"Material Support" of Terrorism: An Uncertain Threat to International Nonprofits

Following the September 11 attacks, the Bush Administration began an aggressive campaign of prosecutions against various "supporters" of terrorism, including nonprofit groups accused of acting as terrorist financing structures in charitable guise. The campaign caused considerable uneasiness among the community of nonprofits running international humanitarian operations, or providing grants to foreign humanitarian actors. The standards used by the Bush Administration to define "support" for terrorism seemed to provide almost unbounded room for associational guilt, potentially severing criminal liability from any volitional and substantial contribution to an act of terrorist violence.

Of particular concern has been the criminalization of "material support" for terrorism.[1] "Material support" is very broadly defined, encompassing "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, [. . .] communications equipment, facilities, [. . .] and transportation."[2] "Training" and "expert advice or assistance" are not limited to what the average person might consider "terrorist training," but respectively include any "instruction or teaching designed to impart a specific skill" and any "advice or assistance derived from scientific, technical or other specialized knowledge."[3] The material support proscription was enacted not under Bush but by the Clinton Administration, in the 1996 Antiterrorism and Effective Death Penalty Act,[4] which also provided for U.S. government designation of "foreign terrorist organizations."[5] The designation process rests on an expansive definition of "national security" – itself a problematic term – which includes the "foreign relations" and "economic interests of the United States."[6] Foreign organizations may be deemed "terrorist" if they "engage in terrorist activity," which includes, among many other things, acts "that the actor [. . .] reasonably should know[ ] afford[ ] material support" ("including [. . .] transportation, communications, funds, transfer of funds or other material financial benefit") to terrorist organizations.[7] "Terrorist organizations" covers not only government-designated groups but any groups which "engage in terrorist activity."[8] The definition can effectively recycle itself at this point: a terrorist organization is one which "engages in terrorist activity"; to "engage in terrorist activity" is to provide material support to a terrorist organization. . . To break out of this potentially endless loop of support for support, one has to turn to the statutory definition of "terrorist activity" (as distinguished from "*engage in* terrorist activity"). "Terrorist activity" is variously defined, but troublingly includes "[t]he use of any [. . .] weapon or dangerous device [. . .] with intent [. . .] to cause substantial damage to property."[9]

Under the totality of the statutory scheme, culpability for "material support" of terrorism is kaleidoscopic and almost boundlessly replicable. It might lawfully be expanded by executive

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[1] 18 U.S.C § 2339B(a)(1) (2006).
[2] 18 U.S.C. § 2339A(b)(1).
[3] 18 U.S.C. § 2339A(b)(2)–(3).
[4] Public Law 104-132 of 24 April 1996, 104th Congress, 110 Stat. 1214, 1250, § 303.
[5] *Ibid*., 110 Stat. 1248, § 302, codified at 8 U.S.C. § 1189 (2006).
[6] 8 U.S.C. § 1189(d)(2).
[7] 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).
[8] 8 U.S.C. § 1182(a)(3)(B)(vi)(II)–(III).
[9] 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

fiat to include a $1 donation to a taxi collective that once gave a ride to a member of a group with a subgroup that had given a token amount of money to a group on the State Department's list of designated foreign terrorist organizations. Individual provisions that were poorly or cynically drafted combine to form an operable legal dragnet of vast repressive potential.

The threat posed by these laws has, to date, remained mostly latent – but not entirely. A major test case of the Bush-era "war on terror" was the federal prosecution of the Holy Land Foundation, a Texas-based charity linked to □amās, a militant group involved in the Israeli-Palestinian conflict. Detailed press reports indicate that the foundation's closest proximity to terrorism was provision of some money to families of suicide bombers and □amās members responsible for terrorist attacks who had been assassinated or arrested by Israel.[10] It is not disputed that funds went to social programs affiliated with □amās which, in the F.B.I.'s words, "provide needed social services for the Palestinian population."[11] When the foundation's leaders were convicted in late 2008, the Associated Press reported that "Holy Land wasn't accused of violence. Rather, the government said the [. . .] charity financed schools, hospitals and social welfare programs controlled by Hamas in areas ravaged by the Israeli-Palestinian conflict."[12] It can be argued that the government has a legitimate right to prevent money originating in the U.S. from reaching social institutions controlled by groups involved in terrorism, but prosecuting and imprisoning citizens who have no demonstrable connection to violence and whose "material support" appears in fact to have been expended on social needs is a different matter.

The Holy Land case has a somewhat farcical coda. In January 2009, as part of the gala surrounding the inauguration of a new executive, President Obama attended a prayer service ministrated in part by Ingrid Mattson, the president of the Islamic Society of North America. That organization had, in its turn, been named by federal prosecutors as a co-conspirator in the case against the Holy Land Foundation.[13] The associational guilt is not, however, limited to the "terrorist-friendly" President Obama: during the Bush Administration's watch, Mrs. Mattson was "the guest of honor at State Department dinners," "met with senior Pentagon officials," and "train[ed] Muslim chaplains for the U.S. military," while her organization "provided religious training to the FBI."[14] Depending on the financial and logistical arrangements for all this Beltway schmoozing, it is likely that both administrations would be in breach of the standards for material support of terrorism. Bush's confidante Karen Hughes has averred that Mrs. Mattson is "a wonderful leader and role model for many, many people."[15] No doubt she is. The whole

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[10] Glenn R. Simpson, "Why the FBI Took Nine Years to Shut Group It Tied to Terror," *Wall Street Journal*, 27 February 2002, pp. A1, A6. There is a touch of ambiguity in this otherwise quite detailed account of the government's case, but the bottom line seems to be that the most compromising charge against the Holy Land Foundation is that "[s]ome of the money it raised over the years allegedly went to families of suicide bombers." The head of Holy Land's Israeli branch – who was the principal source of human intelligence in Israel's handling of the case – "allegedly told Israeli investigators that families of so-called martyrs didn't receive any better treatment than other recipients. 'We have about 700 orphans, and only 1% of them belong to Hamas families[. . . .] If it is the orphan of a martyr or not of a martyr, it is not important to the organization.'" *Ibid*, pp. A1, A6.

[11] *Ibid*., p. A6.

[12] Paul J. Weber, "Charity convicted in terrorism financing trial," Associated Press, 24 November 2008 (accessed via Factiva database, 9 October 2012).

[13] Johanna Neuman, "Wary of Obama's Muslim outreach," *Los Angeles Times*, 25 January 2009, p. A16.

[14] Matt Apuzzo, "Obama prayer leader from group US linked to Hamas," Associated Press, 17 January 2009 (accessed via Factiva database, 9 October 2012).

[15] *Ibid*.

affair merely illustrates that “material support,” like all matters touching on terrorism, is less a matter of law than of organized hypocrisy.

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