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Nowhere to Hide: Overbreadth and Other Constitutional Challenges Facing the Current Designation Regime

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Nowhere to Hide: Overbreadth and Other Constitutional Challenges Facing the Current Designation Regime

By Ilya Podolyako

This Article examines the legal foundation and policy implications of the President's power to designate terrorist organizations. These administrative actions carry severe repercussions because of the criminal prohibition on knowingly providing material support to the designated entities, codified at 18 U.S.C. § 2339B. Due to the overlap of the President's Commander-in-Chief power to block enemy assets and specific Congressional authorization of such actions, the designations themselves appear to be immune from constitutional challenges. It is the addition of concomitant criminal sanctions, however, that drastically expands the potency of the designations and turns them into an effective national security tool. This Article argues that the resulting mixture exposes the regime to attack on First and Fifth Amendment grounds. That is, though the designation and material support criminalization elements are each individually legitimate, their combination poses a constitutional issue distinct from that resolved in *Scales v. United States* and other precedents currently seen as controlling.

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Introduction

Modern American jurisprudence, though ostensibly based on common law, looks little like the idealized version of its ancestor prevalent in seventeenth-century England.

Industrialization, globalization, and now digitalization have bred fifty volumes of the United States Code and countless tomes of regulation. In addition, the mixture of healthy political discourse, liberal pleading requirements, and low costs of entry into the judicial system has produced thousands of decisions applying the Constitution, common law, and statute to a wide range of mundane and unusual activities. Of course, the above picture describes only the federal part of the legal environment. The addition of state and local counterparts creates a distinct impression that the majority of one's public activities trigger some official rule, either encouraging or reproofing the behavior.

Despite this trend towards broad regulation, jurists in the republic have taken care to keep some space clear. The freedoms allotted by the Constitution are too valuable to leave unguarded against the creep of administrative turf wars and Congressional pandering. They must be preserved, their borders vigilantly guarded against encroachment, both the seemingly innocuous and the openly hostile kinds. This paper will describe an area of the legal landscape where a combination of national security concerns with complex theory appears to have overwhelmed the sentries and thrust into the citadel of a free and open society.

Specifically, this piece will focus on the relationship between the executive power to block assets of designated organizations under IEEPA and AEDPA and material support provisions criminalizing any transaction with an entity subject to such a sanction. The first step of this scheme features low levels of culpability and limited judicial review. A penchant for broad inferences, logical shortcuts, and harsh penalties characterizes the second step. Together,

these aspects of the designation regime impermissibly infringe on constitutionally protected freedoms of speech and association. They also violate the Fifth Amendment's requirements of due process and clarity.

This piece is structured as follows. The remainder of the Introduction will set up some vignettes to provide context for the subsequent legal discussion. Part I will review the statutory and administrative foundations of the current regime. Part II will discuss its constitutional origins and some associated limitations. Part III will review two contested modern applications of the regime: the designation process and the resulting ban on material support. Part IV will articulate the First and Fifth Amendment defects in the aforementioned structure.

Example 1

Two examples should help the reader appreciate the power and problems of the designation regime. Both are fictions based on real events. First, consider Adam, an American citizen of Armenian descent residing in Boston. Adam receives an invitation for a human rights fundraiser from the local cultural center. The event will feature a speaker, David, from the Persian-Armenian Christian Coalition (PACC), a group dedicated to ending the persecution of Armenian Christians in Iran. David, also an American citizen, heads the U.S. branch of the PACC, a Delaware corporation engaged in charitable activity, headquartered in Philadelphia. PACC-US legally sends money and medical supplies to their brethren in Armenia, who then forward the goods to Iran. Though no branch or member of the PACC has ever been charged with a crime in the United States, the Iranian government has outlawed the group. Moreover, Adam has heard from several relative that PACC staged an attack on an Iranian Revolutionary

Guard outpost in 2005, killing two soldiers. Adam decides to attend David's lecture, where he purchases a t-shirt proclaiming Armenian unity from a PACC stand for \$15 dollars. Under 18 U.S.C. § 2339B,¹ Adam can be sentenced to life in prison for material support of terrorism.

Example 2

The Boston area fundraiser is successful and draws several hundred attendees. Concerned about the growing popularity of a foreign organization with a history of violence, the Department of State convenes a group of advisors to develop an appropriate solution to the PACC problem. Within two days, an investigation uncovers Iranian news reports that detail additional attacks by alleged PACC members against military and police installations. Pursuant to authority granted under the International Economic Emergency Powers Act (IEEPA)² and Executive Order 13,224,³ the Department of State lists PACC and PACC-US as "Specially Designated Global Terrorists." The move immediately freezes all assets held by the organization and its key members, who include David. David's friend Tom is outraged by the United States government's decision to side with a radical Islamic regime against Christians. He organizes a rally in Boston's Scollay Square to express their support for PACC. David, who has not been charged with any crime, rides along with Tom to give a speech at the event. These facts are sufficient to establish that Tom committed a felony by providing material support to a terrorist organization. The result remains the same even if Tom organized an online petition in lieu of the physical protest.

¹ 18 U.S.C. § 2339B (2006).

² 50 U.S.C. §§ 1701 *et seq.* (2006); International Emergency Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-1706).

³ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

Part I: The Current Designation Regime.

The regime that yields the results described in Part I rests on a set of legislative, administrative, and judicial pillars. An understanding of this structure is crucial to detecting its constitutional implications. Accordingly, this Part will review the various statutes and regulations defining the designation power. Despite the apparent redundancy, the definitions contained within each statute, Executive Order, and regulation are of paramount importance. By simultaneously outlining scope of the designation powers and specifying prohibited applications, the regime looks to track the border of constitutionally protected behavior as close as possible without actually invading its territory. Success in this task depends largely on the terminology.

I.A. Statutory Authority.

The keystone of the designation regime is the aforementioned IEEPA. First passed in 1977, the statute aimed to replace the Trading With the Enemy Act (TWEA)⁴ and expand its powers in peacetime. To that end, IEEPA authorizes the President, upon a declaration of a national emergency,⁵ to:

investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions

⁴ 50 U.S.C. App. § 5(b); *see also* Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515 (1995).

⁵ 50 U.S.C. § 1701(a) (2006).

involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States⁶

Further, the Act grants the powers to confiscate any property of a foreign person or entity who has “planned, authorized, aided, or engaged” in hostilities against the United States.⁷ Section 1702(b)(2) conditions President’s ability to prohibit contributions of food, clothing, and medicine designed to relieve “human suffering” on a finding that such donations would impede the response to the the national emergency declared under § 1701, arrive due to coercion against the donor, or endanger the United States Armed Forces.⁸ Section 1704 then permits the Executive to promulgate such regulations as may be necessary to carry out the authority vested by the Act.⁹

⁶ 50 U.S.C. § 1702(a)(1)(B) (2006).

⁷ 50 U.S.C. § 1702(a)(1)(C) (2006). The distinction between the powers granted by subsections B and C is significant. Confiscation of property is a taking under the Fifth Amendment, whereas blocking or nullification orders that do not vest title in the government are not. *See Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (“The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context.” (quoting *Propper v. Clark*, 337 U.S. 472 (1949) and *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981))). Section C restricts the exercise of the more significant taking power to foreigners, who do not have access to Fifth Amendment protections unless they form substantial connections with the United States.

Respondent also contends that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution. He relies on *Graham v. Richardson* and *Foley v. Connelie* for this proposition. But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens.

United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (citations omitted).

⁸ 50 U.S.C. § 1702(b)(2) (2006).

⁹ 50 U.S.C. § 1704 (2006).

A second pillar of the current regime is the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁰ This statute permits the Secretary of State to designate an entity as a Foreign Terrorist Organization (FTO) if it engages in “terrorist activity” or “terrorism” or “retains the capability and intent to engage in terrorist activity or terrorism” and “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”¹¹ Upon publication of the names of the designated entities in the Federal Register,¹² “the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.”¹³ Designations are permanent unless removed by an act of Congress¹⁴ or by the Secretary.¹⁵ Designated entities may appeal their status to the Department of State once every two years.¹⁶ Courts will review designations under the “arbitrary and capricious” standard after administrative remedies have been exhausted.¹⁷

AEDPA relies on the following statutory definitions to demarcate the key inquiries that take place during a designation. First, the Act defines “national security” as “the national defense, foreign relations, or economic interests of the United States.”¹⁸ Second, it defines “terrorist activity” as any activity that is “unlawful under the laws of the place where it is

¹⁰ AEDPA, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.).

¹¹ 8 U.S.C. § 1189(a)(1) (2006).

¹² 8 U.S.C. § 1189(a)(2)(A) (2006).

¹³ 8 U.S.C. § 1189(a)(2)(C) (2006).

¹⁴ 8 U.S.C. § 1189(a)(5) (2006).

¹⁵ 8 U.S.C. § 1189(a)(6) (2006).

¹⁶ 8 U.S.C. § 1189(a)(4)(B)(ii) (2006).

¹⁷ 8 U.S.C. § 1189(c)(3)(A) (2006).

¹⁸ 8 U.S.C. § 1189(d)(2) (2006).

committed” or would be if committed in the United States and involves the threat or implementation of the following: highjacking, hostage-taking, sabotage, assassination, or the use of an “explosive, firearm, or other weapon or dangerous device . . . with intent to endanger, direct or indirectly, the safety of one or more individuals or to cause substantial damage to property.”¹⁹ Alternatively, the designated entity could be involved in “terrorism,” defined in a separate section of the Code as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”²⁰ Section 1189(a)(8) eliminates the ability of a third party to challenge the validity of an FTO designation in a criminal or removal proceeding.²¹

I.B. Executive Order 13,224 and Associated Administrative Elaborations.

The statutory regime is buttressed by administrative pronouncements. The most important of these is Executive Order 13244,²² issued by President George W. Bush on

¹⁹ 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

²⁰ 22 U.S.C. § 2656f(d)(2) (2006).

²¹

Use of designation in trial or hearing. If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

8 U.S.C. § 1189(a)(8) (2006). This provision may be redundant with Article III standing considerations. Courts have held that third parties generally lack standing to challenge administrative action against organizations without reference to statutory provisions.

Additionally, a FTO designation is a designation of a third-party and not a designation of Defendants themselves. This Court views that distinction as a critical distinction to the cases under *Mendoza-Lopez*. Except in rare cases, third parties do not have standing to assert the legal rights or interests of others. The limited exception to this general rule occurs only when: (1) a defendant suffers an injury-in-fact; (2) a defendant had a “close relationship” to the third party such that the two share a common interest; and (3) there is some hindrance to the third party's assertion of its rights.

United States v. Al-Arian, 308 F. Supp. 2d 1322, 1345 (Mid. D. Fla. 2004) (citations omitted). *See Campbell v. Louisiana*, 523 U.S. 392, 397-98 (1998); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

²² Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). In relying on IIEPA, Executive Order 13,224 follows in the footsteps of two orders issued by President Clinton. *See Exec. Order No. 12,978*, 60 Fed. Reg. 54,579 (Oct. 21, 1995) (blocking property persons the Secretary of Treasury finds to “play a significant role,” materially

September 23, 2001. It relies on IEEPA authority to block all “property and interests in property” of *foreign persons* listed in the order and those persons whom the Secretary of Treasury finds “assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order.”²³ Section 1(d)(ii) also blocks the property of individuals “otherwise associated with” those falling under the substantive ambit of the order. Section 2(a) prohibits “any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order . . . , including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order.”²⁴ Section 4 contains the President’s finding that donations of food, clothing, and medicine excepted under § 203(b)(2) of IEEPA²⁵ endanger United States Armed Forces and are therefore prohibited.²⁶ Section 10 of the Order suspends notice to make the document an effective tool in addressing the national emergency.²⁷

assist in, “or providing financial or technological support” to narcotics trafficking activities in Colombia); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995) (declaring a national emergency with respect to the Middle East peace process and establishing the Specially Designated Terrorist (SDT) category of individuals with whom transactions were prohibited).

²³ Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. at 49,079.

²⁴ Exec. Order No. 13,224 § 2(a), 66 Fed. Reg. at 49,079; *see also* 31 C.F.R. § 594.410 (2007) (specifying that the Executive Order prohibits U.S. financial institutions “from performing under any existing credit agreements, including, but not limited to, charge cards, debit cards, or other credit facilities.”).

²⁵ 50 U.S.C. § 1702(b)(2) (2006).

²⁶ Exec. Order No. 13,224 § 4, 66 Fed. Reg. at 49,079; *see also* 31 C.F.R. § 594.409 (2007) (“Unless otherwise specifically authorized by the Office of Foreign Assets Control by or pursuant to this part, no charitable contribution or donation of funds, goods, services, or technology, including those to relieve human suffering, such as food, clothing, or medicine, may be made to or for the benefit of a person whose property or interests in property are blocked pursuant to Sec. 594.201(a).”).

²⁷ Exec. Order No. 13,224 § 10, 66 Fed. Reg. at 49,079.

Regulations in Title 31, Part 594 of the Code of Federal Regulations implement and define Executive Order 13,224.²⁸ Sections 201²⁹ and 305³⁰ establish the Specially Designated Global Terrorist (SDGT) moniker for individuals subject to Executive Order 13,224. Section 205 makes unlawful any conspiracy or transaction that “evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions” of the Executive Order.³¹ Section 316 defines the phrase “to be otherwise associated with” as “to own or control; or to attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial services, to.”³² Section 406 applies the prohibition on transactions involving blocked property to services performed in the United States or by U.S. persons on behalf of parties or with respect to property blocked by the Executive Order.³³ The regulation provides helpful list of prohibited services: “legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other.”³⁴ Fortunately, section 506 permits designated individuals to receive *some* pro bono legal services when they are involved as defendants in a judicial or administrative proceeding.³⁵ The regulation explicitly excepts legal services procured by an SDGT to commence an action or proceeding from this general license.³⁶ Per Part 594, U.S. nationals may also perform emergency medical services on a designated person,³⁷ provide certain in-kind donations of medical supplies to the Palestinian

²⁸ 31 C.F.R. § 594.201 *et seq.* (2007).

²⁹ 31 C.F.R. § 594.201 (2007).

³⁰ 31 C.F.R. § 594.310 (2007).

³¹ 31 C.F.R. § 594.204 (2007).

³² 31 C.F.R. § 594.316 (2007).

³³ 31 C.F.R. § 594.406 (2007).

³⁴ 31 C.F.R. § 594.406(b) (2007).

³⁵ 31 C.F.R. § 594.506(a) (2007).

³⁶ 31 C.F.R. § 594.506(b) (2007).

³⁷ 31 C.F.R. § 594.507 (2007).

Authority,³⁸ and carry out transactions “ordinarily incident to the receipt or transmissions of telecommunications.”³⁹

Title 31, Part 595 of the Code of Federal Regulations replicates the above scheme for Specially Designated Terrorists (“SDT”s),⁴⁰ defined under Executive Order 12,947.⁴¹ Title 31, Part 597 does the same for FTOs designated under AEDPA.⁴²

I.C. Criminal Penalties for Material Support.

When coupled with 18 U.S.C. § 2339B,⁴³ the SDT, FTO, and SDGT labels grow fangs. Section 2339 makes it unlawful to *knowingly* provide material support to a terrorist organization. The statute further defines that mindset required for a violation as either awareness that an organization is designated under AEDPA, “has engaged or engages in terrorist activity” (defined using the Immigration Nationalization Act standard),⁴⁴ or “has engaged or engages in terrorism” (defined by reference to a different statute).⁴⁵

³⁸ 31 C.F.R. § 594.515(a) (2007).

³⁹ 31 C.F.R. § 594.508 (2007). The section was implemented in 2003. *See* 68 Fed. Reg. 34,196, 34,203 (2003). Of course, not every federal agent reads the Code of Federal Regulations closely: on August 25, 2006, the FBI arrested Javed Iqbal, a legal permanent resident of the United States for broadcasting Al-Manar, Hizbollah TV. Iqbal was charged with conspiracy to violate IIEPA. *See* Jennifer B. Lee & William K. Rashbaum, *Man Is Out on Bail In Case of Access to Hezbollah TV*, N.Y. TIMES, Aug. 29, 2006, at B4; Adam Liptak, Op-Ed., *Say What You Like, Just Don't Say It Here*, N.Y. TIMES, Oct. 22, 2007, at A14 (“In a brief filed in July, the government said, in an echo of the Ramadan case, that the satellite case was only about business dealings and “has nothing to do with speech, expression or advocacy,” adding that “the defendants remain free to speak out in favor of Hezbollah and its political objectives.”); *New Yorker Arrested for Broadcasting Hizbollah TV*, REUTERS, Aug. 25, 2006; Walter Pincus, *New Yorker arrested for Providing Hezbollah TV Channel*, WASH. POST, Aug. 25, 2006, at A10.

⁴⁰ 31 C.F.R. §§ 595.201, 595.311 *et seq.* (2007).

⁴¹ Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995)

⁴² 31 C.F.R. § 597.201, 597.309 (2007).

⁴³ 18 U.S.C. § 2339B (2006).

⁴⁴ 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

⁴⁵ 22 U.S.C. § 2656f(d)(2) (2006) (“the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents’). The scrupulous observer will notice that, on its face, 18 U.S.C. § 2339B applies only to terrorist organizations designated as FTO’s under 8

Of paramount importance is the section's definition of "material support,"⁴⁶ which it borrows wholesale from the preceding § 2339A. Accordingly,

"material support or resources" means any property, tangible or intangible, or service, including 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* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart *a specific skill, as opposed to general knowledge*; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.⁴⁷

Following extensive litigation over the constitutionality of the material support provision, which this paper will cover in Part III, Congress specified

No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals

U.S.C. § 1182 (AEDPA). Meanwhile, Executive Order 13,224 and 31 C.F.R. § 594.316 cover *SDGT's* labeled pursuant to IEEPA authority. Criminal sanctions for material support of the latter (as well as SDT's originating under Executive Order 12,979) originate from the references to organizations "engaged in terrorist activity," 18 U.S.C. § 2339B(a)(1), defined in 8 U.S.C. § 1182(a)(3)(B). 8 U.S.C. § 1182 (the Immigration and Nationality Act) has a wide substantive scope, that is, situations where the "terrorist activity" moniker applies following an examination of a person's actual undertakings. The statute also features recursive definitions. Sections 1182(a)(3)(B)(i)(V) and 1182(a)(3)(B)(i)(VI) include a shortcut, classifying as "engaged in terrorist activity" all organizations defined in 8 U.S.C. § 1182(a)(3)(B)(vi). Section 1182(a)(3)(B)(vi) covers all organizations designated by the Secretary of State via publication in the Federal Register – SDT's and SDGT's. The route is circuitous, but the conclusion certain: 18 U.S.C. § 2339B applies to all designated persons, including EO13,224 § 1(d)(ii) SDGT's.

⁴⁶ 18 U.S.C. § 2339B(g)(4) (2006).

⁴⁷ 18 U.S.C. § 2339A(b) (2006) (emphasis added).

(who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. *Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.*⁴⁸

Part II: Constitutional Foundation for Designation and Seizure Powers.

II.A. Executive Commander-in-Chief and Foreign Affairs Authority.

While the power to block assets described in Part I may appear broad, it stands on solid constitutional footing. Throughout this republic's history, the President has seized assets during wartime and dispensed with alien-owned property by relying on a combination of his status as Commander in Chief of armed forces⁴⁹ and exclusive authority to negotiate treaties.⁵⁰ Most often, he did so with Congress's express consent,⁵¹ though the Supreme Court did not find a

⁴⁸ Act of Dec. 17, 2004, P.L. 108-458, Title VI, Subtitle G, §§ 6603(c)-(f), 118 Stat. 3762 (codified as amended at 18 U.S.C. § 2339B(h) (2006)).

⁴⁹ U.S. CONST. art II, § 2. ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

⁵⁰ *Id.* (The President . . . shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

⁵¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-24 (1936) (detailing a history of statutory provisions delegating to the President broad authority to deal with international relations and remarking that if embarrassment "is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."); *see also* *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947) (affirming executive power to confiscate enemy assets in the wartime); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931) (holding that though the President had the power to confiscate vessels, petitioner was entitled to compensation under the Fifth Amendment).

constitutional violation even on occasions when this permission was missing.⁵² Indeed, the federal judiciary has traditionally been reluctant to hear cases alleging impropriety in executive handling of foreign affairs.⁵³

II.A.1. *The Broad Deference of Dames & Moore v. Regan*

The Supreme Court has evaluated IEEPA's constitutionality only once in the statute's eleven-year history, in *Dames & Moore v. Regan*.⁵⁴ Petitioners challenged the power of the Department of Treasury's Office of Foreign Asset Control ("OFAC") to void all attachments of and judgments against Iranian property. At the time, as part of the resolution to the hostage crisis, President Reagan entered into an agreement to move all pending claims to a special tribunal. *Dames & Moore*, an engineering firm that received a multi-million dollar judgment

⁵² See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) ('As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.') (citations omitted); *United States v. Pink*, 315 U.S. 203, 229 (1942) (upholding the legitimacy of the Litvinov Agreement vesting claims by Russian entities in the United States Federal Government in return for recognition of the U.S.S.R. by reasoning that "[t]he powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.').

⁵³ See *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict."); *Baker v. Carr*, 369 U.S. 186, 208-13 (1962) (discussing the relationship between foreign policy issues and the political question doctrine).

⁵⁴ 453 U.S. 654, 678 (1981).

against an Iranian bank, argued such actions to be unconstitutional. Quoting *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁵ the Court held that:

[b]ecause the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”⁵⁶

The justices found the “[t]he language of IEEPA [to be] sweeping and unqualified.”⁵⁷ As such, “[i]t provide[d] broadly that the President may void or nullify the “exercising [by *any* person of] *any* right, power or privilege with respect to . . . any property in which any foreign country has any interest”⁵⁸ Powers not specifically enumerated in the statute were not forbidden; rather, the statute, “which evince[d] legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility”⁵⁹

II.A.2. *The Dames & Moore Legacy*

The Rehnquist opinion considered a series of executive pronouncements that created a chaotic landscape for domestic private parties attempting to resolve legal claims. In this context, the Supreme Court not only found that the Congressional authorization and Presidential foreign affairs powers were sufficient to legitimize the situation, but that even more egregious

⁵⁵ 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁵⁶ 453 U.S. at 674.

⁵⁷ *Id.* at 671.

⁵⁸ *Id.* at 671.

⁵⁹ *Id.* at 678.

infringements on traditional property rights were legitimate. Granted, the decision attempted to rest on narrow grounds because of the temporal exigency of the issue: a district court injunction on OFAC transfers of Iranian assets jeopardized the Algiers Accords that would have freed seventy hostages.⁶⁰ This political background tints but does not negate the sweeping and logical descriptions of the executive power under IEEPA. With *Dames & Moore* as controlling precedent, a lack of subsequent Supreme Court cases challenging the constitutionality of either the IEEPA or AEDPA designation provisions is not particularly surprising.

II.B. Constitutional Limits on Attribution of Guilt by Association.

As mentioned earlier, the current regime relies heavily (though not exclusively)⁶¹ on criminal sanctions for material support to gain traction as a counterterrorism tool. The executive proclamations blocking assets may drain the lifeblood out of threatening organizations, but it is the ability to prosecute supporters that ensures their collapse. To bring about this end, however, the government must craft culpability from association with suspect entities. The idea is not new: the Supreme Court has explored the permissible boundaries on such entailments on several occasions in the nation's history.

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Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, and that we are not prepared to say.

Id. at 674 (citations omitted).

⁶¹ Sanctions against financial institutions conducting transactions with designated individuals also create a significant deterrent effect. See 50 U.S.C. § 1702(b) (2006); R. Colgate Selden, *The Executive Protection: Freezing the Financial Assets of Alleged Terrorists, the Constitution, and Foreign Participation in U.S. Financial Markets*, 8 FORDHAM J. CORP. & FIN. L. 491 (2003).

In 1940, Congress passed the Alien Registration Act, also known as the Smith Act,⁶² which made it unlawful to

knowingly or willfully advocate[], abet[], advise[], or teach[] the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government⁶³

Other parts of the statute forbade organizing and attempting to organize any group that would carry out the aforementioned activities. A series of prosecutions of leftists followed in the law's wake; predictably, members of the Communist party bore the brunt of the offensive.

II.B.1. Scales v. United States: Guilt by Association with Criminal Activity.

By the 1950's, the Supreme Court began to find that many of the charges brought under the Smith Act impermissibly infringed on constitutionally protected freedoms of speech.⁶⁴ These decisions, however, left intact the Act's prohibition on organizations engaging in criminal advocacy of the imminent, violent overthrow of the United States government, an activity that was not covered by the First Amendment.⁶⁵ Litigation over the 1954 indictment and conviction of Junius Scales focused on this remainder.

⁶² Act of June 28, 1940, Ch. 439, Title I, §§ 2, 3, 5, 54 Stat. 670, § 671 (codified as amended at 18 U.S.C. § 2385 (2006)).

⁶³ 18 U.S.C. § 2385 (2006).

⁶⁴ See *Yates v. United States*, 347 U.S. 298 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

⁶⁵ U.S. CONST. amend. I.

The petitioner in *Scales v. United States*⁶⁶ was convicted membership in the Communist Party, which he knew to engage in illegal advocacy. In addition to a First Amendment attack, Scales argued that the Smith Act offended the Fifth Amendment⁶⁷ because “it impermissibly impute[d] guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct”⁶⁸ The Supreme Court did not agree. First, it dismissed a Fifth Amendment vagueness challenge as unpersuasive, stating that a reasonable person would construe the statute to include a requirement of specific intent to carry out criminal activity.⁶⁹

The justices then moved on to the requirement of personal guilt. They reasoned that [W]hen the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other *concededly criminal activity* (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in *illegal advocacy*, it is now said, has not heretofore been recognized by this Court to be such a relationship.⁷⁰

Next, the Court recognized that

⁶⁶ 367 U.S. 203 (1961).

⁶⁷ U.S. CONST. amend. V.

⁶⁸ 367 U.S. at 220.

⁶⁹ *Id.* at 223-24 (“We find no substance in the further suggestion that petitioner could not be expected to anticipate a construction of the statute that included within its elements activity and specific intent, and hence that he was not duly warned of what the statute made criminal.”)

⁷⁰ *Id.* at 224-25 (emphasis added).

[A] person who merely becomes a member of *an illegal organization*, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, *practical impetus given to a criminal enterprise* which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.⁷¹

The Court found the Smith Act to satisfy these requirements by reaching ‘only “active” members having also a guilty knowledge and intent,’ thereby avoiding convictions “on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise”⁷² Upon reviewing the trial record, the majority felt that the prosecution provided adequate proof of defendant’s personal intent to engage in forbidden advocacy. Accordingly, under *Dennis v. United States*,⁷³ petitioner’s speech was not protected by the First Amendment and the conviction could stand.⁷⁴

⁷¹ *Id.* at 227-28 (emphasis added).

⁷² *Id.* at 288.

⁷³ 341 U.S. 494 (1951).

⁷⁴ In its conclusion, the Court took effort to delineate the boundaries of the holding and underlying statute: There must be clear proof that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to violence." *Noto v. United States*. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent "to bring about the overthrow of the government as speedily as circumstances would permit." Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.

II.B.2. NAACP v. Claiborne Hardware: Illegal Elements of a Legal Action.

Another frequently cited case on associational guilt is *NAACP v. Claiborne Hardware*.⁷⁵

There, a Mississippi court found the defendant NAACP liable for \$1.2 million in damages for an illegal conspiracy. The case stemmed from a 1966-68 boycott of white merchants by black residents of Claiborne County, Mississippi, following a refusal by local authorities to desegregate schools, public facilities, and the police force. Business owners sued members of the NAACP, the central organization, and affiliated branches on the theory that enforcement of the concerted action illegally depended on violence and threats of violence.⁷⁶

The Supreme Court held that the boycott overwhelmingly consisted of speech and peaceful picketing protected by the First Amendment.⁷⁷ The few violent incidents directed at individuals who violated its terms were spread over the course of several years and did not change the nature of the action itself.⁷⁸ Organizers relied on shaming, persuasion, and social pressure to enforce the boycott: “speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.”⁷⁹ The state’s interest in curtailing whatever

367 U.S. at 229-30 (citations omitted).

⁷⁵ 458 U.S. 886 (1982).

⁷⁶ *Id.* at 890-98.

⁷⁷ *Id.* at 903 (“Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children.”); *id.* at 906 (“Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.”).

⁷⁸ *Id.* at 908. *See De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”).

⁷⁹ 458 U.S. at 910.

violent elements the boycott contained was not tailored with the precision necessary to respect constitutional freedoms.⁸⁰ This defect, combined with insufficient causation tying respondents' losses to unprotected activity, was fatal. The Court remarked that to 'impose liability for presence at weekly meetings of the NAACP would – ironically – not even constitute “guilt by association,” since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a “guilt *for* association” theory. Neither is permissible under the First Amendment.’⁸¹

The holding of *Claiborne Hardware* is noticeably different from that of *Scales*. In the former, the court evaluated the power of tort principles to trump protected expression. It found that not only does the Constitution severely circumscribe this route (per *United States v. O'Brien*⁸² opinion),⁸³ but that the respondents failed to meet the basic causation requirement altogether. As such, *Claiborne Hardware* has more to say about the mechanics of using the violent behavior of some individuals to characterize concerted action than about the ability of a

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Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.” “To the extent that the court's judgment rests on the ground that “many” black citizens were “intimidated” by “threats” of “social ostracism, vilification, and traduction,” it is flatly inconsistent with the *First Amendment*. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the “precision of regulation” demanded by that constitutional provision.

Id. at 921.

⁸¹ *Id.* at 925.

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To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently 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 alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

⁸³ 458 U.S. at 912.

statute to impute culpability to persons associated with illicit activity. Indeed, while demanding specific evidence to find that the boycott was enforced through violence, the Court refuses to delineate a sufficiency standard for such proofs. Instead, it threatened severe scrutiny for any invasions of First Amendment expression.⁸⁴ The opinion did remark that “civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes and with the specific intention to further those purposes”⁸⁵ But, unlike *Scales*, the dispositive factor here was the absence of any prohibited activity, rather than the methodology of its imputation.

Part III: Applications of the Current Regime.

As the discussion in Part I suggests, the existing designation regime involves multiple levels of authority split between all three branches of government. The complexity leads to an interlocking web of constitutional issues, some larger than others. The following cases will serve as useful guides to the real-world impact of the extant approach. First, the *Holy Land Foundation*

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The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.

Claiborne Hardware, 458 U.S. at 933-34.

⁸⁵ *Id.* at 932.

series of decisions will provide an overview of the mechanics of the designation process. Next, the *Humanitarian* cases will cover the issues emanating from the prohibition of material support for designated organizations. This paper will not review the long procedural histories of each case except where necessary to analyze substantive determinations.

III.A. *Holy Land Foundation* Cases.

In 1998, the Holy Land Foundation for Relief and Development (“HLF,” “Foundation”), was the largest Muslim charity operating in the United States.⁸⁶ On Dec. 4, 2001, OFAC utilized its IIEPA powers to find that HLF acted on behalf of Hamas. It then designated the Foundation as a Specially Designated Terrorist (SDT) under Executive Order 12,947 and as a Specially Designated Global Terrorist (SDGT) under Executive Order 13,224.⁸⁷ HLF filed a lawsuit in the Federal District Court for the District of Columbia challenging the designation and enjoining the defendant Attorney General, Secretary of Treasury, Secretary of State, and their respective Departments from blocking its assets, which, at the time, amounted to \$35 million.

The Foundation mounted an attack under the First, Fourth, and Fifth Amendments, as well as statutory provisions of the Religious Freedom Restoration Act.^{88, 89} In a memorandum opinion, Judge Kessler found all but the Fourth Amendment violations to be unsubstantiated. The court began by reviewing OFAC’s determination under the “arbitrary and capricious”

⁸⁶ *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57, 62 (D.D.C. 2002).

⁸⁷ 219 F. Supp. 2d at 62.

⁸⁸ 42 U.S.C. § 2000bb *et seq.* (2006).

⁸⁹ 219 F. Supp. 2d at 62.

standard.⁹⁰ It ruled that the agency record aptly provided “substantial support” for the conclusions that HLF had financial connections with Hamas, actively engaged the latter’s leadership, and provided funds for the families of martyrs.⁹¹ The decision noted that over a ten-year span preceding the designation, the Foundation provided nearly five million dollars to Hamas-affiliated hospitals, schools, and institutions.⁹² It further pointed out that “[t]his charitable component is an effective way for Hamas to maintain its influence with the public, indoctrinate children and recruit suicide bombers. Moreover, there is evidence that Hamas’ charitable organizations “serve[] as a screen for its covert” component, thereby permitting the transfer of funds to its terrorist activities.”⁹³

While reviewing the factual connections drawn by OFAC between Hamas and HLF, the Court endorsed the administrative use of several types of evidence that may be inadmissible at trial. These include: Israeli government reports analyzing documents seized from HLF’s Jerusalem office,⁹⁴ donation lists prepared by HLF employees, confessions of Hamas activists elicited by Israeli interrogators,⁹⁵ and statements from unidentified FBI informants.⁹⁶ Judge

⁹⁰ 5 U.S.C. § 7602(2)(A) (2006). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (stating that a court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983) (court must uphold the administrative decision if an “agency’s reasons and policy choices . . . conform to ‘certain minimal standards of rationality’”). *See generally* Camp v. Pitts, 411 U.S. 138, 142 (1973) (courts must review the administrative decision based on the record assembled by the agency).

⁹¹ 219 F. Supp. 2d at 69.

⁹² 219 F. Supp. 2d at 71.

⁹³ 219 F. Supp. 2d at 71 n.20.

⁹⁴ 219 F. Supp. 2d at 71.

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[I]t was reasonable for OFAC to rely on information derived from Israeli police interrogations, despite HLF’s contention about the prevalence of torture by the Israeli police. In determining whether to consider factual statements made to a foreign police officer, courts consider the totality of circumstances to determine whether the statements are reliable. *See United States v. Welch* (courts must consider totality of the circumstances to determine whether a statement was voluntary); *In re. Extradition of Atta* (in extradition proceeding, accomplices’ statements supported probable cause finding, despite allegations that statements were the product of torture, because there was no evidence the statements were coerced or unreliable, the statements had factual detail,

Kessler also stated that IEEPA designations may depend on prior activities that the plaintiff has since terminated.⁹⁷ She then moved on to the constitutional arguments presented by the Foundation.

The court held that a case requiring notice prior to an FTO designation under AEDPA⁹⁸ did not control OFAC's actions under IEEPA because the latter relied on a declared national emergency.⁹⁹ That is, Executive Order 13,224 established the existence of an extraordinary situation and an important state interest in combating terrorism. Furthermore, prompt action "by the Government was necessary to protect against the transfer of assets subject to the blocking order;" prior notice would neutralize these measures.¹⁰⁰ Together, these circumstances justified a lack of notice and rendered the designation compliant with constitutional due process requirements.¹⁰¹

Judge Kessler next considered the existence of First Amendment obstacles to OFAC's actions. She remarked that 'IEEPA, the two Executive Orders, and the blocking order do not prohibit membership in Hamas or endorsement of its views, and therefore do not implicate HLF's

were not recanted, and were corroborated). In this case, Anati's statements are corroborated by other evidence in the record.

219 F. Supp. 2d at 73 n.26 (citations omitted) (emphasis added).

⁹⁶ HLF claimed OFAC lacked any basis to consider these statements.

Here, there are eight corroborating and independent sources, in addition to the corroborating evidence detailed above. Further, the FBI indicated that the sources had been reliable in the past (admitting that one source had been both reliable and unreliable), and provision of such information supports OFAC's consideration of their statements.

219 F. Supp. 2d at 73 n.27.

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Even if HLF were correct that the majority of evidence in the record directly connecting HLF to Hamas involves pre-1995 activities--and the Court is not making that finding--the outcome would not change. HLF does not contend that the pre-1995 evidence may not be considered in evaluating the reasonableness of the agency's action. Certainly, the agency itself may consider the genesis of HLF and the totality of its history.

219 F. Supp. 2d at 74.

⁹⁸ *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

⁹⁹ 219 F. Supp. 2d at 76.

¹⁰⁰ *Id.* at 76-77.

¹⁰¹ *Id.* (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974)).

associational rights. Instead, they prohibit HLF from providing financial support to Hamas, “and there is no constitutional right to facilitate terrorism.”¹⁰² Next, the decision concluded that a prohibition on financial contribution is not equivalent to imposing guilt by association, which, in turn, making *Claiborne Hardware* requirements of specific intent irrelevant.¹⁰³ Indeed, demanding such an element from the sanctions would undermine their purpose. “Regardless of HLF’s intent, it can not effectively control whether support given to Hamas is used to promote that organization’s unlawful activities.”

Plaintiffs did not fare any better on the freedom of speech front. Though the court recognized that HLF’s contributions implicated both speech and non-speech elements, it felt that the government’s interest in suppressing terrorist attacks was unrelated to content and justified the incidental restriction on advocacy.¹⁰⁴ Notably, HLF portrayed its donations to Hamas as charitable and humanitarian aid, not as contributions targeted towards political expression. While pragmatic (the Foundation probably would have had difficulty simultaneously asserting that it did not finance Hamas and that its contributions signified support for the organization), the strategy provided grounds for the court to distinguish *Buckley v. Valeo*¹⁰⁵ and deny strict scrutiny.¹⁰⁶ Judge Kessler did find that the Government violated the Fourth Amendment by entering HLF’s offices, searching its property, and seizing its documents without a warrant. The

¹⁰² 219 F. Supp. 2d at 81 (citations omitted).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 82 (applying intermediate scrutiny test articulated in *United States v. O’Brien*, 391 U.S. 367 (1968)).

¹⁰⁵ 424 U.S. 1 (1976) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The *First Amendment* affords the broadest protection to such political expression. . . .”).

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In this case, HLF does not contend that it has made contributions to political organizations or that its contributions are a means of political expression or advocacy. Instead, HLF asserts that its contributions involve “charitable and humanitarian aid.” Such charitable contributions plainly do not involve political expression, and therefore do not warrant strict scrutiny under *Buckley*.
219 F. Supp. 2d at 81 n.37.

designation was not sufficient to make such action constitutional. This finding had no impact on the legitimacy of the asset freeze.¹⁰⁷

On appeal, the Circuit Court for the District of Columbia affirmed the dismissal and partial summary judgment. The opinion by Sentelle¹⁰⁸ adopted the lower court's reasoning almost wholesale. It reiterated that "that there is no constitutional right to fund terrorism,"¹⁰⁹ and the use of classified information is permissible in administrative proceedings.¹¹⁰ One of the few interesting remarks explained that the statutory provisions for disputing a designation made up for the absence of notice.¹¹¹

The *HLF* decision is valuable primarily as a review and constitutional blessing of the SDT / SDGT designation procedures. At the district level, it has three key doctrinal maneuvers. First, the opinion finds that asset blocking is not equivalent to imputing guilt by association. Second, it holds that the requirement for specific intent to support illegal action is inapplicable because of an absence of culpability. Third, it adopts the viewpoint that contributions are not political speech and do not deserve First Amendment protection. Broad deference binds these elements to the administrative record and delivers the aforementioned result.

III.B. *Humanitarian I* and *Humanitarian II*.

The four *Humanitarian* opinions handed down by the Ninth Circuit after a decade of litigation are far more colorful than the *HLF* decisions. Humanitarian Law Project ("HLP,"

¹⁰⁷ 219 F. Supp. 2d at 80.

¹⁰⁸ *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

¹⁰⁹ *Id.* at 165.

¹¹⁰ *Id.* at 164.

¹¹¹ *Id.* at 163-64.

“Project”), the initial lead plaintiff, first sued to enjoin the Attorney General from enforcing the AEDPA¹¹² prohibition on material support of terrorism, codified at 18 U.S.C. § 2339B.¹¹³ HLP had a long history of donating money and services to the Kurdistan Workers’ Party (“PKK”) and the Liberation Tigers of Tamil Elam (“LTTE”). Project staffers went on fact finding missions to the regions controlled by the groups, tutored them on using international human rights law to peacefully promote their agendas, and advocated on behalf of both organizations before Congress and the United Nations. In 1997, the Secretary of Treasury designated both PKK and LTTE as Foreign Terrorist Organizations under AEDPA.¹¹⁴ Thereafter, individuals affiliated with HLP requested that the organization stop distributing literature related to the persecution of the Kurds and Tamils; donors to the Project dried up simultaneously.

In *Humanitarian I*,¹¹⁵ the District Court for the Central District of California evaluated HLP’s claim that § 2339B was unconstitutional because it penalized protected advocacy. In *Humanitarian II*,¹¹⁶ the Ninth Circuit reviewed those determinations. The court found that monetary contributions to Foreign Terrorist Organizations (FTOs) constituted conduct, not speech, and deserved only intermediate scrutiny. It then held that the AEDPA ban on these contributions was tailored narrowly to the persuasive state interest of preventing terrorism and did not infringe on protected expression any more than necessary. Judge Kozinski reasoned 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.”

¹¹² Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.).

¹¹³ (2006).

¹¹⁴ See Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650-51 (1997).

¹¹⁵ *Humanitarian Law Project v. Reno (Humanitarian I)*, 9 F. Supp. 2d 1176, 1205 (C.D. Cal. 1998).

¹¹⁶ *Humanitarian Law Project v. Reno (Humanitarian II)*, 205 F.3d 1130 (9th Cir. 2000).

AEDPA § 301(a)(7), 110 Stat. at 1247. It follows that all material support given to such organizations aids their unlawful goals. Indeed, as the government points out, terrorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used.¹¹⁷

In light of this mission, Congress did not assign to the Secretary of Treasury unfettered discretion to limit plaintiffs' rights to association or free speech via designation.¹¹⁸ In contrast to unconstitutional licensing schemes,¹¹⁹ AEDPA did not directly regulate activities protected by the First Amendment. Rather, the restrictions applied to expressive conduct that was reasonably connected to terrorism, which the government may regulate to a greater degree than pure speech.¹²⁰

Finally, the court reached the plaintiffs' vagueness challenge to AEDPA, where the circuit again agreed with the district decision. Both found that two components of the material support prohibition were impermissibly vague. Judge Kozinski remarked that

¹¹⁷ *Id.* at 1136 (emphasis added).

Further, as amicus Anti-Defamation League notes, even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts. We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion.

Id.

¹¹⁸ *Id.* at 1136-37.

¹¹⁹ See *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Gaudiya Vaishnava Soc'y v. City of San Francisco*, 952 F.2d 1059 (9th Cir. 1991).

¹²⁰

[T]he 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. See 8 U.S.C. § 1182(a)(3). This standard is sufficiently precise to satisfy constitutional concerns. And, because the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context.

205 F.3d at 1137.

It is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term “personnel,” as it blurs the line between protected expression and unprotected conduct Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits under the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy.

But advocacy is pure speech protected by the First Amendment.¹²¹

Similarly problematic was the term “training:” it potentially encompassed teaching international law to members of a designated organization,¹²² an activity that the Constitution protected. The court concluded that even if it inserted a scienter requirement per the government's suggestion, the statute would bar knowing provision of an amoebic concept and affirmed the injunction.¹²³

III.C. Vagueness and Overbreadth.

In *Humanitarian II*, the Ninth Circuit labeled the only problem it found with 18 U.S.C. §§ 2339A and 2339B “vagueness.” Subsequent opinions, discussed below, embraced this terminology and applied it to new iterations of the statute. A brief overview of this constitutional doctrine is essential.

¹²¹ 205 F.3d at 1137.

¹²² *Id.* at 1138.

¹²³

The government invites us to cure any possible vagueness problems with the statute by including the term “knowingly” in it. However, the term “knowingly” modifies the verb “provides,” meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support.

Id. at 1138 n.5.

Traditionally, vagueness challenges grew out of the principle that the Due Process Clause of the Fifth and Fourteenth Amendments¹²⁴ entitled individuals to know what kind of behavior a given law banned. To that end, the Supreme Court stated in *Grayned v. City of Rockford*¹²⁵ that statutes must be sufficiently clear to allow persons of “ordinary intelligence a reasonable opportunity to know what is prohibited.” When the regulated behavior contains elements protected by the First Amendment, the possibility that persons will engage in self-censorship to avoid triggering a vague statute amplifies the concern about fair warning.¹²⁶ The same logic works to establish a constitutional limit on the discretion held by law enforcement officials.¹²⁷ A law that lacks specific guidelines for enforcement is necessarily vague, though the converse doesn’t always hold true.¹²⁸

The *Humanitarian II* takes issue with the material support provisions of AEDPA for a different reason. The opinion considers it inappropriate that the statute could punish constitutionally protected advocacy under the auspices of either “personnel” or “training.”¹²⁹ This is a valid and well-articulated concern, but it is logically distinct from vagueness. For all its flaws, AEDPA provides a detailed list of activities it prohibits. To the extent that the average person has seen the word “personnel” before, the statute offers both a clear notice of the banned

¹²⁴ U.S. CONST. amend. V; U.S. CONST. amend. XIV.

¹²⁵ 408 U.S. 104, 108 (1972).

¹²⁶ *Lakewood v. Plain Dealer Publishing Co.*, 460 U.S. 750, 757-58 (1988) (“The mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . [O]nly standards limiting the licensor’s discretion will eliminate this danger by adding an element of certainty fatal to self-censorship.”)

¹²⁷ Recall HLF’s contention that OFAC represents an improper, discretionary licensing scheme, defeated by the finding that designations must bear a reasonable relationship to a terrorist threat.

¹²⁸ *See Smith v. Goguen*, 415 U.S. 566, 574 (1974) (“[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal elements of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.”). The Court was concerned that a statute prohibiting contemptuous treatment of the United States flag “was devoid of a narrowing state court interpretation” and had “a standardless sweep [that] allow[ed] policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* at 575. *See Robert Post, Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Robert Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491 (1994).

¹²⁹ *See* 18 U.S.C. § 2339A(b) (2006).

activity and a rigid rule of enforcement for the executive branch. The problem is not that the 2000 versions of sections 2339A and 2339B *may* reasonably reach HLP members who educate designated groups about human rights litigation or lobby Congress on their behalf, but rather that *they most certainly do*.

Now, this conclusion must be reconciled with the Ninth Circuit determination that AEDPA is a valid, narrowly tailored tool to implement the government's persuasive interest in stopping material support of terrorism.¹³⁰ The overbreadth doctrine provides a device for doing just that. It concedes the existence of a sphere of permissible government regulation for a particular issue, bounded by a First Amendment definition of protected speech. Though a law should not intentionally cross this line, it may occasionally stumble over because of commingling between speech and conduct or the inherent ambiguity of statutory language. Constitutional inquiries then center on the relative size of the permissible regulatory interest (the inner sphere) compared to the statute's impact on the surrounding interests protected by the First Amendment (the outer sphere). If a court finds that the latter is small (in volume or some other metaphorical metric) compared to the former, the statute will be constitutional; otherwise, it will be struck down as overbroad.¹³¹

The overbreadth doctrine requires skillful, step-by-step application to a fact pattern. First, it only matters after the court determines that government regulation focuses on a permissible area of behavior, not a protected one. Second, judges have to define the substantive

¹³⁰ See *supra* notes 118-120; see also *supra* notes 107-110.

¹³¹ See *Massachusetts v. Oakes*, 491 U.S. 576, 588 (1989) (Scalia, J., concurring in part and dissenting in part) ("In my view we have the power to adopt a rule of law which says that the defendant's acts were lawful because the statute that sought to prohibit them was overbroad and therefore invalid. I do not think we have the power to pursue the policy underlying that rule of law more directly and precisely, saying that we will hold the defendant criminally liable or not, depending upon whether, by the time his last appeal is exhausted, letting him off would serve to eliminate any First Amendment "chill."); see also *Gooding v. Wilson*, 405 U.S. 518 (1972).

constitutional restrictions on a controlling activity, which consists of mixed protected and unprotected elements. Third, they have to evaluate the relative impact of legislation on both sides of this boundary. Due to the operational complexity, many courts shy away from the doctrine or invoke its name to cloak first-order intuitions about whether the Constitution protects an activity at all. Occasionally, as is the case in *Humanitarian II*, the opposite seems to happen: an opinion carries out the overbreadth analysis, at least implicitly, but labels it vagueness.¹³²

The distinction between the two doctrines bears serious repercussions. Statutory vagueness can be repaired with relative ease: for the designation regime, regulations promulgated by the Secretary of Treasury would suffice. Overbreadth is a more severe defect. It describes a real limitation on the government's powers to regulate behavior with protected elements. Adding a section to the Code of Federal Regulations will not save a law that infringes on speech. Instead of clarifying definitions, an overbreadth remedy would need to fundamentally pare down the law's scope, morph the legislative axe into a scalpel. Due to the differing impacts of the two maladies, further discussion will reference each by its logically appropriate name even if a judicial opinion does otherwise.

III.D. *Humanitarian III* and the Legislative Reaction.

On remand from *Humanitarian II*, the district court issued a permanent injunction barring enforcement of the "personnel" and "training" parts of material support but refused to invalidate

¹³² See *Humanitarian Law Project v. Ashcroft (Humanitarian III)*, F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004), discussed in detail in Section II.D, illustrates this quite aptly. Adopting and affirming the "vagueness" determination from *Humanitarian II*, Judge Pregerson reasons: "When a statute criminalizes activity safeguarded by the First Amendment, we are concerned with "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'" *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415 (1963)).

the statute as a whole. On appeal, HLP presented the claim that 18 U.S.C. § 2339B violated the Fifth Amendment's due process requirement of personal guilt. *Humanitarian III*,¹³³ the Ninth Circuit decision penned by Judge Pregerson, evaluated this position.

The opinion stated the situation at hand, the court must construct the mental state requirements based on evidence of congressional intent,¹³⁴ guided by the principle that reasonable statutory interpretations should strive for constitutionality.¹³⁵ Here, “to avoid serious due process concerns,” the Ninth Circuit construed § 2339B “to require the government to prove that a person acted with knowledge of an organization's designation as a “foreign terrorist organization” or knowledge of the unlawful activities that caused the organization to be so designated.”¹³⁶

Next, it examined whether the statute comported with *Scales* and *Brown v. United States*¹³⁷ criteria for imputing illegal intent. The government took the position that “it could convict a person under § 2339B if he or she donates support to a designated organization even if he or she does not know the organization is so designated.”¹³⁸ This stance violated the Fifth Amendment requirement of personal guilt by punishing individuals with innocent intent with potential life imprisonment.¹³⁹ The court, however, had a responsibility to construe the statute

¹³³ *Humanitarian Law Project v. Ashcroft (Humanitarian III)*, 352 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).

¹³⁴ 352 F.3d at 399 (citing *United States v. Balint*, 258 U.S. 250, 253 (1922)).

¹³⁵ 352 F.3d at 393-94 (citing *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)).

¹³⁶ 352 F.3d at 394.

¹³⁷ *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (en banc), *aff'd on other grounds*, 381 U.S. 437 (1965).

¹³⁸ 352 F.3d at 397 (“That is, according to the government, it can convict an individual who gives money to a designated organization that solicits money at their doorstep so long as the organization identifies itself by name. It is no defense, according to the government, that the organization describes to the donor only its humanitarian work to provide basic services to support victims displaced and orphaned by conflict, or to defend the cultural and linguistic rights of ethnic minorities. And, the government further contends, it is no defense that a donor contributes money solely to support the lawful, humanitarian purposes of a designated organization.”)

¹³⁹ *Id.*

constitutionally where fairly possible.¹⁴⁰ To do so, it referenced the long-standing theory that Anglo-American jurisprudence included *mens rea* by default.¹⁴¹ Accordingly, Congress's silence on the matter did not "justify dispensing with an intent requirement."¹⁴² In this context, one statement in the legislative history forced the conclusion that the term "knowingly" required a prosecutor to present proof that the defendant knew of either the designation or underlying unlawful activities to secure a conviction for material support.¹⁴³

The decision reverberated widely. Within three days of the *en banc* rehearing, Congress passed the Intelligence Reform and Terrorism Prevent Act (IRTPA), which amended AEDPA to its current form.¹⁴⁴ The statute codified the *mens rea* requirement of *Humanitarian III* by spelling out that to violate § 2339B, a person must know (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or that (3) "the organization has engaged or engages in terrorism."¹⁴⁵

Moreover, IRTPA elaborated on the meaning of "personnel" and "training," the two terms that led to constitutional trouble in *Humanitarian II*. It defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge;"¹⁴⁶ added a prohibition on providing "expert advice or assistance . . . derived from scientific, technical or

¹⁴⁰ See *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994).

¹⁴¹ 352 F.3d at 398.

¹⁴² *Id.* at 398 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)).

¹⁴³ *Id.* at 400.

This bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in terrorist activities. I am convinced we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up.

142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch).

¹⁴⁴ IRTPA, P.L. 108-408 § 7211-7214, 118 Stat. 3638, 3825-32 (2004).

¹⁴⁵ 18 U.S.C. § 2339B(a)(1); see also *Humanitarian Law Project v. Mukasey (Humanitarian IV)*, 509 F.3d 1122, 1129 n.2 (9th Cir. 2007).

¹⁴⁶ 18 U.S.C. § 2339A(b)(2) (2006).

other specialized knowledge,”¹⁴⁷ and exempted from the definition of personnel “[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives.”¹⁴⁸

Recall, however, the discussion of the constitutional violation described in *Humanitarian II*. If AEDPA was defective because of vagueness, it indeed could be repaired by inserting detailed definitions of prohibited conduct. Post-IRTPA, § 2339B contained a litany of specific activities constituting material support, along with carve-outs for behavior Congress did not intend to punish. These features would have provided very clear notice to any reasonable person.

An overbreadth violation would require stronger medicine. If AEDPA infringed on protected First Amendment activity to an impermissible degree, as Judge Kozinski appears to have suggested, Congress would need to narrow its scope to make it constitutional. Specificity alone would not do – IRTPA had to muzzle the law. Stated differently, if the 2004 Amendments to § 2339B merely redrew the existing boundaries of prohibited behavior with brighter paint, the material support provision would remain overbroad. The changes had to fundamentally shift the balance between advocacy and terrorist activity covered by the law towards the latter.

The *Humanitarian IV* discussion of IRTPA’s effect on prior holdings in the case showcases the Ninth Circuit’s attempts to wrestle with the above distinction.

III.E. *Humanitarian IV*.

¹⁴⁷ 18 U.S.C. § 2339A(b)(3) (2006).

¹⁴⁸ 18 U.S.C. § 2339B(h) (2006).

On December 10, 2007, the Ninth Circuit again took up HLP's case against AEDPA. This time, the court revisited its findings from *Humanitarian II* and *III* in the wake of the 2004 Intelligence Reform and Terrorism Protection Act¹⁴⁹ amendments to the material support provisions. Judge Pregerson authored this *Humanitarian IV* decision.¹⁵⁰

The court held that the amended version of § 2339B now satisfied constitutional requirements of personal guilt. It stated that the new version of the law 'complies with the "conventional requirement for criminal conduct – awareness of some wrongdoing." The statute's explicit *mens rea* element distinguished it from the Smith Act's broad prohibition on membership, making the *Scales* requirement of specific intent to further illegal activity no longer applicable.¹⁵¹

IRTPA fared less well as a remedy to the flaws discussed in *Humanitarian II*. The court expressed a tri-fold concern about vagueness. It stated that:

vague statutes are invalidated for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms."¹⁵²

Referencing the amended definition of "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," it then thought it 'highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international

¹⁴⁹ IRTPA, P.L. 108-408 § 7211-7214, 118 Stat. 3638, 3825-32 (2004).

¹⁵⁰ *Humanitarian Law Project v. Mukasey (Humanitarian IV)*, 509 F.3d 1122 (9th Cir. 2007).

¹⁵¹ *Id.* at 1132-33 ("As the district court correctly observed, Congress could have, but chose not to, impose a requirement that the defendant act with the specific intent to further the terrorist activity of the organization, a requirement clearly set forth in sections 2339A and 2339C of the statute, but left out of section 2339B.").

¹⁵² *Id.* at 1133 (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998)).

bodies for tsunami-related aid, one is imparting a “specific skill” or “general knowledge.”¹⁵³

Thus, the prohibition on material support remained vague in at least one respect. Variations on the theme followed for “expert advice or assistance” and “service.”¹⁵⁴ The court found the § 2339B(h) restriction on “personnel” to satisfy constitutional demands.

While reaching these conclusions, the opinion consistently scrutinized the reach of AEDPA over activities protected by the First Amendment. It felt that “the term “training” could still be read to encompass speech and advocacy protected by the First Amendment,¹⁵⁵ but that IRTPA made sure the ‘plaintiffs advocating lawful causes of PKK and LTTE cannot be held liable for providing these organizations with “personnel” as long as they engage in such advocacy “entirely independently of th[ose] foreign terrorist organization[s].”¹⁵⁶

Curiously, however, the court dedicated an entire section of the opinion to explaining that AEDPA is not overbroad because the statute was aimed at material support of terrorism, not speech. It even counseled against the high costs of applying overbreadth doctrine to invalidate statutes in the national security context.¹⁵⁷ As mentioned previously, this logic is insufficient to defeat an overbreadth challenge, which presumes the existence of a core sphere of legitimate government action surrounded by an outer layer of protected conduct. Here, Judge Pregerson outlined the boundary of the core by referencing the strong interest in avoiding terrorism, but

¹⁵³ 509 F.3d at 1134.

¹⁵⁴ *Id.* at 1135.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1136. The following remarks are also illustrative: “Because the “other specialized knowledge” portion of the ban on providing “expert advice or assistance” continues to cover constitutionally protected advocacy, we hold that it is void for vagueness.” *Id.* at 1135.

¹⁵⁷ *Id.* at 1137. The court relied on *Virginia v. Hicks*, 539 U.S. 113 (2003), to guide its overbreadth analysis. “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech.” 539 U.S. at 124. Judge Pregerson looked to “decide whether the material support statute’s application to protected speech is substantial when compared to the scope of the law’s plainly legitimate applications.” 509 F.3d at 1137. He somehow found that the “many legitimate applications” of 2339B and “the importance of curbing terrorism” resolved this inquiry in favor of the defendants.

never evaluated the impact of the statute on the outlying region of free speech. This omission is particularly odd given the extensive discussion of just these effects in the “vagueness” sections of the opinion.¹⁵⁸

A few central points emerge from the above analysis. The decisions in *Humanitarian II-IV* are elegant, concise statements of concern about the scope of the current material support provisions. Though occasionally inconsistent in their reasoning, they provide a neat taxonomy of the constitutional issues implicated by the power of § 2339B. Their analysis is generally sound (at least sound enough to be informative when attacked), and their conclusions will create points of departure for further discussion.

The cases are also valuable for their insight into the government’s perspective on the appropriate scope of AEDPA power. In *Humanitarian II*, one sees Douglas Letter, the Department of Justice Attorney, claiming that amicus briefs filed to support designated entities constitute expert assistance and merit punishment. At oral argument in *Humanitarian IV*, the government maintained the position that purchasing cookies from the PKK, without any knowledge of the group’s nature or activities, qualifies as material support of terrorism. These are telling viewpoints.

Setting aside their policy merits, the statements provide much needed context for evaluating the extant regime. Spokespersons for the White House and the Pentagon offer blurbs hinting at the government’s intentions and beliefs, but they are neither committal nor

¹⁵⁸ One possible explanation runs as follows: the court found the effects on the outer shell to be small in proportion to the inner sphere of permissible regulation, making the overbreadth determination come out negative. At the same time, it felt the statutory delineation to be defective by either including protected expression in prohibited conduct or focusing all the spillover effects on one particular type of First Amendment activity (here, advocacy). Problematically, these intuitions defeat the overbreadth challenge but undermine the rest of the opinion in the process. The first approach renders AEDPA facially unconstitutional. The second, “lens” / “exhaust pipe” scenario probably does the same and may also count as a *Virginia v. Hicks*, 593 U.S. 113 (2003), overbreadth violation.

authoritative. Members of the intelligence community and others on the front line of the “Global War on Terror” have much clearer opinions about which they are entirely unforthcoming. Even when reports of some activity do leak out (*El-Masri v. Tenet*,¹⁵⁹ *In re: Sealed Case Nos. 02-001, 02-002*¹⁶⁰), one cannot help the feeling that these are just redacted pieces of the mosaic. Yet here are the U.S. Attorneys, pushing hypotheticals with the fate of a statute on the line.

A third aspect of the *Humanitarian* worth noting: in evaluating the constitutionality of the material support provisions, the judges are never interested in the merits of the underlying designation process. This is a significant, intentional gap in otherwise comprehensive reasoning. It originates in part from statute: 8 U.S.C. § 1189(a)(8)¹⁶¹ prohibits third parties from contesting a designation in a criminal or alien removal proceeding. Constitutional standing requirements may pose a problem even in the absence of these provisions.¹⁶² Generally, third parties (here, the

¹⁵⁹ 479 F.3d 296 (4th Cir. 2007).

¹⁶⁰ 310 F.3d 717 (Foreign Intelligence Surveillance Ct. R. 2002).

¹⁶¹

Use of designation in trial or hearing. If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

8 U.S.C. § 1189(a)(8) (2006).

Statute clearly provided procedure by which designated foreign terrorist organization (FTO) could challenge its designation in Court of Appeals for District of Columbia and was equally explicit that defendant in criminal action could not raise any question of validity of designation as defense or objection at any trial or hearing; inability to raise as defense correctness of Secretary of State's determination that FTO was FTO was not itself violation of defendants' rights to due process; element of offense was designation of FTO as FTO, not correctness of determination, and Government would be required to prove at trial that FTO was in fact designated as *FTO*.

8 U.S.C.S. § 1189, LEXIS explanatory note, at *12 (2006).

¹⁶² *Cf.* *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987) (“[O]ur cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding.”); *Yakus v. United States*, 321 U.S. 414, 447 (1944) (holding that the inability to challenge the validity of beef price controls in a prosecution for their violation does not constitute a violation of the defendants’ due process rights).

defendants in a material support prosecution) cannot claim the rights of others (in this case, the designated entity).¹⁶³

The division is prudent. The initial designation falls under the broad executive war time powers. It is based on a declared national emergency, or, in the case of the FTO label, explicit congressional authorization. As such, the IEEPA and AEDPA processes stand on solid constitutional and historic footing. At the same time, it is clear that the Acts are not magic wands. Codifying a random government function in Title 50 of the United States Code will not make it automatically permissible. Traditionally, courts have had to make functional distinctions between various provisions of a given statute, trimming “extraneous” pieces for additional constitutional scrutiny while allotting deference to other parts. Sensible line-drawing involved in this analysis can often be quite difficult; occasionally, as with the separation of the criminal sanctions and the designation basis in the current regime, it is relatively easy.

Part IV: The Constitutional Deficiencies of the Designation Regime.

IV.A. First Amendment, Freedom of Speech.

The First Amendment reads: “Congress shall make no law . . . abridging the freedom of speech.”¹⁶⁴ This phrase has given rise to volumes of decisions and treatises. Parts II and III of this paper summarize some relevant aspects of this record. A fuller account would be impossible to accomplish in a compact form.

¹⁶³ *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1345 (M.D. Fla. 2004) (“Except in rare cases, third parties do not have standing to assert the legal rights or interests of others.”); *see also* *Campbell v. Louisiana*, 523 U.S. 392, 397-98 (1998); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

¹⁶⁴ U.S. CONST. amend. I.

Humanitarian II and *Humanitarian IV* describe one constitutional objection to the existing regime. Namely, those decisions accept the claim that the definition of material support encompasses protected advocacy. Thus, a public relations representative lobbying Congress to strike a designated terrorist organization from OFAC's list would face criminal punishment for pure speech. The same goes for attorneys filing an amicus brief in support of an FTO or doctors educating members of the Tamil Tigers on emergency medical treatment. Sections II.C and II.E explain that though the Ninth Circuit attributes this violation to vagueness, their logic indicates the concern that 18 U.S.C. § 2339B is overbroad. This paper endorses the appropriately labeled version of the First Amendment freedom of speech argument put forward by the Humanitarian Law Project.

IV.A.1. The Implications of Narrow Grounds for Decision

The holdings in the above cases, however, are quite narrow. Partially because of the misapplication of the vagueness framework, the judges hone in on several terms that they consider to be unclear and pin the constitutional merits of the entire statute on these. Yet the very arguments that illustrate the Ninth Circuit's concern with the scope of Section 2339B (references to punishment for providing training in tsunami relief or petitioning the United Nations on behalf of an FTO) should alert an informed observer to the presence of other poison fruit in the regime. The suspicions emanate from the breadth of AEDPA's infringement on First Amendment expression. The government's concession at oral argument that 2339B should cover amicus

briefs¹⁶⁵ is a sign that the constitutional defect in the statute stemmed from the nature of the executive branch's intent and not on the failure of Treasury, Department of State, or Congress to delineate this intent appropriately. As Section III.C explains, a "vagueness" label suggests only the latter, whereas scholars use the term "overbreadth" to denote the former. Therefore, the suggestion in *Humanitarian IV* that the statute can be repaired through better definitions is illusory; to render 2339B constitutional, its ambitions to regulate advocacy *qua* assistance must be curtailed.

IV.A.2. The Pervasiveness of the Flawed Government Interest.

As it turns out, the flawed government interest noted in the *Humanitarian* decisions pervades other aspects of the current regime. Recall that the Secretary of State retains his power to designate groups as SDGTs from IEEPA and Executive Order 13,224.¹⁶⁶ Regulations promulgated pursuant to this authority generally prohibit U.S. persons from providing legal assistance to SDGTs, either for a fee or on a pro bono basis.¹⁶⁷ Title 31, Section 594.506 of the CFR creates an exception for select legal services offered on a *pro bono* basis: counseling on the requirements of the laws of the U.S; initiation and conduct of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. jurisdiction; representation of a person before any agency with respect to the imposition of sanctions on that person; and "provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense."

¹⁶⁵ 509 F.3d 1122, 1135 (9th Cir. 2007).

¹⁶⁶ See Part II, notes 30-36

¹⁶⁷ See Part II, notes 34, 35.

To reiterate, a Department of State regulation currently prohibits individuals labeled Specially Designated Global Terrorists (a category that may include American citizens) from receiving free consultation from American attorneys in all situations where the designated entity would initiate a proceeding. The proscription of the executive branch prohibits citizens from becoming plaintiffs in *Bivens*¹⁶⁸ actions for constitutional violations, suing for defamation, or pressing any other tort and contract claim with the help of an attorney.

IV.A.3. *The First Amendment and Access to Courts.*

For better or worse, litigation has become a primary method of expression in the United States. Many supporters of the trend praise the low federal pleading requirements for facilitating access of the most socially disadvantaged members of society to official fora.¹⁶⁹ In this light, the regulatory restriction on access to counsel is particularly opprobrious. Designations follow viewpoints unpopular with the federal government. Presumably, persons holding these viewpoints express them through actions, not pure speech, rendering the designation regime constitutional. Yet as this paper shows, advocacy of a particular sort often leads to official scrutiny. Thus, when the Holy Land Foundation disputed the validity of its SDGT status, the government emphasized sections of the administrative record detailing meetings between HLF and Hamas, as well as the tendency of the leaders of the former to encourage support for the martyrs of the latter. Without proving specific connections between donation to HLF and Hamas

¹⁶⁸ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹⁶⁹ These individuals are least likely to be able to afford an attorney. They are also least likely to be educated. If one believes that the quality of pleadings increases with access to either external or self-provided legal services, low standards are likely to have the largest impact on access of the underprivileged class.

violence, the Department of State relied on speech to tie together its vision of the charity as supporters of terrorism.

One need not feel that designated groups should be entitled to public advocacy of their beliefs in order to appreciate the harm done by restrictions on access to counsel. These rules prevent groups from mounting PR campaigns to persuade the body politic that a designation is incorrect. Considering the fact that the administrative appeals procedures are highly stylized, the agency record partially classified, and the funds paying for the publicity private, society at large has an interest in hearing out the viewpoint of an entity it just made into a *persona non grata*. Whatever speech comes out of this endeavor is not going to be “dangerous:” a Holy Land Foundation awareness campaign is unlikely to attempt to justify the destruction of Israel, focusing instead on the humanitarian aspect of its contributions.

Moreover, in the same period when regulations prevent a designated entity from making its case, individuals with opposing agendas may well be engaged in smear tactics. For example, following HLF’s designation, conservative groups began to portray all those associated with the charity as Hamas supporters.¹⁷⁰ The targets included Khaled Abou El Fadl, a Professor of Law at UCLA and visiting Yale Law School lecturer,¹⁷¹ as well as the Center for American Islamic Relations, an umbrella group working to “enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and

¹⁷⁰ See, e.g., David Spett & Ron Kampeas, *Courageous or Naive? Reform Leader Gets Mixed Reaction on Speech to Muslim Group*, CHI. JEWISH NEWS, Sept. 7, 2007, available at <http://www.chicagojewishnews.com/story.htm?sid=212226&id=251134>; M. Zuhdi Jasser, *Exposing the “Flying Imams,”* MIDDLE EAST QUARTERLY, Winter 2008, at 3, available at <http://www.meforum.org/article/1809>.

¹⁷¹ Daniel Pipes, *Stealth Islamist: Khaled Abou El Fadl*, MIDDLE EAST QUARTERLY, Spring 2004, available at <http://www.meforum.org/article/916>.

mutual understanding.”¹⁷² The allegations revolved around the premise that HLF and Hamas are identical; thus, anyone who supported the former supported the latter.

Even an organization acknowledging the existence of factual grounds for its designation (but perhaps unsatisfied with their significance) may seek to explain its actions in an effort to clear the name of supporters who had no knowledge of the suspect activity. The most expedient way to do so would be via a suit for libel or intentional infliction of emotional distress against news agencies openly conflating a designated entity with violent terrorist organizations. While such a case would be unlikely to survive a motion for summary judgment,¹⁷³ it would rapidly garner media attention and offer the plaintiffs a public pulpit.

IV.A.4. Application of Existing Right-to-Counsel Jurisprudence.

Indeed, the Supreme Court has recognized a right to one’s choice of counsel in civil matters partially based on the First Amendment concerns showcased above.¹⁷⁴ Due to peculiarities of the common law tradition, topical decisions are few and far between.¹⁷⁵ The ones

¹⁷² Council on American-Islamic Relations, Vision, Mission, and Core Principles, <http://www.cair.com/AboutUs/VisionMissionCorePrinciples.aspx>, (last visited May 22, 2008).

¹⁷³ See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁷⁴ *United Mine Workers, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 221-22 (1967) (striking down, on first amendment grounds, state rule barring union from hiring attorney to assist its members in the assertion of their legal rights); *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982) (“While private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights.”).

¹⁷⁵ Generally,

There is a paucity of authority dealing with the existence of a right to counsel in civil cases. This lack of precedent is due in part to the historical development of the right to counsel in criminal cases. Prior to 1836, the English system recognized the right of accused criminals to be represented by counsel in the trial of less serious crimes, while denying the representation to alleged felons.

Potashnick v. Port City Const. Co., 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 1093 (1980); see also WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-9 (1955); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1327 (1966) (“In view of the anomalous procedures in British criminal courts, it is not surprising that the framers of the American Constitution specifically provided for a right to retain counsel in criminal prosecutions. Because English practice had recognized the right to retain civil counsel, there was

that do exist, however, are unequivocal in their support for a First Amendment right to an attorney:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, . . . it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.¹⁷⁶

The one federal circuit court case to deal specifically with restrictions on counsel emanating from an administrative designation regime intentionally dodged the constitutional issue and instead focused on insufficient statutory authority.¹⁷⁷ Nonetheless, a combination of the *Powell* precedent¹⁷⁸ and *American Airways*¹⁷⁹ dicta strongly suggests that the First Amendment to the Constitution invalidates wholesale regulatory prohibition on legal representation in actions initiated by a designated organization.

no need to reaffirm the prerogative. Therefore, the sixth amendment's rejection of the English criminal practice does not represent a denial of a right to retain counsel in a civil litigation. The existence of such a right has, indeed, been generally assumed in the American legal system.”)

¹⁷⁶ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also* *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 7 (1964) (discussing right to petition and access to courts).

¹⁷⁷ *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984) (holding that the Trading with the Enemy Act does not grant OFAC power to override Florida corporate law and find a corporation unable to retain counsel).

Congress has not authorized the Executive to seize the corporation, control all its internal operations, decide -- with no regard to state law -- who shall act as its president in lieu of the board-elected officer, and impose a prior license requirement before the corporation can designate an attorney to represent it.

Id. at 870. *See generally* Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515 (criticizing the *American Airways* decision for relying on background constitutional and administrative law principles that the opinion seeks to marginalize); Jill M. Troxel, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Privilege*, 24 REV. LITIG. 637 (Summer 2005) (describing confusion in the literature on the power of OFAC to regulate the attorney-client relationship post *American Airways*).

¹⁷⁸ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)

¹⁷⁹ “We stress particularly that, in our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel.” 746 F.2d at 872-73.

The general license for “provision of legal services [to persons named as defendants in domestic proceedings] and in any other context in which prevailing U.S. law requires access to legal counsel at public expense”¹⁸⁰ triggers a related constitutional concern. What happens if the Department of State decides to amend the regulations and foreclose such representation? The executive branch clearly cannot use an administrative measure to deprive an individual of her Sixth Amendment right to council in a criminal proceeding. Thus, designated entities would be entitled to a lawyer even in the absence of a general license. The extent to which the prohibition on support of an SDGT would affect the attorney-client relationship would depend solely on the Supreme Court interpretation of pertinent Fifth and Sixth Amendment clauses. Yet if the Constitution requirements trump the regulations in subsection (a) of 31 C.F.R. § 594.506, they must do the same in subsection (b), which contains the language foreclosing services in proceedings initiated by the designated entity. The only relevant differences between the two parts are the number of topical federal cases and the location of the relevant right. Much as a ban on pro bono criminal defense services promulgated under IEEPA authority would violate the Sixth Amendment of the Constitution, so too does the current ban on civil representation in self-initiated proceedings violate the First Amendment.

Finally, the Section 594.506 prohibition on the provision of “other legal services” has a powerful chilling effect on protected First Amendment expression that may resemble but not constitute actual legal representation. Attorneys may be unwilling to advise individuals whom they suspect to speak on behalf of a designated organization. They may be similarly reluctant to offer their views on the validity of the prohibition or the designation of an entity, fearing that doing so would constitute legal services. Viewpoints critical of the extant regime would be the

¹⁸⁰ 31 C.F.R. § 594.506 (2007).

most vulnerable, because they could ostensibly (or actually) help an organization battle designation or avoid a similar fate for a different group. These hypotheticals are not vacuous – recall the government’s stated belief in *Humanitarian II* that 2339B should cover amici briefs. Rather, they seek to draw attention to empty spaces in public discourse on the validity of the designation regime. Executive overreach appears at fault for some of this depopulation and merits constitutional reprobation.

IV.B. First Amendment, Freedom of Association.

The First Amendment guarantees that “Congress shall make no law . . . abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁸¹ The current regime violates this provision in two distinct, severable ways.

As Section II.B mentions, Executive Order 13,224 applies to the prohibitions on dealing with SDGTs to persons “otherwise associated with” such individuals.¹⁸² Title 31, Section 594.316 of the CFR define the key phrase as “to own or control; or to attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.”¹⁸³ This amoebic definition extends the reach of IEEPA sanctions beyond the substantive category of persons found “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.” Indeed, the Executive Order already includes those assisting, sponsoring, or providing support to the above

¹⁸¹ U.S. CONST. amend. I.

¹⁸² Exec. Order No. 13,224 § 1(d)(ii), 66 Fed. Reg. 49,079 (Sept. 25, 2001).

¹⁸³ 31 C.F.R. § 594.316 (2007).

category in a separate section.¹⁸⁴ Standard interpretive principles avoid readings that make multiple sections redundant. Accordingly, one can assume that section 594.316 covers persons who do not fall into 1(d)(i). The operative words are then: “own,” “control,” “attempt,” “conspire,” or “act on behalf of.”

IV.B.1. Making Sense of the Labels.

Attempt and conspiracy are terms of art, and, as the discussion of *Humanitarian III* in Part III.C explains, courts usually read their Congressional usage through the lens of the legal tradition.¹⁸⁵ Here, however, the terms are adopted by the executive branch, not the legislature. In the administrative context, the *Morissette* approach ceases to make sense. If the Department of Treasury adopted the mental state and harmful outcome requirements associated with the two activities as criteria for designations, the entire point of the process – speed, agility, preemption – would evaporate. Thus, the Executive Order and applicable regulations present a mystery: the terms that define their scope are doppelgangers of their legal brethren, impossible to define via the rules that govern the traditional instantiation.

One is left with only intuition to mark the boundaries of the SDGT label, and intuition suggests that this boundary runs to the limits of the State Department’s discretion. The wide net of “otherwise associated with” may catch almost anyone who comes in contact with a designated organization. As a reminder, the persons falling into this category would not even rise to a level

¹⁸⁴ Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. 49,079 (Sept. 25, 2001).

¹⁸⁵ See *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”).

that merits a first-order SDGT label (under sections 1(a), (b), (c), or (d)(i) of Executive Order 13,224), which itself errs on the side of caution. By definition, a person “otherwise associated with” a designated organization has almost no involvement in any inherent dangerous or illegal conduct; their only transgression is ideological affinity to the threatening entity. In return, their assets are frozen. Financial institutions dealing with these persons risk steep fines and revocation of their licenses. American companies and individuals interacting with section 1(d)(ii) SDGTs fall under the umbrella of 18 U.S.C. § 2339B’s criminal prohibition.¹⁸⁶ Logical scrutiny of Executive Order 13,224 shows that these repercussions impermissibly follow association protected by the First Amendment.

IV.B.2. Scales Comes to a Stop.

The deficiency described above reaches critical mass when coupled with criminal penalties for material support of terrorism listed in 18 U.S.C. § 2339B. Recall the discussion of *Scales* and *Claiborne Hardware* in Part II. A common view of the significance of *Scales* (and its companion case, *Noto v. United States*¹⁸⁷) centers on its proposition that a *mens rea* requirement is dispositive for constitutionality of guilt by association. The opinion certainly makes clear that an element of specific intent is necessary to make criminal charges based on membership survive scrutiny. The passages cited above, however, contain a second key insight into the case logic. Lurking below the surface of the opinion are references to the progeny of *Dennis*¹⁸⁸ and statutes

¹⁸⁶ See *supra* note 45.

¹⁸⁷ 367 U.S. 290 (1961).

¹⁸⁸ *Dennis v. United States*, 341 U.S. 494 (1951).

criminalizing certain forms of advocacy.¹⁸⁹ That is, the Smith Act punishes membership in an organization that engages in *illegal* behavior. Thus, *Scales* demarcates only a fragment, and not the entirety, of constitutional requirements for guilt by association. The decision could offer only guidance for an evaluation of a law that criminalized membership in a group that engaged in innocent activity.

Presumably, the constitutional requirements for such charges would include the *Scales* standard. They would also need to expand on it. The logic of guilt by association is akin to metaphors of the poison fruit of a poison tree common elsewhere in law.¹⁹⁰ That is, within a group, the culpability for an illegal act committed by one member taints or infects others who come in close contact. The organization functions as a generalized distribution network capable of spreading any ideology. Once the law detects the presence of an ideological pathogen in a single node of this network, it seeks to quarantine other members to prevent further damage via statutes like the Smith Act. Of course, not every person connected to the network is bound to be “infected,” but the government is entitled to a margin of error in carrying out its responsibility to protect the public. The Constitution and the courts stand by to make sure the preferred enforcement tool does not cut too wide.

Take away the pathogen, however, and the rationale for quarantining general membership disappears. Without a criminal act somewhere in the network, there is nothing to infect

¹⁸⁹ See The U.S. Sedition Act of 16 May, 1918, 40 Stat. 553 (1918); Espionage Act; Act of June 28, 1940 (Smith Act), Ch. 439, Title I, §§ 2, 3, 5, 54 Stat. 670, § 671 (codified as amended at 18 U.S.C. § 2385 (2006)).

¹⁹⁰ See, e.g., *Harrison v. Schaffner*, 312 U.S. 579 (1941) (finding that transfer of one year’s income from trust amounts to fruit, not tree, does not transfer income); *Helvering v. Horst*, 311 U.S. 112 (1940) (using the fruit metaphor to determine whether the taxpayer has obtained satisfaction from the appreciation of a coupon bond prior to transfer); *Blair v. Commissioner*, 300 U.S. 5 (1937) (holding that transfer of an entire life interest in a trust amounts to the “tree” and shifts income); *Caruth v. United States*, 865 F.2d 644 (5th Cir. 1989) (Disparaging the fruit-and-tree metaphor but stating: “[w]e fail to see why the ripeness of the fruit matters, so long as the entire tree is transplanted before the fruit is harvested.”).

individuals, no reason to remove them from the public sphere. On the contrary, the First and Fifth Amendments demand inclusion.

IV.B.3. Balancing Threats: the Common Cold and the Global Pandemic.

Admittedly, tension always exists between constitutionally protected rights and the need to isolate a threat. Courts are quite cognizant of it¹⁹¹ and seek resolution by “balancing” the implicated interests. Faced with an ideological “pandemic” with high fatality rates, they are likely to accord leeway to the executive branch to inconvenience innocent individuals, lest all laws disappear so that one remains unbroken. Concerned with little more than a common-cold, nuisance level of infection, they look to cramp down on abuse.¹⁹² One can imagine that within this framework, Courts are likely to give a pass on the constitutional issues to an executive branch that alleges the existence of an enormous threat that it cannot pin down. Yet even if one assumes that such a judicial determination is the final, analytically axiomatic call on the validity of an action, a logical problem arises with respect to criminality. Under extant law, a threat that achieves sufficient mass to warrant “guilt-free” quarantine would almost inevitably trigger criminal sanctions as conspiracy or attempt. Indeed, criminalization of sufficiently grave threats is one of the main functions of the current statutory system. If so, the need to rapidly impute guilt by association should run in step with the ability to prosecute a single member. Courts should be highly skeptical when presented with the rare situations when the two do not exist

¹⁹¹ See, e.g., *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

¹⁹² See, e.g., *Watchtower Bible & Tract Society, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (holding that privacy and crime prevention interests asserted by respondent village are not sufficient to support an ordinance that prevents anonymous pamphleteering due to the impact on spontaneous speech).

simultaneously and take great care to ensure the vitality of constitutional rights for affected persons. That, in turn, means performing *Scales* level scrutiny and then some.

The implications of this reasoning for 18 U.S.C. § 2339B are quite grave. In theory, the statute aims to isolate the pathogen of terrorism by punishing those who enable it through material support. In practice, the disease is never diagnosed, and the punishment accompanies individual symptoms that could be attributable to other conditions. That is, unlike *Scales* or the respondents' claims in *Claiborne Hardware*, the activity at the core of the AEDPA prohibition is *legal*. The designations that trigger section 2339B evince administrative worries, not judicial or quasi-judicial determinations of culpability. Accordingly, in its exigency and the amount of excusable deprivation of constitutional freedoms, the extant regime is more akin to the common cold than to the bubonic plague.

As shown throughout this paper, few real restrictions exist on the ability of the Department of Treasury or the Department of State to label an entity FTO, SDT, or SDGT. A modicum of concern about the interpersonal connections of leadership or their ambitions will suffice to survive scrutiny under the “arbitrary and capricious” standard. Indeed, since courts do not view designation as punishment, protected expression may provide grounds for the designation.¹⁹³

Thereafter, a whole slew of liability theories opens up for prosecutors. Within a month of the designation, the government may charge key leadership for violating the “personnel” aspect of the material support ban by providing their own managerial services in an attempt to rescue the organization.¹⁹⁴ The U.S. Attorney may prosecute employees who insist on gathering in front

¹⁹³ See *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57, 81 (D.D.C. 2002).

¹⁹⁴ Recall that the exception for “personnel” that rendered the term constitutional in the eyes of the Ninth Circuit in *Humanitarian IV* applies only to individuals who are not working directly for the designated organization. “No

of the office to protest its closure with provision of transportation. She may do the same for individuals replicating speech that lead to the designation.¹⁹⁵

None of these situations would pass the *Scales* test, which looked to avoid “a conviction on what otherwise might be regarded as merely an expression of sympathy with the *alleged criminal enterprise*, unaccompanied by any significant action in its support or any commitment to undertake such action.”¹⁹⁶ The designation of an organization does not make it illegal. Thus, the material support charges lack the criminal pathogen that justifies attribution of guilt based on “contact” with a group. This absence makes the curtailment of First Amendment freedoms of association impermissible.

V.C. Fifth Amendment, Due Process, Vagueness.

Commentators have provided extensive coverage of the procedural issues associated with designations.¹⁹⁷ These pieces generally utilize the *Matthews v. Eldridge*¹⁹⁸ framework to balance the risk of erroneously depriving a private party of their privileges against government interest in prompt action. Authors generally find the current procedural protections insufficient, though specific grounds for these conclusions and resulting recommendations vary. Consensus does

person may be prosecuted . . . unless that person has knowingly provided . . . a foreign terrorist organization with 1 or more individuals (who may be or include himself) . . . to organize, manage, supervise, or otherwise direct the operation of that organization.” 18 U.S.C. § 2339B(h) (2006).

¹⁹⁵ See *Indictment, United States v. Javed Iqbal*, No. 08 Crim. 1054 (S.D.N.Y.) (available on file with author).

¹⁹⁶ *Scales*, 367 U.S. at 228 (emphasis added).

¹⁹⁷ See Peter L. Fitzgerald, “*If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This*”: *Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73 (1999); Nicole Nice-Petersen, *Justice for the “Designated”*: *The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387 (2005); Eric Broxmeyer, Note, *The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT’L L. 439 (2004).

¹⁹⁸ 424 U.S. 319 (1976).

exist on several fronts: pre-deprivation notice for designated organizations is impractical in light of the need to preempt terrorism, post-designation hearings should be mandatory, and the scrutiny allotted to the administrative decision needs to increase. Again, the gamut of specific approaches is quite wide. Aside from endorsing the idea that the extant regime is procedurally defective, this paper will not attempt to repackage other authors' conclusions on the matter.

Some aspects of the Fifth Amendment requirements for the designation regime do merit a separate mention. Section IV.C explains that the vagueness problems articulated by the Ninth Circuit in *Humanitarian II* and *III* are best conceptualized as impermissible overbreadth. Of course, that observation does not entail that AEDPA and IEEPA meet the constitutional requirements for clarity. A rigorous analysis may suggest that the definitions of “terrorist activity” and “terrorism” that trigger the *mens rea* requirements of § 2339B do not provide reasonable guidance to an average person on the nature of prohibited conduct.

Judge Pregerson summarized the antecedent to these conditions as “knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated.”¹⁹⁹ This position is inherently ambiguous. Knowledge of “unlawful” activities must exist with reference to some body of positive law. With respect to a foreign terrorist organization, the standard for legal behavior may come from its country of origin, the United States, or some hybrid of the two (such as a legal fiction that envisions American laws governing behavior in the country of origin).

The IRTPA codification of the *mens rea* requirement does not resolve this issue, pointing instead to ganglial INA definitions. These were developed for the administrative context of

¹⁹⁹ *Humanitarian III*, 352 F.3d at 403.

immigration hearings, not the enhanced formality of criminal proceedings. Accordingly, they fail to exclude from the definition of culpable intent the paradigmatic examples of innocent support for prosecuted political movements. Per the INA, an individual hosting members of the African National Congress in 1986 may be guilty of providing material support to a terrorist organization. The same goes for activists currently pressuring China for Tibetan independence in collaboration with banned local groups. The problem here lies not in the fact that the relevant activity constitutes speech, but rather that even conduct entirely outside the scope of the First Amendment may qualify as a violation of 2339B if the perpetrator knows that the target entity has been (wrongfully) outlawed in its country of operation.

Predictably, this ambiguity on the legal point of reference leads to the very kind of prosecutorial discretion that underpins the constitutional concern over vagueness. In the current political climate, it is difficult to imagine the Department of Justice focusing its resources on charging supporters of a free Tibet or a democratic Burma, but easy to do so for individuals pushing for an Islamic Morocco or Lebanon. The ability to sanction unpopular viewpoints by selective application of an opaque statute is an impermissible violation of the Fifth Amendment right to notice.

V. Conclusion.

The President's authority to designate entities as terrorist organizations is an incredibly useful national security tool. It enables the executive to impose preemptive sanctions without encountering the procedural difficulties and uncertain outcomes of a criminal trial. Instead, with a single Federal Register notice, the Secretary of Treasury can prevent a person from

participating in American society. The isolation is two-fold: first, the actual designation freezes all assets, and second, criminal statutes kick in to prohibit any material support to the entity. Courts review the core determination reluctantly, only after administrative remedies have been exhausted, and then under a highly deferential standard.

Unsurprisingly, the presence of such a powerful weapon with limited safeguards in the hands of the executive branch evokes constitutional concern. The efforts to cut off a designated group from the rest of society ride up against the freedom of expression guaranteed by the First Amendment. Persons commiserating with the cause advanced by a particular entity but opposing its illegal activities may commit a felony through poignant advocacy. Moreover, individuals managing a designated group become criminals by working to rescue their brainchild. Section 2339B of Title 18 of the United States Code makes these scenarios possible by attributing guilt to those who associate with a threatening (“designated”) entity. Unlike prior attempts to impute culpability through casual involvement with illegal activity, the present regime lacks a core criminal element. Accordingly, prohibitions on carrying out protected or innocent activity designed to help designated groups violate the First Amendment’s guarantee for freedom of association. Finally, the ambiguous reference point for the definition of “terrorist activity” that drives § 2339B permits excessive discretion during enforcement, rendering the statute impermissibly vague.