Terrorist Financing

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In This Issue

Introduction

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This edition of the United States Attorneys' Bulletin is based on a series of papers and lectures I put together over the last few years. The ideas in these articles reflect the work of the Department of Justice (Department) Terrorist Financing Task Force, the group of prosecutors brought together after the events of September 11, 2001 to apply white-collar expertise to the problem of terrorism. They do the real work, while I generally remain in Washington trying to draw lessons from their efforts for nationwide applicability. It is an honor to be associated with them.

Although terrorist financing as a law enforcement issue existed before 9/11, its focus was profoundly altered with the Attorney General's November 8, 2001 announcement that, henceforth, the federal prosecutor's core mission would be preventing terrorist attacks. Like all DOJ lawyers today, those who work in terrorist financing enforcement will be judged not by the number of convictions they secure but by how many innocent lives are saved. Unfortunately, we rarely have the satisfaction of knowing we have achieved this goal. On occasion, we enjoy the certainty that we have succeeded–sometimes in very small ways–in using financial investigative tools to disrupt those whose views of world affairs involve the desire to kill innocent people. We can also appreciate the opportunity to work, as lawyers, on the most important national security issue of our time.

Terrorist financing enforcement has emerged as a powerful means of disrupting United States-based terrorist supporters, and those who use our financial system and generosity against us. The crime of providing "material support" to designated foreign terrorist organizations, 18 U.S.C. § 2339B, recently described as a "previously unknown statute," has become a key prosecutorial tool in the war on terrorism. We hope that some of the principles described in this edition of the USA Bulletin are useful to our colleagues who work in this field, or for those who aspire to be part of it.

Special thanks to Christine Reynolds, a student intern in the Counterterrorism Section, for her editorial help with these articles.

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Philosophy of American Terrorism Crimes

I. Introduction

The terrorist financing laws fit within the more general American approach to counterterrorism enforcement. A necessary first step in understanding the federal prosecutor's role in combating terrorist financing is familiarity with the structure of the U.S. counterterrorism enforcement program, including the applicable laws and their rationale.

II. Counterterrorism laws and their rationale

Although the United States has been fighting terrorism since President Thomas Jefferson dealt with the Barbary Pirates in the late 1700s, the treatment of terrorism as a law enforcement matter is a relatively new development. This is partly due to the fact that until the last quarter century the United States was not the target of choice of international terrorists. From the1960s to the 1990s, most acts of terrorism against U.S. interests occurred abroad or in the air. Americans who remained on U.S. soil could feel relatively safe from terrorist threats. Empirically, injuries from household mishaps represented a far greater risk to Americans when they stayed within the U.S.

Nevertheless, the U.S. Criminal Code included terrorism as a law enforcement matter well before the 1990s. The evolution of our terrorism criminal statutes was driven by the establishment of principles of international law, generally through multilateral treaties negotiated under the auspices of the United Nations. These treaties include what are known as "extradite or prosecute" instruments, in which signatory nations agree to create certain terrorism-related domestic crimes and the means of prosecuting them. They also include non-terrorism treaties which officially recognize customary international law concepts regarding the nations' rights to assert criminal jurisdiction over persons located–and conduct occurring–outside their boundaries.

Although these treaties sometimes arise in the course of criminal prosecutions (generally through pretrial motions to dismiss, premised on challenges to a particular criminal statute), federal prosecutors need not be familiar with their text, although they should be able to locate them in the event that they become an issue. Instead, prosecutors should understand that since 1996, U.S. criminal law allows the exercise of extraterritorial authority to the extent permitted under principles of international law. Put another way, the U.S. Criminal Code contains crimes that allow us to prosecute persons for certain actions anywhere in the world, and this assertion of criminal jurisdiction comports with worldwide standards and is intentionally crafted to extend to the limit of international law, without surpassing it. While future legislative amendments will fill in necessary gaps, planned violence against American interests anywhere in the world is now redressable through federal criminal prosecution.

In addition to limits imposed by international law, our terrorism crimes have evolved within the limitations of the United States Constitution. In fact, constitutional limitations have been more influential than those of international law in the development of the American approach to criminalizing terrorism.

III. Criminalizing terrorism

The U.S. Constitution recognizes the inviolable right to free expression and free association, and the right to be free from deprivations of liberty or property without due process of law. As interpreted by criminal courts, persons in the United States cannot be prosecuted for their thoughts alone, nor can we criminalize conduct that is protected by the First Amendment. As a result, our criminal jurisprudence stresses definable acts, rather than thoughts or speech unattached to particular conduct.

The structure of U.S. terrorism crimes follows this tradition. There is no crime of being a terrorist or thinking terrorist thoughts. While the U.S. Code defines the federal crime of terrorism (18 U.S.C. § 2332b(g)(5)), this term simply lists all the terrorism-related crimes, for ease of reference, and for purposes such as the applicability of certain sentencing enhancements. Persons cannot be convicted of the federal crime of terrorism because there is no such crime.

Instead, terrorism crimes have developed in the same manner as other crimes: policymakers determine what evil (or "mischief") should be prevented, and then craft criminal laws that take into account how such mischief is generally achieved. On occasion, acts that are criminalized are not ones that should necessarily be discouraged, if committed by persons not otherwise involved in the targeted conduct. In such cases, laws are crafted to criminalize such conduct only when committed in particular circumstances.

IV. The narcotics analogy

The best illustration of this concept comes from the United States antinarcotics program. To combat the growing scourge of illicit drugs on the streets of urban America, the U.S. declared war on the importation, distribution, and possession of certain controlled substances. Initially, we determined how drug dealers typically operate, then made it a crime to engage in those operations. Drug dealers, for example, are unable to enjoy the proceeds of their crime unless they can find a way to spend it without drawing attention to themselves. To do this, they will necessarily rely on financial institutions to store and transfer their illegal proceeds, and they must find a way to make these proceeds appear legitimate. Recognition of this conduct led to the creation and aggressive enforcement of the crime of money laundering: engaging in financial transactions for the purpose of making dirty money appear clean.

Part of the U.S. money laundering program involved establishing required reports that must be generated and provided to the Treasury Department upon the occurrence of an act that conforms with what we know about drug dealers' operations. For example, because illegal drugs are generally purchased with cash, drug dealers will typically make large cash deposits into their bank accounts. After 1986, banks were required to generate a report, known as a Currency Transaction Report (CTR), whenever a customer deposited more than $10,000 in cash. 31 U.S.C. § 5313; 31 C.F.R. § 103.20.

Is this fair to the person in a legitimate cash business who happens to deposit cash in excess of $10,000? The 1986 law merely requires the submission of a report. It properly recognizes that there may be legitimate reasons to make large currency deposits. Persons who fall into that category should have no reason to fear the issuance of a report, assuming that they generated these funds legally and are paying taxes on them.

The same is not true for drug dealers, to whom the required reports would draw unwanted scrutiny. To accomplish their financial goals after the imposition of this new requirement, drug dealers began dividing their currency deposits into smaller increments, each of which would be under the $10,000 triggering amount for a CTR. To redress this phenomenon, Congress created the crime of "structuring currency transactions" to avoid the reporting requirement. 31 U.S.C. § 5324. Where bank records show that someone made several $9,900 deposits at different banks in the same day, prosecutors can ask the jury to infer that the person had a large corpus of cash and intentionally structured deposits to avoid the CTR requirement, thereby committing a federal felony.

The structuring offense (31 U.S.C. § 5324) is an example of a carefully crafted statute that prohibits conduct that is not inherently offensive (making several large cash deposits in a single day) in those circumstances that separate the innocent from the guilty. It effectively closed a loophole available to drug dealers who aspired to use the U.S. financial system to wash their illegal proceeds, forcing them to rely on other means. If persons other than drug dealers were ensnared in the process, these people are limited to those who had reason to fear the generation of a CTR.

This specific example of policymaking is less challenging than those in the counterterrorism area, where, unlike the act of depositing cash in

excess of $10,000, the peripheral conduct is sometimes constitutionally-protected.

V. The counterterrorism crime challenge

The best illustration of this challenge borrows from a construct used to illustrate the doctrine of overinclusiveness and underinclusiveness, within the constitutional jurisprudence of the Equal Protection Clause within the Fourteenth Amendment. States often make distinctions between classes of persons for purposes of determining such things as eligibility for benefits. The constitutionality of such distinctions depends on the nature of the classification (racial, gender, alienage, income level, etc.), the government's stated interest, and how closely the classification is drawn to achieve such interest.

In formulating criminal laws, governments are, in a sense, drawing a classification. Upon their enactment, a crime creates two classes of people: those who are prosecutable under the statute and those who are not. Persons in the first category, when charged with the crime, sometimes claim that the crime makes an unconstitutional distinction between what they are accused of doing and the non-criminalized conduct of other people. They may advance another constitutional argument, claiming that the enactment of the crime unconstitutionally infringes on their right to express themselves freely or associate with whomever they choose. These arguments are depicted by the following charts:

A. "Overinclusive Targeting"

Figure 1.1

In the case of overinclusive targeting, the person charged claims that his conduct, while perhaps within the larger circle, is outside of the mischief circle. His argument:

> *The crime I am charged with committing arbitrarily ensnares me in something that should not be prohibited, because my conduct is outside the realm of mischief and is no more offensive than the conduct of other people who are not charged with this crime.*

Note that this is the type of argument that would be made by the non-drug dealer charged with structuring. It is, essentially, "I may be a lot of things–tax cheat, bad husband who wants to hide assets from his wife–but I am not a drug dealer, which is what the structuring offense is designed to capture."

The following figure depicts the converse enforcement structure.

B. "Underinclusive Targeting"

Figure 1.2

In the case of underinclusive targeting, the person is charged with conduct that fits within the interior "crime" circle. Her argument:

> *While I may have done something that I should not have done, look at all of the other people who did the same sort of mischief but whose conduct lies outside of the inner "crime" circle. If you are serious about stopping the mischief in which you are accusing me of engaging, the crime I am charged with should include them as well, and it is unfair as applied only to me.*

Neither of these two arguments, cloaked as they are in notions of fairness, are likely to gain much traction with the courts. Motions to dismiss, after all, are generally not granted on fairness arguments by the criminal defendants themselves. In their current form, these two claims are essentially public policy arguments, by self-interested persons who find themselves ensnared in the crimes and a particular enforcement strategy. These claimants, and their legal advisors, would be better served by finding a constitutional argument.

In the first example (Figure 1.1), the person claiming to be aggrieved by the overinclusive targeting should refine his argument as follows:

> *I am charged with the crime of doing something that is protected by the First Amendment. While I do not contest the government's right to punish those people who actually detonated the bomb, you should not lump me into their scheme simply because I believed in their cause and was present in the room when they were planning the attack. By doing so, you are seeking to punish me for my legitimate exercise of First Amendment rights, while chilling the exercise of such rights by other people who will notice what you are doing to me and be deterred from expressing themselves or freely associating with like-minded people.*

The second person, complaining about the underinclusive targeting (Figure 1.2), should say:

> *Your prosecution of me for committing an act of terrorism overlooks similar acts of terrorism committed by people motivated by things other than the right to Palestinian freedom and self-determination. You are selectively prosecuting me because of my race, while consciously overlooking the terrorism committed by radical Jews and Irish nationalists.*

Irrespective of whether these constitutional arguments would work, they come closer to successful constitutionally-based motions to dismiss, and illustrate the legitimate limits of policymaking through the enactment of criminal statutes. They also illustrate the ideal in crime-related policymaking, which is depicted in Figure 1.3.

C. Optimal Targeting

Figure 1.3

This ideal, rarely achievable, criminalizes virtually all of the mischief sought to be prevented, leaving few openings for criminal defendants to attack the enforcement program, either on constitutional or fairness grounds. In reality, criminal statutes and their enforcement are generally overinclusive or underinclusive, which is not problematic as long as they do not infringe on constitutionally-protected rights.

The concepts of overinclusive and underinclusive targeting are helpful when considering the structure of U.S. terrorism crimes. Whether intentionally or not, U.S. counterterrorism enforcement follows a pattern that can be called "strategic overinclusiveness." The need to prevent certain results is so great that we criminalize conduct that leads up to, but does not necessarily reach, the bad result we are seeking to prevent. The inchoate offenses are an example of this strategy.

VI. Preventative Prosecution: Inchoate Offenses

Inchoate offenses are those crimes that fall short of completed, or substantive, offenses: conspiracy, attempt, aiding and abetting, and being an accessory. These offenses, which do not exist in every country, are powerful prosecutorial tools for achieving federal prosecutors' public safety mission. Conspiracy and attempt provisions recognize that certain criminal intent, if accompanied by some affirmative act to achieve the illegal objective, justifies prosecution, even if the criminal goal is never realized. By the same token, the aiding and abetting and accessory crimes allow us to stretch criminal culpability beyond the worst offenders.

Federal law recognizes a general conspiracy provision (18 U.S.C. § 371), which criminalizes the agreement to commit any federal offense or achieve a legal objective through illegal means, and general aiding and abetting (18 U.S.C. § 2) and accessory (18 U.S.C. § 3) offenses. Particular terrorism crimes contain their own conspiracy and aiding and abetting provisions, which allow for greater penalties than the general provisions, and should be relied on when justified by the facts.

There is no general attempt provision within the U.S. Criminal Code, although most of the terrorism crimes contain an attempt provision within their terms. There is a general crime of solicitation (18 U.S.C. § 373) which can serve some of the same purposes.

Finally, the terrorism crimes include substantive offenses for acts that fall short of a completed violent attack. Due to the extremely serious nature of certain types of violent attacks and the need to follow up any possibility of such planning, U.S. law recognizes the crime of "threatening" some terrorist attack. It is a crime, for example, to make threats against the President, President-elect, Vice President or other officer next in the order of succession (18 U.S.C. § 871) and to willfully threaten foreign dignitaries (18 U.S.C. § 878). These types of crimes are powerful preventative tools and their use has been consistently upheld in the face of constitutional attacks. *See United States v. Watts*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). They represent an example of acceptable, strategic overinclusive targeting, useful in thwarting calamitous acts before they occur.

The inchoate crimes, in particular the crime of conspiracy, provide a legal means for federal prosecutors to achieve the Attorney General's new mandate that we prevent terrorism before it occurs. The successful deployment of these tools, however, depends on the development of information. With sufficient information, gained

through human sources, electronic surveillance, and third-party records, terrorist plots can be disrupted through use of the U.S. criminal justice system well before innocent lives are lost. Of course, this assumes that the system for collecting and acting on relevant information is adequate, and that the U.S. can succeed in the goal of inserting law enforcement into the earliest stages of terrorists' conspiratorial planning. Although this goal seems relatively uncontroversial on paper, specific proposals for achieving it generated spirited public debate about what type of security and law enforcement apparatus we want.

VII. Application of these principles to terrorist financing

Terrorist financing enforcement is an example of strategic overinclusiveness, where the crimes are based on the recognition of how terrorists behave, even if the resulting prohibitions–like the donation of funds–reach conduct that is not dangerous *per se.* As shown below, the key terrorist financing statute (18 U.S.C. § 2339B) fits squarely within the American counterterrorism enforcement tradition. Morever, because it contains the inchoate offenses of conspiracy and attempt, it is an extremely powerful tool in the effort to disrupt terrorist plots before they reach fruition. It is also the closest thing we have to the crime of being a terrorist, although it does not go quite so far.❖

What Is Terrorist Financing?

I. The money laundering paradigm

In American law enforcement, the term terrorist financing has traditionally referred to the act of knowingly providing something of value to persons and groups engaged in terrorist activity. This crime has been officially recognized since 1994, with the enactment of the first material support crime, 18 U.S.C. § 2339A. Before 1994, such conduct could only be redressed through money laundering prosecutions.

Money laundering is the process whereby money that is the product of some illegal activity is cleaned and its source disguised, and it is placed inside the banking or other mainstream financial system. While terrorist financing can involve dirty money, it is the application of such money to terrorism that we seek to prevent. With terrorist financing, it does not matter whether the transmitted funds come from a legal or illegal source. Indeed, terrorist financing frequently involves funds that, prior to being remitted, are unconnected to any illegal activity. A common example occurs when legitimate dollars are donated to charities that, sometimes to the chagrin of the donors, are actually fronts for terrorist organizations.

Tracking terrorist financial transactions is more difficult than following the money trails of mainstream criminal groups because of the relatively small amount of funds required for terrorist actions and the range of legitimate sources and uses of funds. While many organized crime groups are adept at concealing their wealth and cash flows for long periods of time, their involvement in the physical trade of illicit drugs, arms, and other commodities, often exposes the revenues and expenditures connected to these illegal dealings. In contrast, terrorist attacks are comparatively inexpensive, and their financing is often overshadowed by the larger financial resources allocated for the group's political and social activities, making it more difficult to uncover the illicit nexus.

The "clean money" type of terrorist financing differs from traditional money laundering, although it can be prosecuted as a crime under the reverse money laundering provision: Title18 U.S.C. §1956(a)(2)(A) criminalizes the act of transmitting funds internationally with the intent to promote some specified unlawful activity (SUA). Because acts of terrorism will generally qualify as SUAs, persons who send funds abroad with the intent to promote politically-inspired violence can be prosecuted under this offense. However, the crime of reverse money laundering, despite its utility, was not designed to address the specific conduct of terrorist financing.

The enactment of the first material support crime in 1994 was followed by additional legislative changes, starting with the 1996 enactment of the powerful § 2339B, and continuing to the recent changes enacted with the USA PATRIOT Act. Today, there are several different crimes, and many new investigative tools, available to American law enforcement in fighting terrorist financing.

II. The concept of terrorist financing

The increased law enforcement emphasis on international terrorism has focused greater attention on how terrorists plan and fund their operations. As a law enforcement matter, the term terrorist financing has been broadened to include a number of different enforcement initiatives, all of which involve the use of financial information and United States courts to redress international terrorism. These initiatives include the following.

- *Identifying terrorists and their supporters through financial analysis*: the use of financial investigative techniques to identify terrorists and their logistical supporters. For example, in the aftermath of 9/11, the FBI Financial Crimes Section led a multiagency task force that used financial techniques to trace the movements and commercial transactions of the nineteen dead hijackers.
- *Targeting known terrorists and their supporters through the enforcement of financial crimes*: the use of traditional financial violations to prosecute persons and groups that are documented, sometimes from sensitive sources and methods which cannot be disclosed, to be engaged in terrorism or terrorist planning.
- *The crimes of terrorist financing*: the prosecution of terrorist supporters under the U.S. Code provisions which criminalize the act of knowingly providing support and engaging in financial transactions with terrorists. 18 U.S.C. § 956; 18 U.S.C. § 2339A; 18 U.S.C. § 2339B; and 50 U.S.C. §§ 1701, 1702.
- *Asset harboring*: the prosecution of the crime of failing to freeze or block assets of a person or group that has been designated under the terrorism-related Executive Orders.
- *Seizing terrorist-connected assets through judicial seizures*: the use of Executive Orders and the civil forfeiture provisions of United States law to freeze, seize, and/or forfeit assets of terrorist supporters.

III. The underpinnings of the United States enforcement program

Understanding the various crimes of terrorist financing requires some familiarity with the philosophy behind the United States terrorist financing enforcement program, and the administrative actions that are its underpinnings. These underpinnings borrow from the idea of "strategic overinclusiveness," discussed in the previous article.

The philosophy of our terrorist financing enforcement program arises from two main factors. First, the United States Constitution, as interpreted by the Supreme Court, recognizes certain financial transactions as protected by the First Amendment, in particular the guaranteed freedoms of speech and association. The act of providing funds is a form of speech and association. Accordingly, any legal restrictions on such conduct must be tailored to conform with the First Amendment. This is not to say that financial transactions cannot be regulated or restricted. The constitutionality of monetary limits on political contributions and of embargoes which prohibit United States citizens from engaging in certain foreign transactions, for example, is well-established.

Second, some of the most lethal international terrorist organizations engage in legitimate philanthropic and humanitarian activity for suffering people. Such activity is considered the benevolent counterpart to their violent activities, and is designed to win the hearts and minds of people in such regions, while they simultaneously kill innocent people through indiscriminate violence elsewhere. Given the hybrid nature of many terrorist organizations, it would be an almost insurmountable law enforcement challenge if we were required to trace the dollars coming from United States sources, through the shadowy Third World financial sector, to their ultimate use in purchasing bombs and bullets. Perhaps more importantly, even if such law enforcement efforts succeeded, it would be even more difficult to establish that the U.S.-based providers specifically knew that the funds were going to the malevolent, rather than humanitarian, purposes of the group.

These two factors led to the philosophical basis for the current terrorist financing statutory scheme: all money is fungible, and the benevolent intent of American donors cannot wash what is inherently a dangerous act–funding overseas groups that kill innocent persons. The funds provided by the humanitarian-minded donor are just as useful to the terrorist organization as the funds provided by persons who intend such funds to be used for violence.

This recognition has led to an approach to terrorist financing enforcement that is unique to the United States, although it is increasingly being adopted by other countries. This approach involves list-making. We have adopted an administrative procedure which results in the publication of lists of designated groups and persons that, according to facts contained in administrative records compiled for this specific purpose, are conclusively determined to be terrorists. Upon the inclusion of any group or person on these lists, it becomes a crime for anyone subject to United States jurisdiction to engage in financial transactions with that group/persons, even if the transaction itself is not designed to promote terrorism.

This list-making approach to terrorist financing effectively alters the enforcement landscape. Instead of tracing monies from the United States to their ultimate use in terrorist acts, the enforcement challenge now is to establish that persons here are engaged in financial transactions with persons they knew were acting on behalf of designated terrorist groups and individuals. Because the crimes of terrorist financing do not require a completed crime, if prosecutors can establish sufficient proof of intent, persons within the United States can be prosecuted for domestic transactions where the funds never make it overseas to their ultimate destination. To be convicted, the accused merely needs to agree to provide funds to a terrorist organization, and send a payment in furtherance of this goal. This powerful law enforcement tool is the main terrorist financing crime of 18 U.S.C. § 2339B, known as the crime of providing "material support to designated terrorists." Enacted in April 1996, this crime did not become fully operational until the Secretary of State issued the first list of "Designated Foreign Terrorist Organizations" (FTOs) on October 7, 1997.

IV. Section 2339B and the designation of terrorist groups

The offense portion of 18 U.S.C. § 2339B provides:

> **§ 2339B. Providing material support or resources to designated foreign terrorist organizations**
>
> **(a) Prohibited activities.**--
>
> **(1) Unlawful conduct.**--Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

The Secretary of State designates FTOs, in consultation with the Attorney General and the Secretary of the Treasury. These designations are based on definitions contained within the Immigration and Nationality Act. FTO

designations are valid for two years and are renewable. The first FTO list, announced by Secretary of State Madeleine Albright in October 1997, consisted of twenty-nine organizations. Certain groups have been added and removed. The current FTO list contains 36 groups:

1. Abu Nidal Organization (ANO)
2. Abu Sayyaf Group
3. Al-Aqsa Martyrs Brigade
4. rmed Islamic Group (GIA)
5. Asbat al-Ansar
6. Aum Shinrikyo
7. Basque Fatherland and Liberty (ETA)
8. Communist Party of the Philippines/New People's Army
9. Gama'a al-Islamiyya (Islamic Group)
10. HAMAS (Islamic Resistance Movement)
11. Harakat ul-Mujahidin (HUM)
12. Hizballah (Party of God)
13. Islamic Movement of Uzbekistan (IMU)
14. Jaish-e-Mohammed (JEM) (Army of Mohammed)
15. Jemaah Islamiya (JI)
16. al-Jihad (Egyptian Islamic Jihad)
17. Kahane Chai (Kach)
18. Kurdistan Workers' Party (PKK)
19. Lashkar-e Tayyiba (LT) (Army of the Righteous)
20. Lashkar I Jhangvi (LJ) (Army of Jhangvi)
21. Liberation Tigers of Tamil Eelam (LTTE)
22. Mujahedin-e Khalq Organization (MEK)
23. National Liberation Army (ELN)
24. Palestinian Islamic Jihad (PIJ)
25. Palestine Liberation Front (PLF)
26. Popular Front for the Liberation of Palestine (PFLP)
27. PFLP-General Command (PFLP-GC)
28. al-Qa'ida
29. Real IRA
30. Revolutionary Armed Forces of Colombia (FARC)
31. Revolutionary Nuclei (formerly ELA)
32. Revolutionary Organization 17 November
33. Revolutionary People's Liberation Army/Front (DHKP/C)
34. Salafist Group for Call and Combat (GSPC)
35. Shining Path (Sendero Luminoso, SL)
36. United Self-Defense Forces of Colombia (AUC)

The Secretary of State's FTO designations are the culmination of an exhaustive interagency review process in which information about a group's activity, taken both from classified and open sources, is scrutinized. The State Department, working closely with the Justice and Treasury Departments and the intelligence community, prepares a detailed administrative record which documents the terrorist activity of the proposed designee. Seven days before publishing an FTO designation in the Federal Register, the Department of State provides classified notification to Congress.

With the announcement, designations are subject to judicial review, triggered by a challenge from the group itself. This has occurred a few times since the publication of the original FTO list. In addition, one lawsuit was filed independently by the prospective donors of two FTOs, arguing that the designation infringed on their First Amendment freedoms of speech and association, and seeking a declaratory judgment that the statutory scheme was unconstitutional. The constitutionality of the FTO designation process has been thoroughly upheld. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000); *People's Mojahedin Org. of Iran v. Dep't of State,* 182 F.3d 17 (D.C. Cir. 1999) (rejecting challenges by two designated groups); *National Council of Resistance of Iran v. Dep't of State,* 2001 WL 629300 (D.C. Cir. June

8, 2001) (groups that have sufficient United States presence are entitled to procedural due process).

The other two terrorist lists that are relevant to terrorist financing enforcement involve the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701, 1702, which permits the prosecution of persons who willfully engage in financial transactions with persons and organizations the President has determined to be a threat to United States national security. The Treasury Department administers these programs under its economic sanctions authority. The two lists are entitled Specially Designated Global Terrorists (SDGTs) and State Sponsors of Terrorism (SSTs). A third list, which contains groups and individuals whose conduct threatens the Middle East Peace Process, is referred to as Specially Designated Terrorists (SDTs), although its usefulness is limited to transactions that occurred between January 1995 and September 1997.

The SDGT list is premised on Executive Order 13224, 66 Fed. Reg. 49,079 (September 23, 2001), which authorized the Treasury Department to block assets and freeze bank accounts of these designated groups/individuals. There are currently over 260 SDGTs, and that number grows from week to week. Any willful violation of these blocking orders is a criminal IEEPA violation.

The SDGT list now includes all of the organizations on the State Department's FTO list, plus many more. Thus, there is a potential IEEPA violation in every § 2339B investigation. Unlike the FTO list, the IEEPA list of designated entities is not limited to foreign groups. The Texas-based Holy Land Foundation for Relief and Development (HLFRD), for example, was designated under IEEPA on December 7, 2001. *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp.2d 57 (D.D.C. 2002). It is also not limited to organizations, as the IEEPA list includes Usama bin Laden himself, as well as HAMAS leader Mousa Abu Marzook. As a result, financial transactions with HLFRD, bin Laden, or Marzook, without the requisite Treasury licensing, is a crime, even though none of the three are FTOs.

V. The overinclusiveness argument

The appropriateness of this list-making approach and § 2339B enforcement is illustrated by the overinclusiveness arguments that would be made by persons ensnared in the crime. Consider the following figure:

Conduct Criminalized by § 2339B

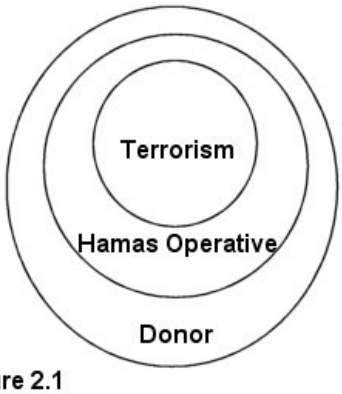

Figure 2.1

In an effort to prevent mischief represented by the center circle, we make it a § 2339B offense to provide material support or resources to Hamas. A prosecutor obtains indictments against three different persons: (1) the Hamas leader within the smallest circle; (2) the Hamas operative in the middle circle; and (3) the person within the United States who knowingly provided funds to the Hamas operative, in the outer circle.

The third of these defendants, indicted under § 2339B, might make the following argument in his motion to dismiss:

> *I am charged with doing something that is not inherently dangerous–providing funds to the charity of my choice. In making this*

donation to Hamas, I intended my funds to be used for philanthropic goals, never violence. The United States government, if anything, should encourage charitable gift-giving. My decision to give to Hamas is protected by my First Amendment rights to express myself however I want, and to associate with whomever I choose. Moreover, people looking at what you are doing to me will naturally be deterred from giving funds to Hamas, and their First Amendment-protected activities will be chilled.

The prosecutor responds:

Section 2339B represents Congress' clear intent to dry up American sources of funds for international terrorists. Under this statute, the United States announces the groups it views as designated foreign terrorist organizations. That action brands groups that use violence to achieve their political goals, and the fact that they may also engage in philanthropy does not change the terrorist nature of that organization. As a person within the United States, the defendant is prohibited by § 2339B from providing any funds to certain groups, including Hamas, no matter how the defendant intends Hamas to use his donations. This is a reasonably tailored prohibition, supported by clear legislative history, which comports with First Amendment jurisprudence, just as the laws that prohibit United States citizens from purchasing items produced with embargoed countries have been affirmed. In addition, the statutory scheme has been upheld when challenged on these same grounds by persons who are alleged to have engaged in the same type of conduct as the defendant.

Note that this prosecutor's argument responds to the arguments of the defendant situated in the outermost ring, the one furthest removed from the violent activity depicted in the inner circle. With regard to the constitutionality of § 2339B as applied to particular facts, the conduct of the other two defendants is an even easier argument. That is, these two defendants would have a more difficult time arguing that their alleged conduct is protected by the First Amendment.

VI. "Material support or resources"

The previous example involves cash, the most fungible of all media of exchange. Section 2339B, however, reaches a broader range of items that can change hands. The key term within § 2339B is "material support or resources," the providing of which to FTOs is illegal. The term was first defined in the other material support statute,18 U.S.C. § 2339A, enacted in 1994 but which, because of its exacting intent requirement and the challenge of tracing funds overseas, resulted in few criminal prosecutions. The term expands these statutes beyond the provision of funds to include virtually anything of value. Recently amended by the USA PATRIOT Act, "material support or resources" is now defined as:

> currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. § 2339A(b).

Thus, it is illegal to provide virtually any type of asset. It is also irrelevant whether the material support is provided to the FTO as a *quid pro quo*. An American company that advertises on an FTO-owned television station, and pays fees in exchange for this service, is probably violating § 2339B, even if it gets the benefit of broadcasting time in return. This theory would presumably cover American lawyers who wittingly use their attorney-client relationship to facilitate otherwise illegal communications between the client and the FTO he leads, as in the New York indictment of attorney Lynn Stewart which, at the time of this writing, is pending.

In one of the judicial opinions that upheld the constitutionality of the § 2339B designation process, the court ruled that the terms "training" and "personnel" contained within the definition are too vague. *Humanitarian Law Project v. Reno*,

205 F.3d 1130 (9th Cir. 2000). In response, the Department issued internal guidance regarding charging decisions in cases involving these two types of material support.

a. Personnel

It is the policy of the Department that a person may be prosecuted under § 2339B for providing personnel to an FTO if, and only if, that person knowingly provided one or more individuals to work under the foreign entity's direction or control. Individuals who act independently of the designated FTO to advance its goals and objectives are not working under its direction or control, and may not be prosecuted for providing personnel. Only individuals who have subordinated themselves to the FTO, i.e., those acting as full-time or part-time employees or otherwise taking orders from the entity, are under its direction or control.

There are two different ways of providing personnel to a designated FTO: (1) by working under the direction or control of the organization; or (2) by recruiting another to work under its direction or control. The statute encompasses both methods, so long as the requisite direction or control is present.

This policy also applies to attempts and conspiracies. A person may be prosecuted under § 2339B for attempting or conspiring to provide personnel to an FTO if, and only if, that person knowingly attempted or conspired to provide the organization with one or more individuals to work under its direction or control.

There are three reasons behind this policy. First, the most natural interpretation of a statute proscribing the provision of personnel to an FTO is that it does not reach independent actors. Rather, it reaches those who have provided employees or individuals who function like employees to serve the FTO and work at its command. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 878 (9th ed. 1989) (defining personnel as a body of persons usually employed, as in a factory, office, or organization). The fact that a designated group may benefit from independent activity (e.g., a third party autonomously engages in violence against a common enemy) does not mean that personnel has, therefore, been provided to it.

Second, it is prudent to avoid the constitutional questions that would be presented if the statute were interpreted more broadly. Independent speech in support of an FTO is protected by the First Amendment, and the statute can and should be interpreted to avoid criminalizing such speech. *See* § 301(b) of the Antiterrorism and Effective Death Penalty Act (AEDPA), 110 Stat. 1247 (Congress' purpose in enacting § 2339B and related provisions was to give the Federal Government the fullest possible basis, consistent with the Constitution, to prevent the provision by United States persons of material support or resources to foreign terrorist organizations); H.R. REP. NO. 104-383, at 44-45 (1995) (ban on "material support or resources" in predecessor bill to AEDPA would not affect one's right to speak on behalf of a designated foreign terrorist organization, in concert with it, or in favor of its attitudes and philosophies).

Third, the interpretation of personnel advanced here is limited to that unique term, and does not narrow or affect the government's ability to prosecute the provision of other types of material support or resources apart from personnel. Thus, an individual within the United States, or subject to its jurisdiction, who knowingly sends currency or other physical assets to an FTO can be prosecuted under § 2339B regardless of whether he acted under the direction or control of the organization.

b. Training

Section 2339B also prohibits knowingly providing any training to a designated foreign terrorist organization, regardless of the subject matter of the training. The verb "train" is commonly understood to mean: to teach so as to make fit, qualified, or proficient. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1251 (9th ed. 1989). As this definition implies, the term training connotes instruction or teaching designed to impart specific skills, as opposed to general knowledge. For example, one can receive training in how to drive a car, but a lecture on the history of the automobile would not normally be thought of as training.

It is the prosecutive policy of the Department that a person may be prosecuted under § 2339B for providing training to an FTO if, and only if, that person has knowingly provided instruction to the organization designed to impart one or more specific skills. This policy also applies to attempts and conspiracies, i.e., a person may be prosecuted under § 2339B for attempting or conspiring to provide training to an FTO if, and only if, that person has knowingly attempted or conspired to provide instruction to the organization designed to impart one or more specific skills.

VII. Application of § 2339B to overseas conduct

Section 2339B defines the universe of persons liable for the offenses as anyone within the United States or subject to its jurisdiction. The crime also expressly provides for extraterritorial federal jurisdiction. 18 U.S.C. §§ 2339B(a)(1) & (d). The United States terrorist financing enforcement program views the combination of these provisions to allow for the prosecution of United States citizens for conduct they commit overseas, or nonUnited States persons whose criminal conduct occurs within the United States. NonUnited States persons, including persons who have never been in the United States, can and have been charged with § 2339B conspiracy, as long as overt acts of the conspiracy have occurred within the territory of the United States.❖

The Clean Money Cases: U.S.-Based Fund-raising by NGOs and Charities

I. Introduction

The most common and challenging type of terrorist financing investigation involves activity within the United States by persons who are raising funds, sometimes on behalf of seemingly legitimate organizations, with the ultimate goal of supporting terrorist groups. This fact pattern is the essence of what 18 U.S.C. § 2339A and § 2339B were designed to combat. The clean money terrorist financing prosecution is the one where the material support being provided is not derived from illegal activity. The problem is not how the funds are generated, but how, and where, they are applied.

The advent of 18 U.S.C. § 2339B and the designation process, in addition to creating criminal liability, also required United States financial institutions to freeze and report all accounts established in the name of an Foreign Terrorist Organization (FTO). In addition, persons who may have been acting openly in the United States on behalf of such groups as Hamas and Palestine Islamic Jihad (PIJ) were put on notice that their assistance was illegal and would be prosecuted. As a result, there is rarely open fund-raising by, or checks written to, FTOs.

This does not mean that such activity in the United States ceased. As anticipated, the people who engaged in this type of activity proceeded to set up fronts, typically charities which give them the cover of apparent legitimacy and the benefit of tax deductions to their donors. The terrorist fund-raising went underground, thereby increasing the law enforcement challenge. The following sections describe the issues relevant to this type of case.

II. United States fund-raiser as a front for a designated FTO

Admissible proof that a certain organization or individual is, in reality, a front for a designated FTO will be a central component of any "clean money" prosecution under 18 U.S.C. § 2339B. In fact, it will be a legal prerequisite in all but the most uncommon clean money cases.

The enactment of § 2339B as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) attempted to eliminate the requirement that United States law enforcement follow the trail of funds from U.S. donors through the shadowy world of Middle East money changers to their application in actual terrorist attacks. In § 2339B actions, the prosecution need not show that the defendants specifically knew and intended that the material support or resources they provided would be used for terrorist purposes, as required by§ 2339A. Section 2339B requires only that the prosecution show that the defendants knowingly provided material support or resources to a designated FTO. The providers' specific goals in making the transfers are irrelevant. Even if they intended that their donations be used by FTOs for benevolent purposes, they can still be convicted under § 2339B. As noted in the previous article, this conclusion was reinforced by judicial opinions upholding 18 U.S.C. § 2339B against constitutional challenges.

Section 2339B created some new proof problems that might not have been anticipated at the time of its enactment. After the first round of FTO designations in 1997, terrorists quickly altered their western fund-raising methods. There now appears to be little proof that funds continue to be raised openly in the United States on behalf of HAMAS or Hizballah. To the extent that terrorist groups continue to receive funds and other support from United States sources, it is accomplished under the guise of front groups or individuals who have no overt connection with the FTOs.

Accordingly, any § 2339B charge will turn on whether there is adequate proof that the donors knew that the organizations or individuals to whom they gave money were actually FTO fronts. Instead of following the trail of money to a particular terrorist attack, as required pre-§ 2339B, the challenge now is to establish, through admissible evidence, the connection between FTOs and the groups and individuals raising funds for them. This is the front evidence that is so vital to an 18 U.S.C. § 2339B enforcement strategy.

This point is illustrated by considering how, in this climate of U.S.-based front groups raising money for designated FTOs, § 2339B prosecutions will play out against two types of possible defendants: the fund-raising group, and the individual donors. These classes of defendants approximately correspond to the second and third rings of the figure below, introduced in the previous articles.

Classes of § 2339 Targets

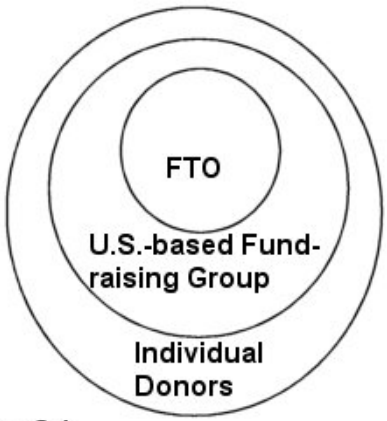

Figure 3.1

III. The fund-raisers

If the fund-raising group is truly acting as a front for, and raising funds on behalf of, an FTO, some of its members/agents will be chargeable under 18 U.S.C. § 2339B. This is true whether all of the donations, or any money at all, is actually forwarded to the FTO, because the definition of material support or resources is so broad:

> currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities,

weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

Even if a domestic entity fails to remit funds it solicits on behalf of the FTO, its fund-raising efforts may nonetheless qualify as providing material support or resources. Simply by offering its fund-raising services, the domestic group may be providing nonmonetary help (financial services, communications equipment, facilities, or personnel) to the FTO, raising the FTO's profile and furthering its goals. Individual members of such domestic groups would be in violation of § 2339B to the extent they are shown to be aware that their actions fit within the enumerated, nonmonetary items of material support or resources, and they were knowingly providing them to the FTO.

This conclusion is legally supported by the scope of the statute. In addition to the fact that material support and resources is not limited to funds, § 2339B includes the offenses of attempt and conspiracy. Thus, the mere fact that a domestic entity fails to complete the § 2339B offense does not bar prosecution of its members for knowingly attempting to violate the statute. Irrespective of whether the fund-raisers meet their goals, the act of holding fund-raising events may itself be a crime, if the requisite intent and some affirmative act of the attempt offense can be proven. This conclusion also makes sense conceptually, since even unsuccessful fund-raising events can inure to an FTO's benefit. The act of holding fund-raising events should not escape our reach merely because of the fortuitous fact that the events were not successful enough to exceed their overhead costs. If there is admissible evidence that the domestic entity was acting as a front for the FTO, proof that it actually sent the funds overseas may not always be necessary in a 18 U.S.C. § 2339B prosecution.

IV. The donors

For § 2339B to reach the individual donors, however, there must be evidence of an actual link between the domestic fund-raiser and the FTO, and some proof that the donors were aware of this link. If the fund-raising group is, in reality, not an FTO front, the individual donors will generally not be guilty of the 18 U.S.C. § 2339B violation, even if they mistakenly believe that such a link exists and intend for their donations go overseas. Despite the attempt offense within 18 U.S.C. § 2339B, it is doubtful that the crime of attempt could be extended this far, where the donor's affirmative acts did not, as a factual matter, get him or her any closer to a completed 18 U.S.C. § 2339B violation.

Thus, to prosecute individual donors, it is not enough to show that a United States group is a front for a designated FTO. To convict the donors, there must be some proof that they were aware of the domestic group-FTO link. Section 2339B convictions are premised on the theory that the defendants knowingly provided material support or resources to a designated FTO. If a defendant's conduct was limited to providing funds to a United States entity, they cannot be convicted unless they intended such material support to go to an FTO. After all, it is the FTO, rather than the domestic group, that is designated. Thus, to prosecute the donors, we would need proof both that the fund-raising group, in reality, was a front, and that the donor was aware of this fact.

V. The value of the inchoate offenses

The attempt offense may be useful in 18 U.S.C. § 2339B prosecutions where fund-raising groups can be shown to be FTO fronts, and the donors can be shown to be aware of this fact, but it cannot be proven that the particular donor's money actually reached the FTO.

Consider fund-raising appeals for money on behalf of an FTO, where donors answer the call under circumstances indicating that they are fully aware of the fund-raiser-FTO link. If the particular fund-raising rally is less successful than its organizers anticipated, the total donations raised could end up being applied solely to the rental costs of the venue and other overhead. In this situation, the individual donor's payment may never be routed to the FTO's coffers. Alternatively, donations may be forwarded to the FTO, but in such a way that we cannot follow the trail once it goes beyond United States borders. (To be designated as an FTO, an organization must be foreign, and its operations must be located primarily outside the United States.) Establishing a trail from the donors' wallet to the FTOs'

depositories will not be any easier in an 18 U.S.C. § 2339B case than in a 18 U.S.C. § 2339A prosecution.

If the fund-raisers may be prosecuted under these facts for attempting to violate 18 U.S.C. § 2339B, any workable enforcement strategy that includes prosecution of the individual donors will need to proceed on the theory that donors who can be shown to be aware of the actual fund-raiser-FTO link, can be prosecuted even if it cannot be established that their particular donations were ultimately received by the FTO. Otherwise, 18 U.S.C. § 2339B will not have solved any of the evidentiary problems associated with 18 U.S.C. § 2339A. Proof of particular U.S.-source funds being received overseas by the FTO will continue to be impossible in all but the most remarkable cases.

However, if the fund-raiser-FTO link can be established, we should be able to prosecute individual donors in these circumstances on the theory that, by making donations to the front, the donors are knowingly providing material support and resources to the FTO. Alternatively, they could be prosecuted on the basis that their conduct constitutes an attempt to provide material support to the FTO. It does not matter whether the specific donations are actually forwarded overseas, or whether their precise financial routes can be proven.

The underlying theory of these prosecutions is the same principle used to justify the 18 U.S.C. § 2339B ban on all cash donations to FTOs, including donations that are philanthropic in nature: all funds are fungible. By knowingly making contributions to front groups acting on behalf of FTOs, donors are at least attempting to violate 18 U.S.C. § 2339B and furthering the FTOs' interests, even if their monies are never demonstrably routed to the FTOs. For example, donations that permit domestic fronts to continue to plan and hold United States fund-raisers on behalf of FTOs should be considered a form of material support and resources provided to FTOs themselves. With such donations, the FTOs are freed of their need to use their own funds to bankroll their United States fund-raising efforts and to subsidize their domestic fronts. Funds pledged to the domestic fronts help make them self-sustaining, thereby inuring to the FTOs' benefit.

Given our understanding of how United States funds have been and continue to be raised since the original round of designations in 1997, we should focus on two types of evidence: proof that the fund-raising group is, in fact, a front for a designated FTO, and proof that the donors knew that the funds they remitted were being raised on behalf of the FTO. In cases where only the first type of proof is developed, the prosecution will be limited to the members of the fund-raising group. If both types of proof are present, both the fund-raisers and the individual donors may be prosecuted. The question then turns on what proof will qualify under each category.

VI. Proving fund-raiser is a front

The most obvious form of evidence will be direct payments from the domestic group to the FTO, particularly if these transactions correspond in time with fund-raising events. The issue of whether one entity is an *alter ego* of another frequently arises in the course of civil litigation. The evidence supporting such a link generally consists of standard business records. For example, if two entities share a bank account (as shown by bank records), or members of their board of directors (as shown by state incorporation records), or office space (as shown by public real estate records or records obtained from the lessor), or employees (as shown by payroll records), or regularly pay each other's expenses (as shown by third-party bank records or vendor receipts), a trier of fact can conclude that they are legally one and the same. This type of evidence may exist in the case of FTO fronts and can be obtained in criminal investigations focusing on potential 18 U.S.C. § 2339B violations by the domestic organizations.

There must be a factual predicate for such investigations. The question is how to establish a fund-raiser-FTO link sufficient to trigger a full criminal investigation through which these types of standard business records can be obtained.

The unique history of terrorist fund-raising enforcement offers some promising evidentiary leads. Prior to the AEDPA and 18 U.S.C. § 2339B,

North American representatives of groups that were eventually designated as FTOs were less furtive in their behavior. We have seen examples of earlier fund-raising activity that, had it been conducted after October 1997, would be appropriate for § 2339 prosecution, or at least would constitute a strong basis for further investigation. Such pre-1997 fund-raising activity openly conducted by operatives of the PIJ, for example, is depicted in Steven Emerson's documentary, "Jihad in America." Videotape: Terrorists Among Us–The Jihad in America (Steven Emerson 2001) (available at Amazon.com). Persons depicted in this film have since been indicted for terrorist financing offenses in Tampa, Florida.

Because groups that became designated FTOs were, prior to October 1997, more overt in their United States fund-raising efforts, we can get a good idea who their fronts are now simply by determining how their previously identifiable operatives in the United States have devoted their energies since October 1997. It is unlikely that the affiliation between the group and its operatives was suddenly severed with the groups' FTO designation. By determining where these American-based operatives went after October 1997, where they are currently working, and what they are doing now, we may come to understand the scope and structure of FTOs' continuing North American presence.

VII. Proving donor knowledge

Once it is established that a domestic group is a front, and that the donors know this, intent is inferred in white collar fraud cases. The donors' own statements to others about the donations and the specific circumstances of the fund-raising events, as well as demonstrable misrepresentations by the donors indicating they have something to hide, will be most probative.

The particular environment in which the financial appeals are made (evidence that could be presented by videotaped surveillance or by human witnesses) will be important. For example, if a rally features either speakers who are introduced as leaders of known terrorist organizations or the screening of FTO-produced videotapes showing the FTO's various military successes, the government can present such proof and argue that the donors' knowledge can be inferred from these circumstances.

The fact-specific nature of individual donor 18 U.S.C. § 2339B culpability is illustrated by the hypothetical situation of a rally held by a fictitious entity known as Justice for Palestine (JFP). Assume that we can establish that JFP is indeed a front for HAMAS. The factual circumstances of the event may vary, as follows:

- At the rally, the speakers talk about the need for funds for military training so that Israel can be destroyed. At the end of the meeting, the speakers appeal for money on behalf of HAMAS. Donations are received.
- At the rally, the speakers talk exclusively about the dire need for educational and medical supplies in Gaza and, at the end, appeal for donations on behalf of HAMAS. Donations are received.
- At the rally, the speakers talk about the need for funds for military training so that Israel can be destroyed. At the end of the meeting, the speakers appeal for money on behalf of JFP. Donations are received.
- At the rally, the speakers talk exclusively about the dire need for educational and medical supplies in Gaza and, at the end, appeal for donations on behalf of JFP. Donations are received.

There is no question that donors could be prosecuted under the first two scenarios. Each represents a *prima facie* case that the donors violated 18 U.S.C. § 2339B by making donations directly to HAMAS, irrespective of any innocent goals for their donations. The third and fourth scenarios are closer calls, and (especially the fourth) would probably not be appropriate for charging under 18 U.S.C. § 2339B without additional proof the donors were aware that JFP was a front for HAMAS.

However, other evidence that JFP is a HAMAS front could justify initiating a criminal investigation. This investigation, in turn, could yield evidence of the particular circumstances of the fund-raising rally. If, for example, a HAMAS

banner was draped over the podium when the speakers appealed for donations, a criminal prosecution of the donors may be appropriate. If such an investigation yielded evidence that particular donors were later heard bragging about how they had given money in order to kill infidels, the prosecutive merits of the case would be that much better.

As noted, all of this proof will be irrelevant unless we can establish that the fund-raiser is truly linked to the FTO. Absent this proof, the individual donors probably cannot be prosecuted under 18 U.S.C. § 2339B, even if they intended that their donations assist the FTO and were simply mistaken in their belief that a link existed. Accordingly, the primary focus of initial investigative efforts should be on developing admissible evidence that certain domestic fund-raising groups are FTO fronts, from which the prospect of fund-raiser and donor culpability will arise.

VIII. Examples of "clean money" cases

United States v. Enaam Arnaout, No. 02 CR 892, 2003 WL 255226 (N.D. Ill. Feb. 4, 2003)

Enaam Arnaout, Executive Director of Benevolence International Foundation (or BIF, an Illinois charity recognized by the IRS as a 26 U.S.C. § 501(c)(3) entity), had a long-standing relationship with Usama bin Laden and his associates. Arnaout used BIF to illicitly obtain funds for terrorist organizations from unsuspecting people and to serve as a channel for people to fund such groups. The Syrian-born naturalized citizen has been in federal custody since he was arrested April 30, 2002 on perjury charges. On October 9, 2002, he was indicted on charges of mail fraud (18 U.S.C. § 2, §1341); wire fraud (18 U.S.C. § 1343); money laundering (18 U.S.C. § 1956); conspiracy to money launder; racketeering (18 U.S.C. § 1962); and providing material support knowing that such support would be used to engage in overseas violence under 18 U.S.C. §2339A and § 956. The indictment described a multinational criminal enterprise that, for at least a decade, used charitable contributions from innocent Americans, Muslims, non-Muslims, and corporations, to covertly support *al Qaeda*, the Chechen mujahideen, and armed violence in Bosnia. The indictment alleged that BIF, which was not itself indicted but was subject to asset freezing and forfeiture, operated, together with Arnaout and other individuals and entities, as a criminal enterprise that engaged in a pattern of racketeering activity, raised funds, and provided other material support for the violent activities of mujahideen and terrorist organizations, including *al Qaeda* and Hezb e Islami, in various areas of the world. On February 10, 2003, Arnaout pleaded guilty to a racketeering conspiracy, admitting that donors of BIF were misled into believing that their donations would support peaceful causes when, in fact, funds were expended to support violence overseas. Arnaout also admitted providing various items to support fighters in Chechnya and Bosnia-Herzegovina, including boots, tents, uniforms, and an ambulance. As of this writing, he is awaiting sentencing.

United States v. Sami Omar Al-Hussayen CR-03 048-NEJL (D. Idaho Feb. 12, 2003)

The Department of Justice recently took law enforcement actions in Idaho and Syracuse, in an investigation involving a Michigan-based charity known as the Islamic Assembly of North America (IANA). IANA's self-proclaimed mission is to proselytize Islam through a variety of media outlets. The IANA Internet Websites contain messages designed to raise funds and recruit persons for anti-U.S. violence.

On February 12, 2003, a University of Idaho graduate student named Sami Al-Hussayen was indicted in Boise on seven counts of visa fraud (18 U.S.C. § 1546) and four false statement offenses (18 U.S.C. § 1001). The charges are based in part on Al-Hussayen's failure to include his association with IANA on a student visa renewal form. Al-Hussayen, a Saudi citizen, has been IANA's registered agent since May 11, 2002. He is also listed as the administrative contact on a number of IANA-operated Websites. According to the indictment (paragraph 20), in June 2001, an

IANA Website (www.alsasr.ws) posted an article entitled "Provisions of Suicide Operations," which suggested the use of aircraft as instruments of suicide attacks. Other Websites linked to Al-Hussayen contain statements calling for violent *jihad*. Between January 23, 1997 and December 31, 2002, approximately $300,000 of unexplained (nonstudent aid) funds flowed through various bank accounts controlled by Al-Hussayen. Approximately one-third of the money transmitted into Al-Hussayen's account from overseas sources was ultimately remitted to IANA and persons associated with it.

United States v. Dr. Rafil Dhafir, Osameh Al Wahaidy, Ayman Jarwan, Maher Zagha, Help the Needy, and Help the Needy Endowment, Inc. 5:03-CR-64 (NAM) (N.D.N.Y. Feb. 18, 2003).

On February 18, 2003 in Syracuse, New York, four defendants and two organizations were charged with conspiring to transfer funds to Iraq in violation of IEEPA, and with twelve counts of money laundering and one count of conspiracy to commit money laundering. Founded in 1993, Help the Needy describes its mission as a relief effort to Iraq. Its founder, Dr. Rafil Dhafir is listed as IANA's vice president. Osameh Al-Wahaidy was an Imam at the Auburn Correctional Facility in New York and a math instructor at the State University of New York-Oswego. Dhafir, Al Wahaidy, and Ayman Jarwan were arrested on February 25, 2003, and search warrants were executed at eleven different locations. On April 22, 2003, Al Wahaidy pleaded guilty to a felony information charging him with an IEEPA violation, based on his sending money to Iraq in violation of the United States economic sanctions. On April 25, 2003, Jarwan pleaded guilty to conspiring to violate IEEPA by sending money to Iraq, and to conspiring to defraud the United States by impairing and impeding the IRS in the calculation and collection of taxes. The sentencings are scheduled for August 26, 2003.

United States v. Mohammed Ali Hasan Al-Moayad and Mohammed Moshen Yahya Zayed M-03-0016 (E.D.N.Y. Jan. 4, 2003)

On January 4, 2003, prosecutors in Brooklyn filed a criminal complaint charging Mohammed Al-Moayad with conspiring to provide material support and resources to *al Qaeda* and Hamas, in violation of 18 U.S.C. § 2339B. On January 9, 2003, a criminal complaint was filed charging Al-Moayad's assistant, Mohammed Moshen Yahya Zayead, with the same charges. Al-Moayad is a prominent Yemeni religious leader whose name appears as a reference on *al Qaeda* training camp documents. Al-Moayad solicited funds from persons in the United States, claiming that he had provided over $20 million to *al Qaeda* and that he could guarantee that the remitted funds would be applied solely to *jihad* activities. On January 10, 2003, al Moayed and Zayed were arrested in Germany, where they had traveled to receive a large donation. On January 11, 2003, a German court found the United States charge sufficient under German law and ordered them detained. In March 2003, in Frankfurt, Germany, a German judge ruled that the United States had presented enough evidence to extradite Al-Moayad and Zayed to the United States. As of this writing, the extradition is pending.

United States v. Sami Al-Arian et al. 83:03-CR-77-T-30 TBM (M.D. Fla. Feb. 19, 2003)

On February 19, 2003 in Tampa, Florida, Professor Sami Al-Arian and seven other persons were charged in a fifty-count indictment with, *inter alia*, using facilities in the United States, including the University of South Florida and some affiliated non-profit research foundations, to serve as the North American base for Palestinian Islamic Jihad (PIJ), a designated terrorist organization since 1995. Eight years of intercepted conversations and faxes

allegedly demonstrate the defendants' active involvement in the worldwide operations of PIJ. The charges are: (1) RICO conspiracy, 18 U.S.C. § 1962(d); (2) conspiracy to murder, maim, or injure persons outside the United States, 18 U.S.C. § 956(a)(1); (3) conspiracy to provide material support to terrorism (18 U.S.C. § 2339B); (4) conspiracy to make and receive contributions of funds, goods or services to or for the benefit of specially designated terrorists (IEEPA), 18 U.S.C. § 371; (5) interstate travel/use of mail or facility in interstate commerce, 18 U.S.C. § 1952(a)(2) and (3); (6) attempting to procure citizenship unlawfully, 18 U.S.C. § 1425(b); (7) making a false statement in an immigration application, 18 U.S.C. § 1546(a); (8) obstructing justice, 18 U.S.C. § 1505; and (9) perjury, 18 U.S.C. § 1621.❖

Useful Sources of Information in Clean Money § 2339B Investigations

I. Introduction

If there is public information suggesting that a domestic entity is acting as a front for a designated FTO, it should be sufficient to justify an investigation into that link. Once established, the investigative focus can then turn to the donors' intent, the specific conduct of the fund-raiser, and the circumstances of the fund-raising event. Establishing this link is a necessary precondition of most 18 U.S.C. § 2339B prosecutions and it should be confirmed through the development of admissible evidence before shifting the investigative focus to the particulars of the setting and the individual conduct of the fund-raisers and donors.

Public records are a promising source of information on possible domestic group-FTO links, whether sought for an investigatory predicate or in the course of the investigation itself. This is true, in part, because the examination of such records is so minimally intrusive. Public records useful for this purpose fall into three categories: the Internet, the news media, and publicly-accessible government records. There is a fourth category, government-maintained information, which is available to law enforcement without process, and it is also included in this discussion.

II. The Internet

Because of its informational volume, the Internet provides a unique means of showing connections between a domestic group and an FTO. This possibility is heightened by certain technological features of Websites. Internet users are able to maneuver quickly through a group of Websites by the technological innovation known as hyperlinks which, when clicked, allow the user to jump to an entirely different Website or page. Generally, a Website's creator determines what hyperlinks to include on the site, so that visitors can easily reach complementary sites or sources of related information.

The presence of hyperlinks on a particular Webpage can be used as circumstantial evidence

that two or more Websites are affiliated, aligned, or at least generally approve of each other's goals. In this sense, a hyperlink can be a useful tool in larger efforts to establish that a domestic organization is a front for an FTO. Coupled with other information, the hyperlink may help to establish the actual link.

To illustrate this point, consider two separate Websites: an official FTO Website, which recounts the glories of FTO-sponsored terrorist incidents, and one created by a United States entity which is devoted to an appeal for charitable contributions. If the FTO site contains hyperlinks to the domestic charity's site, one of two inferences can be drawn. Either the charity is a front for the FTO, and the operators of the FTO Website would like people to donate money to the charity since the FTO receives a portion, or the charity is not a front, the FTO does not receive a portion of the donations, but the FTO agrees with the charity's philanthropic goals and wants to encourage donations. In this situation, while we may be able to introduce this hyperlink as part of a larger mountain of circumstantial evidence against the charity and its donors, its probative value is probably limited. The benign inference is just as likely as the malevolent one. It is, after all, not a crime for United States charities to receive moral support from FTOs.

In the reverse situation, where the charity's Website contains a hyperlink to the FTO, this evidence is qualitatively superior. There, the charity's broad appeal for money is being accomplished on a Website that is linked, through its particular web design, to an FTO site that contains specific descriptions of terrorist activity. In this situation, one can infer the following: (1) that the charity is a front for the FTO, (2) the charity is not a front for the FTO and does not share its donations, but does agree with its activities and goals, or (3) the charity is not an FTO front and does not agree with its goals, but feels that, through the hyperlink, it can opportunistically tap into the support of more militant sources of money in the United States

All three possibilities give rise to possible 18 U.S.C. § 2339B culpability of the charity and should be grounds for further investigation. In the first scenario, the charity clearly violates 18 U.S.C. § 2339B by providing money to an FTO. In the second and third scenarios, although the charity is not remitting a portion of its donations to the FTO, it may nonetheless be providing nonmonetary material support and resources in the form of communication equipment, financial services, or perhaps Website referrals to the FTO in violation of 18 U.S.C. § 2339B. Clearly, the presence of the hyperlink on the charity's web site is sufficiently probative to justify an 18 U.S.C. § 2339B criminal investigation of that charity, as long as the investigation conforms with various First Amendment-related FBI guidelines.

A related question involves the charity's online donors and whether computer evidence can establish their culpability. Whether these donors are prosecutable under 18 U.S.C. § 2339B will depend on whether there is proof that they knew the charity was an FTO front. If it is not a front, as in the second and third scenarios, the donors are probably not chargeable under 18 U.S.C. § 2339B, even if they hoped their donations to the charity would help the FTO commit terrorist acts. (As noted above, the attempt offense would probably not reach this conduct by the donors). However, if the charity is a front, computer records that show that a particular donor, while on the charity's Website, used the hyperlink to visit the FTO site and thereafter made an online donation to the charity, would be proof from which a jury could infer that the donor was aware of the link and wanted their charitable donations (which may, in fact, be tax deductible) to be forwarded to the FTO.

In recent years, several English-language Web sites, apparently hosted by Web servers within the United States, containing information about various designated FTOs and hyperlinks to domestic groups, have appeared. The following information comes from a survey conducted in 2000. It should be noted that, for 18 U.S.C. § 2339B purposes, Website providers may be offering FTOs facilities or communications equipment within the meaning of the "material support or resources."

III. HAMAS

The site that purported to be the official Website of HAMAS was contained at www.palestine-info.com and was, according to our sources, maintained by an American company located in Milford, Connecticut. It opened to a banner headline, "Welcome to the Islamic Resistance Movement, HAMAS." The site contained information similar to what HAMAS publicly releases to media outlets in the Middle East. Some of this information, however, is significant because it would lead a first-time reader, otherwise unknowledgable about HAMAS, to conclude that it conducted terrorist attacks. The site was divided into six subparts: About HAMAS, Communiques, Documents, Glory Record, HAMAS Leaders, and HAMAS homepage.

Within the "About HAMAS" section, there was a subsection entitled "Military Action in HAMAS Program," which included this excerpt:

> *Military action is the movement's strategic instrument for combating the Zionist element. In the absence of a comprehensive Arab and Islamic plan for liberation, military action will remain the only guarantee that would keep the conflict going and that would make it difficult for the enemy to expand outside of Palestine. In its strategic dimension, military action is the Palestinian people's main instrument to keep the fire log burning in Palestine and to counter the Israeli schemes which aim at transferring the center of tension to other parts of the Arab and Islamic world. Military action, moreover, is an instrument to deter the Zionists and to prevent them from threatening the security role of the Palestinians. This was evident in the series of heroic attacks carried out by the movement in retaliation to the crime committed by the terrorist Baraugh Goldstein against the Palestinians who were praying in Al Ibrahimi Mosque.*
>
> *In resisting the occupation, HAMAS directs its actions against military targets and does its best to ensure that its resistance would not cause losses among civilians. It is true that in some cases resistance carried out by the movement resulted in some civilian losses, but these losses were in self-defense and came in retaliation to the massacres committed against innocent Palestinian civilians.*

Descriptions of specific terrorist activity conducted by HAMAS were contained on the Glory Record section. Significantly, the last two items on this 85-item chronological list were attacks that resulted in the death of United States citizens Scott Dobertsein and Eric Goldberg (October 9, 1994) and Nachon Wachmsman (October 11, 1994). In the description of these attacks, the assailants were described as martyrs. The descriptions of some of the other incidents (such as Item No. 4 below) left no doubt about HAMAS' violent proclivities:

> ***4. Kidnaping of two soldiers**: A group belonging to Al Qassam Brigades kidnaped the Israeli sergeant Avey Saporets while he was standing at Joulus near the Hadai junction on 17 February 1989. The group disarmed the sergeant and took all his papers. He was then exterminated and disposed of.*

Other parts of this Website contained similar types of terroristic language. One of the documents included in the Communique section was dated December 8, 1999, and stated:

> *Greetings also to the martyrs Yahya Ayyash, Imad Aqel, Kamal Kehail, Muhien Deen Sharif and the brothers Adel Imad Awadallah. And greetings to the martyrdom bombers in our country who plant death and horror in the hearts of the Zionists and seed victory and dignity among the Palestinian People and who prove that they are non-dying people who do not surrender and who are able to extract victory and defeat the enemy.*

Although the HAMAS Website, which was part of a larger site entitled "Palestinian Information Center" at the same Internet address, contained some general appeals for support, it did not contain any overt charitable pleas or instructions on how to make contributions. The general appeals urged such things as moral support for political prisoners in Israeli jails.

There was, however, a separate site described as the unofficial HAMAS Website (www.hamas.org), hosted by a United States company known as NETCOM Interactive in

Dallas, Texas. This site contained a hyperlink to the official HAMAS site, as well as to several United States-based charities, including Holy Land Foundation for Relief and Development, the Islamic Association of Palestine, and the Palestinian Children's Relief Fund.

The Holy Land Foundation (HLF) Website (www.hlf.org) contained a Web page entitled "DONATE!" which describes various methods of remitting tax-deductible charitable donations including online pledges, and contained a Donor's Bill of Rights, pursuant to which donors could earmark donations for specific HLF programs or activities. There was no reference to terrorist activity or to HAMAS. The same was true of the Website for the Palestinian Children's Relief Fund (PCFR) (www.wolfenet.com), based in Kent, Ohio, which claimed to seek donations to cover the transportation costs in bringing injured children to the United States for medical care and the shipping costs for sending medical supplies or equipment to the Middle East. This Website contained hyperlinks to the Holy Land Foundation and the United Palestinian Appeal, Inc. In addition, the PCFR site contained a list of other United States charities that have assisted its humanitarian tasks. They included the Jerusalem Fund (Washington D.C.), International Relief Organization (Falls Church, VA), Global Relief Foundation (Bridgeview, IL), US Omen Trust (Los Angeles, CA), Children International (Kansas City, MO), and Mercy Medical Airlift of Virginia (Manassas, VA).

IV. *Al Qa'ida*

Although it did not claim to be the official Website for Usama bin Laden's organization, the New Azzam Publication Web Site (subtitled "Information about Jihad and Mujahideen everywhere") was located at www.azzam.com, although it has since been moved. It was apparently hosted by OLM LLC Web Hosting, the same Milford, Connecticut company that hosted the official HAMAS site. It was quite obviously designed to support *al Qa'ida*, whether officially or not. For example, it contained photographs of bin Laden and the full text of his various declarations of war.

It also contained overt appeals for donations. In a section entitled "What Can I Do to Help Jihad and the Mujahideen?" there was a subsection entitled, "Raising, collecting and donating money," which read, in part:

> *Around the Muslim world, the Jihad is being entirely funded by donations from individuals. It is not the amount that is given but the sincerity of the person who gives it....Therefore the first and most important thing that Muslims can do in the West is to donate money and to raise it amongst their families, friends and others. In the U.K. today, millions of pounds of sterling is spent building and refurbishing large beautiful mosques, whereas the Muslims are still getting further away from their Deen and fewer and fewer people are attending those mosques. Jihad is a profitable investment that pays handsome dividends. For someone who is not able to fight at this moment in time due to a valid excuse they can start by the collection and donation of funds. . . . .*
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> *Azzam Publication is able to accept all kinds of Zakah and Sadaqah donations and pass them on where they are most needed. We can categorically say that Azzam Publication ONLY helps the oppressed people by passing on the money directly without cutting for unnecessary expenditures; it does NOT support, financially or otherwise, terrorist acts against innocent citizens, in ANY country in the world. This is fact NOT just a disclaimer.*
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> . . . .
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> *The Jihad does not only consist of one person firing a gun. It consists of a large and complex structure that includes: the one who organizes the weapons and ammunition, ... the one overseas who raises the money, the one who brings or transfers the money, the one sitting in a Western country who locates and purchases highly sophisticated equipment such as High Frequency Radios.*

V. Hizballah

There was an unofficial Hizballah Website (www.hizbollah.org) hosted by the same Dallas company that hosts the unofficial HAMAS site.

Although it was small and did not contain any overt appeals for donations, it did state, "The site providers do not get any financial support from any government and rely solely on contributions from individuals concerned about bringing the truth to the people." The site did contain a hyperlink to what was described as the official Hizballah Website (www.hizbollah.org), as well as to the unofficial HAMAS site (www.hamas.org), the Islamic Association of Palestine (www.iap.org), and the Palestinian Children's Relief Fund (www.wolfenet.com).

The official Hizballah site proclaimed itself as a legitimate political organization in Lebanon, though it described suicide attacks as special types of resistance against the Zionist enemies. There were no overt appeals for money.

VI. Public government records

The specter of a domestic group-FTO link may also be raised by information contained in government records that are available to the public. A systematic analysis of this information (which will be guided by certain FBI and DOJ investigative guidelines) may justify the initiation of a criminal investigation or provide additional proof of such a link.

The Internal Revenue Service (IRS) is a potentially valuable source of this type of information. Virtually all organizations in the United States that engage in financial transactions must file tax returns. Corporations are required to annually file United States Corporate Income Tax Returns, IRS Forms 1120, while partnerships file United States Partnership Returns, IRS Forms 1065. In the case of corporations and partnerships that are operated for profit, these returns are protected from disclosure by the security provision of the U.S. Tax Code, 26 U.S.C. § 6103. That is, they are not public.

Tax-exempt (or 26 U.S.C. 501(c)(3)) organizations are a different matter. Such entities are exempt from state and federal taxes and, in appropriate circumstances, their donors are entitled to tax deductions for their charitable contributions. The IRS grants tax-exempt status to organizations and assures that they operate in a manner that is consistent with the eligibility criteria. There are currently over one million IRS-recognized 26 U.S.C. 501(c)(3) organizations.

Because tax-exempt status is a form of government subsidy, 26 U.S.C. 501(c)(3) organizations are accountable to the public. An organization's initial application for 26 U.S.C. 501(c)(3) recognition (IRS Form 1023) is open to the public, as are its annual tax returns (IRS Forms 990). In fact, much of this information is available over the Internet, through a Website known as Guidestar (www.guidestar.org).

IRS Form 1023 (Application for Recognition of Exemption) must be signed under penalties of perjury by an authorized agent of the entity. The information required by the form includes an employer identification number (EIN), a conformed copy of the organization's Articles of Incorporation, a copy of any bylaws adopted by the organization, a full description of the organization's purposes and activities, and financial statements showing its receipts (and their sources) and expenditures (and their nature) for the current year and for the preceding three years, including a balance sheet for the most recent period. The form also includes several specific questions:

- "What are or will be the organizations's sources of financial support?" (Part II, Line 2)
- "Describe the organization's fund-raising program, both actual and planned, and explain to what extent it has been put into effect . . . . Attach representative copies of solicitations for financial support." (Part II, Line 3)
- "Does the organization control or is it controlled by any other organization?" (Part II, Line 5)
- "Is the organization financially accountable to any other organization?" (Part II, Line 7)
- "Describe the organization's present and proposed efforts to attract members, and attach a copy of any descriptive literature or promotional material used for this purpose." (Part II Line 11(b))

On its annual IRS Forms 990, the entity must report its gross receipts and expenses, and include copies of its financial statements. It must also list

the identity and salary of its five highest-paid employees, as well as the identity and contribution amounts of donors who contributed $5,000 or more that year.

The Forms 1023 and Forms 990 filed by 501(c)(3) entities are almost entirely public documents, although organizations can seek to protect against the release of information that may constitute trade secrets. On the Forms 990 the IRS releases to the public, the identity of the large (over $5,000 per year) contributors is redacted, although the amounts of their contributions remain. This redaction is required by a specific provision of the Tax Code, and neither that provision nor its corresponding IRS regulation describes a procedure for accessing this nonpublic information. Title 26 U.S.C. § 6104(d)(3)(A) ("Publicity of information from certain exempt organizations and certain trusts") creates the general rule that Forms 1023 and Forms 990 are public, but with this proviso: "In the case of [501(c)(3) organizations], paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization."

This disclosure issue has apparently never been litigated. Thus, the public cannot normally determine from the publicly-disclosed Forms 990 who is bankrolling the organizations. To the extent that we decide to seek this information, we could only do so in the context of a criminal investigation, and probably only with a court order. The public information does, however, include the names of the tax-exempt organization's officers. There is no question that this donor information would be valuable in proving a link between United States charities and FTOs. On a nonredacted Form 990 for the Holy Land Foundation filed several years ago, Musa Abu Marzook, a known HAMAS leader, was listed as a major donor.

VII. Other government records available without process

There are other types of government-maintained records which, though not public, are nonetheless available for review by other federal agencies without formal service of process.

The Department of Treasury Currency and Banking Retrieval System (CBRS) contains currency transaction/transportation reports and suspicious activity reports filed in accordance with legal requirements. The State Department's TIPOFF database, designed to prevent the issuance of United States visas to undesirables, contains a list of individuals who have been implicated in terrorist activities, their birth dates, passport numbers, and their suspected countries of origin. The TIPOFF data can be matched against the CBRS information, which can yield a list of financial transactions involving suspected terrorists. The results of this program may establish certain United States groups' links to FTOs and justify further criminal investigation.❖

Case Type: American Jihad

The overseas application of 18 U.S.C. § 2339B, along with the inclusion of personnel within the definition of material support or resources, has allowed its use in circumstances that do not necessarily involve financial investigative tools. Since 9/11, United States persons who have tried to travel to Afghanistan to fight on behalf of *al Qaeda* have been charged with § 2339B offenses. These prosecutions are premised on the notion that, by providing their own bodies to Foreign Terrorists Organizations (FTOs), they are both providing personnel to an FTO (in violation of§ 2339B) and illegally providing services to a Specially Designated Global Terrorist (SDGT), in violation of International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701, 1702.

The prosecution of the so-called American Taliban, John Walker Lindh, in Alexandria, Virginia is the most prominent example of this type of material support case. Other American *Jihad* cases have been initiated in Seattle, Buffalo, and Portland. The term "personnel," in addition to covering the providing of one's own body, also covers the conduct of recruiting other persons for the service of FTOs.

United States v. Yahya Goba, Shafal Mosed, Yasein Taher, Faysal Galab, Mukhtar Al-Bakri, and Sahim Alwan 02-M-107, 240 F. Supp. 2d 242 (W.D.N.Y. Oct. 21, 2003).

> Prior to 9/11, the defendants, young American-Muslims, traveled to and received training at an *al Qaeda* training camp in Afghanistan, where they met Usama bin Laden and heard him describe past and future plans to attack American interests. Thereafter they returned to their homes in Lackawaana, New York. On October 21, 2002, they were indicted on *al-Qaeda*-related§ 2339B charges. On January 10, 2003, Faysal Galab pleaded guilty to a superseding criminal information charging him with an IEEPA violation, premised on his illegal transactions with *al Qaeda*, and he agreed to a seven year sentence. Goba, Mosed, and Alwan have pleaded guilty to§ 2339B violations, agreeing to sentences of ten years, eight years, and nine years, respectively.

United States v. James Ujaama CR:0200283R (W.D. Wash. Aug. 28, 2002)

> On August 28, 2002 in Seattle, James Ujaama, a U.S. citizen and Muslim convert, was indicted for conspiracy to provide material support and resources in violation of 18 U.S.C. § 2339A , § 2339B, and §956(a)(1) and (b); and using, carrying, possessing, and discharging firearms during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and (2). Ujaama allegedly attempted to set up a *jihad* training camp at a farm in Bly, Oregon, and operated Websites for the former Imam of the Finsbury Park Mosque in London, England. On April 14, 2003, Ujaama pleaded guilty to conspiracy to violate IEEPA. He admitted to conspiring with others to provide support, including money, computer software, technology, and services, to the Taliban and to persons in the territory of Afghanistan controlled by the Taliban. He agreed to cooperate with the government's ongoing terrorism investigations. Pursuant to the plea agreement, Ujaama will be sentenced to twenty-four months in prison.

United States v. Jeffrey Leon Battle, October Martinique Lewis, Patrice Lumumba Ford, Muhammad Ibrahim Bilal, Ahmed Ibrahim Bilal, Habis Abdulla al Saoub, and Mike Hawash , No. CR02-399-HA (D. Ore., Oct. 3, 2002).

The charges arise out of an alleged attempt in late 2001 and early 2002 by six of the seven defendants (Battle, Ford, Ahmed Bilal, Muhmmad Bilal, Saoub, and Hawash) to enter Afghanistan through China and Pakistan to aid and assist the Taliban against the United States and coalition forces stationed there. The seventh defendant, October Lewis, is Battle's ex-wife who served as a conduit of money to him during the course of his trip. This included his later travel to the Republic of Korea and then Bangladesh to join Tablighi Jamatt, an evangelical Islamic group, as a way of entering Pakistan and ultimately Afghanistan. On October 3, 2002, Battle, Ford, Lewis, Saoub, and the Bilal brothers were indicted on charges of conspiring to levy war against the U.S. (18 U.S.C. § 2384), conspiring to violate § 2339B and IEEPA, and possession of firearms in furtherance of crimes of violence (18 U.S.C. § 924(c)(1)(A)(iii)). Hawash was charged by criminal complaint on April 28, 2003 and ultimately added as a defendant by superseding indictment on May 2, 2003. Trial is scheduled for October 1, 2003. In a related matter, on March 3, 2003, Mohammed Kariye, the Iman of the Portland mosque, pleaded guilty to social security fraud.❖

Case Type: Dirty Money

The 18 U.S.C. § 2339B crime differs from the traditional money laundering offense in that it does not require that the remitted funds be derived from an illegal source. Persons in the United States as agents of Foreign Terrorist Organizations (FTOs), however, sometimes engage in criminal behavior, both to support their presence here and to generate funds that are sent back to their principals in the homeland. Where this is uncovered by law enforcement, United States prosecutions can include both 18 U.S.C. § 2339B and standard criminal charges, such as RICO.

United States v. Mohamed Hammoud, Bassam Youssef Hammoud, Mohamad Atef Darwiche, Ali Hussein Darwiche, Ali Fayez Darwiche, Hassan Hilu Laqis, Mohamed Hassan Dbouk, Ali Adham Amhaz, Nabil E. Ismail, Mohit Behl, Hussein Chahrour, Mary Denise Covington, Marie Lucie Cadet, Jessica Yolanda Fortune, Mehdi Hachem Moussaoui, Angela Georgia Tsioumas, Said Mohamad Harb, and Chawki Hammoud 3:00 CR 147-MU (W.D.N.C. Aug. 20, 2000)

A criminal investigation that began when a local sheriff in western North Carolina noticed a group of Lebanese men buying large volumes of cigarettes ultimately led to the FBI Joint Terrorism Task Force investigation that uncovered a cigarette smuggling enterprise involving two dozen people, some of whom had connections to Hizballah operatives in Lebanon. The investigation ultimately resulted in a RICO and terrorist financing indictment.

On March 28, 2001, the defendants were indicted on RICO charges, based on the cigarette smuggling and tax evasion. A few months later, they were charged by superceding indictment with conspiring to provide material support to Hizballah under 18 U.S.C. § 2339B. The latter charges were premised on funds the defendants sent to Hizballah, and a military procurement program in which Hizballah operatives in Beirut tasked North America-based adherents to purchase and ship a variety of dual-use items purchased in the United States and Canada.

Following a series of guilty pleas by the other defendants, Mohamed Hammoud and Chawki Hammoud were convicted in June 2002, in the first 18 U.S.C. § 2339B jury trial in American history. On February 28, 2003, Mohammed Hammoud was sentenced to 155 years imprisonment (based on the terrorism sentencing enhancement) and his brother Chawki Hammoud received 51 months imprisonment and was ordered to report to

Immigration and Naturalization Service (INS) for deportation proceedings immediately after serving his sentence.

Guilty pleas and a jury conviction have resolved the charges against all of the defendants in the United States. The remaining defendants are international fugitives.

United States v. Syed Mustajab Shah, Muhammed Abid Afridi and Ilyas Ali 02 CR 2912 (S.D. Cal. Sept. 17, 2002).

On September 17, 2002, the defendants were charged with conspiring to import and distribute drugs and conspiring to provide material support to *al Qaeda*. Between April and September 2002, they allegedly negotiated with undercover law enforcement agents for the sale of 600 kilograms of heroin and five metric tons of hashish. The defendants also negotiated with undercover law enforcement agents for the purchase of four "Stinger" anti-aircraft missiles, which they indicated they were going to sell to members of *al Qaeda* in Afghanistan. The negotiations took place in, among other places, San Diego and Hong Kong. The defendants were arrested in Hong Kong on September 20, 2002 by local law enforcement authorities, at the request of the United States government. On March 6, 2003, they were extradited and thereafter arraigned in San Diego.

United States v. Uwe Jensen, Carlos Ali Romero Varela, Cesar Lopez (a/k/a Commandant Napo), and "Commandant Emilio" H-02-1008 M (S.D. Tex. Nov. 1, 2002)

On November 1, 2002, federal prosecutors in Houston filed a criminal complaint charging Uwe Jensen and his boss, Carlos Ali Romero Varela, both of Houston, Cesar Lopez, also known as "Commandant Napo," and an individual identified as "Commandant Emilio," both high ranking members of the AUC, the right-wing designated terrorist organization in Colombia, with drug conspiracy and conspiracy to provide material support or resources to AUC. The complaint provided the authority for Costa Rican law enforcement officials, in conjunction with the FBI and DEA, to arrest three of the defendants (Varela, Napo, and Emilio), on November 5, 2002 in San Jose, Costa Rica. Jensen was arrested that day in Houston. These arrests were the result of an undercover sting in a drugs-for-weapons deal that envisioned $25 million worth of weaponry being provided to AUC, in exchange for cash and cocaine. The weapons that the defendants believed they were purchasing included 9,000 assault rifles, including AK-47's, submachine guns, and sniper rifles; 300 pistols; rocket propelled grenade launchers, and almost 300,000 grenades; shoulder fired anti-aircraft missiles; and approximately 60 million rounds of various types of ammunition. The grand jury returned an indictment on December 4, 2002. On April 23, 2003, Carlos Ali Romero Varela pleaded guilty to the§ 2339B and drug conspiracies. Jensen pleaded guilty on June 24, 2003. Emilio and Napo are both in Costa Rican custody awaiting extradition.❖

Case Type: Material Support to Unknown Groups

The enactment of 18 U.S.C. § 2339B was a watershed event in terrorist financing enforcement. The statute enacted two years earlier, 18 U.S.C. § 2339A, was quickly found to be ill-suited to the problem of terrorists receiving support from United States sources. The creation of the 18 U.S.C. § 2339B crime of providing material support to foreign terrorist organizations (FTOs) did not, however, render 18 U.S.C. § 2339A a dead letter. That statute continues to exist in the United States Criminal Code, and it was improved with certain changes in the USA PATRIOT Act. For example, § 2339A now covers conduct "within the United States or subject to the jurisdiction of the United States" (the same language used in § 2339B) and contains a conspiracy provision.

Recent experience in the United States terrorist financing enforcement program has breathed new life into 18 U.S.C. § 2339A. Although it will never be as powerful as 18 U.S.C. § 2339B, nor will it generate as many prosecutions, there are certain factual circumstances that will result in 18 U.S.C. § 2339A cases where 18 U.S.C. § 2339B charges remain beyond reach. Such circumstances will generally involve investigations which uncover the material support-type of activity which either predates the first FTO designations (October 7, 1997) or which cannot be pinpointed as undertaken on behalf of a particular FTO.

Cases that may fall within the coverage of 18 U.S.C. § 2339A, but not 18 U.S.C. § 2339B, will generally be limited to providing a specific type of support that is inherently violent or dangerous. To successfully prosecute someone under 18 U.S.C. § 2339A, the United States must prove that the person provided the support or resources, knowing or intending that it was to be used in carrying out one of a number of federal terrorist-type crimes. The *mens rea* is far more difficult to prove than it is in the 18 U.S.C. § 2339B crime, which only requires proof that the defendant knew his/her material support was going to an FTO.

When the material support being provided is traveling from the United States to locations abroad and is, by its nature, lethal, the provider may be shown to know such support was going to be used to commit a violation of 18 U.S.C. § 956, which since 1996 has been a predicate for the 18 U.S.C. § 2339A offense. Section 956 criminalizes conspiracies within the jurisdiction of the United States to kill, kidnap, maim, or injure persons, or damage property outside the United States. United States-based *jihad* training, where the participants are schooled in guerilla warfare and terrorist trade craft, could expose the instructors to 18 U.S.C. § 956-predicated 18 U.S.C. § 2339A liability, even if it cannot be established that they were seeking to assist a particular terrorist organization.❖

Case Type: Hiding Terrorist Assets

There is a new type of terrorist financing case that is being developed by United States law enforcement. These cases are akin to the crime of harboring fugitives, although they involve assets rather than persons.

By operation of law, the designation of groups and individuals as Specially Designated Terrorists (SDTs) and Specially Designated Global Terrorists (SDGTs) under the President's International Emergency Economic Powers Act (IEEPA) authority requires institutions holding their assets to freeze them. This requirement transcends banks, whose deposits include designated terrorist accounts, to include companies in which terrorists, prior to their designation, had investment interests. In December 2002, the Attorney General

announced the indictment in Dallas of a closely-held computer company known as INFOCOM and several of its officers. The indictment centers on the defendants' alleged conduct of concealing the continuing profit interest held in the company by Mousa Abu Marzook, a senior Hamas leader who was named an SDT by a 1995 Executive Order. Marzook and his wife, who allegedly participated in the scheme, were also named as defendants. Under IEEPA and the related designation process, United States-based persons can be charged with the crime of failing to freeze assets of designated terrorists. U*nited States v. Bayan Elashi, Basman Elashi, Hazim Elashi, Ihsan Elashyi, Ghassan Elashi, Mousa Abu Marzook, Nadia Elashi, and Infocom Corp*. 3:02-CR-052-R (N.D. Texas, Dec. 17, 2002).❖

Frequently-Asked Questions Regarding Terrorist Financing

Q. What is terrorist financing enforcement?

In criminal law, terrorist financing generally means the use of financial information and the United States courts to redress international terrorism. This concept involves four areas:

Identification of terrorists and their supporters through financial analysis: the use of financial investigative techniques to identify terrorists and their logistical supporters. For example, in the aftermath of September 11, the FBI Financial Crimes Section led a multi-agency task force that used financial techniques to trace the movements and commercial transactions of the nineteen dead hijackers.

Targeting known terrorists and their supporters through the enforcement of financial crimes: the use of traditional financial violations to prosecute persons and groups that are documented, sometimes from sensitive sources and methods that cannot be disclosed, to be engaged in terrorism or terrorist planning.

The crime of terrorist financing: the prosecution of terrorist supporters under the United States Code provisions which criminalize the act of knowingly providing support and engaging in financial transactions with terrorists. 18 U.S.C. § 956; 18 U.S.C. § 2339A; 18 U.S.C. § 2339B; and 50 U.S.C. §§ 1701, 1702.

Seizing terrorist-connected assets through judicial seizures: the use of Executive Orders and the civil forfeiture provisions of United States law to freeze, seize, and/or forfeit assets of terrorist supporters.

Q. What are the crimes of terrorist financing?

18 U.S.C. § 2339A: Providing material support or resources for acts of international terrorism (generally used in conjunction with 18 U.S.C. § 956) (Conspiracies within the United States to kill/maim persons and destroy specific property abroad);

18 U.S.C. § 2339B: Providing material support or resources to designated foreign terrorist organizations;

50 U.S.C. §§ 1701, 1702: Engaging in financial transactions in violation of United States economic sanctions (also known as violations of the International Emergency Economic Powers Act, or IEEPA).

Other statutes that can be useful in terrorist financing efforts include the crimes of transmitting funds to promote a specified unlawful activity (18

U.S.C. § 1956(a)(2)(A)); operating an unlicensed money transmitting business (18 U.S.C. § 1960); and structuring transactions to evade currency reporting requirements (31 U.S.C. § 5324).

Q. What is meant by designated foreign terrorist organizations?

Designated foreign terrorist organizations, or FTOs, are groups that have been designated by the Secretary of State, in consultation with the Justice and Treasury Departments, under Section 219 of the Immigration and Nationality Act. FTO designations are renewable every two years. As of May, 2003, there are thirty-six FTOs.

In addition to FTOs, the Treasury Department designates both foreign and domestic individuals and groups as Specially Designated Global Terrorists (SDGT) which, under the President's emergency economic and foreign policy authority, makes willfully engaging in financial transactions with these persons/groups a crime. There are currently over 260 SDGTs. Criminal prosecutions under this statute are not as common as those brought under 18 U.S.C. § 2339B, for which the intent element is knowingly rather than willfully.

Q. Who is involved in the designation process?

Every two years, the Criminal Division's Counterterrorism Section (CTS), the Civil Division's Office of Immigration Litigation (OIL), and Federal Programs Branch jointly review the administrative records compiled by the State Department. Thereafter, they make recommendations to the Attorney General on whether he/she should concur, along with the Secretary of Treasury, in the State Department's recommendation to the Secretary of State.

Q. What is the prosecutorial significance of a group being designated?

The terrorist organization designation process (sometimes referred to as the United States list-making approach to terrorist financing) is designed to obviate the need to follow money to specific terrorist applications, and to prove the intent of the providers to facilitate specific terrorist acts. Designating certain organizations as FTOs takes away any argument that such groups are freedom fighters or national liberation movements, and that their supporters intend their donations to be used for benevolent purposes. This approach is based on the notion–specifically included in the Congressional findings and legislative history–that all money is fungible and that, to the extent political organizations include terrorism as part of their methods, any funds that they receive from donors frees up other funds that can be used to kill innocent people.

Where criminal targets provide support for groups and individuals that are not designated as FTOs and SDGTs, prosecuting them requires proof that they knew their support would be used for specific terrorist acts.

Q. Does the crime of terrorist financing involve more than funds?

Yes. Title 18 U.S.C. § 2339B criminalizes the act of providing material support or resources to FTOs. Material support or resources is defined as almost anything of value, except medicine and religious materials.

Q. Who investigates terrorist financing crimes?

By statute, the Attorney General is responsible for the investigation of criminal violations of 18 U.S.C. § 2339B, which means most terrorist financing crimes are investigated by the FBI. However, any federal, state, or local law enforcement agency may refer such violations, developed in the course of their investigations, to the United States Attorney's Office and the Department of Justice. Where terrorist financing refers to the targeting of known terrorists through financial analysis, the law enforcement agency responsible for enforcing the resulting crimes (*e.g.* Customs, ATF, IRS, DEA, Postal Inspectors, and Social Security Administration) play an important role.

Q. What is Treasury's role in terrorist financing?

Generally speaking, Treasury plays a leading role in the regulatory and administrative measures relating to terrorist financing, as well as a limited role in criminal law enforcement. Treasury's role includes efforts designed to block or freeze terrorist assets within the United States and abroad through IEEPA and Presidential Executive Orders,

in addition to diplomatic efforts in the international arena.

Q. What is Justice's role in Treasury's terrorist financing efforts ?

The Justice Department's role in Treasury's terrorist financing efforts primarily involves the Civil Division's defense of Treasury actions if challenged in court. The Criminal Division and the United States Attorneys' Offices generally will interact with Treasury efforts when the proposed action involves agents or assets of terrorists located within the United States, and where there is a clear United States interest in prosecuting these persons and seizing their assets. In addition to CTS, the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS) is involved in these interactions.

Q. What is the difference between blocking and freezing assets?

Blocking and freezing assets generally mean the same thing: the removal of the assets from the owners' control, until such time as the assets are ordered returned. Neither blocking nor freezing affect the title to the assets.

Q. What is the difference between blocking/freezing and seizing assets?

Forfeitures are accomplished by judicial or administrative proceedings and result in the permanent transfer of title to the property to the United States Government.

Q. How are the crimes of terrorist financing investigated?

Like most white-collar crimes, terrorist financing crimes are investigated through the analysis of third-party records which reveal that persons are engaged in illegal financing transactions, combined with the search for evidence of materially false statements and other demonstrable proof that the targets were undertaking furtive activities designed to conceal or disguise their actions. While money laundering involves the process in which dirty money is cleaned so that it appears legitimately-derived, terrorist financing is the process by which clean money (such as charitable contributions) becomes dirty by virtue of its application and use. As a result, terrorist financing has been referred to as "reverse money laundering," or "money soilage." The best terrorist financing prosecutions will consist of transaction records that suggest money is being sent to an overseas destination and conspiratorial conversations about the nature or goal of the transaction (sometimes in code), followed by false statements to law enforcement authorities and third-parties about what the targets were doing.

Q. How are terrorist financing crimes prosecuted?

The crimes of terrorist financing are prosecuted by United States Attorneys' offices and the DOJ Terrorist Financing Task Force located within CTS. After September 11, the Attorney General created Antiterrorism Task Forces (ATTFs) in each of the ninety-three judicial districts. The ATTFs are chaired by an Assistant United States Attorney designated as the district's Antiterrorism Coordinator (ATC). In order to effectively coordinate the operations of the ATTFs, the Justice Department appointed six Regional Antiterrorism Coordinators (RATC), who are responsible for ten to fifteen ATTFs, divided by geographic regions. The RATCs are the following CTS attorneys:

Dana Biehl - North Central States;

Jeff Breinholt - Western and Pacific States;

Michael Keegan - Northeastern States;

Cherie Krigsmen - South Atlantic States;

Martha Rubio - Southwestern States;

Sylvia Kaser - Midwestern States.

Q. How many prosecutions involving the crime of terrorist financing have been initiated?

Approximately twenty. The first trial involving 18 U.S.C. § 2339B conspiracy charges occurred in Charlotte, North Carolina in the spring of 2002, with the Hizballah-affiliated defendants convicted on all counts. The lead defendant was sentenced to 155 years in prison. There have been some guilty pleas involving Mujahedin-e Khalq Organization (MEK) supporters, and charges filed in Detroit against individuals involved in Hizballah military procurement. In the so-called American Taliban case, John Walker Lindh was charged under 18 U.S.C. § 2339B with providing material support,

in the form of his own person, to *al Qaeda* and Harakat ul-Mujahidin (HUM), and the United States Attorney in Chicago obtained a guilty plea from the director of an *al Qaeda*-affiliated charity. Title 18 U.S.C. § 2339A and § 2339B conspiracy charges were returned by grand juries in Seattle, Portland, Buffalo, and Detroit, based on *jihad* recruitment and training. In San Diego, Houston, and Miami, 18 U.S.C. § 2339B charges are pending in drugs-for-weapons plots, and there are defendants in German custody, awaiting extradition to Brooklyn on *al Qaeda*-related 18 U.S.C. § 2339B charges. Eight persons, some of whom were affiliated with the University of South Florida, are charged in Tampa with providing material support to the Palestinian Islamic Jihad (PIJ). Title 18 U.S.C. § 2339A was charged in a Florida case involving IRA gun smugglers, which went to trial in 2000. Unfortunately, while the defendants were convicted of gun charges, the jury acquitted them on the § 2339A charges.

Q. What districts have been active in the investigation of terrorist financing crimes?

The Southern District of New York has been involved in the financial investigation of *al Qa'ida* as a result of its role in prosecuting the first 1993 World Trade Center bombing and the Sheik Rahman cases. The United States Attorneys' offices in Dallas and Chicago have been involved in a multi-year investigation into Hamas fund-raising, while Chicago has been leading the investigations into the Islamic charities known as Global Relief Foundation (GRF) and Benevolent International Foundation (BIF). Miami, Detroit, Los Angeles, and Charlotte have successfully prosecuted terrorist financing crimes. Other districts involved in current terrorist financing cases include Buffalo, Syracuse, Seattle, Boise, Portland (Oregon), San Diego, Tampa, and Alexandria (Virginia). Brooklyn and San Diego have been particularly active in the targeting of suspected terrorists through nonterrorism charges.

Q. What information is relevant to terrorist financing criminal investigations?

Although terrorist financing investigations do not require that the funds provided derive from an illegal source, investigations that uncover dirty funds being sent to certain parts of the world known for terrorist activity (Gaza, West Bank, Lebanon, Jordan, Philippines) should analyze whether the scheme involves terrorist financing. For example, criminal tax investigations involving corporate diversions that are being routed to these geographic regions warrant terrorist financing scrutiny.

Where the support being provided is not the proceeds of a crime, relevant information includes any evidence that the persons providing it are behaving in a manner designed to conceal their activity. For example, large transfers of monies from United States bank accounts to foreign bank accounts, combined with the account holders' failure to report any interest in or control over a foreign account on his United States tax returns, suggest a furtiveness that, upon closer examination, could be related to terrorist financing.

Seemingly legitimate charities and foundations have been operated for the benefit of FTOs, and general financing activity that is inconsistent with charitable operations is worthy of further investigation. Where a charity engages in fund-raising, the manner in which the fund-raising appeals are made and donations solicited can suggest a terrorism tie. Security-consciousness and the practice of trade craft by operators of charities are highly suspicious in the philanthropic industry, where the players are required, by law, to be transparent in their business dealings.

Finally, the counterterrorism intelligence investigations conducted by the FBI (known as 199 cases) frequently yield information that suggests terrorist financial support. Where 199 cases involve electronic surveillance under the Foreign Intelligence Surveillance Act (FISA), for example, intercepted telephone calls sometimes reveal the participants speaking in code in what appears to be a conversation about specific financial transactions. On occasion, this information can be compared to bank, telephone, and third-party records obtained by grand jury subpoena, to match it (by time and amount) with particular transactions. Where this occurs, declassification of the technical FISA recordings may be considered.

Q. How does the FBI conduct 199 investigations?

These investigations are designed to develop intelligence relevant to terrorist threats against the United States as a result of the activities of Americans and non-Americans located here. Unlike criminal investigations, which seek to develop evidence that is admissible in court, the goals of 199 investigations are to produce information that is circulated throughout the intelligence community and used by policymakers and operational decision makers for threat assessment and actions. Information developed in 199 investigations is classified, typically at the SECRET level. Where the information includes material provided by human sources, those individuals do not expect to testify in open court. A minority of 199 investigations include intelligence developed through court-ordered methods authorized under the FISA statute, which involves special court supervision.

Q. What is FISA?

FISA, an acronym for the Foreign Intelligence Surveillance Act, is the statute enacted in 1978 which codified the Executive Branch's authority to conduct electronic surveillance for national security purposes. While such surveillance occurred prior to 1978, it was always done at the President's behest and without any court supervision. FISA created a special court, known as the Foreign Intelligence Surveillance Court (FISC), consisting of United States District Court judges from around the country who review and rule on classified FBI applications for authority to engage in wiretaps and surreptitious entries.

Q. How does FISA authority differ from the standard court-overseen criminal investigatory surveillance techniques?

To obtain FISA authority, the FBI need not establish probable cause that a crime has been committed. Rather, FISA requires some articulable indication that the proposed target in the United States is acting on behalf of a foreign power. Accordingly, FISA-approved surveillance represents an exception to the criminal warrant requirement of the Fourth Amendment. The lawyers who prepare FISA warrants, attorneys from a Department of Justice office known as the Office of Intelligence and Policy Review (OIPR), are not involved in criminal law enforcement and are not part of the Criminal Division.

Q. Can prosecutors review 199 information to develop terrorist financing investigations?

Yes. Those DOJ personnel involved in criminal law enforcement who enjoy the appropriate security clearances and "need to know," are entitled to review FISA and non-FISA 199 information developed in the course of any current or past 199 investigation.

Q. Can United States Attorneys' Offices access 199 information?

Under the Attorney General Guidelines (March 6, 2002), AUSAs are entitled to review all 199 information possessed by the FBI, to the same extent as the Criminal Division.

Q. If 199 information is generally classified at the SECRET level, how can this information be useful to prosecutors?

Information developed during 199 investigation is not evidence, which is to say that it has not been obtained with an eye towards its use in court. Such information, however, can be very valuable to criminal law enforcement for lead purposes, and occasionally can be transformed into evidence.

Understanding this process requires recognition of the interrelationship between information and evidence. All evidence consists of information, but not all information is evidence. Information becomes evidence when it is put into a form that can be properly introduced in court, pursuant to the Federal Rules of Evidence. In particular, all evidence offered in court is subject to the process of authentication, a factual showing by the proponent of the evidence that what is being offered is, to the court's satisfaction, what it purports to be. Where the information consists of out-of-court statements, not only must it be authenticated, but it must fit within one of the exceptions to the hearsay rule. Thus, where prosecutors seek to admit the defendant's statement against interest under the party-opponent admission hearsay exception, they present a person who witnessed the defendant's statement. In court

proceedings where hearsay is not permitted, admissibility and authentication is not possible if the person who witnessed the defendant's statement is an intelligence asset whose identity cannot be disclosed and who will not testify.

As a general proposition, limitations on the use of 199 information relate to authentication issues. This information is classified because of an intelligence concept known as "sources and methods," which refers to the sensitive manner in which it was collected that would be compromised if the information was disclosed. The sources and methods used in 199 investigations are not necessarily any more sensitive or elaborate than those used in criminal investigations. Often, it is the fact that someone is the subject of a 199 investigation, as well as the identity of human sources providing information and that certain electronic methods are being used, that makes 199-derived information classified. If the same information can be replicated outside of the 199 investigation, it can be used without jeopardizing the 199 sources and methods.

Information from 199 investigations may be reconstructed through another nonclassified method, so that the information can meet evidentiary standards. For example, where third-party records are obtained in the course of a 199 investigation, they may be obtained through a grand jury subpoena that is independent of the 199 inquiry. In many instances, a grand jury subpoena may not be necessary, if the third-party recipient of a national security letter (NSL) is willing to testify to the necessary foundations items for business record authentication.

Q. What are the authorization requirements for a United States Attorney's Office that seeks to investigate a terrorist financing criminal case?

To initiate a criminal investigation into a matter involving overseas terrorism, United States Attorneys' offices must obtain approval of the Criminal Division. USAM § 9-2.136.

Q. How does a United States Attorney's Office obtain approval to initiate a terrorist financing investigation?

A short e-mail to CTS (to either Jeff Breinholt or your Regional Coordinator), describing what you suspect and what you are planning, including the name of the proposed target, will generally suffice. It must be detailed enough for us to check for potential multidistrict or international operational conflicts, and to initiate the process of checking any intelligence equities that may exist at the FBI.

Q. How does a terrorist financing indictment get approved?

Terrorist financing charges (or any criminal charges in terrorist financing investigations) require the express approval of the Assistant Attorney General for the Criminal Division. Such approval is obtained for you by CTS, based on a copy of your indictment and any additional information, which can be provided in writing or by phone. Although CTS can obtain such approval on short notice, we generally seek notice of at least three days before the planned return of the indictment. If the charges are to be filed by complaint and arrest warrant, the same procedure should be followed.

Q. How can CTS help a United States Attorney's Office conduct a terrorist financing investigation?

As in any new criminal enforcement area, the field of terrorist financing is evolving. CTS terrorist financing experts–those attorneys assigned to the Department Terrorist Financing Task Force–are available to assist you, either from Washington or by traveling to your district. They will help in developing an appropriate theory of prosecution and in drafting charging language, based on the current state of the law, what has proven to be effective, and their knowledge of nationwide trends.

For example, the Department has recently had success in prosecuting 18 U.S.C. § 2339B conspiracies based entirely on intercepted telephone conversations, without any independent financial corroboration of what was discussed in these calls. In such cases, a single telephone call can generate more than one chargeable overt act of the conspiracy, to include the conspiratorial phone

call (itself an overt act) plus all the acts discussed during the conversation that have been undertaken. With this strategy, the process of drafting the § 2339B conspiracy charge can benefit from what has occurred already in other districts.

Depending on the particular facts, it is possible to charge a material support violation even in the absence of evidence that your targets are working for a particular FTO, through the 18 U.S.C. § 2339A violation predicated on 18 U.S.C. § 956. CTS can work with you on this theory and offer sample indictment language. CTS can also help you access a number of government and commercial databases. Other significant resources for terrorist financing enforcement include the Foreign Terrorist Tracking Task Force (F-Tri-F), a DOJ/DOD component that is in the process of gathering and harmonizing databases from all sources, and the FBI Headquarter's Terrorist Financing Operations Section (TFOS).❖

Acronyms Related to DOJ Terrorist Financing Enforcement Efforts

AEDPA the Antiterrorism and Effective Death Penalty Act of 1996, which created the crime of providing material support to designated FTOs (18 U.S.C. § 2339B).

AFMLS the Criminal Division's Asset Forfeiture and Money Laundering Section.

ATC Antiterrorism Coordinator, the Assistant U.S. Attorney appointed to chair an ATTF.

ATTF Antiterrorism Task Force, the unit mandated by the Attorney General within each of the ninety-four judicial districts, headed by the ATC, and tasked with coordinating the district's counterterrorism efforts.

CTS the Criminal Division's Counterterrorism Section, the location of the RATCs and the TFTF.

CES the Criminal Division's Counterespionage Section.

FISA the Foreign Intelligence Surveillance Act, the 1978 statute that created a judicial review system for national security-based surveillance conducted by the FBI within the United States.

FISC the Foreign Intelligence Surveillance Court, the court that rules on FISA requests.

FRG the Financial Review Group, now known as TFOS, the operational unit within FBI Headquarters established in the aftermath of 9/11, headed by the FBI Financial Crimes Section, to serve

as the depository for all financial information amassed in the PENTTBOMB investigation. The FRG's mandate was ultimately expanded and it became a permanent, operational financial unit within the FBI's Counterterrorism Division.

FTO Foreign Terrorist Organization, an entity designated by the Secretary of State to which it is illegal for U.S. persons to provide material support or resources.

FTTTF (pronounced F-Tri-F) the Foreign Terrorist Tracking Task Force, the Justice-created and Defense-funded data warehouse, located in Crystal City, Virginia, which seeks to be the single largest source for public and private information that can be mined to identify terrorist presence within the United States.

IEEPA the International Emergency Economic Powers Act, the statute that criminalized the act of conducting financial transactions with entities named by the President as SDT or SDGTs (50 U.S.C. §§ 1701, 1702).

JTTF the Joint Terrorism Task Forces, the FBI-led groups of federal, state, and local law enforcement officials, which serve as the operational arm of the ATTFs and are currently located in fifty-six cities.

OFAC the Office of Foreign Asset Control, the Treasury Department component responsible for preparing the designation record for SDTs and SDGTs and issuing blocking orders for their assets within the United States.

OIPR the Office of Intelligence and Policy Review, the Main Justice component within the Deputy Attorney General's Office responsible for interacting with the FISC.

RAID the database used by the FRG (now TFOS) to collect and summarize financial information relating to terrorists and their affiliates. RAID stands for Rapid Access Intelligence Database, software created and operated by the National Drug Intelligence Center (NDIC).

RATC the six Regional Antiterrorism Coordinators, located within TVCS, who are responsible for coordinating the ATTF operations of ten to fifteen judicial districts each.

SDT Specially Designated Terrorists, groups and individuals designated by the President in 1995 as representing a threat to the Middle East Peace Process.

SDGT Specially Designated Global Terrorists, groups and individuals designated as terrorist-affiliated for purposes of the President's September 24, 2002 EXEC. ORDER NO. 13224.

TFOS the FBI Terrorist Financing Operations Section, the current name of the FRG (see above).

TFTF The DOJ Terrorist Financing Task Force, a unit within CTS consisting of white-collar prosecutors drawn from various Main Justice litigating components and U.S. Attorneys' Offices.

TVCS the Terrorism and Violent Crime Section, the former name of the Criminal Division's Counterterrorism Section (CTS).❖

Notes

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