, *Bush Vows to Defeat Terror, Recession*, WASH. POST, Jan. 30, 2002, at A1 (noting that President Bush had "laid out a justification for a longer and broader war against terrorism" and identified North Korea, Iraq, and Iran as representing "'an axis of evil' . . . attempting to develop nuclear, biological and chemical weapons").

domestic security and military needs stemming from the attacks on September 11.[15]

While the long-term campaign[16] against terrorism will continue to have a criminal law component,[17] it is likely to be more carefully scrutinized than it was in the past[18] and be part of a broader diplomatic, intelligence,

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15. Dana Millbank, *Bush Seeks $27.1 Billion More for Military, Security, Relief Efforts*, WASH. POST, Mar. 22, 2002, at A7.

16. In his address to the joint session of Congress following the attacks on the World Trade Center and the Pentagon, President Bush stated in part:

> Our response involves far more than instant retaliation and isolated strikes.
>
> Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen. It may include dramatic strikes visible on TV and covert operations, secret even in success.
>
> We will starve terrorists of funding, turn them one against another, drive them from place to place until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism.

Bush's Address on Terrorism, *supra* note 10, at B4; *see also* Goldstein & Allen, *supra* note 14, at A1 (reporting that in his first State of the Union address, President Bush stated "Our war on terrorism is well begun, but it is only begun, [Bush said.] This campaign may not be finished on our watch, yet it must be and it will be waged on our watch."); Mike Allen, *Bush: War May Last Over 2 Years; President Says He's Ready to Accept Political Consequences*, WASH. POST, Oct. 18, 2001, at A29 (reporting that President Bush indicated "he expects his war on terrorism to take more than two years and that he is ready to accept the political consequences if the nation tires of the fight").

17. *See* Dan Eggen & Karen DeYoung, *FBI Draws 'The Line' with Names and Faces*, WASH. POST, Oct. 11, 2001, at A16 (reporting the unveiling of a list of "Most Wanted Terrorists" supplementing the FBI's popular "10 Most Wanted"); *see also* David Johnston & Benjamin Weiser, *Ashcroft Is Centralizing Control Over the Prosecution and Prevention of Terrorism*, N.Y. TIMES, Oct. 10, 2001, at B9 (discussing establishment of "9/11 Task Force" within the Department of Justice "to operate as the agency's central command structure for prosecuting terror cases and helping to prevent further acts of violence against the United States"); Jim Oliphant, *Bush's Burden: Seeking Justice in Terror's Wake*, LEGAL TIMES, Sept. 17, 2001, at 12 (stating "[u]ltimately, it is likely that an extensive military campaign will exist side by side with a domestic prosecutorial effort").

18. *See* Rush Limbaugh, *Bush's FDR Example*, WASH. POST, Nov. 28, 2001, at A35 (arguing that if al Qaeda terrorists were prosecuted in civilian courts as opposed to military tribunals, the "government would be required to reveal secret intelligence information and techniques in open court, and our courtrooms would most likely be turned into forums for propagandizing and encouraging further terrorist acts"); *see also* William Glaberson, *U.S. Faces Tough Choices if Bin Laden is Captured*, N.Y. TIMES, Oct. 22, 2001, at B5 (noting that trial of Osama bin Laden in federal court "would present problems. Among other things, American courts give defendants access to much of the government's evidence against them. A federal court trial could provide terrorists with a road map to the country's intelligence sources . . . giving them an advantage in the continuing battle against terrorism."); Karen De Young & Michael Dobbs, *Bin Laden: Architect of New Global Terrorism*, WASH. POST, Sept. 16, 2001, at A8 (discussing in part how prosecution of terrorists enables terrorist organizations to learn how authorities investigate and pursue organization when evidence related to those questions is presented in open court); John Lancaster & Susan Schmidt, *U.S. Rethinks Strategy for Coping with Terrorists; Policy Shift Would Favor Military Action, Tribunal Over Pursuing Suspects Through American Courts*, WASH. POST, Sept. 14, 2001, at A9 ("Stunned by the magnitude of . . . terrorist attacks, Congress and the White House are reassessing an approach to fighting terrorism that . . . has favored the tools of law enforcement over those of war.").

economic, and military effort.[19] It has been suggested that, historically, criminal law has focused on the third method of combating terrorism—responding to the terrorist attack after it occurs.[20] Whether or not this is accurate, this much is now clear. On September 18, 2001, as part of the counter-terrorism strategy in response to the attacks on the World Trade Center and the Pentagon, Attorney General John D. Ashcroft announced that every United States Attorney had been directed to establish an anti-terrorism task force in his or her district; these task forces would be "part of a national network that [would] coordinate the dissemination of information and the development of . . . strategy to disrupt, dismantle and punish terrorist organizations throughout the country."[21] Attorney General Ashcroft stated that the creation and operation of these task forces "represent[ed] a more preventative approach to doing business," a change in mission brought about by the attacks on the World Trade Center and the Pentagon.[22]

One aspect of the aftermath of these devastating attacks was the renewed recognition[23] that funding plays an important role in the activities of international terrorists.[24] Indeed, almost two weeks after the attacks, President Bush entered an executive order directing financial institutions to

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19. *See* Bob Woodward, *50 Countries Detain 360 Suspects at CIA's Behest; Roundup Reflects Aggressive Efforts of an Intelligence Coalition Viewed as Key to War on Terrorism*, WASH. POST, Nov. 22, 2001, at A1 (reporting that a "senior White House official said . . . the intelligence coalition is as important as the military and diplomatic coalitions involved in the war on terrorism"); *see also* Steven Mufson & Alan Sipress, *Bush to Seek Nation's Support Tonight; First Warplanes Head to Targeted Area; Battle Called 'A War of Will and Mind,'* WASH. POST, Sept. 20, 2001, at A1 ("Bush and senior administration officials spent another day lining up international support for military, financial and economic actions that the president said would be designed to locate terrorist leaders, 'get them out of their caves, get them moving, cut off their finances.'").

20. *See* Warneck, *supra* note 1, at 179.

21. Press Briefing, FBI Headquarters, Attorney General Remarks 2 (Sept. 18, 2001) *available at* http://www.usdoj.gov/ag/speeches/2001/0918pressbriefing.htm (last visited 4/10/02).

22. *Id.* at 3; *see also* Dan Eggen & Jim McGee, *FBI Rushes to Remake Its Mission; Counter-terrorism Focus Replaces Crime Solving*, WASH. POST, Nov. 12, 2001 (reporting that "[s]ince the Sept. 11 terrorist attacks, Attorney General John D. Ashcroft and his handpicked FBI director, Robert S. Mueller III, have begun to refocus the Bureau's efforts on detecting and thwarting future terrorist assaults, instead of pursuing culprits after crimes are committed"); *Council to Coordinate Anti-Terror Efforts,* UNITED PRESS INT'L, Mar. 6, 2002 (reporting the creation of National Security Coordination Council at the Department of Justice to coordinate the fight against terrorism).

23. Prior to the September 11 attacks, the government froze the assets of certain terrorist organizations in an effort to disrupt their operations. Wedgwood, *supra* note 2, at 562. For example, following the attacks of the American embassies in Nairobi and Dar es Salam, "an executive order froze the U.S. assets of bin Laden and forbade any financial transactions between U.S. companies and his associates." *Id.* at 562-63 (citation omitted).

24. Paul Blustein, *New Task Forces Target Terrorist Funding; Money Laundering Studied; Groups May Have Tried to Profit From Attacks*, WASH. POST, Sept. 20, 2001, at A6; Kevin McCoy, *Feds Probe Whether Islamic Charities Linked to Hijackers*, USA TODAY, Sept. 20, 2001, at A3.

freeze any assets belonging to fifteen organizations and twelve individuals suspected of funding terrorists.[25]

One existing tool aimed at curtailing the funding of international terrorist activity is found in the Antiterrorism and Effective Death Penalty Act ("AEDPA" or the "Act"), which was signed into law by President Clinton on April 24, 1996.[26] The purpose of the AEDPA, described by some commentators as a first-stage preemptive approach to combating terrorism,[27] was in part, as the name implies, to "deter terrorism."[28] Under the international terrorist prohibitions of the Act, the Secretary of State has the authority to designate an entity as a foreign terrorist organization, thereby effectively freezing its assets and rendering the provision of any material support to that organization subject to criminal prosecution.[29]

The enforcement of the international terrorist prohibitions of the AEDPA raises a number of questions. For example, what procedural due process concerns are implicated by the Secretary of State's designation of a terrorist organization? Are all of the findings associated with the designation of an entity as a foreign terrorist organization subject to judicial review? Do the anti-fundraising provisions of the Act violate the First Amendment? Are they constitutionally overbroad? This article discusses the answers to these questions and provides a general overview of the developing case law on those sections of the AEDPA related to these topics.

II. AN OVERVIEW OF THE INTERNATIONAL TERRORISM PROHIBITIONS OF THE AEDPA

The antiterrorism provisions of the AEDPA were designed to "provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to

25. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); *see also* Mike Allen & Paul Blustein, *Bush Moves to Cut Terrorists' Support; Foreign Banks Urged to Help Freeze Assets of 27 Entities*, WASH. POST, Sept. 25, 2001, at A1; John Mintz & David Hilzenrath, *Bush's Target List Draws Path to Bin Laden's Backers*, WASH. POST, Sept. 25, 2001, at A9.

26. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 624-25 (1996) (discussing the legislative evolution of the AEDPA).

27. *See* Warneck, *supra* note 1, at 179.

28. 110 Stat. 1214. The AEDPA is composed of nine titles and covers areas such as justice for victims, habeas corpus reform, international terrorism prohibitions, nuclear, biological, and chemical weapons restrictions, implementation of plastic explosives convention, terrorist and criminal alien removal and exclusion, criminal-law modifications to counter terrorism, and assistance to law enforcement. 110 Stat. 1214-17.

29. 8 U.S.C. § 1189(a) (2000).

foreign organizations that engage in terrorist activities."[30] Under the AEDPA, the Secretary of State ("Secretary"), in consultation with the Secretary of the Treasury and the Attorney General, may

> designate an organization as a foreign terrorist organization . . . if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity[31] . . . ; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security[32] of the United States.[33]

In making this determination, the Secretary may rely upon classified information.[34]

The consequences of designation are significant. Upon notification by the Secretary to members of Congress of an intended designation,[35] the Secretary of Treasury may freeze any assets[36] that the organization has on deposit with any financial institution[37] in the United States.[38] These assets

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30. 18 U.S.C. § 2339B (2000) (quoting Findings and Purpose, Pub. L. No. 104-132, § 301(a) & (b), 110 Stat. 1214, 1247).

31. Generally, "terrorist activity" includes the following acts, or the threat, attempt or conspiracy to engage in the same: (i) hijacking or sabotaging an aircraft, vessel, or vehicle; (ii) seizing, detaining, or threatening to kill an individual in order to compel a third person (including a government organization) to do or abstain from doing an act; (iii) attacking an internationally protected person; (iv) engaging in an assassination; and (v) using biological or chemical agents, nuclear weapons, explosives, or firearms with the intent to endanger others or damage property. 8 U.S.C. § 1182(a)(3)(B)(ii)(I)-(V) (2000).

32. "National security" is defined as "the national defense, foreign relations, or economic interests of the United States." *Id.* § 1189(c)(2).

33. *Id.* § 1189(a)(1) & (c)(4). "While this definition does not specifically address the issue of multifaceted organizations, it appears that if an organization engages in any form of terrorism, it will be considered terrorist regardless of the other functions the group may perform." Jacqueline Benson, Comment, *Send Me Your Money: Controlling International Terrorism by Restricting Fundraising in the United States*, 21 HOUS. J. INT'L L. 321, 343 (1988).

34. 8 U.S.C. § 1189(a)(3)(B). This subsection states:

> The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (b) [of this section].

Id.

35. Seven days prior to designating an entity as a foreign terrorist organization, the Secretary must, by "classified communication," notify selected members of Congress and of particular committees of the contemplated designation. *Id.* § 1189(a)(2)(A)(i). Seven days after the notification, the Secretary must publish the designation in the Federal Register. *Id.* § 1189(a)(2)(A)(ii). The designation takes effect upon publication. *Id.* § 1189(a)(2)(B)(i).

36. *See* 31 C.F.R. § 597.302 (2001) (defining assets).

37. *See* 31 C.F.R. § 597.319(a) (2001) (defining "U.S. financial institution" in part as "[a]ny financial institution organized under the laws of the United States, including such financial institution's foreign branches").

38. 8 U.S.C. § 1189(a)(2)(A)-(C); *see also* 31 C.F.R. § 597.201(a) (2001); *see generally*, 31 C.F.R. § 597.309 (2001) (defining foreign terrorist organization as "an organization designated *or* redesignated as a foreign terrorist organization, or with respect to which the Secretary of State has

remain frozen "until further directive from either the Secretary of the Treasury, Act of Congress, or order of court."[39] Furthermore, any financial institution that becomes aware it holds assets belonging to a foreign terrorist organization or its agent[40] must freeze that account and report its existence to the Secretary of the Treasury.[41]

Members of a designated organization and its representatives also are barred from entering the United States.[42] More significantly, anyone subject to or within the jurisdiction of the United States who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" may be criminally prosecuted.[43] The Act defines "material support or resources" 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."[44]

The Secretary's designation is effective for two years.[45] Prior to the termination of the two-year period, the Secretary may redesignate an organization as a foreign terrorist organization, provided that the relevant circumstances that led to the initial designation still exist.[46] Congress may block or revoke a designation.[47] The Secretary also may revoke a

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notified Congress of the intention to designate as a foreign terrorist organization, under 8 U.S.C. § 1189(a)") (emphasis added).

39. 8 U.S.C. § 1189 (a)(2)(C); *see also* 31 C.F.R. § 597.201(b).

40. *See* 31 C.F.R. § 597.301 (2001) (defining agent).

41. 18 U.S.C. § 2339B(a)(2) (2000). A financial institution's failure to retain possession of such funds may result in the imposition of civil penalties and injunctive relief. *Id.* § 2339B(b) & (c).

42. 8 U.S.C. § 1182(a)(3)(A) (2000).

43. 18 U.S.C. § 2339B(a)(1), as amended by § 810(d) of the USA Patriot Act of 2001, 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 death of any person results, shall be imprisoned for any term of years [or for] life.

Id. The provision of material support or resources to a terrorist organization is also now a predicate offense to money laundering under 18 U.S.C. § 1956 (2000) (§ 805(b) of the USA Patriot Act).

44. 18 U.S.C. §§ 2339A(b) & 2339B(g)(4) (*as amended* by § 805 (b) of the USA Patriot Act of 2001).

45. 8 U.S.C. § 1189(a)(4)(A) (2000).

46. *Id.* § 1189(a)(4)(B).

47. *Id.* § 1189(a)(5).

designation if changed circumstances or the national security of the United States warrant the change.[48]

On October 2, 1997, then Secretary of State Madeline K. Albright made the first set of designations under the Act, identifying thirty organizations as foreign terrorist organizations.[49] On October 8, 1999, Secretary Albright redesignated twenty-seven groups[50] and added al-Qa'ida, the terrorist organization led by Osama bin Laden associated with the attacks on the World Trade Center and the Pentagon.[51] On September 25, 2000, Secretary Albright designated one organization.[52]

The Bush Administration also has been involved in the designation process under the Act. On October 5, 2001, Secretary of State Colin L. Powell renewed the designation of twenty-four organizations and added one new organization to the list.[53] More recently, on December 26, 2001 and March 27, 2002, Secretary Powell designated five additional groups as terrorist organizations, including two Pakistani groups and a group linked to PLO Chairman Yasser Arafat's party.[54]

The Secretary's designations of organizations have included aliases.[55] While the statute does not expressly allow for an alias designation, one court has recognized that the Secretary's "power to designate an

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48. *Id.* § 1189(a)(6)(A)(i)-(ii).

49. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650-51 (Oct. 8, 1997).

50. Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112-13 (Oct. 8, 1999). Three groups designated in 1997 were allowed to lapse.

51. *See* T.R. Reid, *Tape Proves Bin Laden is Guilty, Britain Says*, WASH. POST, Nov. 15, 2001, at A29 (reporting that according to the British government, "[i]n a videotape made [on Oct. 20], Osama bin Laden declared that his al Qaeda network 'instigated' the Sept. 11 attacks"); *see also* Dan Eggen & Vernon Loeb, *U.S. Has Strong Evidence of Bin Laden Link to Attack*, WASH. POST, Sept. 12, 2001 (reporting that "[a]ccording to the [U.S.] State Department's April 2001 report on global terrorism, bin Laden uses a $300 million family inheritance to finance his terrorist organization, al Qaeda, which has 'several hundred to several thousand members' and a 'worldwide reach'").

52. Designation of a Foreign Terrorist Organization, 65 Fed. Reg. 57,641, 57,641-44 (Sept. 25, 2000).

53. Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,088, 51,088-90 (Oct. 5, 2001); *see also* Steven Mufson, *U.S. Updates List of Terrorist Groups*, WASH. POST, Oct. 6, 2001.

54. Press Release, Colin L. Powell, Secretary of State, Statement on Designation of Three Additional Terrorist Organizations (Mar. 27, 2002), *available at* http://www.state.gov/secretary/rm/2002/9017.htm; *see also* Alan Sipress, *U.S. Lists Bomber's Group as Terrorist, Freezes Assets*, WASH. POST, Mar. 22, 2002, at A18; Peter Slevin, *Pakistan Groups Called Terrorist Organizations; Powell Names 2 in Formal Declaration*, WASH. POST, Dec. 27, 2001, at A20.

55. For example, the Secretary's designation of "al Qa'ida" on October 8, 1999, provided that it was also known as al Qaeda, the Base, the Islamic Army, the World Islamic Front for Jihad Against Jews and Crusaders, the Islamic Army for the Liberation of the Holy Places, the Usama Bin Laden Network, Islamic Salvation Foundation, and the Group for the Preservation of the Holy Sites. Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112 (Oct. 8, 1999); *see also A Look at Groups Linked to Osama Bin Laden*, ASSOCIATED PRESS, Sept. 20, 2001.

organization as a foreign terrorist organization if it commits the necessary sort of terrorist acts under its own name implies the authority to so designate an entity that commits the necessary terrorist acts under some other name."[56]

An entity designated as a foreign terrorist organization may seek judicial review of such designation within thirty days of publication in the Federal Register with the United States Court of Appeals for the District of Columbia Circuit.[57] The judicial review is to be "based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation."[58] The court must set aside a designation if it finds the designation

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . or (E) not in accord with the procedures required by law.[59]

III. THE SECRETARY OF STATE'S DESIGNATION AND PROCEDURAL DUE PROCESS

As a preliminary matter, it bears noting that courts have held that the AEDPA does not give the Secretary the "unfettered discretion," in violation of the First and Fifth Amendments, to designate groups as foreign terrorist organizations.[60] As explained by the court in *Humanitarian Law Project v. Reno*:[61]

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56. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 200 (D.C. Cir. 2001).

57. 8 U.S.C. § 1189(b)(1) (2000).

58. *Id.* § 1189(b)(2). "Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the 'administrative record' may consist of little else." People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 19 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2001).

59. 8 U.S.C. § 1189(b)(3)(A)-(E). "The pendency of an action for judicial review of a designation [does] not affect the application of . . . section [1189], unless the court issues a final order setting aside the designation." *Id.* § 1189(b)(4).

60. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). *But see* Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L. J. 693, 704-05 (1998) (arguing the designation provision is problematic, notwithstanding the requirement that the organization engage in terrorist activities, because "an entire group of people might be officially classified as a 'terrorist organization' based upon no more than one unlawful act committed by one of its members").

61. 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

> The statute authorizes the Secretary to designate only those groups that engage in terrorist activities. This standard is not so vague or indeterminate as to give the Secretary unfettered discretion. For example, the Secretary could not, under this standard, designate the International Red Cross or the International Olympic Committee as terrorist organizations. Rather, the Secretary must have reasonable grounds to believe that an organization has engaged in terrorist acts—assassinations, bombings, hostage-taking, and the like—before she can place it on the list. This standard is sufficiently precise to satisfy constitutional concerns.[62]

Moreover, because the conduct involves foreign affairs, the executive branch is entitled to more latitude than in the domestic context.[63]

The designation process under the AEDPA occurs without any prior notice or hearing.[64] The only notice provided under the Act occurs after the designation is made public, and it only triggers an opportunity for judicial review of an administrative record, which the aggrieved party has no opportunity to add to or challenge.[65] Does such a procedure comport with the Fifth Amendment's guarantee of due process?[66] Currently, the answer is no, assuming the foreign organization is eligible for constitutional protection in the first place.[67]

In *National Council of Resistance of Iran v. Department of State*,[68] two organizations challenged their designation on the ground that by "designating them without notice or hearing as a foreign terrorist organization, with the resultant interference with their rights to obtain and possess property and the rights of their members to enter the United States, the Secretary deprived them of 'liberty, or property, without due process of law,' in

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62. *Humanitarian Law Project*, 205 F.3d at 1137 (citations omitted). One commentator has observed that a major problem with the AEDPA "is deciding which groups qualify as terrorist organizations. It is difficult to determine the primary function of organizations that focus on political or religious issues but occasionally utilize terrorist tactics." Benson, *supra* note 33, at 342-43 (citations omitted).

63. *Humanitarian Law Project*, 205 F.3d at 1137.

64. 8 U.S.C. § 1189(a)(2).

65. *Id.* § 1189(a)(8).

66. The Fifth Amendment provides in part that no person shall "be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V. Generally speaking, under the dues process clause, "[i]f life, liberty or property is at stake, the individual has a right to a fair procedure. The question then focuses on the nature of the 'process' that is 'due.'" 3 RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW, § 17.1, at 3 (3d ed. 1999).

67. *See* Andy Pearson, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association*, 24 WM. MITCHELL L. REV. 1185, 1206-11 (1998) (arguing that the process by which the Secretary designates an organization as a foreign terrorist organization violates procedural due process).

68. 251 F.3d 192 (D.C. Cir. 2001).

violation of the Fifth Amendment of the United States Constitution."[69] The court agreed.[70]

The court began its analysis by noting that for an organization to avail itself of constitutional protection, an organization designated as a foreign terrorist organization must be able to establish a "constitutional presence in the United States."[71] In this case, the court found that "the entire record including the classified information" established that one of the organizations "c[ould] rightly lay claim to having come within the territory of the United States and developed substantial connections with this country."[72] As described by the court (insofar as the non-classified information was concerned), the connection to the United States at least consisted of the organization's "overt presence within the National Press Building in Washington, D.C.," and "an interest in a small bank account."[73] Furthermore, since the Secretary's designation of this organization was premised on the theory that it was an alter ego of another organization, the other organization likewise could claim protection.[74]

In making the determination that the organizations were entitled to constitutional protection, the court rejected the government's contention that, as foreign government instrumentalities, the organizations were subject to interaction "not within the constitutional framework, but through the system of international law and diplomacy."[75] The court explained:

> It is certainly true that sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections such as the Due Process Clause. However, since neither . . . [of the two organizations] is a government, none

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69. *Nat'l Council*, 251 F.3d at 200.

70. *Id.*

71. *Id.* at 201. "A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999).

72. *Nat'l Council*, 251 F.3d at 202. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), the Supreme Court ruled that the Fourth Amendment was inapplicable to foreign searches by American law enforcement officials involving property of non-resident aliens with "no voluntary connection" to the United States. *Verdugo-Urquidez*, 494 U.S. at 261. In support of its connection or presence determination, the court in *National Council* explained that nothing in *Verdugo-Urquidez's* holding "purport[ed] to establish whether aliens who have entered the territory of the United States and developed connections with this country but not substantial ones are entitled to constitutional protections" and that it was "not undertaking to determine, as a general matter, how 'substantial' an alien's connections with this country must be to merit the protections of the Due Process Clause or any other part of the Constitution." *Nat'l Council*, 251 F.3d at 202.

73. *Nat'l Council*, 251 F.3d at 201. The court's reliance in *National Council* on classified information in support of its presence ruling appears to leave little or no precedential value on this question since there is no record of what the court considered.

74. *Id.*

75. *Id.* at 202.

> of the authorities offered by the Secretary have any force. . . . If the United States were to recognize . . . [one of the organizations] as a government, or even perhaps to deal with it as if it were a government, then the result might be different. But on the present record, the Secretary has deemed the [organization] to be nothing but a foreign terrorist organization, and it is as such that the Secretary must litigate with that entity.[76]

Having then determined that the organizations were entitled to protection under the Fifth Amendment, the court next addressed whether the designation process and its consequences in fact deprived them of a liberty or property interest, and if so, what process was due.[77]

A. THE DEPRIVATION OF A RECOGNIZED INTEREST

In assessing whether there had been a deprivation of a recognized interest protected by the Due Process Clause, the court initially found that the most obvious rights affected were the organizations' property rights.[78] The interest in a bank account by one of the organizations, the court determined, raised at least a colorable allegation sufficient to support a due process claim.[79]

The court went on to recognize that plausible arguments were raised by both parties as to whether the denial of readmission into the United States to members of the organization who traveled abroad[80] and the criminal prohibition on the provision of resources or material support to the organizations[81] affected liberty interests protected by the due process

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76. *Id.* at 202-03.

77. *See* Pearson, *supra* note 67, at 1207 ("The first question under procedural due process analysis is whether there has been a deprivation of liberty or property. When liberty or property interests are at stake, the second question concerns the procedural protection necessary.") (citations omitted).

78. *Nat'l Council*, 251 F.3d at 204. As noted by two distinguished commentators, "[c]ertainly all of the traditional forms of real and personal property fall within" the definition of "property" under the due process clause of the Fifth Amendment. 3 ROTUNDA & NOVAK, *supra* note 66, § 17.5, at 69.

79. *Nat'l Council*, 251 F.3d at 204 (relying on Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931) for the proposition that a foreign organization that acquires or holds property in the United States may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention).

80. The Secretary maintained "with some convincing force that aliens have no right of entry and that the organization ha[d] no standing to judicially assert rights which its members could not bring to court." *Nat'l Council*, 251 F.3d at 204. For their part, the organizations argued that the Act limited the "ability to travel abroad of its members who [we]re already in the United States as they kn[e]w they would be denied readmission." *Id.*

81. *Id.* at 205. The organizations contended that the Act's ban on material support "deprive[d] their members of First Amendment associational and expressive rights." *Id.* The government responded that the ban did "not affect the ability of anyone to engage in advocacy of the goals of the organizations, but only from providing material support which might likely be

clause.[82] Having concluded previously that a property right was already implicated, triggering due process protection, the court declined to rule on the liberty interests which the organizations claimed also were affected.[83]

B. THE PROCESS DUE—WHEN AND WHAT

Well-established due process jurisprudence holds that before the government can deprive a person of a protected property or liberty interest, it must generally afford that person notice and an opportunity to be heard.[84] This is not to say, however, that due process is "a technical concept with a fixed content unrelated to time, place and circumstances."[85] To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands."[86]

In *Mathews v. Eldridge*,[87] the Supreme Court identified three distinct factors that must be considered when seeking to determine how much procedural protection is required in a given context.[88] The Court described the factors as:

> First, the private interest[s] that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail.[89]

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employed in the pursuit of unlawful terrorist purposes as [i]f First Amendment protected advocacy." *Id.*

82. *Id. See* 3 ROTUNDA & NOVAK, *supra* note 66, § 17.4, at 28 (discussing deprivation of liberty involving persons).

83. *Nat'l Council*, 251 F.3d at 205.

84. *See, e.g.*, LaChance v. Erickson, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard." (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985))).

85. Gilbert v. Homar, 520 U.S. 924, 930 (1997) (quoting Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961)).

86. Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

87. 424 U.S. 319 (1976).

88. *Mathews*, 424 U.S. at 335.

89. *Id.* at 335. In employing the *Mathews* balancing test, there are three procedural areas for a court to consider:

> First, a court should use the test to determine if an individual is entitled to a hearing prior to (rather than after) a governmental action which would deprive him of a liberty property interest . . .
>
> Second, whether the court decides that a pre-deprivation or post-deprivation hearing is required, it should employ the balancing test to determine the precise procedures to be employed at the hearing. These balancing test rulings may cover the procedural spectrum from requiring only informal hearings to requiring a full adversarial process.

After applying those factors, the court in *National Council* ruled that the "Secretary must afford the limited due process available to the putative foreign terrorist organization *prior* to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of particularized need."[90]

As to what process is due, the court ruled that the "Secretary must afford to the entit[y] under consideration notice that [a] designation is impending."[91] This notice, the court explained, must provide the unclassified information upon which the Secretary intends to rely.[92] With respect to the opportunity to be heard, the court rejected the suggestion that a hearing similar to a trial was required.[93] What is required, the court determined, was "the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations."[94]

In conclusion, following *National Council*, the Secretary must (absent a showing of particularized need) afford notice to a terrorist organization, which has a constitutional presence in the United States and is not recognized or treated as a de facto government, of an impending designation so that the organization can have an opportunity to respond to the nonclassified information upon which the Secretary intends to rely.

> Third, if the court requires a formal adversarial process, it may use the balancing test to determine the standard of proof that the government must meet in order to justify the deprivation of the individual liberty or property interest in the individual case.

3 ROTUNDA & NOVAK, *supra* note 66, § 17.18, at 111-13.

90. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001) (emphasis added). The court recognized that "alerting a previously undesignated organization to the impending designation as a foreign terrorist organization might work harm to th[e country's] foreign policy goals in ways" that may not immediately be apparent; the court made clear that its ruling was not intended to "foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made." *Id.*

91. *Id.*

92. *Id.* at 209. The court indicated in *National Council*:

> The notice must include the action sought, but need not disclose the classified information to be presented in camera and ex parte to the court under the statute. . . . However, the Secretary has shown no reason not to offer the designated entities notice of the administrative record which will in any event be filed publicly, at the very latest at the time of the court's review.

Id. at 208-09.

93. *Id.* at 209 (quoting *Mathews*, 424 U.S. 319, 333 (1976)).

94. *Id.*

IV. JUDICIAL REVIEW OF THE SECRETARY'S FINDINGS

As previously noted, under the AEDPA, the Secretary may designate an organization as a foreign terrorist organization if he finds that "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . and (C) the terrorist activity . . . of the organization threatens the security of United States nationals or the national security of the United States."[95] The AEDPA further provides for judicial review of a designation if a petition is filed within thirty days of the publication of the designation in the Federal Register.[96] But, all three of the Secretary's findings are not subject to judicial review.

In *People's Mojahedin Organization of Iran v. United States Department of State*,[97] the court was confronted with petitions for review filed by two organizations which had been designated as foreign terrorist organizations under the Act.[98] The court ruled that there was substantial support in the record for the Secretary's determination that both organizations were foreign organizations engaged in terrorist activities—the first two findings under the AEDPA.[99] As to the Secretary's finding that the organizations were a threat to national security, the court, relying on *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[100] ruled that this determination represented a political foreign policy decision, one "'for which the Judiciary has neither aptitude, facilities nor responsibility and [which] h[as] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'"[101]

In *Waterman*, the Supreme Court confronted the propriety of judicial review of orders emanating from the Civil Aeronautics Board (CAB) which operated to "grant or deny applications by citizen carriers to engage in overseas and foreign air transportation . . . subject to the approval of the President."[102] In ruling that such orders were not subject to judicial review, even if issued prior to any presidential action, the Supreme Court observed that the review of "an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in

95. 8 U.S.C. § 1189(a)(1) (2000); *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law—U.S. Designation of Foreign Terrorist Organization*, 94 AM. J. INT'L L. 348, 365 (2000).

96. 8 U.S.C. § 1189(b)(1).

97. 182 F.3d 17 (D.C. Cir. 1999).

98. *People's Mojaheden*, 182 F.3d at 18.

99. *Id.* at 24-25.

100. 333 U.S. 103 (1948).

101. *People's Mojahedin*, 182 F.3d at 23 (quoting *Waterman*, 333 U.S. at 111).

102. *Waterman*, 333 U.S. at 104.

its most obnoxious form—advice that the President has not asked . . . on a subject concededly within the President's exclusive, ultimate control."[103]

In the case involving the organizations, the court reasoned that the admonition in *Waterman* regarding advisory opinions did not preclude meaningful judicial review. As the court explained in *People Mojahedin*:

> there is a difference between the statutory system in *Waterman* and the statutory system we have before us. . . . [In *Waterman*,] the [CAB] order could not be effective without Presidential action. . . . Judicial review of the CAB's action, then, would have amounted to rendering an advisory opinion. Not so here. If we were to determine that the Secretary failed to comply, or did comply, with Section 1189(a)(1)(A) and (B), there would be nothing advisory about our opinion. We would uphold, or set aside, the Secretary's determination on that ground.[104]

In short, judicial review of a Secretary's designation under the AEDPA appears to be limited to whether there is substantial support[105] in the record for the finding that the organization is foreign and engages in terrorist activity.[106]

V. THE FIRST AMENDMENT AND THE AEDPA'S BAN ON SUPPORT

The AEDPA has come under legal challenge by organizations and citizens who claim that criminalizing the provision of support directed to aid only the legal and political activities of a designated organization infringes on the First Amendment right of freedom of association. The courts have rejected this contention.

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103. *Id.* at 113.

104. *People's Mojahedin*, 182 F.3d at 24.

105. *Id.* at 24-25. The court's refusal to review the Secretary's findings under something more akin to the "substantial evidence" standard of the Administrative Procedure Act reflects a recognition that the record compiled by the Secretary is not subject to any adversary, adjudicative-type process. *Id.* at 24 & n.8; *see also* Derek P. Jinks, Int'l Decision People's Mojahedin Org. of Iran v. U.S. Dep't of State, *182 F.3d 17 U.S. Court of Appeals, D.C. Circuit, June 25, 1999*, 94 AM. J. INT'L L. 396, 398 n.33 (2000).

106. *People's Mojahedin*, 182 F.3d at 25. One commentator has opined that "[this] compromise of limited judicial review demonstrates proper deference to the Supreme Court's holding in *Waterman* and yet allows the court to perform the role Congress intended without entering the political sphere." Michael J. Avenatti, D.C. Circuit Review, *Judicial Review Under the Anti-terrorism and Effective Death Penalty Act*, 68 GEO. WASH. L. REV. 803, 808 (2000). Another, however, maintains that "in leaving the Secretary such broad and unfettered discretion in the fact-finding process, the court effectively isolated the Secretary's actions" from judicial review. Jinks, *supra* note 105, at 399 (citations omitted).

A. FREEDOM OF ASSOCIATION

The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech."[107] Although the word "association" is not found in the First Amendment, the Supreme Court has held that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[108] Put another way, "an individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[109]

B. *HUMANITARIAN LAW PROJECT V. RENO*

In *Humanitarian Law Project v. Reno*,[110] plaintiffs, six organizations and two United States citizens, sought injunctive relief against the enforcement of the AEDPA's ban on support for designated terrorist organizations on various First Amendment grounds.[111] The district court denied the requested relief for the most part[112] and on appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court.[113]

The court began its analysis by rejecting the argument that the AEDPA was unconstitutional because it imposed guilt by association.[114] The court recognized that under First Amendment jurisprudence, liability cannot be imposed "by reason of association alone."[115] But the AEDPA, the court

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107. U.S. CONST. amend. I. The full text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

108. NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958).

109. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

110. 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

111. *Humanitarian Law Project*, 9 F. Supp. 2d at 1180, 1184-85.

112. *Id.* at 1204. The district court found that the AEDPA's prohibitions against providing "personnel" and "training" were impermissibly vague and enjoined enforcement of those provisions against plaintiffs and any of their members. *Id.* at 1205 n.31. *See supra* Part VI (discussing this aspect of the court's ruling in more detail)

113. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1138 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

114. *Id.* at 1133.

115. *Id.* (quoting NAACP v. Claiborne Hardware Corp., 458 U.S. 886, 920 (1982)). In *Claiborne Hardware*, the Supreme Court held that the "right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Clairborne Hardware*, 458 U.S. at 908. As a result, following *Claiborne Hardware*, "a law may not punish association without more, but it may proscribe association with an organization whose members strive to advance the group's violent goals." Pearson, *supra* note 67, at 1204-05 (citations omitted); *see also* Scales v. United

determined, does "not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group."[116] Rather, as the court in *Humanitarian Law Project* explained:

> What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.[117]

As to the contention that the AEDPA was unconstitutional because it proscribed the giving of support irrespective of the donor's intent,[118] the court observed that "[a]dvocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts."[119] Here, plaintiffs did "not contend they [we]re prohibited from advocating the goals of the foreign terrorist organizations, espousing their views, or even being members of such groups."[120] Material support, however, could be "used to promote the organization's unlawful activities, regardless of donor intent," and the court rejected the contention that the government was required to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds.[121]

In response to the argument that terrorist organizations also engaged in political advocacy and that the provisions of moneys to such organizations reflected political association and expression, the court recognized that

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States, 367 U.S. 203, 229 (1961) (finding membership in a group may be punished if the government can demonstrate that the person is actively involved with group, knows of its illegal activities, and has intent to further those objectives).

116. *Humanitarian Law Project*, 205 F.3d at 1133.

117. *Id.*

118. *See id.*; *see also* Beall, *supra* note 60, at 699 (noting that an American citizen, if convicted, may be imprisoned "for making political contributions, even if he is contributing only to the legal, peaceful activities of the organization. There is absolutely no requirement that the government prove an individual had the specific intent to advance the illegal aims of the group through [the] contribution.").

119. *Humanitarian Law Project*, 205 F.3d at 1134.

120. *Id.*

121. *Id.* at 1133-34. The court in *Humanitarian Law Project* recognized that in *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (*ADC I*), a panel of the court ruled that, in order to punish advocacy, "the government must establish a 'knowing affiliation' and a 'specific intent to further those illegal aims.'" *Id.* at 1063 (quoting Healey v. James, 408 U.S. 169, 186 (1972)). The *Humanitarian Law Project* court distinguished *ADC I* on the ground that "advocacy is far different from making donations of material support." *Humanitarian Law Project*, 205 F.3d at 1134. Furthermore, although the same panel of the court in *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1376 (9th Cir. 1999), *vacated* 525 U.S. 471 (1999) (*ADC II*), had noted that the associational activities of the plaintiffs in *ADC I* included fundraising, the court in *Humanitarian Law Project* found that *ADC II* had been vacated; also, there had been "no language in *ADC I* holding that fundraising enjoy[ed] First Amendment protection on a par with pure speech or advocacy." *Humanitarian Law Project*, 205 F.3d at 1134.

there were cases such *Buckley v. Valeo*,[122] where the contributions were made to candidates running for political office in order to assist them to engage in electioneering.[123] However, the court reasoned, "[w]hile the First Amendment protects the expressive component of seeking and donating funds, expressive *conduct* receives significantly less protection than pure speech."[124] And where, as in the case of the AEDPA, the prohibition "serves purposes unrelated to the content of expression," intermediate scrutiny is the governing standard.[125]

The test under this standard is set forth in *United States v. O'Brien*,[126] where the Supreme Court ruled that a content neutral regulation may be justified:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[127]

The court in *Humanitarian Law Project* answered all of these questions in the affirmative.[128]

First, the court found that the federal government clearly has the power to enact laws that restrict dealings between United States citizens and foreign entities.[129] Second, the court determined there was no doubt that preventing the spread of international terrorism furthered an important and substantial government interest.[130] As to the third factor—whether the interest was unrelated to the suppression of free expression—the court concluded that such was the case because the ban restricted "the actions of

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122. 424 U.S. 1 (1976).

123. *Buckley*, 424 U.S. at 12-13.

124. *Humanitarian Law Project*, 205 F.3d at 1134-35 (quoting Texas v. Johnson, 491 U.S. 397, 406 (1989)).

125. *Id.* at 1135 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) (stating when government's regulation is unrelated to the suppression of a particular message or idea, it is content neutral and subject to intermediate level of scrutiny). The court observed in *Humanitarian Law Project* that the restriction was not "aimed at interfering with the expressive component of [the organizations'] conduct but at stopping aid to terrorist groups." *Humanitarian Law Project*, 205 F.3d at 1135.

126. 391 U.S. 367 (1968).

127. *O'Brien*, 391 U.S. at 377.

128. *Humanitarian Law Project*, 205 F.3d at 1135.

129. *See id.* (citing Regan v. Wald, 468 U.S. 222, 224 (1984) and adding a parenthetical, "restrictions on travel to Cuba do not violate the Fifth Amendment").

130. *Id.*

those who wish to give material support to the groups, not the expression of those who advocate or believe the ideas that the group supports."[131]

Finally, the court found that the ban was "well enough tailored to its end of preventing the United States from being used as a base for terrorist fundraising."[132] The court noted that "Congress explicitly incorporated a finding into the statute 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.'"[133] Consequently, it "follow[ed] that all material support given to such organizations aids their unlawful goals," and it could not be said the Congress could not properly have come to that conclusion.[134]

Notwithstanding the concern raised by some commentators that the anti-funding provisions of the AEDPA violate the First Amendment's guarantees of free speech and association,[135] the only court that has squarely confronted this issue has found otherwise.[136] In light of the recent attacks on the World Trade Center and the Pentagon, and the favorable case law, it would be surprising if the government did not become more aggressive in its enforcement of the anti-funding provisions of the AEDPA.

VI. THE AEDPA AND VAGUENESS

A criminal law such as § 2339B(a) must be sufficiently clear so that a person of common intelligence does not have to guess at its meaning to determine what is proscribed.[137] At least three rationales compel special strictness when reviewing laws for vagueness that impact on constitutional rights such as freedom of association or freedom of speech.[138] First, the requirement that a law put persons on notice as to what is criminal "is of special importance when the activity distinguishes between criminal

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131. *Id.*; *see also* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2091 (1996) (arguing the Act regulates conduct not speech); William Patton, Note, *Preventing Terrorist Fundraising in the United States*, 30 GEO. WASH. J. INT'L L. & ECON. 127, 149 (1996) ("Preventing the spread of terrorism at home and abroad is clearly an important government interest that bears no relation to the suppression of freedom of expression."). *But see* Beall, *supra* note 60, at 702-03 (arguing the contrary).

132. *Humanitarian Law Project*, 205 F.3d at 1136.

133. *Id.* (quoting AEDPA § 301(a)(7), 110 Stat. 1214, 1247 (1996)).

134. *Id.* (citations omitted).

135. *See, e.g.*, Beall, *supra* note 60, at 702-05; Pearson, *supra* note 67, at 1211-15; Gregory C. Clark, Note, *History Repeating Itself: The (D)Evolution of Recent British and American Antiterrorism Legislation*, 27 FORDHAM URB. L.J. 247, 276-77 (1999).

136. *Humanitarian Law Project*, 205 F.3d at 1134-36.

137. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 618 (1954) (stating the statute will be void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

138. *See* Village of Hoffman Estates v. Flipside, 455 U.S. 489, 499 (1982).

activity and activity that constitutes a fundamental constitutional right."[139] Second, unless law enforcement officers have distinct guidelines, they would be able to enforce the statute selectively.[140] Finally, "because the First Amendment needs breathing space, the governmental regulation that is tolerated must be drawn with 'narrow specificity.'"[141]

In *Humanitarian Law Project*, plaintiffs argued that the AEDPA was impermissibly vague because it failed to provide adequate notice as to what constituted "material support and resources."[142] The district court agreed that two of the terms defining support—"training" and "personnel"—were impermissibly vague and enjoined the prosecution of any of plaintiffs' members for activities covered by those terms.[143]

In affirming the ruling below, the United States Court of Appeals for the Ninth Circuit found that "[s]omeone who advocat[ed] the cause of the [designated organization] could be seen as supplying them with personnel," yet "advocacy [was] pure speech protected by the First Amendment."[144] Similarly, the term "training" fared little better since someone who was interested in teaching "members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term 'training.'"[145]

As noted previously, the AEDPA defines "material support or resources" 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."[146] The court's ruling in *Humanitarian Law Project* with respect to two of the terms under that definition by no means signals the death knell of the prohibition against the provision of material support to terrorist organizations.

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139. 4 ROTUNDA & NOVAK, *supra* note 66, § 20.9, at 274; *see also* Colautti v. Franklin, 439 U.S. 379, 391 (1979).

140. 4 ROTUNDA & NOVAK, *supra* note 66, § 20.9, at 275.; *see also* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

141. 4 ROTUNDA & NOVAK, *supra* note 66, § 20.9, at 275 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)); *see also* Grayned v. City of Redford, 408 U.S. 104, 108 (1972).

142. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1203 (C.D. Cal. 1998).

143. *Id.* at 1203-04.

144. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000).

145. *Id.*

146. *See* 18 U.S.C. §§ 2339A(b) & 2339B(g)(4) (as amended by § 805(b) of the USA Patriot Act of 2001).

VII. CONCLUSION

America's criminal laws will continue to play a part in the government's protracted campaign to combat international terrorism.[147] Naturally, some laws will have more of an impact than others. The AEDPA's provisions authorizing the Secretary to designate an organization as a foreign terrorist organization, effectively freezing any assets the organization may have in the United States and also rendering the provision of material support to that organization subject to criminal federal prosecution,[148] provide the government with another weapon in its battle against the eradication of international terrorism.[149]

147. *See* Dana Milbank, *For President, Reassuring a Jittery Nation*, WASH. POST, Oct. 12, 2001, at A19 ("The defeat of al Qaeda 'may happen tomorrow, it may happen a month from now, it may take a year or two,' [the President] said. 'But we will prevail.'"); *see also Powell Says Going After Bin Laden is Only First Phase of U.S. Counterterrorism Campaign*, ASSOCIATED PRESS, Oct. 4, 2001 ("Secretary of State Colin Powell said . . . a prospective military strike in Afghanistan against the al-Qaida terrorism network would be only the first step in the U.S. campaign against terrorism."); Walter Pincus, *Committee: Terrorism Threat is Long Term*, WASH. POST, Sept. 20, 2001, at A33 ("Senate Select Committee on Intelligence . . . described international terrorism as a long-term threat and called on the U.S. intelligence community to avoid considering . . . attacks on the World Trade Center and the Pentagon as 'a short-lived phenomenon.'").

148. *See* Paul Nowell, *Judge Allows Canadian Spy Evidence in Cigarette Smuggling Trial*, ASSOCIATED PRESS, Feb. 2, 2002 (reporting on prosecution of four defendants for providing material support to Hezbollah, a known terrorist organization); James Pierpoint, *U.S. Seeks to Use Canadian Wiretaps in Terror Case*, REUTERS, Dec. 5, 2001 (identifying prosecution described in article above as the "first to come to trial under a 1996 law that makes it illegal to aid foreign groups designated by the U.S. government as terrorist organizations").

149. *See* Warneck, *supra* note 1, at 226-27; *see also* Patton, *supra* note 131, at 149.