



Department of Justice

STATEMENT

OF

**DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

CONCERNING

ISSUES REGARDING THE MATERIAL SUPPORT OF TERRORISM

PRESENTED ON

MAY 5, 2004

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Good morning, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you today to discuss recent court decisions concerning the material support to terrorists statutes and to offer some ideas for improving those critical statutes.

At the outset, it is important to recognize the vital role that the material support statutes have played in the Department of Justice's prosecution of the war against terrorism. Terrorists and terrorist organizations do not operate in isolation. Rather, they depend upon the support and assistance of those who sympathize with their cause. For this reason, a key element of the Department's strategy for winning the war against terrorism has been to use the material support statutes to prosecute aggressively those individuals who supply terrorists with the support and resources they need to survive.

The critical aspect of the Department's strategy for winning the war against

terrorism is preventing and disrupting terrorist attacks before they occur. The Department seeks to identify and apprehend terrorists before they can carry out their plans, and the material support statutes are a valuable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction.

Since the attacks of September 11, 2001, the Department has brought charges under the material support statutes against individuals across the country, from Seattle and Portland in the West to Buffalo and Alexandria in the East, and because of these efforts, numerous individuals who have provided support and assistance to terrorists and terrorist organizations are currently behind bars and will stay there for many years to come.

As this Committee is well aware, there has been recent litigation involving certain provisions of the material support statutes. While there are limits to what I can say about this ongoing litigation, in my testimony today, I will review some concerns expressed by courts about various aspects of the material support statutes, concerns that unfortunately may interfere in the future with the Department's ability to prosecute those providing vital assistance to terrorists and terrorist organizations. I will then discuss the Department's response to these concerns, and some ways that Congress might consider addressing these concerns by amending the material support statutes. Finally, I will briefly suggest a couple of other ideas for improving the material support statutes.

18 U.S.C. § 2339A prohibits the provision of "material support or resources" to

terrorists, while 18 U.S.C. § 2339B prohibits the provision of "material support or resources" to designated foreign terrorist organizations. The term "material support or resources" is defined, for purposes of the statutes, 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 and religious materials." 18 U.S.C. 2339A(b).

Some courts, however, have found key terms in this definition to be unconstitutionally vague, potentially undermining the Department's ability to prosecute those supplying assistance to terrorists or terrorist organizations. The United States Court of Appeals for the Ninth Circuit, for instance, has held that the terms "personnel" and "training" in the definition of "material support or resources" are "void for vagueness under the First and Fifth Amendments because they bring within their ambit constitutionally protected speech and advocacy." *Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382, 403 (9th Cir. 2003).

The Ninth Circuit has specifically expressed the concern that an individual who independently advocates the cause of a terrorist organization could be seen as supplying that organization with "personnel" and thus has concluded that the term "'personnel' could be construed to include unequivocally pure speech and advocacy protected by the First Amendment." *Id.* at 404. Likewise, the Ninth Circuit has asserted that the term "training" could be interpreted by reasonable people to encompass First Amendment

protected activities, such as instructing members of foreign terrorist organizations on how to use humanitarian and international human rights laws to seek the peaceful resolution of conflicts. *See id.*

Applying this Ninth Circuit precedent, the United States District Court for the Central District of California recently also held the term "expert advice or assistance" in the definition of "material support or resources" to be impermissibly vague. *See Humanitarian Law Project v. Ashcroft*, 2004 WL 547534 (C.D. Cal. Mar. 17, 2004). The court reasoned that "just like the terms 'personnel' and 'training,' 'expert advice or assistance' 'could be construed to include unequivocally pure speech and advocacy protected by the First Amendment' or 'to encompass First Amendment protected activities.'" Notably, however, the district court refused to hold the term "expert advice or assistance" as overbroad under the First Amendment.

The Department of Justice respectfully disagrees with these decisions holding key terms in the definition of "material support or resources" to be unconstitutionally vague and is either pursuing or considering whether to pursue further judicial review in these cases. In the case of *Humanitarian Law Project v. United States Dep't of Justice*, for example, the Department has filed a petition for rehearing *en banc* with the Ninth Circuit, asking that court to reconsider the decision of the three-judge panel finding the terms "personnel" and "training" to be unconstitutionally vague. In its petition, the Department has argued that the meaning of these two terms is sufficiently clear and provides individuals with fair warning as to the range of conduct proscribed by the material

support statutes.

The Department has pointed out that the term "personnel" has a discernible and specific meaning, one found in basic dictionary definitions of the word: it describes those working under the direction or a control of a specific entity. Thus, as the Department has explained in its United States Attorney's Manual, the ban on providing "personnel" to foreign terrorists or terrorist organizations contained in the material support statutes covers situations in which individuals have submitted themselves to the direction or control of a foreign terrorist organization. Independent advocacy of a designated foreign terrorist organization's interests or agenda falls outside the scope of the statutes' coverage. It is for this reason that, contrary to the concerns expressed by the Ninth Circuit, independent speech or advocacy by an individual in favor, or on behalf of, a foreign terrorist organization is not prohibited by the statutes. Just as one independently extolling the virtues of McDonald's hamburgers is not supplying "personnel" to the restaurant chain, neither is one independently advocating on behalf of a foreign terrorist organization supplying "personnel" to that organization. But when one works under the direction or control of the organization, one does provide "personnel."

Likewise, the Department has argued in its petition for rehearing *en banc* in *Humanitarian Law Project* that the term "training" is not unconstitutionally vague. The material support statutes unequivocally prohibit persons within the United States or subject to its jurisdiction from providing any form of "training" to terrorists or to designated foreign terrorist organizations, and, again, the word "training" is a common

term in the English language, a clear definition of which can be found in any dictionary. With respect to the Ninth Circuit's concern that prohibiting individuals from instructing foreign terrorist organizations in peaceful conflict resolution might raise First Amendment concerns, the Department has argued that it is doubtful that the statutory ban on "training" foreign terrorist organizations would be unconstitutional as applied to those activities. This is because, as with the provision of cash or goods, support of a terrorist organization through "training," even of a foreign terrorist organization's seemingly innocuous activities, may have the effect of making other resources available for violent acts, or gaining time for a terrorist campaign while the terrorist organization pretends to negotiate peacefully.

The Department is also currently considering whether to appeal to the Ninth Circuit the Central District of California's decision holding the term "expert advice or assistance" in the definition of "material support or resources" to be impermissibly vague. As the Department argued in the district court in that case, the Department does not believe that the meaning of the term "expert advice or assistance" is insufficiently clear. Expertise is a familiar concept both in the law and to those outside of the legal profession. Rule 702 of the Federal Rules of Evidence, for example, defines "expert" testimony to be testimony based on "scientific, technical, or other specialized knowledge." Likewise, the terms "advice" and "assistance" are commonly understood terms defined in any dictionary.

To be absolutely clear, the Department believes that the terms "personnel,"

"training," and "expert advice or assistance," as they are used in the material support statutes, are not unconstitutionally vague and should not need further clarification in order to withstand constitutional scrutiny. Even so, given the court decisions reviewed above, which, if not overturned, threaten to hamper the Department's ability to prosecute those who provide personnel, training, or expert advice or assistance to terrorists or to foreign terrorist organizations, Congress may wish to consider amending the material support statute to provide more specific definitions of "personnel," "training," and "expert advice or assistance." The Department would not oppose amending the material support statute to include such definitions and would be happy to work with Congress to do so in a manner that addresses the vagueness concerns that have been raised by some courts and at the same time maintains the efficacy of the statutes. Similarly, in light of the reservations expressed by some courts that the material support statutes could be interpreted to prohibit activities protected under the First Amendment, Congress may wish to consider amending the statute to make it absolutely clear that the statute should not be construed so as to abridge the exercise of rights guaranteed under the First Amendment. Such a provision would have no effect on current prosecution policy, which does not target conduct protected by the First Amendment, but would help to allay concerns that the material support or resources statutes pose a threat to the exercise of First Amendment rights.

In addition to issues related to terms used in the definition of "material support or resources," another recent aspect of the Ninth Circuit's decision in the *Humanitarian Law*

Project case also deserves mention. Recently, in the same decision in which it held the terms "personnel" and "training" to be unconstitutionally vague, the Ninth Circuit also held that an individual, to violate the material support statute, either must have knowledge of an organization's designation as a foreign terrorist organization or have "knowledge of the unlawful activities that caused the organization to be so designated." *Humanitarian Law Project*, 352 F.3d at 400. Unfortunately, one could interpret the latter part of this requirement to mean that a defendant must have knowledge of the facts contained in the generally classified, internal State Department documents, which form the basis for the Secretary of State's decision to designate an organization as a foreign terrorist organization. The Department believes that such a burdensome scienter requirement is not compelled by 18 U.S.C. § 2339B and that it would dramatically reduce the utility of that statute. The Department assumes that the Ninth Circuit did not intend to impose such a requirement on prosecutors and has asked in its petition for rehearing *en banc* that this portion of the panel's opinion be clarified. Specifically, the Department has requested that the Ninth Circuit amend its opinion to make clear that the material support statute (18 U.S.C. § 2339B) requires only knowledge by the defendant of either the "foreign terrorist organization" designation, or that the organization engages in terrorist activity, as defined by relevant provisions of federal law.

While the Department does not believe that further clarification of the material support statute's scienter requirement is necessary, Congress may wish to provide such clarification in light of the Ninth Circuit's recent decision on this issue. And if Congress

were interested in developing such a clarification, the Department would be happy to work with Congress on this issue.

In addition, if Congress were to revise the material support statutes to respond to the recent court decisions mentioned above, there are at least two deficiencies with the current statutory language that Congress should also consider addressing. First, at present, the material support statutes reach only a limited number of situations where material support or resources are provided to facilitate the commission of international or domestic terrorism. 18 U.S.C. § 2339A currently forbids the provision of material support or resources for only certain federal crimes likely to be committed by terrorists, such as biological weapons offenses or chemical weapons offenses. This list of predicate offenses contained in 18 U.S.C. § 2339A is too narrow. For example, it does not even encompass all federal crimes of terrorism identified in 18 U.S.C. § 2332b(g)(5), let alone other violent acts that constitute international or domestic terrorism under 18 U.S.C. § 2331.

The current limited scope of the material support statutes' coverage simply does not make sense. Because the acts of violence and destruction perpetrated by terrorists are not limited to those federal crimes currently listed in 18 U.S.C. § 2339A, there is no reason why the scope of that statute's coverage should be restricted in this manner. Consequently, the Department would support broadening the scope of the statute in this regard and would be happy to work with Congress to do so in a manner that would both increase the statute's efficacy and respect relevant constitutional constraints.

In addition, Congress may wish to consider revising the definition of "material support or resources" in the current material support statute. At the moment, as noted above, that term is 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).

The types of property and services specifically enumerated in this definition, however, may not potentially include all of the possible types and forms of support that could be given to terrorists or to foreign terrorist organizations. This could be problematic because any type of material support given to entities designated as foreign terrorists or foreign terrorist organizations furthers the violent aims and goals of the organization and threatens the vital interests and national security of the United States. Material support or resources of any kind are troublesome and, when support of a non-lethal nature is donated to a foreign terrorist or terrorist organization, such support frees up resources that may then be used to promote violence.

For this reason, the Department would support refining the definition of "material support or resources" to encompass any tangible or intangible property or service, while at the same time maintaining the current statutory exemptions for medicine and religious materials. Such a refinement would heighten the efficacy of the material support statutes and make it less likely that an individual prosecuted in the future for providing property

or services to a terrorist or to a foreign terrorist organization would be able to take advantage of a loophole in the statutes. If such a change were to be made, the Department would support retaining the list of types of property and services currently set forth in the definition of "material support or resources" in order to illustrate forms of support clearly prohibited by the statute.

In conclusion, I would like to thank the Committee for holding today's hearing on such an important topic. The material support statutes are vital tools that are being used on a regular basis by the Department in the war against terrorism. While some courts have complained that certain terms in the statutes lack clarity, the Department respectfully disagrees with those contentions and is actively working to reverse these unfavorable court rulings. Should Congress, however, seek to revise the material support or resources statutes to respond to the concerns expressed by some courts, the Department would be happy to work with Congress to improve these vital laws. Thank you once again for allowing me to appear before you today, and I look forward to the opportunity to respond to any questions that you might have.