Obstructing Justice: The Rise and Fall of the AEDPA*

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The author could not have made this a successful project without the time and patience of many people. He wishes to thank the members and Editorial Board of Volume 41 of the *San Diego Law Review* for their hard work. The author also thanks his parents, Anil and Abha Agarwal, for their compassion and support. Finally, the author would like to thank Anu Grewal for her love, understanding, and smile every day.

I. INTRODUCTION

From 1994 through as late as August 2001, the United States intelligence community[1] received information that terrorists had seriously contemplated using airplanes as instruments for carrying out international terrorist attacks.[2] This method of attack was clearly "discussed in terrorist circles," yet community analysts demonstrated little effort to strategically counter such terrorist groups.[3]

Moreover, in 1998, U.S. intelligence received specific information that "a group of unidentified Arabs planned to fly an explosive-laden plane from a foreign country into the World Trade Center."[4] In July 2001, senior government officials were warned of "a significant terrorist attack against U.S. and/or Israeli interests in the coming weeks" that would be "spectacular and designed to inflict mass casualties . . . with little or no warning."[5] Two months later, FBI and CIA units containing no more than sixty combined personnel were assigned the specific task of tracking terrorist kingpin Osama bin Laden, an intelligence method later viewed as inadequate with respect to the severity of the destructive threat involved.[6]

Despite these findings,[7] the eleventh day of September 2001 reminded

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1. "Intelligence community" "refer[s] to the group of fourteen government agencies and organizations that, either in whole or in part, conduct the intelligence activities of the United States Government," including, but not limited to, the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), and the Federal Bureau of Investigation (FBI). ELEANOR HILL, JOINT INQUIRY STAFF STATEMENT, Part I, at 6 (2002), *available at* http://i.CNN.net/CNN/2002/ALLPOLITICS/09/18/intelligence.hearings/intel.911.report.pdf. The intelligence community has various duties with respect to countering terrorism, including: "[c]ollecting, analyzing, and disseminating information regarding terrorist incidents and groups that perpetrate terrorism . . . ; [i]ssuing warnings to policymakers to counter potential terrorist threats; [p]reventing, pre-empting, and disrupting terrorist organizations; and [s]upporting diplomatic, legal, and military operations against terrorism." *Id.* at 7.

2. *Id*. at 9.

3. *Id*.

4. *Id*. at 15; *see also Report Cites Warnings Before 9/11*, CNN.COM (Sept. 19, 2002), *at* http://www.CNN.com/2002/ALLPOLITICS/09/18/intelligence.hearings. In June 1998, the United States received a stream of intelligence information from several sources that Osama bin Laden considered planning attacks specifically in New York and Washington, D.C. HILL, *supra* note 1, at 15.

5. *Report Cites Warnings Before 9/11*, *supra* note 4.

6. *Id.* In addition, the National Security Agency (NSA) intercepted two communications sent by individuals in Afghanistan to Saudi Arabia on September 10, 2001, stating, "Tomorrow is zero hour," and, "The match begins tomorrow." Kate Snow, *FBI Seeks Senators' Records in 9/11 Leak Probe*, CNN.COM (Aug. 24, 2002), *at* http://www.CNN.com/2002/ALLPOLITICS/08/24/attacks.congress.leaks/index.html. The messages were not translated into English until September 12. HILL, *supra* note 1, at 22.

7. On July 24, 2003, Congress released more of the roughly eight-hundred-page, ten-month joint investigation report, which was the product of five thousand interviews and a review of nearly one million documents by House and Senate intelligence

Americans of the "'systemic problems (that) might have prevented our government from detecting and disrupting al Qaeda's plot.'"[8] With constant reminders of the haunting images now burned into our memories by the international press, it is impossible to forget what transpired: four hijacked aircraft, a Manhattan skyline stripped of its twin towers, a gaping cavity in the Pentagon, and a death toll estimated at 2752 in New York City alone.[9] But where the actions and reactions of tireless cleanup crews, dismayed firefighters, and grieving families were excessively recorded, the voices of officials elected to handle this crisis before and after it occurred were suppressed. After an attack seeped through the cracks of U.S. intelligence, one question remained: How would the nation's political branches respond?

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committees. *Congressional Report Cites "Missed Opportunities" Prior to 9/11*, CNN.COM (July 24, 2003), *at* http://www.CNN.com/2003/ALLPOLITICS/07/24/9.11. report/index.html. The report illustrated additional security lapses leading to the September 11, 2001 tragedies. It noted that at least fourteen people, who had helped six of the hijackers "find housing, open bank accounts, obtain driver's licenses and locate flight schools," had come to the FBI's attention before the attacks. *Id*. In fact, the CIA had tracked two particular hijackers, who later were aboard American Airlines Flight 77 that crashed into the Pentagon, "to California after the men were photographed at an al Qaeda planning meeting . . . in January 2000," a meeting where terrorists "were plotting the attack on the *USS Cole*." Brian Ross, *Avoidable Tragedy? FBI Agent Didn't Have CIA Information About Sept. 11 Hijackers*, ABCNEWS.COM (July 24, 2003), *at* http://abcnews.go.com/sections/wnt/world/ sept11_intel030724. html. The CIA's intelligence information was, however, not relayed to the FBI, whose San Diego-based agent could have easily monitored the hijackers, particularly when both men rented rooms in the house of the agent's informant. *Id*. According to the Congressional Joint Inquiry Report, this San Diego connection could have been "perhaps the Intelligence Community's best chance to unravel the September 11 plot." *Id*. The report also acknowledged: "The important point is that the Intelligence Community, for a variety of reasons, did not bring together and fully appreciate a range of information that could have greatly enhanced its chances of uncovering and preventing Usama Bin Ladin's plan to attack these United States on September 11, 2001." S. REP. NO. 107-351, H.R. REP. NO. 107-792, at xv (2002). Nearly two years after the September 11 attacks, the report proclaimed that the government "still lacks a consolidated terrorism watch list that is easily accessible to all law enforcement." Pierre Thomas, *Intelligence Failure: U.S. Government Still Lacks Centralized Terrorist Watch List*, ABCNEWS.COM (Apr. 29, 2003), *at* http://abcnews.go.com/sections/wnt/US/sept11failure_030429.html.

8. *Report Cites Warnings Before 9/11*, *supra* note 4 (quoting Chairman of the Senate Intelligence Committee Bob Graham). Graham noted that the intent of the intelligence report was "not to point a finger or pin blame," and that identifying and stopping the threat "wouldn't have taken a lot of luck. It would have taken someone who could have asked and gotten answers to the right follow-up questions and then put it together." *Id*.

9. Dan Barry, *A New Account of Sept. 11 Loss, with 40 Fewer Souls to Mourn*, N.Y. TIMES, Oct. 29, 2003, at A1.

Part II of this Comment begins to answer that question with an overview of the current political climate, focusing primarily on the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001[10] (Patriot Act)—the legislature's answer to "9/11." Part II then summarizes the resulting negative reaction by civil libertarians contending that the Patriot Act unconstitutionally takes away individual freedoms under the guise of stopping terrorism. As Part II demonstrates, public support for the government's position is hard to find.

Part III focuses on one of the legislature's previous attempts to deter terrorism. The integral Antiterrorism and Effective Death Penalty Act of 1996[11] (AEDPA) prohibits donations of material support and resources to foreign terrorist organizations, including al Qaeda, so as to prevent the United States from being used as a base for terrorist funding. Part III first reviews the statute and its relevant antifundraising provisions[12] and then chronicles the AEDPA during a two-year time period in which it overcame a variety of constitutional challenges, including those based on the freedom of association and the void-for-vagueness doctrine.

Part IV documents the immediate downfall of the AEDPA and focuses on the district court opinion in *United States v. Rahmani*,[13] a post-9/11 decision declaring the AEDPA facially unconstitutional for violating procedural due process.[14] Part IV argues that the explosive nature of contemporary international hostilities requires the nation to safeguard its homeland before extending due process rights to terrorist organizations and their supporters.

In defense of national security measures, this Comment provides four factors that, if met, justify the AEDPA as an appropriate crisis law despite its abridgement of some due process rights. These factors help distinguish legitimate measures from previous blatant attacks on individual freedoms,

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10. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 18, 42 & 50 U.S.C.).

11. Pub. L. No. 104-132, 110 Stat. 1214–1319 (codified in scattered sections of 8, 18, 28, 40 & 42 U.S.C.).

12. This Comment refrains from discussing the Act's immigration provisions or its impact on race relations, which have both incurred heavy criticism for targeting minorities and foreigners. For a discussion on how the AEDPA targets Arab-Americans, see generally Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2883 (2001) (suggesting various corrective measures to achieve equal justice for Arabs in America); *see also* Adrienne R. Bellino, Comment, *Changing Immigration for Arabs with Anti-terrorism Legislation: September 11th Was Not the Catalyst*, 16 TEMP. INT'L & COMP. L.J. 123, 123–24 (2002) (arguing that the AEDPA profiles Arabs as terrorists and enemies).

13. 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

14. *Id*. at 1055.

including the Alien and Sedition Acts of 1798[15] and the operation of Japanese internment camps during World War II.[16] Finally, Part IV criticizes the *Rahmani* court for adjudicating the validity of the AEDPA without appropriate statutory authorization.

The United States is not only fighting the war on terror overseas; it is concurrently fighting a legal war to protect against terror domestically. Amidst concern that 9/11 induced the government to overreact, this Comment urges courts to assist the struggling intelligence community, accept certain security measures, recognize that these measures may justifiably encumber the Constitution, and resurrect the AEDPA.

II. THE CURRENT POLITICAL LANDSCAPE: PUSHING FORWARD DESPITE PUBLIC DISSENT

With emotion still raw just three days after 9/11, both the Senate and the House of Representatives overwhelmingly passed the "Authorization for Use of Military Force" resolution.[17] The resolution granted President Bush the statutory authority to use U.S. Armed Forces against those responsible for the attacks.[18] Amidst concern over unwisely giving the President too much leeway, especially because the resolution was the first of its kind since the 1991 Persian Gulf War, Senate Minority Leader Trent Lott responded: "These are different times, and we must act

15. *See* 1 MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 137 (2d ed. 2002).

16. *See* Korematsu v. United States, 323 U.S. 214, 215 (1944) (upholding the conviction of an American citizen of Japanese descent for remaining in a designated "military area" from which all persons of Japanese ancestry were excluded).

17. Authorization for Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified in 50 U.S.C. § 1541 (Supp. I 2001)) (signed by President Bush on Sept. 18, 2001). "The resolution was formally introduced in the Senate on the morning of September 14, 2001, passed immediately . . . by a vote of 98–0, passed later that day by the House of Representatives after extensive discussion by a vote of 420–1, and signed by the President on September 18, 2001." David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 71 n.1 (2002) (discussing the manner in which members of Congress reached a compromise in drafting the text of the resolution).

18. S.J. Res. 23, § 2(a). The measure authorized President Bush

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

decisively. The American people expect it, and they will accept nothing less. . . . The world has changed, and we are acting appropriately."[19]

While the resolution allowed for force in finding and punishing the perpetrators and sponsors of 9/11, it did not authorize the President to use force against *anyone* who might be considering future acts of terrorism, nor did it encompass *how* the President may bolster U.S. intelligence.[20] Rather, it was a landmark act passed in the wake of 9/11 that specifically called for broader tracking measures, giving officials greater authority to trace and intercept communications for law enforcement and foreign intelligence purposes.[21] The often chastised Patriot Act,[22] signed into law on October 26, 2001, permits government agencies to gather information on individuals within the United States "through enhanced intelligence surveillance procedures, limited judicial oversight of telephone and internet surveillance, and the ability of law enforcement to delay notice of search warrants."[23]

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19. *See Congress Approves Resolution Authorizing Force*, CNN.COM/U.S. (Sept. 15, 2001), *at* http://www.CNN.com/2001/US/09/15/congress.terrorism/index.html.

20. *See* Abramowitz, *supra* note 17, at 73 & n.7 (citing Alan Fram, Associated Press, *Bush Anti-Terror Aid Request Doubled* (Sept. 13, 2001)) (reporting that some lawmakers opposed earlier resolution language that approved President Bush to "deter and pre-empt any related future acts of terrorism or aggression against the United States" because that "would have gone too far in eliminating Congress' role in future incidents").

21. Charles Doyle, *The USA PATRIOT Act: A Sketch*, Congressional Research Service (Apr. 18, 2002), *available at* http://www.fas.org/irp/crs/RS21203.pdf.

22. Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 18, 42 & 50 U.S.C.). The Patriot Act is long and complex, amounting to 342 pages in ten parts, amending over fifteen different statutes, and covering a variety of subjects from immigration, to money laundering, to surveillance, to assisting victims of terrorism. *EFF Analysis of the Provisions of the USA PATRIOT Act that Relate to Online Activities*, ELECTRONIC FRONTIER FOUND. (Oct. 31, 2001), *at* http://www.eff.org/Privacy/Surveillance/Terrorism_ militias/20011031_eff_usa_patriot_analysis.php; *see also* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1088 (2002). Upon signing the Patriot Act, President Bush emphasized: "As of today, we're changing the laws governing information-sharing. And as importantly, we're changing the culture of our various agencies that fight terrorism. Countering and investigating terrorist activity is the number one priority for both law enforcement and intelligence agencies." President George W. Bush, Remarks at the White House Signing of the USA PATRIOT Act of 2001 (Oct. 26, 2001), *available at* http://www.pbs.org/newshour/bb/terrorism/bush_terrorismbill.html. Bush also noted: "The bill before me takes account of the new realities and dangers posed by modern terrorists. It will help law enforcement to identify, to dismantle, to disrupt, and to punish terrorists before they strike." *Id.* For a firsthand account of America's response to 9/11 through the lives of various people on the front lines, including Attorney General John Ashcroft's personal excursion during the creation of the Patriot Act, see STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 14 (2003).

23. Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 963 (2002) (citing Patriot Act of 2001, Pub. L. No.

Numerous judicial scholars and political activists alike argue that the Patriot Act articulates politicians' desperate attempts to give Americans a quick fix, thereby unduly sacrificing citizens' rights of privacy and providing the executive branch with an overreaching power not subject to any meaningful check or balance.[24] Accordingly, critics tab the Patriot Act as a "rush job" not having been carefully studied by Congress,[25] proceeding at a "'blistering pace' despite containing several controversial

107-56, 115 Stat. 272 (codified in scattered sections of 8, 18, 42 & 50 U.S.C.)). Evans argues that the Patriot Act potentially violates guaranteed Fourth Amendment protections. *Id*. at 974. As explained by CNN, major provisions of the Patriot Act include authorizing "roving wiretaps" in order for law enforcement to wiretap any phone, especially cellular and disposable phones, that a suspected terrorist would use; permitting "the federal government to detain non-U.S. citizens suspected of terrorism for up to seven days without specific charges" (the Bush Administration originally hoped to detain them indefinitely); granting "law enforcement officials greater subpoena power for e-mail records of terrorist suspects"; and "[e]xpanding measures against money laundering by requiring additional record keeping and reports for certain transactions and requiring identification of account holders." *See Explaining the U.S.A. Patriot Act*, CNN.COM (Aug. 23, 2002), *at* http://www.CNN.com/2002/LAW/08/23/patriot.act.explainer.

24. Michael F. Dowley, Note, *Government Surveillance Powers Under the USA PATRIOT Act: Is It Possible to Protect National Security and Privacy at the Same Time? A Constitutional Tug-of-War*, 36 SUFFOLK U. L. REV. 165, 165 (2002) (footnotes omitted). Many of these checks and balances that the Patriot Act eliminates were implemented after both domestic law enforcement and intelligence agencies abused their surveillance power, including the 1974 revelation that the FBI had spied on over ten thousand U.S. citizens including Martin Luther King, Jr. *EFF Analysis of the Provisions of the USA Patriot Act that Relate to Online Activities*, *supra* note 22. Now, with the advent of the latest antiterrorism legislation, "two out of three branches of the federal government are also being left out of the loop in a growing number of circumstances." Susan Herman, *The USA Patriot Act and the US Department of Justice: Losing Our Balances?*, JURIST (Dec. 3, 2001), *at* http://jurist.law.pitt.edu/forum/forumnew40.htm.

25. *EFF Analysis of the Provisions of the USA Patriot Act that Relate to Online Activities*, *supra* note 22; *see* Evans, *supra* note 23, at 985; *see also* Nat Hentoff, *Terrorizing the Bill of Rights: "Why Should We Care? It's Only the Constitution*," VILLAGE VOICE, Nov. 20, 2001, at 32 (describing Wisconsin Congressman David Obey's reaction to the Patriot Act as "a backroom quick fix," and sarcastically noting: "It's only the Constitution [at stake]"), *available at* http://www.villagevoice.com/issues/0146/hentoff.php (2001); George A. Lyden, Note, *The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 FORDHAM J. CORP. & FIN. L. 201, 202 (2003) (noting that the Patriot Act was "rammed through Congress" as "one of the 'swiftest-moving bills in federal history'") (footnote omitted). The Patriot Act "was introduced in the House of Representatives on October 23, 2001," and "[p]ursuant to a rule waiver, it was passed the next day by a vote of 357-to-66." Whitehead & Aden, *supra* note 22, at 1087 n.26. The Senate then approved the Patriot Act "without amendment by a vote of 98-to-1 on October 26th," the same day President Bush signed it into law. *Id*.

criminal provisions that Congress had rejected in previous years."[26] Complainants claim it impacts the lives of innocent Americans rather than those of hostile terrorists,[27] successfully doing so while sneaking past the awareness, or lack thereof, of average law-abiding citizens by masking itself as primarily relating to foreign nationals and focusing on terrorism.[28] As a result, the Patriot Act has been attacked for containing provisions that, in reality, have little to do with terrorism and more to do with satisfying an FBI surveillance "wish list" that includes intrusive techniques such as snooping in on people's computer use and meddling with individual medical records.[29]

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26. Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for* Bona Fide *Refugees*, 16 GEO. IMMIGR. L.J. 505, 505 (2002) (citing Jonathan Lancaster, *Anti-Terrorism Bill Is Approved; Bush Cheers House's Quick Action, But Civil Liberties Advocates Are Alarmed*, WASH. POST, Oct. 13, 2001, at A1) (discussing generally how the Patriot Act is likely to affect asylum adjudications). In an October 12, 2001 address, the lone dissenting voter in the Senate, Senator Russell Feingold (D-Wis.), stated the following:

> It is one thing to shortcut the legislative process in order to get federal financial aid to the cities hit by terrorism. We did that, and no one complained that we moved too quickly. It is quite another to press for the enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people without due deliberation by the peoples' elected representatives.

Senator Russell Feingold, On Opposing the U.S.A. Patriot Act, Address to the Associated Press Managing Editors Conference (Oct. 12, 2001), *available at* http://www.archipelago.org/vol6-2/feingold.htm (last visited Feb. 13, 2004).

27. Anne Uyeda, *The USA Patriot Act May Infringe on Civil Liberties in Cyberspace*, 2002 UCLA J.L. & TECH. NOTES 1 (noting that with the existence of the Patriot Act, "many Americans should become cautious about the terms they type into their search engines") *at* http://www.lawtechjournal.com/notes/2002/01_020204_uyeda.php (last visited Feb. 26, 2004); *see* Whitehead & Aden, *supra* note 22, at 1083 ("Americans' liberties have been trammeled in a variety of different ways."); *see also Gore Accuses Bush of Undermining Freedoms*, CNN.COM (Nov. 9, 2003) ("[Former Vice President Al Gore] called for a repeal of most of the USA Patriot Act, saying its few useful provisions are far outweighed by those [Gore] said are impinging on American freedoms."), *at* http://www.CNN.com/2003/ALLPOLITICS/11/09/gore.bush/index.html.

28. Jennifer Van Bergen, *Repeal the USA Patriot Act*, Truthout, Part I (Apr. 1, 2002), *at* http://www.truthout.org/docs_02/04.02A.JVB.Patriot.htm.

29. Hentoff, *supra* note 25; *see* Feingold, *supra* note 26; *see also* Michael Isikoff, *Show Me the Money*, NEWSWEEK, Dec. 1, 2003, at 36 (reporting on the federal government's use of the money laundering provision in the Patriot Act to investigate the records of three Las Vegas officials accused of accepting bribes from the city's largest strip club owner Michael Galardi—in 2003, the "Feds have used the Patriot Act to conduct searches on 962 suspects, yielding 'hits' on 6,397 financial records. Of those, two thirds (4,261) were in money-laundering cases with no apparent terror connection."). *But see Justice Document: Patriot Act Provision Never Used*, CNN.COM (Sept. 17, 2003) (reporting that section 215 of the Patriot Act, criticized for allowing the FBI under secret court order to seize tangible items such as business records from any private business, including hospitals and libraries, has actually never been utilized according to the Justice Department), *at* http://www.CNN.com/2003/LAW/09/17/ashcroft.patriot. One answer to the allegation that the Patriot Act strips away civil liberties is that because the Attorney General retains a great amount of discretion in exercising the powers provided therein, the Patriot Act is not so severe. Michael T. McCarthy, *USA Patriot*

Critics suggest that the government has taken full advantage of a national crisis, capitalizing on 9/11 to substantiate long desired executive powers previously viewed as "politically unacceptable in peacetime."[30] Even harsher reactions are assured when the Bush Administration attempts to inconspicuously finalize its bold and more comprehensive sequel legislation to the Patriot Act, entitled the "Domestic Security Enhancement Act of 2003"[31] or "Patriot Act II." The proposed legislation, if passed, would further expand law enforcement's authority to gather intelligence, sanctions the use of secret arrests, and seeks to seize U.S. citizenship status from persons who belong to or support disfavored political groups.[32] Opponents contend that the proposal goes so far as to

Act, 39 HARV. J. ON LEGIS. 435, 451–52 (2002). Thus, although some provisions may allow the executive branch to, for example, deport a non-U.S. citizen who donates coloring books to a terrorist organization, the resulting action is not always automatic. *See id*. Mitigating interests may factor into the administration's use of its newly delegated powers, such as public policy, and it is up to the courts and Congress to remedy any abuses. *Id*. For an argument that the Patriot Act does not "expand law enforcement powers dramatically," see Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607, 608–09 (2003) (explaining how conventional wisdom regarding the Patriot Act "misses the mark").

30. McCarthy, *supra* note 29, at 451 & n.117 (citing *Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong. 57 (2001) (statement of Rep. Bob Barr (R-Ga.)) (alleging that "law enforcement urged swift passage as a means of taking 'advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously'") (quoting Rep. Bob Barr (R-Ga.)); *see also* Feingold, *supra* note 26 (noting that a certain proposal, relating to criminal forfeiture laws, within the Patriot Act "was simply an effort on the part of the [Justice] Department to take advantage of the emergency situation and get something that they've wanted to get for a long time").

31. The Center for Public Integrity in Washington, D.C. obtained a copy of an undisclosed draft, dated January 9, 2003, of the Domestic Security Enhancement Act of 2003 and made it available in full text. *See* Charles Lewis & Adam Mayle, The Center for Public Integrity, *Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act*, *at* http://publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0 (Feb. 7, 2003). The Justice Department has not officially released the bill. Even if "[i]t would be premature to speculate on any future decisions," it is rumored that the bill expands law enforcement privileges and creates a "substantial new terrorist identification database." *Id*.; *see Will There Be a Patriot Act Part II?*, PRIVACY & INFO. L. REP., Feb. 2003, at 2; *see also* Rupal Shah, *Administration Drafts "Patriot Act II," Activists Concerned*, INDIA-W., Feb. 28, 2003, at A26 (discussing how the Patriot Act II is already drawing stiff opposition).

32. Lewis & Mayle, *supra* note 31. The Justice Department may already conceal the names of hundreds of foreigners detained after 9/11, despite the cries of more than twenty civil liberties groups invoking the Freedom of Information Act, a law requiring disclosure of certain government files. Smita Nordwall, *Ruling Favors U.S. on 9/11 Detainees*, USA TODAY, June 18, 2003, at 5A. The Court of Appeals for the District of Columbia, by a two-to-one vote, held that disclosing the names of detainees may "give

subject an antiwar protestor to the death penalty if the protestor breaks the law during a demonstration resulting in someone's death.[33] Once

terrorists insight into the government's Sept. 11 investigation" and that federal judges, when asked to compel disclosures, should defer to the Bush Administration's concerns that such disclosures assist the "nation's enemies." *Id*. The majority wrote: "Disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not." Mark J. Prendergast, *Names of 9/11 Detainees Can Remain Secret, Court Rules*, N.Y. TIMES, June 17, 2003 (quoting Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003)). In dissent, Judge David S. Tatel noted that disclosure would allow the public to determine whether the government abused "one of its most awesome powers," the power to "arrest and jail." *Id*. (Tatel, J. dissenting) (citing *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 937–38). The public may then determine particularly whether individuals were detained solely because of their religion and ethnicity and for long periods of time without communication with legal counsel. *Id*. Attorney General John Ashcroft responded: "We are pleased the court agreed we should not give terrorists a virtual road map to our investigation that could allow terrorists to chart a potentially deadly detour around our efforts." *Id*.

33. *E.g.*, Press Release, American Civil Liberties Union, ACLU Says New Ashcroft Bill Erodes Checks and Balances on Presidential Power; Patriot II Legislation Would Needlessly Infringe on Basic Constitutional Liberties (Feb. 12, 2003), *available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11817&c=206 (citing § 411). As portrayed by the ACLU, the new legislation, if passed into law, would:

> Make it easier for the government to initiate surveillance and wiretapping of U.S. citizens under the shadowy, top-secret Foreign Intelligence Surveillance Court. (Sections 101, 102 and 107)
>
> Shelter federal agents engaged in illegal surveillance without a court order from criminal prosecution if they are following orders of high Executive Branch officials. (Section 106)
>
> Authorize, in statute, the Department of Justice's campaign of secret detentions by including a provision that would preempt federal litigation challenging non-disclosure of basic information about detainees. (Section 201)
>
> Threaten public health by severely restricting access to crucial information about environmental health risks posed by facilities that use dangerous chemicals. (Section 202)
>
> Harm Americans' ability to receive a fair trial by limiting defense attorneys from challenging the use of secret evidence. (Section 204)
>
> Reduce the ability of grand jury witnesses in terrorism investigations to defend themselves against public accusations by gagging them from discussing their testimony with the media or the general public. (Section 206)
>
> Allow for the sampling and cataloguing of innocent Americans' genetic information without court order and without consent. (Sections 301–306)
>
> Permit, without any connection to anti-terrorism efforts, sensitive personal information about U.S. citizens to be shared with local and state law enforcement. (Section 311)
>
> Undercut trust between police departments and immigrant communities by opening sensitive visa files to local police for the enforcement of complex immigration laws. (Section 311)
>
> Terminate court-approved limits on police spying, which were initially put in place to prevent McCarthy-style law enforcement persecution based on political or religious affiliation. (Section 312)
>
> Provide an incentive for neighbor to spy on neighbor and pose problems similar to those inherent in Attorney General Ashcroft's "Operation TIPS" by granting blanket immunity to businesses that phone in false terrorism tips, even

again, discontent has arisen over the lack of review by Congress in the face of such broad legislation.[34]

The political climate since 9/11 continues to revolve around the fiery debate between civil libertarians, stoutly protesting against the abridgement of any constitutional right, and the legislature,[35] filled with alacrity and motivated by a ubiquitous fear of repeat terrorism. New surveillance programs such as the aviation industry's Computer Assisted Passenger Prescreening System II (CAPPS II),[36] which is designed to scan public and private databases for information on individuals traveling to and from the United States in order to designate passengers as potential security threats, only add fuel to the fire.[37] The government clearly

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> if their actions are taken with reckless disregard for the truth. (Section 313)
> Further criminalize association—without any intent to commit acts of terrorism—with unpopular organizations labeled as terrorist by our government. (Section 402)
> Under the pretext of fighting terrorism, unfairly target undocumented workers with extended jail terms for common immigration offenses. (Section 502)
> Provide for summary deportations without evidence of crime or criminal intent, even of lawful permanent residents, whom the Attorney General says are a threat to national security. (Section 503)
> Abolish fair hearings for lawful permanent residents convicted of criminal offenses through an "expedited removal" procedure, and prevent any court from questioning the government's unlawful actions by explicitly exempting these cases from habeas corpus. Congress has not exempted any person from habeas corpus—a protection guaranteed by the Constitution—since the Civil War. (Section 504)

Id.

34. *See Administration Formulates "Patriot II" with Harsher Immigration Provisions*, 80 NO. 8 INTERPRETER RELEASES 270, 272 (2003).

35. Some lawmakers however, including Republicans, have introduced the Security and Freedom Ensured Act (SAFE Act), which responds to the Patriot Act's threats to civil rights. *See Ashcroft Warns of Bush Veto on Scaled-Back Patriot Bill*, CNN.COM (Jan. 29, 2004), *at* http://www.CNN.com/2004/ALLPOLITICS/01/29/patriot.act.ap. The SAFE Act, if passed, would "impose expiration dates on nationwide search warrants and other Patriot Act provisions." *Id*. The SAFE Act has yet to reach a hearing in either branch of Congress, yet Attorney General John Ashcroft issued an advance warning, stating that passing the proposed legislation would "undermine our ongoing campaign to detect and prevent catastrophic terrorist attacks." *Id*.

36. *See* Elliot Borin, *Private Info Becoming Plane Truth*, WIRED NEWS (Sept. 16, 2002), *at* http://www.wired.com/news/politics/0,1283,55037,00.html. Called the "nation's largest domestic surveillance system," the CAPPS II program may be extended to screen individuals in other methods of transportation that involve the public's trust, including truckers, railroad conductors, and subway workers. Robert O'Harrow Jr., *Air Security Focusing on Flier Screening*, WASH. POST, Sept. 4, 2002, at A1.

37. The ACLU reports that the types of information collected by the CAPPS II program may include "financial and transactional data," credit card purchases, housing information, communications records, health records, and legal records. Press Release,

wishes to push its policies forward to fight terror,[38] even at the risk of passing overinclusive[39] reform, despite public demonstrations of dissent and plain ignorance.

III. THE AEDPA OF 1996

A. At Issue: Prohibiting Material Support to Designated Foreign Terrorist Organizations

The Patriot Act is not the legislature's first attempt at combating international and domestic terrorism.[40] In one of its previous efforts, responding to the 1993 World Trade Center[41] and 1995 Oklahoma City bombings,[42] a bipartisan Congress introduced[43] the AEDPA.[44] Signed

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American Civil Liberties Union, CAPPS II Data-Mining System Will Invade Privacy and Create Government Blacklist of Americans, ACLU Warns (Feb. 27, 2003), *at* http://www.aclu.org/Privacy/Privacy.cfm?ID=11956&c=130. ACLU legislative counsel Katie Corrigan claims that once CAPPS II determines that an individual is a security threat, the program does not allow the suspect to review the information on which the decision was based or permit the suspect to appeal the designation. *See id*. Director of the ACLU's Technology and Liberty Program Barry Steinhardt adds, "Nothing like [CAPPS II] has ever been done in this country." *Id*.

38. On June 5, 2003, Attorney General John Ashcroft urged Congress to expand the Patriot Act's powers, including increasing the number of federal terror-related crimes punishable by life sentences or the death penalty. Richard B. Schmitt, *Stiffer Terror Laws Urged*, L.A. TIMES, June 6, 2003, at A1. Ashcroft also sought to deny bail entirely to suspected terrorists. *Id*.

39. One proposed explanation as to why many of the new powers implemented by the Patriot Act seem to extend beyond terrorism is because "legislators simply lacked the time and opportunity to develop complex, nuanced definitions that would be neither over-inclusive nor under-inclusive." McCarthy, *supra* note 29, at 451. Thus, due to the perceived threat to the country not only from 9/11 but also from the subsequent anthrax contamination and pressure from the Bush Administration, Congress "erred on the side of over-inclusiveness." *Id*. For more information on the post-9/11 anthrax investigations, see *Confirmed Anthrax Cases*, WASH. POST, Nov. 1, 2001, at A8.

40. For a brief discussion on past antiterrorism laws with surveillance implications, including Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA) and the Foreign Intelligence Surveillance Act of 1978 (FISA), see Evans, *supra* note 23, at 952–58.

41. On February 26, 1993, six people were killed and a thousand others were injured when a truck carrying a twelve hundred-pound bomb was detonated in the World Trade Center's parking garage. On November 12, 1997, after three days of deliberation, a federal jury convicted Ramzi Yousef, then twenty-nine years old, and Eyad Ismoil, then twenty-six, on murder and conspiracy charges for their roles in the Islamic extremists' plot to bomb the Trade Center. Yousef was one of the ringleaders, while Ismoil was accused of driving the truck into the parking garage. After the attack, both fled from the United States on commercial airline flights, only to be captured in 1995. The attack "brought home to the American public their possible vulnerability to Middle Eastern terrorism." *Jury Convicts 2 in Trade Center Blast*, CNN.COM (Nov. 12, 1997), *at* http://www.CNN.com/US/9711/12/world.trade.center/index.html.

42. On April 19, 1995, 168 people, including nineteen children, were killed and 850 others were injured in the worst terrorist attack on U.S. soil until 9/11, when a massive bomb inside a rental truck exploded in front of the Alfred P. Murrah Federal

into law by President Clinton on April 24, 1996,[45] the AEDPA principally

Building in Oklahoma City, Oklahoma. Whidden, *supra* note 12, at 2825; Evans, *supra* note 23, at 933 n.2 (citing *Oklahoma City Tragedy: The Bombing*, CNN.COM, *at* http://www.CNN.com/US/OKC/bombing.html (last visited Dec. 7, 2003)). Timothy McVeigh, "an extremist who wrote of making blood flow in the streets of America . . . was found guilty of eight counts of capital murder . . . one count of conspiracy to use a weapon of mass destruction, one count of actually using that weapon and one count of destruction by explosive." *McVeigh Guilty*, CNN.COM (June 2, 1997), *at* http://www.CNN.com/US/9706/02/mcveigh.verdict/index.html. McVeigh was executed by lethal injection on June 11, 2001 in the first federal execution since 1963. *Timothy McVeigh Dead*, CNN.com/LAW CENTER (June 11, 2001), *at* http://www.CNN.com/2001/LAW/ 06/11/ mcveigh.01/index.html. Terry Nichols was also convicted for his role in the Oklahoma City bombing, sentenced to life imprisonment, and ordered to pay the government $14 million for the damages caused to the federal building. *See* Evans, *supra* note 23, at 933 n.2 (citing *Nichols Gets Life for Oklahoma Bombing*, CNN.COM (June 4, 1998), *at* http://www.CNN.com/US/ 9703/okc.trial/nichols.sentence/index.html).

43. Legislators responded to "give law enforcement the tools it needs to do everything possible to prevent [a tragedy like the Oklahoma City bombing] from happening again." Whidden, *supra* note 12, at 2825 n.4 (citing *Presidential Statement on Senate Passage of Antiterrorism Legislation*, 31 WEEKLY COMP. PRES. DOC. 993 (June 7, 1995)). The response was not immediate however, as the House did not endorse the bill introduced by the Senate in June 1995 "until almost one year after the bombing." Evans, *supra* note 23, at 958 n.163 (citing William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 107 (2000)).

44. Pub. L. No. 104-132, 110 Stat. 1214–1319 (1996) (codified in scattered sections of 8, 18, 28, 40 & 42 U.S.C.). The AEDPA consists of nine titles covering "areas such as justice for victims, habeas corpus reform, international terrorism prohibitions, nuclear, biological, and chemical weapons restrictions, implementation of plastic explosives convention, terrorist and criminal alien removal and exclusion, criminal-law modifications to counter terrorism, and assistance to law enforcement." Roberto Iraola, *Due Process, Judicial Review, the First Amendment, and the Anti-Terrorism and Effective Death Penalty Act of 1996*, 78 N.D. L. REV. 1, 5 n.28 (2002) (citing Pub. L. No. 104-132, 110 Stat. 1214–17). Although the AEDPA has been described as a "first-stage preemptive approach to combating terrorism," the purpose of the AEDPA is to "deter terrorism." *Id*. at 5 (citing Stephen C. Warneck, Note, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 179 (1998)). Warneck concludes that the AEDPA affects, and advocates how it attacks, the "underlying financial structures of terrorist organizations." Warneck, *supra*, at 182. The Center for National Security Studies, however, has called the AEDPA "a major blow to the Bill of Rights" that "represents the worst setback for civil liberties in many years." Center for National Security Studies, *Terrorism Law Is Major Setback for Civil Liberties*, *at* http://www.cdt.org/policy/terrorism/cnss_habeas.html (June 20, 1996). The AEDPA has also been called the "direct antecedent" of the Patriot Act. Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1, 15 (2002) (noting, however, that the Patriot Act is "more far reaching than the AEDPA in terms of the powers granted to the enforcement, security and intelligence agencies, and the extent to which [these powers] violate human rights").

45. The Clinton Administration considered the prior "anti-terrorism laws to be 'a

consists of stronger immigration laws through amendment of the Immigration and Nationality Act.[46]

At issue in this Comment is how the AEDPA fights terrorism by prohibiting persons from knowingly providing "material support or resources to designated foreign terrorist organizations."[47] Specifically,

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confusing patchwork of measures'" and thus decided "to take an even tougher stance against terrorism." Roberta Smith, Note, *America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 261 (1997) (footnotes omitted). Not included in the AEDPA, however, were provisions sponsored by Clinton that would have enhanced "wiretapping capabilities of all telephones used by suspected terrorists" and granted the government access to terrorists' records, including consumer credit reports. *Id*. at 269. In response to increased terrorist acts on Americans, the Clinton Administration had drafted the Omnibus Counterterrorism Act in February 1995, two months before the bombing in Oklahoma City, to, among other things, "provide clear Federal criminal jurisdiction for any international terrorist attack that might occur in the United States." *Id*. at 260–61 (quoting President's Message to Congress Omnibus Counterterrorism Act of 1995, 31 WEEKLY COMP. PRES. DOC. 227 (Feb. 9, 1995)). President Clinton expanded the bill soon after the Oklahoma City incident and urged quick action from the Senate. Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 694–95 (1998) (discussing the constitutionality of the AEDPA in its beginning stages). For a criticism of different components of the initially drafted Omnibus Act, see Center for National Security Studies, *Clinton Terrorism Legislation Threatens Constitutional Rights*, *at* http://www.cdt.org/policy/terrorism/cnss.cti.anal.html (Apr. 26, 1995).

46. *See* Evans, *supra* note 23, at 958 (citing 8 U.S.C. §§ 1158, 1251–59 (2000)). One of the more controversial provisions, AEDPA § 440(d), disallows legal aliens convicted of certain enumerated crimes from obtaining waivers of deportation. *See* AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 28, 42 & 50 U.S.C.). *See generally* Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1423 (1997) (noting that § 440(d) "may deprive a permanent resident of discretionary relief and thus attach a new legal consequence of automatic deportation to certain criminal convictions"). The resulting automatic deportation sets forth a larger class of individuals, albeit those with criminal records, that are denied the chance to plead their cases before a possibly sympathetic immigration judge. *See id.* at 1421. President Clinton publicly opposed the AEDPA's immigration provisions as he signed the legislation, "calling them 'ill-advised' and stating that they 'reach beyond the scope of counter terrorism efforts.'" Lisa C. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381, 1381 n.4 (1997) (citation omitted) (discussing generally how the AEDPA effects constitutional rights traditionally afforded to legal aliens); *see also* President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 24, 1996). Even the Patriot Act, often criticized for expanding previous antiterrorism laws, cut back on one AEDPA immigration provision that mandated detention for those seeking asylum until their claims were adjudicated. McCarthy, *supra* note 29, at 448. The Patriot Act presently "authorizes detention for only seven days, after which the government must bring immigration or criminal charges." *Id*. at 449 (footnote omitted).

47. *See generally* Pub. L. No. 104-132, § 303, 110 Stat. 1214 (1996) (codified at 18 U.S.C. § 2339B(a)(1) (Supp. I 2001)). The section sets forth unlawful conduct as follows:

the AEDPA authorizes the Secretary of State (Secretary), in consultation with the Attorney General and the Secretary of the Treasury,[48] to designate an organization as a "foreign terrorist organization" if the Secretary finds the following: (A) The organization is a foreign organization,[49] (B) the organization engages in terrorist activity,[50] and

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> 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.

Id. The Patriot Act "also aims to stop terrorism by disrupting terrorist financial networks through Title III of the Act, the International Money Laundering and Abatement and Anti-Terrorist Financing Act of 2001." McCarthy, *supra* note 29, at 446–47 (citing § 301, 115 Stat. at 296). The money laundering provisions of the Patriot Act mandate that banks and other financial institutions keep an eye on "account activity and . . . report suspicious transactions." *Id*. at 448.

48. Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1250 (codified at 8 U.S.C. § 1189(c)(4) (2000)). The term "Secretary," as used in the statute, "means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General." *Id*.

49. Neither the AEDPA nor the entire United States Code defines the term "foreign organization." Joshua A. Ellis, Note, *Designation of Foreign Terrorist Organizations Under the AEDPA: The* National Council *Court Erred in Requiring Pre-Designation Process*, 2002 BYU L. REV. 675, 679. However, "a few unrelated sections of the Code of Federal Regulations," including 12 C.F.R. § 347.102(k) (2001), do include a definition of "foreign organization" as "'an organization that is organized under the laws of a foreign country.'" Ellis, *supra*, at 679 n.26. The Patriot Act amends the definition of "terrorist organization," expanding it to mean "any group that engages in violence or destruction of property." McCarthy, *supra* note 29, at 450 (citing Pub. L. No. 107-56, § 411, 115 Stat. at 346–48). Opponents of this definition remain unsatisfied, claiming that it is not limited to foreign or international groups, encompassing even "advocacy groups causing minor property damage during an act of civil disobedience." *Id.*

50. 8 U.S.C. § 1182(a)(3)(B) (Supp. I 2001). Generally, "terrorist activity" includes the following acts, or the threat, attempt, or conspiracy to engage in: (i) hijacking or sabotaging an aircraft, vessel, or vehicle; (ii) seizing, detaining, or threatening to kill an individual in order to compel a third person (including a government organization) to do or abstain from doing an act; (iii) attacking an internationally protected person; (iv) engaging in an assassination; and (v) using biological or chemical agents, nuclear weapons, explosives, or firearms with the intent to endanger others or damage property. *Id*. § 1182(a)(3)(B)(iii)(I)–(V).

An organization engages in terrorist activity when it commits or incites another to commit a terrorist activity, when it prepares or plans a terrorist activity, when it "gather[s] information on potential targets for terrorist activity," when it solicits funds for a terrorist activity or another terrorist organization, or when it solicits an individual to engage in a terrorist activity or to become a member of a terrorist organization. *Id*. § 1182(a)(3)(B)(iv)(I)–(V). Thus, the statute provides that a donor has to know or have reason to believe that the individual to whom he was providing support has committed or planned to commit a terrorist activity. *Id*. § 1182(a)(3)(B)(iv)(VI)(bb). Furthermore, an organization engages in terrorist activity when it provides material support "for the commission of a terrorist activity" or "to a terrorist organization." *Id*. § 1182(3)(B)(iv)(VI).

(C) the organization's terrorist activity threatens the security of U.S. nationals or the national security[51] of the United States.[52] In designating a foreign terrorist organization, the Secretary may consider classified information[53] and must create an administrative record with supporting facts.[54]

Designation results in dire consequences. Funds that the designated organization has on deposit with any financial institution in the United States may be blocked in future transactions.[55] Representatives and certain members of the organization are consequently barred from entering the United States.[56] Most importantly, AEDPA § 2339B forbids all persons within or subject to U.S. jurisdiction from "knowingly

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Amended by the Patriot Act, the definition of "terrorist activity" now includes a "catch-all provision," which defines such activity as the use of "any weapon or dangerous device," not merely limited to those listed previously. *See* Germain, *supra* note 26, at 518 (citing Pub. L. No. 107-56, § 411(a)(1)(E), 115 Stat. 272 (2001) (codified at INA § 212 (a)(3)(B)(iii)(V)(b))). The only limitation on this definition "is that the use of the weapon must not be for 'mere personal monetary gain' and that the individual must have the 'intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.'" *Id*. (citing § 411 (codified at INA § 212(a)(3)(B)(iv)(VI))).

51. 8 U.S.C. § 1189(a)(1)(C) (Supp. I 2001). The statute defines the term "national security" as the "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(c)(2) (2000). National security may be threatened not only domestically but also by "threats to U.S. nationals or U.S. interests abroad." Ellis, *supra* note 49, at 682 (footnote omitted).

52. 8 U.S.C. § 1189(a)(1) (Supp. I 2001). The antiterrorism provisions of the AEDPA were designed to "provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities." Iraola, *supra* note 44, at 5–6 (quoting 18 U.S.C. § 2339B).

53. 8 U.S.C. § 1189(a)(3)(B) (Supp. I 2001). Classified information may not be disclosed so long as it remains classified, but "such information may be disclosed to a court *ex parte* and *in camera* for purposes of judicial review under Section 1189(b)." *Id*. Section 1189(c)(1) provides that the term "classified information" "has the meaning given to that term in section 1(a) of the Classified Information Procedures Act," which defines "classified information" as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1998) (codified at 18 U.S.C. app. 3).

54. 8 U.S.C. § 1189(a)(3)(A) (2000).

55. 8 U.S.C. § 1189(a)(2)(C) (Supp. I 2001); *see also* 18 U.S.C. § 2339B(a)(2) (2000). The Secretary of the Treasury may freeze any assets that the organization has on deposit with any financial institution in the United States. 8 U.S.C. § 1189(a)(2)(C); *see also* 31 C.F.R. § 597.302 (2001) (defining assets); *id*. § 597.319(a) (defining "U.S. financial institution" in part as "[a]ny financial institution organized under the laws of the United States, including such financial institution's foreign branches"). These assets remain frozen "until further directive from either the Secretary of the Treasury, Act of Congress, or order of court." 8 U.S.C. § 1189(a)(2)(C); *see also* 31 C.F.R. § 597.201(b).

56. 8 U.S.C. § 1182(a)(3)(A) (2000).

provid[ing] material support or resources" to the organization.[57] Under the AEDPA, the provider of material support has to know or have reason to know that any individual to which the contributor provided support has committed or planned to commit a terrorist activity, but this knowledge is not required when the provider donates to a terrorist organization.[58] Violation results in a fine, may lead to imprisonment for up to fifteen years or longer if the violation results in "the death of any person," or both.[59]

Prior to filing a designation, the Secretary, by classified communication, must in writing notify several specified high ranking members of Congress of the intent to designate a certain entity as a foreign terrorist organization, together with supplying findings and the factual basis that support the designation.[60] Seven days thereafter, the Secretary must publish the designation in the Federal Register.[61] The designation is

57. 18 U.S.C. § 2339B(a) (Supp. I 2001). The statute defines "material support or resources" as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.* § 2339A(b). It has been held that "two of the components included within the definition of material support, 'training' and 'personnel,' were impermissibly vague," thereby "enjoin[ing] the prosecution of [people] for activities covered by these terms." Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000); *see infra* Part III.B.3 (discussing the viability of the AEDPA through the void-for-vagueness doctrine). The term "expert advice or assistance" has also been held unconstitutionally vague. Humanitarian Law Project v. Ashcroft, No. CV 03-6107 ABC (MCx), 2004 WL 547534, at *15 (C.D. Cal. Mar. 17, 2004).

58. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (Supp. I 2001) (amended by the Patriot Act of 2001, Pub. L. No. 107-56, § 411(a), 115 Stat. 272). The AEDPA did not originally make this distinction. *See* 8 U.S.C. § 1182(a)(3)(B)(iii) (2000). The current law now prohibits a contributor who provides material support to a terrorist organization, "regardless of whether [the provider] has knowledge that its members have committed or plan to commit a terrorist activity," subject to two exceptions. Germain, *supra* note 26, at 519 (citing Pub. L. No. 107-56, § 411(a), 115 Stat. 272 (codified at INA § 212(a)(3)(B)(iv)(VI))). The first "applies if the provider gave to a group that has not been officially designated as a terrorist organization and if he can demonstrate that he did not know and should not reasonably have known that his act would further the organization's terrorist activity." *Id.* The second "applies if the Secretary of State and Attorney General, in their unreviewable discretion, determine that the clause should not apply." *Id.*

59. 18 U.S.C. § 2339B(a) (Supp. I 2001).

60. 8 U.S.C. § 1189(a)(2)(A)(i). The congressional leaders to be notified are "the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant [congressional] committees." *Id.*

61. *Id.* § 1189(a)(2)(A)(ii).

effective for a period of two years[62] and is only renewable by the Secretary, provided that the relevant circumstances that led to the initial designation still exist.[63] Congress, however, may block or subsequently revoke a designation.[64] The Secretary may also choose to revoke a designation depending on whether changed circumstances or the national security of the United States warrants such action.[65] Nonetheless, the revocation of a designation does "not affect any action or proceeding based on conduct committed prior to the effective date of such revocation."[66]

For the purposes of prosecution under 18 U.S.C. § 2339B, designation takes effect immediately upon publication in the Federal Register.[67]

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62. 8 U.S.C. § 1189(a)(4)(A) (2000). Both the Clinton and Bush Administrations have designated foreign terrorist organizations under the AEDPA scheme. *See* Iraola, *supra* note 44, at 8. Thirty organizations formed the first-ever set of designations, made by former Secretary of State Madeline K. Albright on October 2, 1997. *Id*. (citing Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997)). "On October 8, 1999, Secretary Albright redesignated twenty-seven groups, and added al-Qa'ida, the terrorist organization led by Osama bin Laden" believed to be responsible for the September 11, 2001 attacks in New York and Washington, D.C. *Id*. (citing Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112–13 (Oct. 8, 1999) (designating "al Qaeda" for the first time)). Secretary Albright designated one additional organization on September 25, 2000. *Id*. (citing Designation of a Foreign Terrorist Organization, 65 Fed. Reg. 57,641, 57,641–49 (Sept. 25, 2000) (designating the Islamic Movement of Uzbekistan)).

The Bush Administration has also been engaged in designating foreign terrorist organizations. Secretary of State Colin L. Powell designated a new organization and renewed twenty-four others on October 5, 2001. *Id*. (citing Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,088, 51,088–90 (Oct. 5, 2001)). Also "on December 26, 2001 and March 27, 2002, Secretary Powell designated five additional groups as terrorist organizations, including two Pakistani groups and a group linked to PLO Chairman Yasser Arafat's party." *Id*. (citing Press Release, Colin L. Powell, Secretary of State, Statement on Designation of Three Additional Terrorist Organizations (Mar. 27, 2002), *available at* http://www.state.gov/secretary/rm/2002/9017.htm). As of May 23, 2003, thirty-six groups had been designated as foreign terrorist organizations, as indicated in a State Department fact sheet. U.S. DEP'T OF STATE, OFFICE OF COUNTERTERRORISM, FOREIGN TERRORIST ORGANIZATIONS (May 23, 2003), *available at* http://www.state.gov/s/ct/rls/fs/2003/12389.htm. On October 2, 2003, twenty-five organizations were redesignated, including "al-Qa'ida." Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860–02 (Oct. 2, 2003).

63. 8 U.S.C. § 1189(a)(4)(B) (Supp. I 2001). The Secretary may renew designation for an additional two-year period at the end of the two-year period referred to in § 1189(a)(4)(A), "but not sooner than 60 days prior to the termination of such period." *Id*. § 1189(a)(4)(B). In addition, "[a]ny redesignation shall be effective immediately following the end of the prior [two]-year designation or redesignation period unless a different effective date is provided in such redesignation." *Id*.

64. 8 U.S.C. § 1189(a)(5) (2000).

65. 8 U.S.C. § 1189(a)(6)(A)(i)–(ii) (Supp. I 2001).

66. *Id*. § 1189(a)(7).

67. *Id*. § 1189(a)(2)(B)(i). Either designation or redesignation precludes a defendant in a criminal action from raising any question concerning the validity of the designation "as a defense or an objection at any trial or hearing." *Id*. § 1189(a)(8).

Within thirty days, a designated organization may seek judicial review[68] in the Court of Appeals for the District of Columbia.[69] Generally, the court must limit its review to the administrative record, yet in ex parte and in camera review, the court may also consider classified information used in making the designation.[70]

On review, the D.C. Circuit must hold unlawful and set aside a designation that it finds to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
> (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . or
> (E) not in accord with the procedures required by law.[71]

B. Major Constitutional Victories: The Rise of the AEDPA

The great deference given to the Secretary and the fairly easy misinterpretation of certain provisions within the AEDPA raise a number of constitutional questions.[72] For example, does the AEDPA violate the First Amendment? Is it unconstitutionally vague? What level of constitutional scrutiny should be applied? What procedural due process concerns are affected by the Secretary's designation of a foreign terrorist organization? And, are all of the Secretary's findings in making the designation subject to judicial review? The following section of this Comment will address possible answers to these questions and will track the AEDPA's rise in constitutional validity, provided mostly by the Ninth Circuit in

68. The only function of the Court of Appeals for the D.C. Circuit in reviewing an order of the Secretary designating an entity as a foreign terrorist organization under the AEDPA "is to decide if the Secretary, on the face of things, had enough information . . . to come to the conclusion that the organizations were foreign and engaged in terrorism." Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 199 (D.C. Cir. 2001) (quoting People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 25 (D.C. Cir. 1999)). Furthermore, there is no greater function for the appellate court in reviewing a Secretary's designation of one such organization as an alias of another. *Id*.

69. 8 U.S.C. § 1189(b)(1) (2000); *see infra* Part IV.C.

70. 8 U.S.C. § 1189(b)(2).

71. *Id*. § 1189(b)(3). The pendency of an action for judicial review does not alter the effectiveness of the designation, "unless the court issues a final order setting aside the designation." *Id*. § 1189(b)(4).

72. For a more extensive discussion on answers to similar questions, see Iraola, *supra* note 44, at 5–22.

Humanitarian Law Project v. Reno.[73]

1. Under the First Amendment: Guilt by Association

The First Amendment provides the following:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[74]

Although the word "association" does not appear in the First Amendment, freedom of association arises by implication. The Supreme Court has held that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[75] Accordingly, opponents claim that the AEDPA

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73. 205 F.3d 1130 (9th Cir. 2000). The following discussion will not, however, analyze the recent indictments of the following individuals under the AEDPA: (1) Former University of South Florida computer engineering professor Sami Al-Arian, who was indicted on February 19, 2003, with three other men, for helping to finance suicide bombings and other attacks by the Palestinian Islamic Jihad in Israel. George C. Harris, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT'L L.J. 135, 146 n.65 (2003) (book review). For the June 2003 decision on the defendants' various pretrial motions, see *United States v. Al-Arian*, 267 F. Supp. 2d 1258 (M.D. Fla. 2003). (2) Earnest James Ujaama, who was indicted in August 2002 in a Washington federal court for providing material support and resources to al Qaeda and conspiring to establish a terrorist training camp in rural Oregon. *See* Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Response to the Government's War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 799 n.38 (2003); *see also* Anti-Defamation League, *Convictions/Sentencing*, TERRORISM UPDATE, July 2003, at 3 (reporting that Ujaama pleaded guilty and was sentenced to a two-year prison term on April 14, 2003), *available at* http://www.adl.org/terror/tu/terrorism_update_32_july2003.pdf. (3) Enaam M. Arnaout, head of the Benevolence International Foundation, a purportedly international charitable organization, was indicted in 2002 for providing funds to al Qaeda, Hezb e Islami, Chechen rebels at war with the Russian army, and other groups involved in violent activities in Chechnya. Associated Press, *Islamic Charity Head Charged With Funneling Funds to Bin Laden*, FOXNEWS.COM (Oct. 9, 2002), *at* http://www.foxnews.com/story/0,2933,65252,00.html. On the morning of his trial, Arnaout entered a guilty plea to a charge of racketeering fraud conspiracy, and in exchange, the government agreed to dismiss the material support charge. United States v. Arnaout, 282 F. Supp. 2d 838, 840 (N.D. Ill. 2003).

74. U.S. CONST. amend. I.

75. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citations omitted) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). In other words, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (citation omitted).

prohibits individuals from participating in organizations that assist or support terrorism without explicitly examining the individuals' purpose in such involvement, thereby incriminating those who may be supporting the *legal* activities of such designated organizations.[76] As a result, criminal defendants have recently attacked the AEDPA on First Amendment freedom of association grounds, but have not been successful.[77]

In particular, the district court in *United States v. Lindh*[78] rejected such a challenge. The defendant, an American citizen, contested a ten count indictment filed against him under 18 U.S.C. § 2339B[79] in February 2002 for allegedly joining "certain foreign terrorist organizations in Afghanistan and serv[ing] these organizations [overseas while] in combat against Northern Alliance and American forces until his capture

76. Gross, *supra* note 44, at 17. Opponents criticize the AEDPA for impeding the right to financially support one's chosen group, claiming this violates the essential right to associate. *See, e.g.*, Whidden, *supra* note 12, at 2845 (citing David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 246–50).

77. Iraola, *supra* note 44, at 16.

78. 212 F. Supp. 2d 541 (E.D. Va. 2002). Defendant John Philip Walker Lindh, the so-called "American Taliban" fighter, moved to dismiss the indictment on the ground that the prejudicial media attention surrounding his case deprived him of his Sixth Amendment right to a fair trial, a request later denied by the court. *Id*. at 547–51. Lindh was subsequently sentenced to twenty years in federal prison, *see* Susan Candiotti, *Walker Lindh Sentenced to 20 Years*, CNN.COM (Oct. 4, 2002), *at* http://www.CNN.com/2002/LAW/10/04/lindh.statement/index.html, and attacked by a fellow inmate. *See John Walker Lindh Attacked in Prison*, CNN.COM (Mar. 6, 2003), *at* http://www.CNN.com/2003/US/West/03/06/walker.lindh.prison/index.html. Due to the sentencing, one commentator proclaimed the following:

> So discount the assertions of the naysayers, the pessimists, and the fearful, that the United States government lacks the resources to deal with people within our jurisdiction who engage in active or sleeper terrorist activities. Sections 391 [the federal conspiracy statute] and 2339 are more than up to the challenge. Rest assured that, thanks to these two statutes, accused domestic terrorists will fall like tenpins.

Henry Mark Holzer, *Terrorists' Nemesis*, FRONTPAGEMAGAZINE.COM (Sept. 26, 2002), *at* http://www.frontpagemag.com/Articles/Printable.asp?ID=3381.

79. Counts two through five had § 2339B implications, charging Lindh with conspiracy to provide and providing material support and resources to designated foreign terrorist organizations, namely the Harakat ul-Mujahideen (HUM) (counts two and three), a terrorist group dedicated to an extremist view in Islam, and al Qaeda (counts four and five). *Lindh*, 212 F. Supp. 2d at 547; *see also* Executive Order 13224: Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, 66 Fed. Reg. 49,079, 49,079–83 (Sept. 23, 2001) (listing HUM as an organization whose "property and interests in property . . . that are in the United States . . . are blocked").

in November 2001."[80] The defendant argued that he had a right to associate with foreign individuals and groups and that the indictment impermissibly infringed this right by criminalizing his relationship, resulting in the government's imposition of guilt by association.[81]

The court deemed the argument unfounded, especially because the defendant crossed the line between First Amendment-protected activities and constitutionally unprotected criminal conduct.[82] In this instance, the defendant was accused not only of associating with disfavored groups, but also of joining groups that did more than "merely advocate terror, violence, and murder of innocents"; these groups actually carried out their campaigns.[83] Therefore, individuals who actively take part in a terrorist organization's acts of terror, violence, and murder, *at whatever level*, carry out crimes with no constitutional protection.[84] Challenges by these participants are thus struck down.[85]

The court in *Lindh* cited its strongest authority in *Humanitarian Law Project v. Reno*,[86] where the Ninth Circuit squarely rejected a similar notion.[87] Plaintiffs, comprised of six organizations and two U.S. citizens,[88] claimed

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80. *Lindh*, 212 F. Supp. 2d at 545. The indictment specifically alleged that the defendant (1) attended a military training camp in Pakistan run by HUM; (2) crossed from Pakistan into Afghanistan for the purpose of taking up arms with the Taliban; (3) reported to a Taliban recruiting center in Kabul; (4) attended al Qaeda's al-Farooq training camp for military training and personally met with al Qaeda leader Osama bin Laden; (5) participated in a terrorist training course; (6) completed his training and was subsequently issued rifles and grenades; (7) traveled with other combatants to the front line in Takhar (in northeastern Afghanistan) where he opposed Northern Alliance forces; (8) remained with his fighting group after the United States had entered the conflict and until the defendant surrendered at Kunduz, Afghanistan; and (9) was among a group of Taliban prisoners who staged a violent uprising at the Qala-i-Janghi (QIJ) prison that resulted in the death of an American intelligence agent. *Id*. at 545–47.

81. *Id*. at 569.

82. *Id*. The court summarized the point as follows: "The First Amendment's guarantee of associational freedom is no license to supply terrorist organizations with resources or material support in any form, including services as a combatant. Those who choose to furnish such material support to terrorists cannot hide or shield their conduct behind the First Amendment." *Id*. at 570.

83. *Id*. at 569.

84. *Id*.

85. This statement "finds support in long-standing Supreme Court precedent upholding the government's authority to place restrictions or outright bans on dealings with foreign entities that have acted against United States interests." *Id*. at 570. For example, the Supreme Court has upheld a prohibition on dealings with Cuba, further holding: "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Regan v. Wald, 468 U.S. 222, 242 (1984) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)) (alteration in original).

86. 205 F.3d 1130 (9th Cir. 2000).

87. *Id*. at 1133. The court further noted that § 2339B "has teeth" because a violation leads to punishment by fine, imprisonment, or both. *Id*. at 1132.

88. *Id*. at 1133. Named plaintiffs included six organizations—the Humanitarian Law Project, Ilankai Thamil Sangam, Tamils of Northern California, Tamil Welfare and

that the AEDPA prohibition violated the long-established rule as set forth in cases such as *NAACP v. Claiborne Hardware Co*.[89] In order for liability to be imposed by reason of association alone, the rule deems it "necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[90] Accordingly, the plaintiffs in *Humanitarian Law Project* argued that criminalizing their support of two *nonviolent* humanitarian and political organizations[91] infringed upon their rights of association.[92]

Human Rights Committee, Federation of Tamil Sangams of North America, World Tamil Coordinating Committee—and two United States citizens—Ralph Fertig and Nagalingam Jeyalingam. *Id*. at 1130. The Center for Constitutional Rights brought the suit against named defendants Secretary of State Madeline K. Albright, Attorney General Janet Reno, and the U.S. Departments of Justice and State. *Id*.; *see also* Joseph Furst, III, Comment, *Guilt by Association and the AEDPA's Fundraising Ban*, 16 N.Y.L. SCH. J. HUM. RTS. 475, 486 (1999).

89. 458 U.S. 886 (1982). In *Claiborne Hardware*, ninety-two petitioners were found liable for economic damages incurred as a result of a boycott of the respondents' businesses, owned by white merchants in Claiborne City, Mississippi. *Id*. at 888–93. The judgment was reversed on appeal because the majority of the petitioners' activities were nonviolent and entitled to protection under the First Amendment, but the Supreme Court observed that those who took part in an unlawful activity and had further violent goals could nevertheless be held liable. *Id*. at 933–34. The Court held: "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id*. at 908. Thus, absent a showing of specific intent to further unlawful conduct, the Court concluded that mere association by the petitioners with the boycotting group was insufficient to predicate liability. *Id*. at 920.

90. *Id*. (footnote omitted). Furthermore, to punish association with a group having both legal and illegal aims, "there must be 'clear proof that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to violence."'" *Id*. at 919 (citing Scales v. United States, 367 U.S. 203, 229 (1961) and quoting Noto v. United States, 367 U.S. 290, 299 (1961)). The government has the burden to establish both the defendant's affiliation with an organization possessing unlawful claims and goals and the defendant's specific intent to further illegal aims. *Id*. at 919–20 (citing Healy v. James, 408 U.S. 169, 186 (1972)); *see also* Elfbrandt v. Russell, 384 U.S. 11, 18 (1966) (rejecting an Arizona statute that provided for "guilt by association" and punished membership in the Communist Party or of any other organization that included the overthrow of the Arizona state government as one of its purposes).

91. The Kurdistan Workers' Party (PKK) (also known as the Partiya Karkeran Kurdistan) and the Liberation Tigers of Tamil Eelam (LTTE) (also known as the Tamil Tigers and the Ellalan Force) were designated as foreign terrorist organizations on October 8, 1997. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (9th Cir. 2000) (citing Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997)). The plaintiffs claimed that they were prevented from providing support to the PKK and the LTTE out of fear of criminal sanctions. *Id*. at 1182. The plaintiffs' main argument centered around the AEDPA not requiring "specific intent" to further the illegal aims of the PKK and LTTE before a criminal violation arises, thus imposing guilt by association and infringing upon

The rule expressed in *Claiborne Hardware* and similar cases, however, is applicable only in situations where people are punished "by reason of association alone."[93] Conversely, the AEDPA does not necessarily prohibit participating as a member in a designated group, supporting or promoting the political goals of a designated group, or praising designated groups for using terrorism to achieve certain political ends.[94] Rather, the AEDPA punishes the act of *giving* material support, including giving organizations weapons and explosives to further their terrorist missions.[95]

In a major triumph, the AEDPA's prohibitions were held not to impose guilt by association, prompting the Ninth Circuit to affirm the judgment of the district court.[96] The court further bolstered the AEDPA's strength by refusing to require that the government demonstrate a donor's specific intent in aiding an organization's illegal activities before ascribing liability to the donation of funds.[97] Material support,

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plaintiffs' protected free speech. *Id*. at 1185.

92. *Humanitarian Law Project*, 205 F.3d at 1133. The plaintiffs sought injunctive relief barring enforcement of the AEDPA against them. *Id*. The United States District Court for the Central District of California (Justice Audrey B. Collins presiding) denied the injunction due to the plaintiffs' associational challenge, but enjoined enforcement on vagueness grounds. *Humanitarian Law Project*, 9 F. Supp. 2d at 1204; *see also infra* Part III.B.3.

93. *Humanitarian Law Project*, 205 F.3d at 1133 (quoting *Claiborne Hardware*, 458 U.S. at 920). "[B]y reason of association alone" means merely participating in a group or "espousing its views." *Id*.

94. *Id*.

95. *Id.* The AEDPA additionally prohibits providing resources with which terrorist organizations may purchase weapons, explosives, and other military artillery. *Id*.

96. *Id*. at 1138; *see also* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000, 1015, 1027–28 (7th Cir. 2002) (holding that the AEDPA does not violate the First Amendment right of free association and that the government's interest in preventing terrorism was sufficient to alter a statute that incriminated acts of international terrorism and to apply it to a *civil* cause of action by injured plaintiffs). In *Boim*, the plaintiffs filed a civil suit under 18 U.S.C. § 2333 against several nonprofit entities accused of soliciting and laundering funds to finance a designated terrorist organization whose members murdered the plaintiffs' son. *Id*. at 1001–04. Section 2333 gives U.S. nationals and their survivors the right to sue in U.S. district courts for damages incurred "by reason of an act of international terrorism." 18 U.S.C. § 2333(a) (2000) (enacted as Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521 (entitled "Terrorism Civil Remedy")). The court in *Boim* upheld the theory that the definition of terrorism as an activity "*involv[ing]* violent acts," as defined in 18 U.S.C. § 2331(1)(A), allows plaintiffs to raise claims against not only those who engage in violent terrorist activity, but also those who aid and abet such acts. *Boim*, 291 F.3d at 1015. This tort framework, which requires knowledge, intent, and causation, protects § 2333 from claims of unconstitutionality because it punishes not merely association, as the court in *Claiborne Hardware* condemns, but also the material support of illegal activity that is left unprotected by the Constitution. *Id*. at 1026–27. This opens the door to a new class of litigants alleging aiding and abetting rather than "close involvement in violent terrorist activities." Recent Case, Boim v. Quranic Literacy Institute, *291 F.3d 1000 (7th Cir. 2002)*, 116 HARV. L. REV. 713, 716 (2002).

97. *Humanitarian Law Project*, 205 F.3d at 1133–34. The court distinguished *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1063 (9th Cir. 1995)

therefore, currently entails the promotion of an organization's unlawful activities, irrespective of a sponsor's intent.[98]

2. Under the First Amendment: Political Advocacy and the Question of Scrutiny

The plaintiffs in *Humanitarian Law Project*, in addition to making the argument that the AEDPA's antiterrorist provisions violated their respective freedom of association rights,[99] contended that both terrorist organizations at issue engaged in political advocacy.[100] Citing *Buckley v. Valeo*,[101] the plaintiffs argued that because "providing money to organizations engaged in political expression is itself both political expression and association," they had not infringed the AEDPA.[102]

The court centered this debate on Americans' right to associate with foreign political groups through donations[103] and determined that past cases that likened monetary support to political expression "involved organizations whose *overwhelming function* was political advocacy."[104]

(requiring the government to establish a terrorist organization advocate's "knowing affiliation" and a "specific intent to further those illegal claims") (citation omitted), because "advocacy is far different from making donations of material support." *Humanitarian Law Project*, 205 F.3d at 1133–34.

98. *Humanitarian Law Project*, 205 F.3d at 1134. Opponents of the AEDPA suggest that the federal government amend the Act and follow an antiterrorist funding statute enacted by the Illinois legislature. *See, e.g.*, Furst, *supra* note 88, at 500 (citing 720 ILL. COMP. STAT. 5/29C-5, 10, 15 (1999)). Unlike the AEDPA, the Illinois statute requires a showing of a donor's specific intent to fund an act of international terrorism. *Id*. Although this requirement appears reasonable, it weakens law enforcement. Hypothetically, if a sponsor donates money to an organization lacking the intent to fund terrorism, the Illinois statute would prohibit the United States from blocking or criminalizing this action, even though the organization may nonetheless use that money for terrorist purposes. *See id*. The AEDPA's primary purpose is to eliminate funds to designated entities. The donor's intent is irrelevant.

99. *See supra* Part III.B.1.

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

101. 424 U.S. 1 (1976). In *Buckley*, the Supreme Court established that attempts to regulate financial campaign contributions pursuant to the Federal Election Campaign Act of 1971 are so closely related to and necessary for political expression so as to fall under the First Amendment protection of free expression. *Id*. at 14.

102. *Humanitarian Law Project*, 205 F.3d at 1134; *see Buckley*, 424 U.S. at 44–45 ("[T]he constitutionality of [the restrictions on contributions to political candidates] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.").

103. *See Humanitarian Law Project*, 205 F.3d at 1134 n.1.

104. *Id*. at 1134 (emphasis added). The court labeled *Buckley* as the "quintessential example where the contributions were made to candidates for political office for the purpose of helping them engage in electioneering." *Id*. (citing *Buckley*, 424 U.S. at 12–

While the First Amendment protects contributions to support U.S. political advocacy, the Constitution does not protect the political advocacy of foreign terrorist organizations within their own governments, which was the case here.[105] Moreover, the First Amendment protects the expressive *component* of seeking and donating funds as pure speech, but not expressive *conduct*.[106] In other words, the government may choose to regulate contributions not only to organizations that engage in unlawful or harmful activities, but also to organizations that engage in lawful, but not speech-related, activities.[107]

In addition, in allowing the legislature more leeway, § 2339B does not merit strict scrutiny[108] because the provision "is not aimed at interfering with the expressive component of [the plaintiffs'] conduct but at stopping aid to terrorist groups."[109] Rather, proper review falls under the

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13). The Federal Election Campaign Act of 1971 specifically restricted political contributions and expenditures applied to all phases and all participants of the election process. *Buckley*, 424 U.S. at 12–13.

105. *See Humanitarian Law Project*, 205 F.3d at 1134 n.1 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment constitutional protection against unreasonable search and seizure could not be extended to a Mexican citizen with no voluntary attachment to the United States)).

106. *Id. at* 1134–35.

107. *Id.* at 1135 (citing Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."). The issue is "not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." *Johnson*, 491 U.S. at 406–07.

108. Constitutional review is comprised of three main standards: (1) In order to satisfy the strict scrutiny standard, the "most rigorous and exacting standard of constitutional review," a statute must be "narrowly tailored to achieve a compelling interest" and must be the least restrictive effective means of doing so. *See* Miller v. Johnson, 515 U.S. 900, 920 (1995). Statutes based on racial classifications trigger the strict scrutiny standard. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958 (1996) (applying strict scrutiny to voting districts drawn with race as the predominant factor). (2) In order to satisfy intermediate scrutiny, a more lenient level of scrutiny typically applied to gender-based classifications, "the legislation must be substantially related to advancing important or substantial governmental interests, and not be substantially more burdensome than necessary to advance these interests." R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002) (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1, at 529 (1997) (noting that "[i]ntermediate scrutiny is used for discrimination based on gender")). (3) Under the minimal rationality review, "the legislation only has to be rationally related to legitimate governmental interests, and not impose irrational burdens on individuals." *Id*. (citing CHEMERINSKY, *supra*, § 9.1, at 529). The standard of review a court implements depends on "a myriad of factors that counsel [a court] either to defer to legislative judgment, in which case rational review is employed, or counsel [a court] to be suspicious of the legislative action, in which case some form of heightened scrutiny is applied." *Id*. at 228–29 (footnotes omitted).

109. *Humanitarian Law Project*, 205 F.3d at 1135. *Compare* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (applying intermediate scrutiny to a statutory

intermediate scrutiny standard, which applies when "a regulation . . . serves purposes unrelated to the content of expression."[110] In applying this standard, the court makes four inquiries: (1) "Is the regulation" at issue within the constitutional "power of the government?" (2) Does the regulation "promote an important or substantial government interest?" (3) Is the promoted interest "unrelated to suppressing free expression?" (4) "[I]s the incidental restriction on First Amendment freedoms no greater than necessary?"[111]

The court in *Humanitarian Law Project* swiftly answered each of the first three questions in the affirmative.[112] The fourth question turned on whether the AEDPA was tailored enough to accomplish its purpose of "preventing the United States from being used as a base for terrorist fundraising."[113] Because such a determination depends significantly on foreign policy considerations, courts must allow political branches "wide latitude in selecting the means to bring about the desired goal."[114] This

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regulation that prohibited the burning of a draft card because the statute condemned only the independent *noncommunicative* impact of *conduct* within its reach), *with Johnson*, 491 U.S. at 406 (applying strict scrutiny to law that prohibited the burning of flags that offended witnesses because the law restricted the *content* of the message that flag burning conveys).

110. *Humanitarian Law Project*, 205 F.3d at 1135 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (alteration in original) (applying intermediate review to a regulation that required concert performers to use the city's sound amplification equipment and sound technician in order for the city to regulate the volume of music coming from the stage in the city's park). The regulation pursuant to the AEDPA prohibits aid to terrorist groups, not the freedom of expression. *See Humanitarian Law Project*, *supra*.

111. *Id*. at 1135; *see also O'Brien*, 391 U.S. at 377.

112. *Humanitarian Law Project*, 205 F.3d at 1135. (1) As to whether the federal government had the power to regulate aid to terrorist organizations, the court held that it clearly did through the power to enact laws restricting transactions between U.S. citizens with foreign entities. *Id*. (2) As to whether the regulation promotes an important or substantial government interest, the court identified such an interest in preventing the spread of international terrorism. *Id*. (citing Haig v. Agee, 453 U.S. 280, 307 (1981) ("Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.")). (3) The court found it true that this substantial interest is unrelated to suppressing free expression because the government "restricts the actions of those who wish to give material support to the groups, not the expression of those who advocate or believe the ideas that the groups supports." *Id*.

113. *Id*. at 1136.

114. *Id*. The plaintiffs additionally argued that the statutory scheme prior to the amendments implemented by the AEDPA in 1996, *see* 18 U.S.C. § 2339A(b) (1994), which allowed individuals to donate humanitarian assistance to those who were not directly involved in terrorist activity, had an acceptable scope and that the current AEDPA scheme is overbroad. *Humanitarian Law Project*, 205 F.3d at 1136. The court

latitude is sufficient enough so that the government need not employ the least restrictive or least intrusive means to safeguard against terrorism.[115]

Consequently, the government's decisions as to whether donations to foreign terrorist organizations amount to material support are not met with heavy skepticism.[116] One reason for this is that Congress possesses the factfinding resources necessary to make such conclusions properly.[117] Largely due to this deference to legislative decisionmaking, the judiciary has not found that the AEDPA restricts First Amendment freedoms to a greater degree than necessary.[118]

3. Under the First Amendment: Vagueness

A final challenge presented by the plaintiffs in *Humanitarian Law*

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deflected this argument and acted on its presumption that Congress had a good reason to expand the scope of the scheme's antiterrorist provisions. *Id*.

115. *Humanitarian Law Project*, 205 F.3d at 1136 (citing *Ward*, 491 U.S. at 798). Rather, the intermediate scrutiny standard of review is satisfied so long as the AEDPA's antifundraising provisions promote a substantial governmental interest that would be achieved less effectively had the AEDPA failed to exist. *See* United States v. Albertini, 472 U.S. 675, 689 (1985).

116. This deference to the government led to the rejection of an additional argument asserted by the plaintiffs in *Humanitarian Law Project*. Relying on *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *Gaudiya Vaishnava Society v. City & County of San Francisco*, 952 F.2d 1059 (9th Cir. 1991), two cases holding certain licensing schemes unconstitutional because they granted government officials "unfettered discretion" to regulate First Amendment activity, the plaintiffs argued that the AEDPA violated the First Amendment by "giving the Secretary 'unfettered discretion' to limit their right to associate with certain foreign organizations, and by insulating [the Secretary's] decisions from judicial review." *Humanitarian Law Project*, 205 F.3d at 1136. The Ninth Circuit provided more proof of the AEDPA's strength, distinguishing *Forsyth* and *Gaudiya Vaishnava* by noting that the regulations contained in both cases encompassed First Amendment-protected activities over which government officials enjoyed the pure discretion to regulate. *Id.* (The protected activities were parades in *Forsyth* and the sale of merchandise carrying political, religious, philosophical, or ideological messages in *Gaudiya Vaishnava.*) In contrast, the AEDPA does not prescribe such empowerment; it fails to strictly scrutinize free speech or association per se, focusing more on restricting expressive *conduct*, or the *act* of giving material support to designated foreign organizations. *Id*. at 1136–37. Logically, the AEDPA does not grant the Secretary unfettered discretion to render haphazard designations because the Secretary may only designate groups that explicitly engage in terrorist activities, as defined by statute, thus eliminating the likelihood that the International Red Cross or the International Olympic Committee can ever be designated. *Id*. at 1137. In a sign of trust, the court held that the AEDPA is not so trivial as to categorize the Secretary's authority as "unfettered discretion," especially because the statute requires the Secretary's grounds for designation to be reasonable. *See id*. (citing 8 U.S.C. § 1182(a)(3)).

117. *Humanitarian Law Project*, 205 F.3d at 1136 (stating that the court "will not indulge in speculation about whether Congress was right to come to the conclusion that it did"). In addition, the executive branch in designating foreign terrorist organizations receives more latitude from the judiciary in regulating foreign affairs than domestic conduct. *Id*. at 1137.

118. *Id*. at 1136.

Project accused the AEDPA of being impermissibly vague under the First Amendment.[119] Under the vagueness doctrine, a law that does not fairly inform a person "of ordinary intelligence" of what is commanded or prohibited is unconstitutional as violating due process.[120] Assuming that persons are free to choose between lawful and unlawful conduct, the doctrine "insist[s] that laws give [persons] of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [persons] may act accordingly."[121] Moreover, in order to prevent arbitrary and discriminatory enforcement, it is crucial that laws provide "explicit standards" for those who enforce them.[122] For the AEDPA to survive a vagueness challenge, it must define the "offense with sufficient definiteness [so] that ordinary people can understand what conduct is prohibited."[123]

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119. *Id*. at 1137.

120. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (determining the vagueness of an antinoise ordinance that prohibited the noise or diversion adjacent to any building in which a school or class was in session). The type of statute involved may determine the amount of vagueness that the Constitution will permit. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). For example, economic regulations are subject to a more lenient vagueness test because its provisions are often more narrow than, for example, a case involving the First Amendment. *Id*.; *see also* United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963) (considering the vagueness of the Robinson-Patman Act, a statute that incriminated the sale of goods at unreasonably low prices for the purpose of destroying the competition, not only on its face, but also as applied to the facts of the case).

121. *Grayned*, 408 U.S. at 108 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (noting that when people are required to live under a rule of law, they "are entitled to be informed as to what the State commands or forbids") (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)) (citations omitted)).

122. *Id.* at 108; *see also* Kolender v. Lawson, 461 U.S. 352, 358 (1983). In *Kolender*, the petitioner challenged a California statute that required persons who loiter or wander to provide proof of "credible and reliable" identification when requested by a peace officer. *Id*. at 353. The California Court of Appeal defined "credible and reliable" identification as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id*. at 357 (quoting People v. Solomon, 108 Cal. Rptr. 867, 873 (Ct. App. 1973)). Because the statute contained no standard for an individual to determine what he or she could do to provide reliable and credible identification, it gave complete discretion to the police in determining if the individual had met the requirements of the statute. *Id*. at 358. The Supreme Court held that because the statute encouraged arbitrary enforcement by not providing with sufficient particularity what an individual must do to comply with the law, the statute was unconstitutionally vague. *Id*. at 361.

123. *See Kolender*, 461 U.S. at 357. The Supreme Court typically upholds statutes in the face of vagueness challenges if statutory language includes words having well-known technical or special meanings or settled common law meanings, or if the text or subject matter of the statute affords some type of standard. Connally v. Gen. Constr.

In particular, the plaintiffs in *Humanitarian Law Project* alleged that the terms "foreign terrorist organization" and "material support," as defined by the AEDPA, violated the vagueness doctrine.[124] The district court partially agreed, finding that two items "within the definition of material support, 'training' and 'personnel,' were impermissibly vague," thereby issuing a limited preliminary injunction enjoining "the prosecution of any of the plaintiffs' members for activities covered by these terms."[125]

Upon review, the Ninth Circuit found that the term "personnel" blurred the line between First Amendment-protected expression and unprotected conduct, thus creating an element of uncertainty regarding

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Co., 269 U.S. 385, 391–92 (1926). In *Connally*, the plaintiff brought suit to enjoin officers from enforcing an Oklahoma statute providing that "not less than the current rate of per diem wages in the locality where the work is performed" shall be paid to laborers on the basis that it was unconstitutionally vague. *Id*. at 393. The Court held that the statute was fatally uncertain because "the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc." *Id*. at 393. Although statutes must define offenses with reasonable certainty, this does not mean that statutes cannot use terms that are adequately interpreted by "common usage and understanding." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340–41 (1952) (quoting Sproles v. Binford, 286 U.S. 374, 393 (1932)) (upholding a statute as not unconstitutionally vague because the statute was a product of a long history of regulation in which terms were commonly understood).

124. *Humanitarian Law Project*, 205 F.3d at 1137. The term "material support or resources," prior to the 2001 amendment by the Patriot Act, meant "currency or other financial securities, financial services, lodging, *training*, 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) (2000) (emphasis added). The Patriot Act amended the definition so that the phrase "or monetary instruments or financial securities" replaced "or other financial securities," and the term "expert advice or assistance" was added. *See* Patriot Act of 2004, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (codified as amended in scattered sections of 18 U.S.C.). However, the term "expert advice or assistance" has been held unconstitutionally vague. Humanitarian Law Project v. Ashcroft, No. CV 03-6107 ABC (MCx), 2004 WL 547534, at *15 (C.D. Cal. Mar. 17, 2004). The term "foreign terrorist organization" is defined as "an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act." 18 U.S.C. § 2339B(g)(6). Codified at 8 U.S.C. § 1189, section 219 of the INA, before being amended by the Patriot Act, originally designated an organization as a foreign terrorist organization if:

> (A) the organization is a foreign organization;
> (B) the organization engages in terrorist activity [or terrorism or retains the capability and intent to engage in terrorist activity or terrorism]; and
> (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the Unites States.

8 U.S.C. § 1189(a)(1)(A)–(C) (2000), *amended by* Patriot Act of 2001, Pub. L. 107-56, tit. IV, § 411(c), 115 Stat. 272, 349 (codified as amended in 8 U.S.C. § 1189(a)(1)(A)–(C) (Supp. I 2001)).

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

the scope of the AEDPA.[126] For example, pure speech protected by the First Amendment, such as advocacy, may be construed as supplying personnel, especially when resources normally reserved for simply advocating a foreign terrorist group are instead used to *actively* engage in terrorist activities.[127] Likewise, the court held that the term "training" may also be construed to prohibit otherwise protected acts. For example, instructing members of a designated organization on how to petition the United Nations for aid and relief has little to do with donating to or engaging in military training or training in terrorist activities, but may nonetheless fall within the scope of the term "training."[128]

Accordingly, because the plaintiffs established meritorious vagueness claims with respect to both personnel and training, the Ninth Circuit concluded that the district court had not abused its discretion in issuing its limited preliminary injunction and enjoining the plaintiffs' prosecution in the process.[129]

The vagueness challenge in *Humanitarian Law Project* may have yielded some success, but subsequent challenges based on vagueness in both *United States v. Lindh*[130] and *United States v. Goba*[131] fell on deaf ears, thereby strengthening the AEDPA's already vast constitutional scope. In *Lindh*, the defendant relied on *Humanitarian Law Project* in making the case that section 2339B was unconstitutionally vague.[132] The court rejected this argument and disregarded the Ninth Circuit's holding in *Humanitarian Law Project* as being neither persuasive nor controlling, noting that the plain meaning of "personnel" indicated exactly what the term "personnel" typically purports: an employment or employment-like relationship between the persons in question, and in this context, terrorist organizations.[133] The court further held that the term "personnel" is

126. *Id*.
127. *Id*. The government suggested that in order to keep the AEDPA from overreaching on constitutionally-protected advocacy and other forms of free speech, the court read into the statute a requirement that the activities prohibited be performed "under the direction or control" of the foreign terrorist organization. The court declined, due to lack of authority, to rewrite the law so as to survive constitutional scrutiny. *Id*. at 1137–38.
128. *Id*. at 1138.
129. *Id*.
130. 212 F. Supp. 2d 541 (E.D. Va. 2002); *see also supra* note 78 and accompanying text.
131. 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002).
132. *Lindh*, 212 F. Supp. 2d at 573.
133. *Id*. at 574.

unequivocally "aimed at denying the provision of human resources to proscribed terrorist organizations, and not at the mere *independent* advocacy of an organization's interests or agenda" and that the term gives "fair notice to the public of what is prohibited."[134] Thus, the court found the term "personnel" to be sufficiently clear to defeat a void for vagueness challenge.

Similarly, the court in *Goba* rejected a vagueness challenge when applied to defendants accused of training at a known terrorist organization's camp.[135] The court acknowledged that one can unambiguously provide "material support or resources" by offering services to a terrorist organization and by allowing oneself to become "indoctrinated and trained as a 'resource' in that organization's beliefs and activities."[136] The court responded to the defendants' reliance on *Humanitarian Law Project*, a civil case wherein the plaintiffs sought injunctive relief for fear that their legitimate humanitarian activities would be criminalized by the AEDPA, by citing *Lindh*, an analogous criminal indictment.[137] The court in *Goba* quoted *Lindh* for the proposition that the statute was not unconstitutional:

> [Defendant] Lindh contends his conduct does not, as a matter of law, amount to providing "material support and resources," including "training" and "personnel," because he provided no training and that merely enlisting in an armed force—rather than recruiting for such a force—does not constitute providing personnel. Lindh is incorrect on both arguments.
>
> Thus, to provide personnel is to provide people who become affiliated with the organization and work under its direction: the individual or individuals provided could be the provider himself, or others, or both.[138]

Consistent with *Lindh* and *Humanitarian Law Project*, in *Goba*, § 2339B

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134. *Id*.

135. *Goba*, 220 F. Supp. 2d at 194. In *Goba*, the magistrate found that all six defendants, also known as the "Buffalo Six," had traveled to Pakistan in 2001 in two separate groups and "attended a training camp . . . in Afghanistan at which Usama bin Laden spoke espousing anti-American sentiment and received training in the use of weapons and lectures on suicide as a means of causing harm to the enemy." *Id*. at 192; *see* United States v. Goba, 240 F. Supp. 2d 242, 244 (W.D.N.Y. 2003); *see also* Andrew Cohen, *Buffalo Six's Day in Court*, CBSNEWS.COM (Oct. 9, 2002), *at* http://www.cbsnews.com/stories/2002/10/09/news/opinion/courtwatch/main524967.shtml. After several weeks, the defendants returned to Lackawanna, New York, where they "resumed their regular lives until their arrests on or about September 13, 2002." *Goba*, 240 F. Supp. at 244–45 (denying the defendants' motions for revocation of the magistrate's detention order). On December 3, 2003, the first member of the group, twenty-three-year-old Mukhtar al-Bakri, was sentenced to ten years in prison after pleading guilty to providing material support under § 2339B. *Al Qaeda Trainee Gets 10-Year Sentence*, CNN.com/LAW CENTER (Dec. 3, 2003), *at* http://www.CNN.com/2003/LAW/12/03/buffalo.six.

136. *Goba*, 220 F. Supp. 2d at 194 (recognizing that this principle is offered by the district judge in *Lindh*).

137. *Id*. at 193.

138. *Id*. at 194 (quoting *Lindh*, 212 F. Supp. 2d at 577).

once again overcame a constitutional challenge, thereby completing the string of victories.[139]

IV. HITTING A BRICK WALL: THE FALL OF THE AEDPA

Fresh off a major victory in March 2000,[140] the AEDPA's antifundraising provision seemed constitutionally insurmountable. Section 2339B fought off allegations that it wrongfully deprived individuals of their associational rights.[141] It dodged the dreaded strict scrutiny standard.[142] Its defenders convinced courts to uphold contested terms in the face of vagueness challenges.[143] Finally, it preserved the government's right to criminalize the donation of material resources to designated terrorist organizations without inspecting a donor's intent.[144] Moreover, it paved the way for the Patriot Act despite critics' screams that it shreds the

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139. In summarizing the rise in the AEDPA, one scholar put it best:

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

Iraola, *supra* note 44, at 20 (footnotes omitted) (citing to *Humanitarian Law Project* as the "only court").

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

141. *See supra* Part III.B.1. Prior to *Humanitarian Law Project*, opponents boldly, yet erroneously, stated the following:

> The AEDPA ban not only unconstitutionally burdens free speech, but it also impinges on the right of association. Under the Act, individuals are forced to choose between going to jail or not contributing to a designated foreign organization, even though they may only want to support the legal aims of the group.

See, e.g., Beall, *supra* note 45, at 703–04 (footnote omitted).

142. *See supra* Part III.B.2. Opponents likewise declared the following: "The AEDPA's complete ban on speech in the form of contributions to particular groups certainly would not satisfy strict scrutiny. As the name implies, strict scrutiny is a difficult test for the government to overcome." Beall, *supra* note 45, at 700 (footnote omitted). Opponents also recognized that AEDPA proponents might argue that the Act "regulates conduct and not speech." *Id*. at 702. In that case, opponents acknowledged that the intermediate scrutiny standard of *United States v. O'Brien* would apply but maintained that the AEDPA fundraising ban would still fail because the governmental interest was not "unrelated to the suppression of free expression." *Id*. (footnote omitted). As it turned out, the court in *Humanitarian Law Project* held exactly the opposite. *See supra* note 107 and accompanying text.

143. *See supra* Part III.B.3.

144. *See supra* notes 97–98 and accompanying text.

Constitution.[145]

With little luck in overthrowing the antifundraising provision, opponents turned to the AEDPA's other facet, section 1189, which describes the procedure by which the Secretary designates an entity as a foreign terrorist organization.[146] Primarily, organizations complained that the AEDPA's designation procedure violated Fifth Amendment Due Process, which guarantees the following: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[147] The Supreme Court has held that, while the procedural protections required by the Due Process Clause do not have "a fixed content unrelated to time, place and circumstances,"[148] fundamental procedural due process nonetheless requires the opportunity to be heard "at a meaningful time and in a meaningful manner."[149] Because the AEDPA does not require the Secretary to provide either notice or the opportunity for a hearing to entities regarding impending designation, opponents have questioned the validity of section 1189.[150]

In the first significant case to address a due process challenge against section 1189,[151] the D.C. Circuit in *People's Mojahedin Organization of Iran v. Department of State* (*People's Mojahedin*)[152] held that foreign

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145. *See, e.g.*, Van Bergen, *supra* note 28. In Van Bergen's opinion: "The USA Patriot Act is an insult to Americans. The name, itself, is insulting, given what the Act contains and what it will someday be known for: its complete abdication of democratic law and principles. It should be called the Constitution Shredding Act." *Id*. In response to such condemnation, Attorney General John Ashcroft called this criticism a "bold declaration[] of so-called fact" that has dissolved into "vague conjecture" in light of the U.S. Justice Department's excruciating attention to detail in its terrorism prevention strategy. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 316 (2001) [hereinafter *Hearings*] (testimony of Attorney General John Ashcroft).

146. *See* 8 U.S.C. § 1189 (2000 & Supp. I 2001).

147. U.S. CONST. amend. V. Courts interpret "this clause to have a procedural and a substantive component." Ellis, *supra* note 49, at 683–84 (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1, at 544–45 (6th ed. 2000)).

148. Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

149. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

150. *See infra* notes 152–154 and accompanying text. Generally:

> [a] court must examine three critical issues in any procedural due process claim asserted by a foreign person or entity: (1) whether the person or entity has a constitutional presence in the United States; (2) whether government action deprived the person or entity of a constitutionally protected interest; and (3) whether the procedural protections provided by the government, if any, were constitutionally sufficient.

Ellis, *supra* note 49, at 684 (footnote omitted).

151. *See* Ellis, *supra* note 49, at 690.

152. 182 F.3d 17 (D.C. Cir. 1999). The plaintiffs, the LTTE and the People's Mojahedin Organization of Iran (PMOI) (also known as the Mujahedin-e Khalq, the MEK, and the MKO), were designated as foreign terrorist organizations by then-

organizations without property or presence in the United States are not entitled to any due process protections.[153] Two years later, the issue

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Secretary of State Madeline K. Albright on October 8, 1997. *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997). Both organizations sought judicial review of the designations under 8 U.S.C. § 1189(b)(1). *People's Mojahedin*, 182 F.3d at 18–19. In support of designating the LTTE a foreign terrorist organization, the court in *People's Mojahedin* quoted unclassified material in the Secretary's administrative record as follows:

> "The Liberation Tigers of Tamil Eelam was founded in 1976 for the purpose of creating a separate Tamil state in Sri Lanka. The group began its war against the Government of Sri Lanka in 1983 and has employed violent means, including bombings and political assassination, to achieve the goal of a separate entity in the North and East of the country. Some 50,000 people are estimated to have died in fourteen years of fighting." "Sri Lankan military and intelligence sources that have reported reliably in the past have identified the Ellalan Force as another alias for the Liberation Tigers of Tamil Eelam," which "will hereafter be referred to as the 'LTTE.'" "Headquartered in the Jaffna Peninsula [of Sri Lanka], . . . Velupillai Prabhakaran," "the founder and leader of Sri Lanka's LTTE . . . organized the insurgency group to pursue an independent homeland for Tamils in Sri Lanka's northern and eastern regions out of frustration over the ethnic discrimination of the Sri Lankan government, according to press reports." "Tamils . . . are the mainstay of his organization, according to U.S. military officials."

Id. at 19 (footnote omitted) (alterations in original). Furthermore, a February 1995 Hong Kong news story stated that the LTTE tacitly had admitted to having killed former Indian Prime Minister Rajiv Gandhi and that the group has been accused of killing Sri Lankan President Ranasinghe Premadasa. *Id*. at 19–20. A State Department report in 1996 reported: "The LTTE has refrained from targeting Western tourists, but a front group—the Ellalan Force—continued to send threatening letters to Western missions and the press." *Id*. at 20. Finally, designation is significant because the LTTE "exploits large Tamil communities in North America, Europe, and Asia to obtain funds and supplies for its fighters in Sri Lanka." *Id*.

In further support of designating the PMOI as a foreign terrorist organization, a July 1993 CIA intelligence research paper reported that the PMOI's primary goal is to overthrow the Iranian government and that the organization's history is "marked by violence and terrorism" and is "studded with anti-Western activity." *Id*. For example, the PMOI assassinated at least six American citizens, supported the takeover of the U.S. embassy, and opposed the release of American hostages during its part to overthrow the former Shah of Iran. *Id*. The PMOI has had a history of bombing U.S.-associated targets, including the Iran-American Society and the offices of Pepsi Cola, General Motors, Pan-American Airlines, and Shell Oil Company. *Id*. Designation is also crucial because the PMOI, whose main ally and supporter at the time was Baghdad, has offices and members throughout North America, from which the PMOI collects donations to fund the PMOI's activities and to show the organization support. *Id*. at 20–21.

153. The plaintiffs challenged their respective designations, arguing that the Secretary's factfinding procedures deprived them of due process, particularly because the Fifth Amendment's Due Process Clause bars the government from condemning organizations without giving them notice and the opportunity to be heard. *Id*. at 22 (referring to *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), which held that designating certain organizations as Communist violated due process).

took center stage in *National Council of Resistance of Iran v. Department of State* (*National Council*).[154] Applying the three factor balancing test from *Mathews v. Eldridge*,[155] the D.C. Circuit found that a foreign organization with property in the United States is entitled, at a minimum, to notice and to some type of hearing *prior* to designation by the Secretary.[156] The court viewed the procedural due process protections

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The court rejected this claim because the entities at issue in *Joint Anti-Fascist Refugee* had been domestic, whereas the LTTE and the PMOI were foreign entities with no presence in the United States. *Id*. They were therefore not entitled to any constitutional due process rights. *Id*. (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.") (alterations in original)). The court concluded that the plaintiffs enjoy only statutory rights under the AEDPA, which allowed both organizations to contest their designations on grounds set forth in § 1189(b)(3). *Id*. The court did not answer the question of whether organizations with substantial connections in the United States are afforded any due process rights under the AEDPA.

154. 251 F.3d 192 (D.C. Cir. 2001). The petitioners, the PMOI and its alias, the National Council of Resistance of Iran (NCRI), were redesignated and freshly designated respectively as foreign terrorist organizations by the Secretary of State on October 8, 1999. *See* Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112 (Oct. 8, 1999). The redesignation of the PMOI extended its 1997 designation for an additional two years after the Secretary found that the organization had continued to engage in terrorist activities, including the murder of two Iranian officials and "three separate bombings of Iranian government facilities in Iran." Ellis, *supra* note 49, at 692 n.116. The Secretary designated the NCRI for the first time as an "alter ego or alias" of the PMOI. *Nat'l Council*, 251 F.3d at 197. Both petitioners argued that designating them as foreign terrorist organizations without notice or hearing interfered with their rights to obtain and possess property in the United States and the rights of their members to enter the United States. *Id*. at 200. The Secretary thus "deprived them of 'liberty, or property, without due process of law,' in violation of the Fifth Amendment of the United States Constitution." *Id*. The government's defense was twofold, asserting that (1) the petitioners had no protected constitutional rights because they had not established physical presence in the United States, and (2) even if they did have such rights, none had been violated. *Id*.

155. 424 U.S. 319, 335 (1976). Generally, before the government constitutionally deprives a person of the protected liberty or property interest, the government must afford the affected person notice and a hearing. *Id*. at 334. The professed "*Mathews* balancing test" contains three distinct factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335. The test is applied to determine if an individual is entitled to a hearing prior to a governmental deprivation of a protected interest (the "when" of due process). *See Nat'l Council*, 251 F.3d at 205–06, 208. The test is also applied to identify the precise procedures to be employed at the hearing (the "what" of due process). *See id*. The purpose of the constitutional right to be heard "is not only to ensure abstract fair play to the individual," but more particularly, "to minimize substantively unfair or mistaken deprivations." Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972).

156. *Nat'l Council*, 251 F.3d at 208. Unlike the decision in *People's Mojahedin Organization of Iran*, the court in *National Council* determined that the PMOI had

provided by the government under the AEDPA as constitutionally insufficient.[157]

Although the court in *National Council* deemed the AEDPA's designation procedure invalid on due process grounds, the court neither vacated the designations at issue nor explicitly declared the AEDPA facially unconstitutional.[158] One year later, a federal district court in *United States v. Rahmani*[159] called the *National Council* court's attempt to save the statute from facial invalidity "impermissible judicial legislation."[160] In *Rahmani*, the defendants moved to dismiss an indictment charging them with violating § 2339B.[161] The indictment described solicitations, wire transfers, and monetary donations by the defendants for the benefit of the Mujahedin-e Khalq Organization (MEK) from October 8, 1997

entered and established substantial connections with the United States. *Id*. at 203. Its alias, the NCRI, also developed substantial connections with the United States because of its "overt presence within the National Press Building in Washington, D.C." and an interest in a two hundred dollar bank account. *Id*. at 201, 203; *see also* Ellis, *supra* note 49, at 693 n.122 (arguing that the only difference between a finding that PMOI lacked any constitutional presence in *People's Mojahedin* and a finding of constitutional presence in *National Council* was the two hundred dollar bank account possessed by its alias, the NCRI). Because presence was established, both organizations were entitled to constitutional protections. *Nat'l Council*, 251 F.3d at 203.

157. *Nat'l Council*, 251 F.3d at 208–09.

158. *Id*. at 209. Due to foreign policy and national security concerns, the court rather instructed that putative terrorist organizations receive the option of presenting and filing evidence in support of their allegations that they were not terrorist organizations. *Id*. In addition, the court required that these organizations be afforded a meaningful opportunity to be heard by the Secretary upon the Secretary's relevant findings. *Id*.

159. 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

160. *Id*. at 1056–57 (citing *Tillema v. Long*, 253 F.3d 494, 500–01 (9th Cir. 2001), for the proposition that "where a statute permits only one permissible interpretation, it is not the province of the federal courts to rewrite the statute to accommodate a different interpretation" and *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984), for the proposition that "courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement")). The *Rahmani* court did not believe that the court's attempt in *National Council* to constitutionally construct § 1189 would "save the statute from a claim of facial invalidity." *Id*. at 1057. In addition, the court in *Rahmani* noted that the government, by citing to precedent where the Supreme Court upheld governmental actions even under an unconstitutional scheme, seemed to be arguing that the result in *National Council* is legally supportable (especially because "the D.C. Circuit found the MEK's designation unconstitutional but, nevertheless, upheld such designation"). *Id*. at 1058. The court noted that the cases cited by the government were all civil cases, whereas the case at issue involved a criminal defendant charged with crimes amounting to at least fifteen years imprisonment. *Id*. The court stood firmly in its stance, choosing not to "abdicate its duty to ensure that the prosecution of such charges comports with due process." *Id*.

161. *Rahmani*, 209 F. Supp. 2d at 1047.

through February 27, 2001.[162] The defendants' motion subsequently required the *Rahmani* court to resolve what it tabbed a "somewhat provocative question":

> If the procedure whereby an organization is designated by the Secretary of State as "terrorist" violates the Due Process Clause of the United States Constitution, may such designation nevertheless be utilized as a predicate in a criminal prosecution against individuals for providing material support to that designated terrorist organization?[163]

The answer echoed a resounding "no." The court established that § 1189 does not provide a foreign organization with notice of impending designation, the occasion to supplement the record with information to contradict the designation, or an opportunity to object to the administrative record, which the Secretary creates and the judiciary solely considers on appeal.[164] Consequently, the court concluded that any designation under the AEDPA is "a nullity" and thus could not be relied upon in a § 2339B prosecution.[165]

The court in *Rahmani* drove a lethal stake into the AEDPA. To the glee of political activists, the legislation, which not so long ago stood tall as an effective weapon in stunting the growth of unwelcome and

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162. The defendants were charged with conspiracy and fifty-eight substantive counts of providing material support to the MEK, an entity designated as a foreign terrorist organization under the AEDPA on October 8, 1997. *Id*.; Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997). The MEK is also known as the MKO and as the People's Mujahedin Organization of Iran (PMOI). *Id*. The indictment charged defendants Roya Rahmani, Mustafa Ahmady, Hossein Afshari, Alireza Mohammadmoradi, Mohammad Omidvar, Navid Taj, and Hassan Rezaie. *Rahmani*, 209 F. Supp. 2d at 1047. The defendants were arrested at Los Angeles International Airport (LAX) in February 2001 on charges of raising more than one million dollars for the MEK. *Two Iran-Related Terrorism Trials in U.S.*, 5 IRAN REPORT (July 1, 2002), http://www.rferl.org/iran-report/2002/07/24-010702.html. The defendants allegedly solicited funds from passengers at LAX for a "charity called the Committee for Human Rights in Iran while displaying photos of alleged Iranian atrocities." *Id*. The money received was then "transferred to bank accounts in Turkey" and allegedly used to buy weapons. *Id*.

163. *Rahmani*, 209 F. Supp. 2d at 1047.

164. *Id*. at 1055.

165. *Id*. at 1059. The court derived this conclusion from two specific provisions of 8 U.S.C. § 1189. The first, § 1189(a)(3)(A), provides: "In making a designation under this subsection, the Secretary shall create an administrative record." The second, § 1189(b)(2), provides: "Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for *ex parte* and *in camera* review, classified information used in making the designation." *Id*. at 1055. The court, in "[c]onsidering these two subsections together," concluded: "Section 1189 provides for judicial review based *solely* on an administrative record created by the Secretary, without notice to or participation by the organization to be designated." *Id*. In addition, the court noted that "apart from the administrative record, the only other matter that may be considered for judicial review is classified information provided *by the government* in support of the designation." *Id*. Rather than constructing appropriate procedures into the AEDPA, the court invalidated the Act altogether. *See id*. at 1058–59.

historically violent organizations, was immediately reduced to facially unconstitutional fodder. Yet, we must ask at what cost? Unquestionably, U.S. national security, the very basis for the AEDPA,[166] suffered a severe setback. And while the court in *Humanitarian Law Project* sidestepped well established precedent, such as *NAACP v. Claiborne Hardware Co.*[167] and *Buckley v. Valeo*,[168] for the sake of national security, the court in *Rahmani* failed to see the value of doing the same.[169]

Since 9/11, the value of homeland security deserves to overshadow the rights of foreign organizations and their sponsors. Even Americans themselves have consented to surrendering some of their freedoms for stronger U.S. safety laws.[170] By utilizing three arguments outlined below, courts may provide the necessary framework required to revalidate the AEDPA: (1) Referring to compelling national security concerns to justify abridging procedural due process to terrorist organizations; (2)

166. In order for an entity to be designated as a foreign terrorist organization, the Secretary must find that the organization's terrorist activity threatens the security of U.S. nationals or the national security of the United States. 8 U.S.C. § 1189(a)(1)(C) (Supp. I 2001). Furthermore, a designation may be revoked depending on whether changed circumstances or the national security of the United States warrants such action. *See supra* note 65 and accompanying text.

167. *See supra* note 89 and accompanying text.

168. *See supra* note 101 and accompanying text. Prior to *Humanitarian Law Project*, opponents predicted that the AEDPA fundraising ban would not survive the *Buckley* scrutiny standard, even though *Buckley* upheld limitations on campaign contributions. *See* Beall, *supra* note 45, at 700.

169. While the court in *Rahmani* ignored the government's national security argument when determining the constitutionality of § 1189, it relied on the government's judgment when refusing to settle the debate between certain members of Congress and the Secretary regarding whether the designation of the MEK was legitimately and factually supported. *See Rahmani*, 209 F. Supp. 2d at 1051. As to the uncertainty of the designation, the court stated that "Congress, and not the courts, has the fact-finding resources to conclude how best to prevent the United States from being used as a base for terrorist funding." *Id*. at 1052 (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000)). Moreover, "[w]hether the MEK is a foreign terrorist organization presents a political question. 'Political questions' are controversies which revolve around policy choices and value determinations constitutionality committed to the Congress or the Executive Branch, and are not subject to judicial review." *Id*. at 1051. The court admitted that if it weighed in on the debate, it would create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. at 1052. However, this concern did not stop the court from determining the constitutionality of § 1189, even when it had no statutory authorization to do so. *See infra* Part IV.C.

170. Whitehead & Aden, *supra* note 22, at 1084 & n.8 ("[S]eventy-eight percent of those polled stated they would accept new security laws, even if it meant fewer privacy protections . . . .") (citing *NBC News/Wall Street Journal: 72% Say U.S. Is Moving in the Right Direction*, THE HOTLINE, Sept. 17, 2001, WL 9/17/2001 APN-HO 37).

fulfilling four independent factors to defend security measures as appropriate crisis legislation despite curtailing civil liberties; and (3) recognizing that the decision that invalidated the AEDPA should be revoked due to improper judicial review.

A. National Security: Abridging Procedural Due Process to Terrorist Organizations

One effective policy-driven argument proffered by the government, although irrelevant to the claim that § 1189 is facially unconstitutional, is that invalidating the AEDPA would result in serious negative consequences on U.S. counterterrorism efforts.[171] National security is a matter of "concern and responsibility," the court responded, but such an argument "should not serve as an excuse for obliterating the Constitution" when "weighed against a fundamental constitutional right which defines our very existence."[172] The court suggested that the Secretary should make every effort "to weigh the circumstances where national security concerns can rationally coexist within a constitutional atmosphere" and remarked that the Secretary made no such attempt in the case at issue.[173] The court thus noted that "time honored constitutional protections" should not be dispensed with by way of the Secretary's failing to show how a designated entity is a national security threat.[174]

The significance of national security should not be so easily dismissed. Among all else, "'no governmental interest is more compelling than the security of the nation.'"[175] Furthermore, the preservation of this country's safety constitutes an "extraordinary situation" that justifies postponing both notice and the opportunity to be heard.[176] For example, the Supreme

171. *Rahmani*, 209 F. Supp. 2d at 1057 (citing to the fourth footnote of the government's supplemental brief).

172. *Id*.

173. *See id*.

174. *Id*. at 1057–58 (noting that "[t]he moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections").

175. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207 (D.C. Cir. 2001) (quoting Haig v. Agee, 453 U.S. 280, 307 (1981) (concluding that the United States had a compelling governmental interest to protect foreign policy and revoke a former CIA employee's passport for denouncing the CIA and exposing confidential information to foreign countries)).

176. Ellis, *supra* note 49, at 675–76 (citing Fuentes v. Shevin, 407 U.S. 67, 90 (1972)). In *Fuentes*, the appellants challenged the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin, neither of which provided notice or hearing to the possessor of property prior to seizure. *Fuentes*, 407 U.S. at 69–70. The Court concluded that these statutes serve no important governmental or general public interest compared to those statutes substantiated in state actions furthering war efforts or protecting the

Court has allowed the outright seizure of property, without notice to the possessor, only when "truly unusual" circumstances warrant the seizure, and even then several safeguards must be met: (1) The seizure must be "directly necessary to secure an important governmental or general public interest"; (2) there must be a "special need for very prompt action"; and (3) "the person initiating the seizure [must be] a government official responsible for determining, under the standards of a narrowly drawn statute, that [action is] necessary and justified in the particular instance."[177] The Court has curtailed procedural due process to meet the needs of a war effort,[178] to protect against certain economic disasters,[179] and to protect the public from misbranded drugs[180] and contaminated food.[181] Protecting against terrorism by designating predefined foreign groups with financial assets in the United States as terrorist organizations similarly represents an unusual circumstance worthy of postponing due process. Under the elements set forth in *Fuentes*, the AEDPA results in: (1) the securing of an important governmental interest by incriminating donors and "seizing" resources contributed to foreign organizations in order to deter acts of terrorism (a general public interest), (2) the ability to act promptly especially because such action may be the difference between preserving life and mass casualties, and (3) a determination made by a government official (the Secretary) in accordance with the terms of a narrowly tailored statute (the AEDPA).[182]

Thus, without mentioning the procedural elements underlying the Due Process Clause,[183] national security interests alone justify the abridgement

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public health. *Id*. at 92–93.

177. *Fuentes*, 407 U.S. at 90–91.

178. *See* Stoehr v. Wallace, 255 U.S. 239, 245 (1921) (holding that enemy property may be seized during wartime without notice so long as an adequate provision for return in the case of a mistake was provided); Cent. Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921) (stating that Congress has the power to seize property of the enemy during times of war without notice).

179. *See* Fahey v. Mallonee, 332 U.S. 245, 253 (1947) (stating that the "delicate nature" of certain economic situations have created an "almost invariable custom" to allow the exercise of authority in a "summary manner" and without a hearing).

180. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950).

181. *See* N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 315 (1908).

182. *See* Ellis, *supra* note 49, at 707–09 (applying the elements to the specific facts of *National Council*).

183. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also supra* note 147. Courts, in "[a]pplying this so-called *Mathews* balancing test," hold that due process requires "that a deprivation of life, liberty, or property 'be *preceded* by notice and opportunity for hearing appropriate to the nature of the case.'" Ellis, *supra* note 49, at 689 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). However, in

of "time honored constitutional protections."[184] Moreover, requiring the Secretary to show at the outset that a security threat exists within a designated group will hinder, not help, the long and difficult fight against terror.[185] If an organization receives notice, especially in a predesignation hearing as advocated by the court in *National Council*,[186] the organization may immediately circumvent the harsh consequences of designation by, for example, "transfer[ring] all of its financial assets outside the jurisdiction of the United States."[187] This undoubtedly frustrates both the "intent of Congress and the foreign policy goals of the President"[188] and leaves the AEDPA with no deterrent effect, no consequence, and no meaning.

The court in *National Council* simply refused to understand this concern, despite recognizing three concepts that seem to support the contrary. First, the "changeable and explosive nature of contemporary international relations" should be sufficient to warrant dispensing with an otherwise available predeprivation hearing.[189] Second, certain classified information not considered dangerous, or even important, by judges may nonetheless "make all too much sense to a foreign counterintelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources

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"extraordinary situations where some valid governmental interest is at stake," postponement of a hearing until after the deprivation of the interest at issue is justified. Ellis, *supra* note 49, at 689 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). Therefore, even when applying the *Mathews* factors of procedural due process, fighting terrorism may be argued to invoke the "extraordinary situation" exception that justifies postponing due process. *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001).

184. United States v. Rahmani, 209 F. Supp. 2d 1045, 1057 (C.D. Cal. 2002).

185. Since 9/11, the United States has consistently warned that the war against terrorism will be long, difficult, and dangerous. *See* Nick Cook, *"A Long, Difficult and Dangerous Campaign,"* JANE'S DEFENCE WEEKLY (Oct. 2, 2001), http://www.janes.com/defence/airforces/news/jdw/jdw011002_1_n.shtml (citing to comments made by U.S. Secretary of Defense Donald Rumsfeld). The Bush Administration has consistently warned Americans to brace for a long and bloody campaign. *See Afghanistan: One Year Later*, CNN.COM (Oct. 10, 2002), *at* http://www.CNN.com/2002/ALLPOLITICS/10/10/timep.afghanistan.year.later.tm/index.html.

186. *See Nat'l Council*, 251 F.3d at 207–08.

187. Ellis, *supra* note 49, at 676.

188. *Id*.

189. *Nat'l Council*, 251 F.3d at 207 (quoting Palestine Info. Office v. Shultz, 853 F.2d 932, 943 (D.C. Cir. 1988)). In *Shultz*, the State Department ordered the closing of the Palestine Information Office (PIO) in Washington, D.C. after it found that the PIO operated as a foreign mission for the Palestine Liberation Organization (PLO). *Shultz*, 853 F.2d at 934. The national interest of curbing international terrorism mandated this action pursuant to the Foreign Missions Amendments Act of 1983. *See id*.; *see also* Foreign Missions Amendments Act of 1983, 22 U.S.C. § 4301 (2000). The PIO's due process claim failed on appeal because foreign policy concerns and explosive international relations defer to the need of the executive branch to act swiftly and authoritatively. *Shultz*, 853 F.2d at 942–43.

and methods."[190] In other words, requiring the Secretary to convey this information to the very organizations being denounced, simply in order to preserve due process, would enervate U.S. intelligence. Third, alerting organizations of impending designation "might work harm to this country's foreign policy goals in ways that the court would not immediately perceive."[191]

In recognizing these principles, the court opened the door for an exception, consistent with the full history of due process jurisprudence, in cases where earlier notification of designation would impinge upon U.S. national security and other foreign policy goals.[192] In these cases, the Secretary may demonstrate the need to withhold all notice and all opportunity to present evidence until a designation formally takes place.[193] However, this exception is not an adequate solution because the court in *National Council* admitted that, in most circumstances, as soon as the Secretary reaches a tentative determination of the impending designation, the Secretary must provide notice of unclassified material, including the action sought.[194] This in turn provides enough forewarning so that a designated entity may evade as much statutory punishment as possible.[195]

Decided before the 9/11 attacks,[196] *National Council*'s valiant yet shortsighted effort to carve out an exception fails to address the compelling national security concerns that encompass the current state of international affairs.[197] The same cannot be said for *Rahmani*, a

190. *Nat'l Council*, 251 F.3d at 208 (quoting United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989)).

191. *Id*. The court provides an example of one such notice that the Secretary may give to putative terrorist organizations: "We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization." *Id*.

192. *Id*.

193. *Id*.

194. *See id*. at 209. The Secretary may withhold classified information to be presented in camera and ex parte to the court under the AEDPA, but still must disclose the action sought. *Id*. at 208.

195. *See supra* note 187 and accompanying text.

196. *National Council* was argued on November 15, 2000 and decided on June 8, 2001. 251 F.3d at 192.

197. Two days after the 9/11 attacks, House Minority Leader Richard A. Gephardt (D-Mo.) stated: "We're in a new world where we have to rebalance freedom and security." Eric Pianin & Thomas B. Edsall, *Terrorism Bills Revive Civil Liberties Debate*, WASH. POST, Sept. 14, 2001, at A16. The events of 9/11 have also led to the advent of the "Homeland Security Advisory System," a color-coded U.S. threat advisory

decision that devoted relatively little thought to the government's security concerns, despite being decided nine months *after* the events of 9/11.[198] The *Rahmani* court cited *Kennedy v. Mendoza-Martinez*,[199] a 1963 case involving the constitutionality of divesting draft evaders of their citizenship,[200] and quoted *Ex parte Milligan*, a similar case decided in 1866,[201] as its *only* support for choosing to safeguard due process even in the gravest of emergencies.[202] With respect to a changed world, these sources are painfully inadequate.

B. Crisis Legislation: The Age-Old Conflict Between Civil Liberties and National Security

The conflict between civil liberties and national security is as old as the United States itself.[203] It is certainly not novel to offer safety as a

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system unveiled by Homeland Security Chief Tom Ridge that creates "'a national framework and a common vocabulary' so that government and the private sector can deal effectively and efficiently with threats of terrorist attack." *Terror Threat Warning System Unveiled*, CNN.COM (Mar. 12, 2002) (quoting Homeland Security Chief Tom Ridge), *at* http://www.CNN.com/2002/US/03/12/rec.threat.alerts/index.html. The warning system is comprised of five levels starting with green, the lowest alert level, then blue, yellow, orange, and red, the highest alert level. *Id*. Each code and color triggers certain actions by federal agencies and state and local governments. *Id*.; *see also Ridge Tries to Calm America's Nerves*, CNN.COM (Feb. 14, 2003), *at* http://www.CNN.com/2003/ALLPOLITICS/02/14/homeland.security/index.html (describing the heightened fear of Americans as a result of the system's elevated terror alert, causing people to seal their homes with plastic sheeting and duct tape in the case of a chemical attack).

198. United States v. Rahmani, 209 F. Supp. 2d 1045, 1045 (C.D. Cal. 2002) (decided June 21, 2002).

199. 372 U.S. 144 (1963).

200. *Id*. at 164–65 (1963) (determining that draft evaders should be punished but not without due process of the law).

201. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 20–21 (1866) (holding that the Constitution applies equally in times of war as well as times of peace). For further discussion of *Ex parte Milligan*, a dispute involving the conviction by a military commission of a civilian who had not joined the Confederacy, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1053 (2003).

202. *Rahmani*, 209 F. Supp. 2d at 1057 n.15.

203. PBS, *Civil Liberties and National Security Timeline*, *at* http://www.pbs.org/now/politics/timeline.html (Feb. 7, 2003). In 53 A.D., Roman philosopher Marcus Tullius Cicero stated: "*[I]nter arma enim silent leges* (amidst the clash of arms, laws fall silent)." Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 427 n.66 (2000) (discussing crimes of aggression in an international context). Similarly, United States Supreme Court Chief Justice William H. Rehnquist has recognized that times of questionable international safety impact Americans' domestic freedoms. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998). Chief Justice Rehnquist commented: "It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime." *Id*. at 224–25. Senate Minority Leader Trent Lott (R-Miss.) has echoed this sentiment, admitting that "when you're at war, civil liberties are

reason to diminish certain constitutional rights when the situation warrants. For example, threatened by Confederate forces during the Civil War, President Abraham Lincoln suspended the writ of habeas corpus, reduced freedom of the press, and tried civilians in military tribunals.[204] Furthermore, during World War I, Congress outlawed mailings advocating treason, insurrection, and forcible resistance to U.S. law in order to suppress fear of subversion by propagandists.[205] A

treated differently." Pianin & Edsall, *supra* note 197. In contrast, Rep. John Conyers (D-Mich.), proclaimed: "Safety should not come at the sacrifice of civil liberties." Toni Locy, *Justice Dept. Prohibits Racial Profiling: But Agents Can Use It to Identify Terrorists*, USA TODAY, June 18, 2003, at 3A (reacting to the Bush Administration's policy of banning federal law enforcement officers from racial profiling in routine police work yet permitting the use of race and ethnicity in identifying suspected terrorists).

204. Special Event, *The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 351 (1998). Lincoln is often considered a "champion of justice and moral righteousness," but his suppression of civil liberties during the Civil War "casts him in a somewhat unfavorable light." Captain Robert G. Bracknell, *All the Laws But One: Civil Liberties in Wartime*, 47 NAVAL L. REV. 208, 209–10 (2000) (book review) (explaining that the writ of habeas corpus, or "The Great Writ," requires the executive to legitimately justify the detainment of a prisoner to a court of law and that the writ is considered a "sacred right of the people against sovereign authority"). Writing for the Supreme Court in the case of John Merryman, a southern sympathizer arrested for "destroying railroad bridges after an antiwar riot in Baltimore," Chief Justice Roger B. Taney ruled that President Lincoln's suspension of habeas corpus was unconstitutional because (1) only Congress could suspend habeas corpus, and (2) the President as a result exceeded his war powers. Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1229–30 (2002) (citing *Ex parte* Merryman, 17 F. Cas. 144 (D. Md. 1861)). Although Justice Taney rejected the proposition that at times of war the President has the authority to do whatever is necessary to protect the country, he did acknowledge that an act of Congress could authorize the suspension. *Id*. at 1230. On March 3, 1863, after President Lincoln requested that Congress sanction his actions, Congress passed the Habeas Corpus Act, authorizing the President "to suspend habeas corpus whenever he determined public safety required suspension." *Id*. at 1231–32. For more on President Lincoln's role as a civil libertarian, see generally Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353 (1993) (reviewing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991)).

205. *See* Murray L. Schwartz & James C.N. Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621, 624 (1959). After the United States entered World War I in April of 1917, anti-German sentiment rose to great heights. Consequently, Americans considered support of German culture and any criticism of the war as treason. Congress passed a series of laws, including the Espionage Act of 1917, which "made it a crime to interfere with the military or recruiting services or to mail materials 'advocating treason, insurrection, or forcible resistance to any law of the United States.'" Joseph A. Ranney, *Aliens and "Real Americans": Law and Ethnic Assimilation in Wisconsin, 1846–1920*, WIS. LAW., Dec. 1994, at 30–31. The act was expanded in 1918 "to prohibit criticism of the flag, the armed forces, the Constitution and the American form of government." *Id*. at 31. In

countless number of cases exist where, in times of stress and conflict, many civil liberties have been compromised in the name of national security; yet not all of these cases are legitimately supported.[206] In an effort to justify the AEDPA as appropriate crisis legislation, thus distinguishing it from previous blatant attacks on civil liberties, this Comment sets forth a four-prong security legislation test. If each prong of this test is met, U.S. security legislation should pass constitutional justification even if individual rights are sacrificed in the process.

The first prong of the test requires the presence of an "undeclared" war or commencement of armed aggression,[207] leading to extraneous foreign and international hostilities implicating a substantial U.S. interest. International terrorism, such as the 1993 World Trade Center and 1995 Oklahoma City bombings,[208] is a prime illustration, as is the

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addition, the Selective Draft Act of 1917 criminalized the act of "discourag[ing] men from registering for the draft or serving in the armed forces." *Id*. at 59 n.18. The Trading with the Enemy Act of 1917 required "publishers of foreign language articles about the war" to "file English translations . . . with local postmasters before publication." *Id*. Due to the heavy expense, many foreign language newspapers were forced to shut down. *Id*. The Tariff Act of 1930 authorized customs officials to seize any material advocating treason or insurrection, thereby denying the importation of such material into the country. *See* Tariff Act of 1930, ch. 497, 46 Stat. 688 (codified at 19 U.S.C. § 1305 (2000)).

206. For an introductory discussion on the relationship between security and liberty in the United States, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955–58 (2002) (arguing that, when balancing liberty and security, it is important to preserve equal dignity and basic human rights of all persons and not to succumb to the temptation of purchasing security at the expense of noncitizens' basic rights). Cole gives three reasons to be cautious about too readily sacrificing liberty in the name of security, especially in the wake of 9/11. First, as a historical matter, the United States has often overreacted in times of crisis. *Id*. at 955. Second, in times of crisis, there is a chance that the United States will overestimate its security needs. This sentiment may lead to feelings of physical stress and anxiety, which are much more "immediate and palpable" than the abstract concept of "liberty," which can easily be taken for granted. *Id*. at 955–56. Third, liberty and security are not "mutually exclusive values in a zero-sum game." *Id*. at 956. In other words, decreasing liberty does not necessarily increase security. *Id*. Often, decreasing liberty inspires more violence. *Id*. While these reasons are worthy of mention, they are given to criticize the unequal treatment of non-U.S. citizens in relation to U.S. citizens, and not to criticize the antifundraising provisions of the AEDPA. *See id*. at 957.

207. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1543–48 (2002). This definition is intended to be broad, as was the definition of "declaring war" in the eighteenth century, and is meant to include armed attacks with the intent to settle differences between nations by force even if no formal proclamations of war are present. *See id*. Undeclared wars and low level hostilities were a great part of eighteenth century reality, and formal declarations were not necessary or even common prior to initiating these hostilities. *Id*. at 1558. In addition, although most scholars agree that the term "'armed attack' entails a serious attack, which is not one-time, against the territory of a State or its citizens," the definition as used here does incorporate serious one-time attacks. *See* Gross, *supra* note 44, at 93.

208. *See supra* notes 41–42. The February 26, 1993 bombing of New York City's World Trade Center, which along with the 1995 Oklahoma City bombing provoked the

post 9/11 undeclared "War on Terrorism."[209]

The second prong of the test requires that only those who possess certain qualities, or belong to a certain class as set forth by specific statutory rules, will have their constitutional rights compromised. In other words, before any group has its rights abridged, it must satisfy a set of meticulously predefined provisions and qualifications set forth in a duly elected statute. For example, the AEDPA provides detailed guidelines for designating a group as a foreign terrorist organization.[210]

The third prong of the test requires that the penalties of designation as a specific group under the statute must have reasonable temporal limits. For instance, the penalties of designation under the AEDPA last two years.[211]

The fourth and final prong of the test requires that an appropriate and specified appellate process exist by which the affected class of persons

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passage of the AEDPA, was remembered at the time as "the gravest attack of international terrorism to occur directly on American soil." Anti-Defamation League, *The World Trade Center Bombing*, *at* http://www.adl.org/learn/jttf/wtcb_jttf.asp (last visited Apr. 6, 2003). Moreover, international hostilities between the United States and Iraq can be linked to both bombings. A persuasive case has been made that World Trade Center bombing mastermind Ramzi Yousef was an Iraqi intelligence agent. Jack Kelly, Jewish World Review, *Saddam's American Friends* (Apr. 8, 2002*), at* http://www.jewishworldreview.com/0402/jkelly040802.asp. When Timothy McVeigh, executed for his role in the Oklahoma City bombing, was arrested, he had several Iraqi telephone numbers on his person. *Id*. Witnesses claimed to have seen McVeigh with a "Middle Eastern-looking person." *Id*. Furthermore:

> An Iraqi connection could explain [multiple facets of the Oklahoma City bombing, including] the frequent trips to the Philippines of McVeigh confederate Terry Nichols, where his path apparently crossed with that of Ramzi Yousef; how McVeigh and Nichols, who had no visible means of support, acquired the money to carry out the bombing; and how they acquired the expertise to build their bomb, which was very like the explosive used at the World Trade Center the year before.

Id.

209. *See* Whitehead & Aden, *supra* note 22, at 1085. Moreover:

> The terrorist enemy that threatens civilization today is unlike any we have ever known. It slaughters thousands of innocents—a crime of war and a crime against humanity. It seeks weapons of mass destruction and threatens their use against America. No one should doubt the intent, nor the depth, of its consuming, destructive hatred.

Hearings, *supra* note 145, at 315. Similarly, the Patriot Act defines domestic terrorism as acts dangerous to human life that occur primarily in U.S. jurisdiction and are intended to intimidate or coerce a civilian population, or intended to influence the government, by mass destruction, assassination, or kidnapping. *See* Patriot Act of 2001, Pub. L. 107-56, § 802, 115 Stat. 376.

210. *See* 8 U.S.C. § 1189(a)(1) (Supp. I 2001).

211. *See* 8 U.S.C. § 1189(a)(4)(A) (2000).

may, in a U.S. tribunal, contest the alleged deprivation of their constitutional rights. The AEDPA sets forth a timeframe for judicial review as well as multiple grounds for reversal.[212]

Critics may argue that this test is far too stringent and that only the most complete and detailed measures will satisfy it. Others will claim that national security legislation is often enacted immediately following a catastrophic event, making these factors almost impossible to satisfy on such short notice. Both of these arguments are fair and deserve consideration. It undeniably takes a comprehensive, carefully planned, and narrowly tailored government action to pass this test.[213] Abruptly written and hastily enacted laws will most likely fail. But more importantly, properly drafted laws can ultimately pass this test, and the most meritorious will survive the inevitable process of judicial review. Such legislation will allow the government to strengthen national security during the most ominous times of stress and crisis. The AEDPA passes this test.

In order to better assess the usefulness of the "security legislation test" and to distinguish the AEDPA from previous attacks on individual freedoms, the following subsections will apply the four factors set out above to the Alien and Sedition Acts of 1798[214] and the propriety of Japanese internment camps during World War II.

1. Distinguishing the Alien and Sedition Acts

Within a four-week period in the summer of 1798, President John Adams incurred tremendous condemnation due to a set of four laws, known as the Alien and Sedition Acts, enacted by the Federalist Party-controlled Congress under his guard.[215] Provoked by fear that the French

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212. *See supra* Part III.A.

213. Passing this test may equal satisfying the strict scrutiny standard, the most rigorous and exacting standard of constitutional review. *See supra* note 108. In order to overcome this standard, a statute must be narrowly tailored to directly advance a compelling governmental interest. *Id*. However, unlike the security legislation test proposed herein, strict scrutiny also requires that the statute at issue be the least restrictive effective means of advancing a compelling governmental interest. *See id*. It is also important to note that under the test, race-based classifications may pass initially, but will likely fail once opponents challenge them in court or in another arena in which they are permitted to invoke judicial review.

214. The immigration provisions of the Alien and Sedition Acts have been compared with those in the Patriot Act. *See* Jennifer Van Bergen, *Repeal the USA Patriot Act Part II: The Wheel of History* (Apr. 2, 2002), *at* http://www.truthout.org/docs02/04.03D.JVB.Patriot.htm.

215. *See* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 64–65 (2002); *see also* Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL'Y 51, 70–73 (2002). Congress enacted four

Revolution would spread into the United States and by certain political tactics by the British Parliament,[216] Congress intended to bolster national defense against both external threats and internal subversion.[217] The laws also sought to gain an "upper hand" on Thomas Jefferson's Democratic-Republican Party,[218] which sympathized with and "proudly supported the French Revolution as progeny of the American Revolution."[219]

Comprised of two parts, the Sedition Act[220] created the most daunting restraint on civil liberties, prohibiting spoken or written criticism of Congress, the President, and the U.S. government in general.[221] The first

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statutes in this "crisis-laden" atmosphere—the Alien Act, Alien Enemies Act, Naturalization Act, and Sedition Act. These collectively became known as the Alien and Sedition Acts. Fehlings, *supra*, at 65; *see also* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 703–04 (1994) (noting that hostilities between the Americans and French "accelerated after negotiations between the countries broke down altogether in March 1798").

216. Edmund Burke, an eighteenth century Irish political philosopher and liberal member of the British Parliament, warned in 1790 that the French Revolution "by its nature would spread violently to other countries." Fehlings, *supra* note 215, at 66. The British Parliament responded, passing the Alien Act of 1793 and the Seditious Meetings and Assemblies Act of 1795 to "prevent spread of the French Revolution to Britain." *Id*.

217. *Id*. at 64–65. Though "France had helped the United States win its independence during the Revolutionary War, the French Revolution had transformed the European nation." *Id*. at 64. France sought a revolutionary republic, all while beheading King Louis XVI in 1793 and executing 17,000 people in eleven months. *Id*. After this period, named "'The Terror,' the French Directory, a ruling council of five directors, assumed power in 1795." *Id*. After "Presidents George Washington and John Adams refused to allow the United States to be dragged into France's wars against Great Britain and other European powers, the French Directory launched a retaliatory war of commercial plunder against America," during which "[t]he French seized over 2,000 American merchant ships." *Id*. This and other developments, including news that "General Napoleon Bonaparte had assembled an invasion force," prompted Congress to take measures for stronger internal security. *Id*. at 64–65.

218. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002).

219. Fehlings, *supra* note 215, at 65. Jefferson wrote that "he preferred to see 'half the world desolated' than see the French Revolution falter." *Id*. (footnote omitted).

220. The House of Representatives narrowly passed the Sedition Act by a 44 to 41 vote. Halstuk, *supra* note 215, at 70 (citing Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596–97 (expired 1800)).

221. § 2, 1 Stat. at 596–97. The Sedition Act provided the following:

> *And be it further enacted*, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against

part of the Act forbade planned resistance to public measures.[222] The second part proscribed criticism of the government that was "malicious, untrue, alienated the people's affections from their government, or brought the government into the contempt of the people."[223] Within two years of Congress's passing the law, "[twenty-five] persons were arrested, up to [eighteen] were indicted and [ten] were tried and convicted, most of them Republican printers and journalists who supported Jefferson."[224] Although virtually all of today's commentators agree that the Sedition Act violated fundamental principles of representative democracy, many scholars in the late eighteenth century defended seditious libel laws and called government dissenters undemocratic.[225]

The other three laws, most relevant in the context of protecting against foreign attacks, were expressly directed at aliens due to fear of French

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> them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Id.

222. James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 122 (1999).

223. *Id*.

224. Halstuk, *supra* note 215, at 71. The Sedition Act lasted less than two years, just as the Democratic-Republican Party came to power. Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 827 (1984). Jefferson drafted the Kentucky Resolutions in 1798, which denounced the Sedition Act and helped him earn the presidency in 1800, "whereupon he pardoned those convicted under the Act and remitted their fines." J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1407 (1992).

225. *See* Martin, *supra* note 222, at 123–27. The Federalists, for example, argued that by obstructing the government's ability to make policy decisions, one "obstructs the majority" because the majority had elected the government to make those decisions. *Id*. at 127. Federalists also argued that one who insulted elected officials insulted the people who elected them. *Id*. Moreover, Federalists relied upon the common law as an adjunct to the Constitution, which provided that the United States "as a sovereign power possessed, 'from the nature of things,' the inherent 'right to preserve and defend itself against injuries and outrages that endanger its existence.'" Gary D. Rowe, *The Sound of Silence:* United States v. Hudson & Goodwin, *The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 938 (1992) (quoting 8 ANNALS OF CONG. 2146 (1798) (remarks of Rep. Otis)).

Even Jefferson did not attack the Sedition Act on grounds that Congress wrongfully abridged freedoms of speech and the press, but that the laws were unconstitutional because the states, not the federal government, owned the natural rights to regulate the press. Halstuk, *supra* note 215, at 73.

invasion and insurrection.[226] First, the Naturalization Act increased the time of residence necessary to acquire U.S. citizenship, and thus the right to vote, from five to fourteen years.[227] Citing national security reasons and improved monitoring of potentially subversive aliens, "Congress barred the naturalization of aliens of a country at war with the United States, and it commanded all white immigrants to register with the government."[228] Not coincidentally, immigrants were increasingly offering their political support to Republicans.[229] Second, the Alien Act[230] gave the President enormous discretion to imprison or deport aliens suspected of posing a threat to the national government without a formal hearing.[231] The final component, the Alien Enemies Act,[232] further

226. Fehlings, *supra* note 215, at 66–69. In fact, "John Quincy Adams, President Adams' son and U.S. Ambassador to Prussia, advised his father that France intended to invade America's western frontier." *Id*. at 66. Speculation of French troops destined for the United States induced President Adams to call George Washington from retirement in order to command the U.S. Army. *Id*. "French emigré Médéric Louis-Elie Moreau de Saint-Méry wrote . . . of the nation's anxiety: 'People acted as though a French invasion force might land in America at any moment. Everybody was suspicious of everybody else: everywhere one saw murderous glances.'" *Id*. at 67 (footnote omitted).

227. *See id*. at 69.

228. *Id*.; *see* Naturalization Act, ch. 54, 1 Stat. 566–69 (1798) (repealed by Naturalization Act, § 2, 2 Stat. 153 (1802)).

229. *See* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 834 (1997).

230. The Alien Act is also known as "An Act Concerning Aliens" (Alien Act). An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798). Congress modeled the Alien Act on the British Aliens Act of 1793, "which authorized the expulsion of any alien considered dangerous." Fehlings, *supra* note 215, at 70. The law was to expire in two years but was never enforced. *Id*. at 71, 74. The Supreme Court would later remark: "The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability." *Id*. at 70 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 610–11 (1889)).

231. Fehlings, *supra* note 215, at 70–74. Specifically, the law, as a temporary war measure, authorized the President at his discretion to deport aliens "dangerous to the peace and safety of the United States" or those suspected of "any treasonable or secret machinations against the government." *Id*. at 73. Fehlings also characterized the Alien Act as:

> requir[ing] captains of arriving ships to report all aliens on board. An alien who reentered the United States after having been expelled committed a criminal offense, and upon conviction, the alien faced imprisonment for as long as, in the opinion of the President, the public safety required. Federal courts had jurisdiction over "all crimes and offenses against this act," but all other matters lay within the President's authority.

Id. at 72; *see also* Alien Act, ch. 58, 1 Stat. 570–71 (1798).

232. This Act is also known as "An Act Respecting Alien Enemies." Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798).

provided for the arrest, confinement, and expulsion of aliens of an enemy nation.[233]

The Alien and Sedition legislation may have been passed at a time of international hostility between the United States and France, but all four of the Acts fail under the security legislation test.[234] The Alien Enemies Act, the lone statute that has survived intact to the present day,[235] fulfills the first two prongs[236] but fails to delineate the time period for which its provisions deprive aliens of their constitutional rights.[237] The Alien Enemies Act also fails to provide an adequate appellate procedure by which aliens of an enemy nation may seek judicial review.[238] As a result, the Alien and Sedition Acts are invalid examples of national

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233. In particular, the Alien Enemies Act provided for the arrest, confinement, or expulsion of aliens of an enemy nation:

> whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, . . . and the President of the United States shall make public proclamation of the event.

Id. Upon such a proclamation or such a declaration of war, alien enemies could be arrested, detained, and removed from the United States without a hearing. *Id*.

234. *See supra* Part IV.B.

235. Sidak, *supra* note 224, at 1407. "The [Alien Enemies] Act, with minor revisions, remains part of the United States Code to this day and has been used as recently as 1950." Fehlings, *supra* note 215, at 74; *see also Ex parte* Zenzo Arakawa, 79 F. Supp. 468, 470 (E.D. Pa. 1947) ("There can be no question that the Enemy Aliens Act is constitutional."). Its constitutionality was never seriously questioned by pro-Federalist intellects such as Jefferson and James Madison. *See* Ludecke v. Watkins, 335 U.S. 160, 171 n.18 (1948) (observing that "there was never any issue raised as to the validity of the Alien Enemy Act").

236. First, the Alien Enemies Act "reflected the tensions that existed between the United States and France . . . that eventually erupted into the undeclared Quasi War at sea." Sidak, *supra* note 224, at 1406 (footnote omitted); *see also supra* Part IV.B. Second, the Alien Enemy Act curtails civil liberties of a specified class of persons labeled "alien enemies," including "all natives, citizens, denizens, or subjects of a hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized." Sidak, *supra* note 224, at 1408. As originally drafted, the statute was applied only to males and amended during World War I to apply equally to women. *Id*. at 1408 n.30 (citing Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577; Act of Apr. 16, 1918, ch. 55, 40 Stat. 531).

237. Although the Alien Enemies Act sets forth circumstances that trigger its applicability, namely, when either (1) a foreign nation or government attacks, or is about to attack, the United States or (2) there is a formal declaration of war by the United States, the law fails to set a specific time period that defines the duration of its consequences. *See* 50 U.S.C. § 21 (1988). The Alien Enemies Act authorizes the President to control the manner and degree of the restraint that aliens are subjected to as well as other regulations deemed necessary for public safety. Sidak, *supra* note 224, at 1408–09.

238. Sidak, *supra* note 224, at 1420–24. The Alien Enemies Act's "terms, purpose, and construction leave no doubt" as to its preclusion of judicial review. *Id*. at 1421 (quoting *Ludecke*, 335 U.S. at 163–64). Aliens seeking judicial review must petition for a writ of habeas corpus while sitting incarcerated and awaiting deportation, but many times the incarceration can last as long as the hostilities that invoked the incarceration, making judicial review pointless. *See id*. at 1421.

security legislation.

2. Distinguishing Japanese Internment

On December 8, 1941, one day after the bombing of Pearl Harbor, Congress declared war against Japan.[239] Two months later, President Franklin D. Roosevelt signed Executive Order 9066,[240] which gave broad authority to the military to secure U.S. borders and to remove any individual, whether an American citizen or not, in order to create military-only zones.[241] Although Japanese Americans were not singled out, the order ultimately removed and imprisoned nearly the entire Japanese American population inhabiting America's west coast.[242]

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239. Declaration of War Against Japan, Pub. L. No. 77-328, 55 Stat. 795 (1941).

240. Exec. Order No. 9066, 3 C.F.R. 1092–93 (1938–1943). The order requires every possible protection against espionage and sabotage to national defense material, national defense premises, and national defense utilities. *Id*. The order specifically provides the following:

> [B]y virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, *to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded*, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order.

Id. at 1093 (emphasis added). Congress later enacted legislation that ratified and confirmed Executive Order 9066. *See* 18 U.S.C. § 97a (1946).

241. Exec. Order No. 9066, 3 C.F.R. at 1093. On March 18, 1942, President Roosevelt issued Executive Order 9102, establishing the "War Relocation Authority," which reaffirmed Executive Order 9066 and provided for the "removal from designated areas of persons whose removal is necessary in the interests of national security." *See* Exec. Order No. 9102, 3 C.F.R. 1123–25 (1938–1943).

242. *See* John Tateishi & William Yoshino, *The Japanese American Incarceration: The Journey to Redress*, HUM. RTS., Spring 2000, at 10. The internment was ordered for the purpose of protecting against "fifth column" sabotage or Japanese attack. Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 651 (1997). On March 2, 1942, General J.L. DeWitt, Military Commander of the Western Defense Command, issued the first of four proclamations under the authority of Executive Order 9066. Hirabayashi v. United States, 320 U.S. 81, 86 (1943). The first proclamation established that persons may be removed, as the situation may require, in

Within eleven months after Pearl Harbor, 119,803 men, women, and children of Japanese ancestry boarded buses and trains for government detention camps in seven states.[243] Two-thirds of those incarcerated were U.S. citizens forced to abandon their businesses and homes, "suffering extensive property, income, and psychological damage as a result."[244]

The validity of the government's action ultimately made its way through the courts in a trio of cases. First, in *Hirabayashi v. United States*,[245] the Supreme Court upheld the constitutionality of a curfew placed on Japanese Americans.[246] As a defense measure implemented to safeguard important military areas from sabotage by sympathetic persons of Japanese ancestry (and at a time of threatened air raids and invasion by Japanese forces), the curfew order was ruled a proper exercise of war powers.[247] Further, the Court held that the curfew did

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"military areas and zones" comprising "the southern part of Arizona [and] all the coastal region of the three Pacific Coast states [including California, Washington, and Oregon]." *Id*. at 86–87. The second proclamation expanded these areas. *Id*. at 87. The third proclamation established curfew rules. In particular, it stated that from March 27, 1942, all persons of Japanese ancestry were required to stay in their residences from eight o'clock in the evening to six o'clock in the morning. *Id*. at 88. Violation of curfew led to criminal penalties. *Id*. The fourth proclamation recited the need to provide the orderly evacuation and resettlement of Japanese within the area, and "prohibited all alien Japanese and all persons of Japanese ancestry from leaving the military area until future orders should permit." *Id*. at 89.

243. *See* Huong Vu, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661, 665 (2002) (arguing that racism shaped national policy); *see also* Tateishi & Yoshino, *supra* note 242, at 10. Soon after the military imposed curfew laws, the military posted notices ordering all Japanese aliens and U.S. citizens of Japanese ancestry "to report to assembly areas, and to bring with them only what they could carry." *Id*. The government referred to these areas as "relocation centers." *Id*. Japanese Americans were then deported and imprisoned behind barbed wire in ten detention camps located in remote and desolate areas of "California, Idaho, Utah, Arizona, Colorado, Wyoming, and Arkansas." *Id*. "Life in the camps was harsh, with internees enduring the desert heat, cold, and dust storms in hastily constructed wooden barracks with no privacy, poor food, and very little in the way of meaningful activity." Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 5 (2001).

244. Vu, *supra* note 243, at 665; *see also* Philip Tajitsu Nash, *Moving for Redress*, 94 YALE L.J. 743, 743 (1985) (reviewing JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS (1984)).

245. 320 U.S. 81 (1943).

246. *Id*. at 104.

247. *Id*. at 98–100. The Court's inquiry to the constitutionality of the curfew laws was:

> whether in the light of all the facts and circumstances there was any substantial basis for the conclusion . . . that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.

Id. at 95. The facts and circumstances considered by the Court were (1) the fact that a large number of resident alien Japanese were of "mature years" and occupied positions

not unconstitutionally discriminate because the surrounding circumstances, including the war and nature of Japanese communities in the United States, afforded substantial bases for the military's conclusion that persons of Japanese ancestry required differential treatment.[248]

In *Korematsu v. United States*,[249] the Court continued to grant the military great deference by upholding the constitutionality of the government's forced relocation of Japanese Americans, even though the threat of a Japanese invasion had all but disappeared.[250] However, in *Ex*

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of influence in Japanese communities, which they used to disseminate propaganda for the Japanese Government; and (2) the fact that conditions affecting the life of the Japanese resulted in little social intercourse between them and the "white population," further leading to sources of Japanese irritation and isolation. *Id*. at 98. Hirabayashi's conviction was later vacated in 1987. *See* Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987).

248. *Hirabayashi*, 320 U.S. at 100–02. The Court gave the government great deference:

> We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

Id. at 101–02.

249. 323 U.S. 214 (1944).

250. *See id*. at 223. The petitioner, an American citizen of Japanese descent, was convicted in federal district court for remaining in San Leandro, California, a designated military area from which all persons of Japanese ancestry were excluded pursuant to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command. *Id*. at 215–16. In upholding the conviction, the Court admitted: "Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions," but "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Id*. at 219–20. Moreover, the Court noted that Korematsu was not excluded from the designated military area because of his race, but because the United States was

> at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

parte Mitsuye Endo, the Court held that the government's continued detention of an admittedly "loyal" citizen at a time when hostilities were coming to an end was not within the scope of the 1942 Act, which ratified and confirmed executive order 9066.[251] In *Endo,* the Court prohibited lawmakers from placing a greater restraint on citizens than what was "clearly and unmistakably" indicated in the language of Executive Order 9066.[252]

Although issued at a time of war between Japan and the United States, President Roosevelt's executive orders similarly fail to meet all four prongs of the security legislation test[253] and are consequently unjustifiable as appropriate national security measures. The first prong requires the demonstration of aggression implicating a substantial U.S. interest. Even in the midst of heavy criticism that race was the true reason Japanese Americans were forced into internment camps,[254] deference must be given to the government's judgment that the internment was necessary to protect the substantial U.S. interest—that of safeguarding against espionage and sabotage of national defense targets.[255] The first prong, however controversial, appears to be satisfied. Yet, Executive Orders 9066 and 9012 do not fulfill the remaining three elements. First, rather than affecting only a specified class of persons precisely defined by statute, President Roosevelt's orders allowed for the removal of "any or all persons" from exclusive areas designated under the full discretion of the Secretary of War.[256] Second, the government failed to define the

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Id. at 223. The petitioner's conviction was later vacated on April 19, 1984. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

251. *Ex parte* Mitsuye Endo, 323 U.S. 283, 297 (1944). The Court determined that Americans of Japanese ancestry who accepted U.S. institutions and worked "loyally" for the nation made a valuable contribution to the nation's wealth and well-being. As such, the Court noted that it was important, even at times of war, "to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities." *Id*. at 303–04.

252. *See id*. at 300.

253. *See supra* Part IV.B.

254. *See* Vu, *supra* note 243, at 672–73 (examining Japanese-U.S. race relations and quoting President Roosevelt and General DeWitt as having deeply rooted anti-Japanese sentiment and distrust over Japanese American loyalty). In newspaper interviews, DeWitt was quoted as saying, "a Jap's a Jap." *Id*. at 673.

255. *See supra* note 240.

256. Exec. Order No. 9066, 3 C.F.R. 1092–93 (1938–1943). The affected class of persons is vague, especially compared to the more specific Public Proclamation No. 3, which declared the following:

> [F]rom and after March 27, 1942, "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M."

Hirabayashi v. United States, 320 U.S. 81, 88 (1943).

Compare also with the more specified March 24, 1942 civilian exclusion orders that directed all persons of Japanese ancestry, both alien and nonalien, be excluded from a

exact duration of the internment period, leaving the detention camps solely in military control.[257] Third, the orders failed to provide an appropriate and specified appellate process by which Japanese Americans could contest their detention.[258]

C. Dazed and Confused: Judicial Review in the Wrong Court

Assuming that national security concerns fail to justify depriving foreign groups of their due process rights, the district court's decision to invalidate the AEDPA in *Rahmani* is unfounded because appellants must challenge designations under the AEDPA in the D.C. Circuit.[259] Both disputants involved agreed that the D.C. Circuit was the sole venue for judicial review of designations pursuant to § 1189.[260] Nevertheless, the court in *Rahmani* overstepped its bounds and ruled that the "tribunal entrusted with reviewing . . . designation[s] for compliance with the Constitution . . . is *not* the sole arbiter of Section 1189's constitutionality."[261]

Although § 1189 clearly directs petitioners to seek judicial review in the D.C. Circuit, the court contended that the statute does not restrict review exclusively to one court.[262] Citing *Johnson v. Robison*,[263] the

specified portion of Military Area No. 1 in Seattle from May 16, 1942. *Id.* The civilian exclusion orders also required a member of each family, and each individual living alone, affected by the order to report on May 11 or May 12 to a designated civil control station in Seattle. *Id*. at 89.

257. The internment had no finite end date. The internment ended January 2, 1945, but Executive Order 9066 remained in effect until President Gerald Ford rescinded it on February 9, 1976. Vu, *supra* note 243, at 669 n.55 ("President Ford called the evacuation and internment 'national mistakes' and a 'setback to fundamental American principles'" (quoting Proclamation No. 4417, 3 C.F.R. 8 (1976–1977)).).

258. Absent a specific procedure of judicial review, Japanese Americans' only chance to retain review was to be convicted for violating curfew and evacuation orders, and to then seek to dismiss the indictments in court. *See* Saito, *supra* note 243, at 5 (tracking the constitutional challenges brought by Japanese Americans Gordon Hirabayashi, Minoru Yasui, Fred Korematsu, and Mitsuye Endo during World War II).

259. *See* 8 U.S.C. § 1189(b)(1) (2000). It is true that the defendants in *Rahmani* sought only to dismiss the indictments charging them with providing material support to designated foreign terrorist organizations pursuant to § 2339B. United States v. Rahmani, 209 F. Supp. 2d 1045, 1052 (C.D. Cal. 2002). Yet, the defendants also challenged the designations themselves because members of Congress disagreed with the Secretary's administrative record, causing a degree of uncertainty in the Secretary's designations. *Id*. at 1050–52. The district court went further in its analysis and chose to review the designations at issue, despite having no statutory authorization pursuant to § 1189. *See id*. at 1053–54.

260. *Rahmani*, 209 F. Supp. 2d at 1053.

261. *Id*. at 1053–54 (emphasis added).

262. *Id*. at 1053.

court refused to interpret the statute as restricting access to judicial review without the government demonstrating "clear and convincing evidence of Congressional intent to impose such a restriction."[264] Without explaining what the evidentiary standard entails or how the government may meet this standard, the court concluded that the language provided by § 1189 fails to "evince a clear and convincing congressional intent to foreclose judicial review of a designation by other federal courts."[265]

Moreover, the court pointed to the D.C. Circuit's past "inability to conduct an effective judicial review" in both *National Council* and *People's Mojahedin* as further proof that the D.C. Circuit is not the only court that may evaluate designations.[266] In what can only be described

263. 415 U.S. 361, 373–74 (1974).

264. *Rahmani*, 209 F. Supp. 2d at 1053.

265. *Id*.

266. *Id*. at 1053–54. As an example of the D.C. Circuit's "inability," the district court cited to an observation made by the D.C. Circuit in reviewing the designation of the PMOI in the *People's Mojahedin* opinion: "The information recited [in the administrative record] is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating." *Id*. at 1053 n.10 (citing People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 19 (D.C. Cir. 1999)) (alteration in original). Notwithstanding the D.C. Circuit's general frustration with the Secretary's administrative record, the court in *People's Mojahedin* continued to perform its appellate function and determined that upon the Secretary's findings, the PMOI was properly designated. *People's Mojahedin*, 182 F.3d at 24–25. The D.C. Circuit realized that its only function was to decide if the Secretary, "on the face of things," had enough information to come to the conclusion that designated organizations were (1) foreign and (2) engaged in terrorism. *Id*. at 25. As to whether the terrorist activity of the organization threatened U.S. national security, the third factor in designating a foreign terrorist organization under the AEDPA, the D.C. Circuit refrained from resolving the issue because it raised a political question. *Id*. at 23–24 (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (noting that judicial review entails performing the role Congress intended for the court without thrusting the judiciary into the political realm). Political questions, the D.C. Circuit explained, are political judgments and "'decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" *Id*. at 23 (quoting *Chi. & S. Air Lines, Inc.*, 333 U.S. at 111). The district court in *Rahmani* even agreed, refraining from settling the debate between members of the legislative branch and the Secretary regarding the designation of the MEK because "[w]hether the MEK is a foreign terrorist organization presents a political question." *Rahmani*, 209 F. Supp. 2d at 1051–52 (listing six independent factors indicative of a political question and concluding that for the court to weigh in on the debate would create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). The court noted that while the *decision* to designate is "nonjusticiable" and better left for the greater factfinding resources of Congress, the court may nonetheless review the designation *procedure* for conformance with the Constitution. *Id*. at 1052. Contrary to the *Rahmani* court's perception, the D.C. Circuit demonstrated the ability, rather than the inability, to conduct effective judicial review and to conduct the rather difficult task of acknowledging a political question when presented.

as unsubstantiated judicial commentary, the court specifically criticized the D.C. Circuit for upholding designations while acknowledging, in the same opinion, that a designation under the AEDPA violates due process.[267] With little reason, the court utilized its displeasure with the D.C. Circuit as an excuse to weigh in on § 1189's constitutionality even though it lacked any statutory authorization to do so.

As to requiring clear and convincing evidence, the court's reasoning is flawed. The court in *Johnson v. Robison* addressed a statute that prohibited *substantive* judicial review of decisions made by the Administrator of Veterans' Affairs (Administrator), who denied the plaintiff's application for educational assistance even though the plaintiff claimed he was entitled to certain benefits as an eligible veteran of the Armed Forces.[268] The Plaintiff filed suit, claiming that the statute violated his First Amendment guarantee of religious freedom and Fifth Amendment guarantee of equal protection of the laws.[269] The Supreme Court examined the history behind the statute's "no-review" clause, by which Congress intended to ensure that veterans' benefits claims would not burden the courts and that complex benefits decisions by the Administrator would be made uniformly.[270] However, the Court did not find a congressional intention to bar judicial review of constitutional questions and cited to the clear and convincing evidence standard set forth in *Abbott Laboratories v. Gardner*.[271]

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267. *Rahmani*, 209 F. Supp. 2d at 1054. This criticism is from the D.C. Circuit opinion in *National Council*. *See supra* notes 154–158 and accompanying text. As evidence that the *Rahmani* decision is poorly written, the opinion openly criticizes *National Council* without describing, analyzing, refuting, citing, or referring to any specific component of *National Council*.

268. Johnson v. Robison, 415 U.S. 361, 362–65 (1974). Under the statutory scheme of the Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. § 211(a) provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Id. at 365 n.5 (citing 38 U.S.C. § 211(a) (1970)).

269. *Id*. at 364.

270. *Id*. at 369–70.

271. *Id*. at 373–74 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)). The Court concluded that no explicit provision of § 211(a) bars the judicial consideration of one's constitutional claims. *Id*. at 367. Rather, the prohibitions intended to exclude review solely of those "decisions of law or fact" that arose out of the administration of

Similarly, *Abbott Laboratories* involved a statute that prohibited *substantive* judicial review of claims contesting a regulation promulgated by the Commissioner of Food and Drugs (Commissioner).[272] The regulation required manufacturers of prescription drugs to include on labels and other printed material the drug's "established name" as well as its "proprietary" or trade name.[273] The plaintiffs argued that this regulation was beyond the statutory right conferred upon the Commissioner.[274] After analyzing previous statutory drafts, including special review procedures "applying to regulations embodying technical factual determinations," the Court concluded that Congress had never intended to eliminate judicial review of other types of regulations enforced by the Commissioner, including the regulation of drug labels.[275]

Unlike the legislation in *Johnson* and *Abbott Laboratories*, the AEDPA does not limit substantive judicial review. Conversely, the AEDPA authorizes the review of a variety of legal challenges. These include claims, consistent with *Johnson*, that the Act is contrary to constitutional right, power, privilege, or immunity, and that, consistent with *Abbott Laboratories*, the Act is in excess of statutory jurisdiction, authority, or limitation.[276] The fact that Congress limits procedural review to one court is inconsistent with the requirement that the government demonstrate clear and convincing evidence of congressional intent to limit substantive judicial review. In essence, the district court is the improper venue for review of § 1189's constitutionality. The opinion in *Rahmani* should therefore be stricken.[277]

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providing benefits for veterans, not claims that arise under the Constitution. *Id*.

272. *Abbott Labs.*, 387 U.S. at 137–38.

273. *Id*. Under the Federal Food, Drug, and Cosmetic Act, the "'established name' is one designated by the Secretary of Health, Education, and Welfare," whereas the "'proprietary name' is usually a trade name under which a particular drug is marketed." *Id*. at 138. The Act required manufacturers to print the established name of the drug "prominently and in type at least half as large as that used thereon for any proprietary name." *Id*. at 137–38.

274. *Id*. at 138–39. The action was brought by thirty-seven drug manufacturers and by the Pharmaceutical Manufacturers Association, which includes manufacturers of more than ninety percent of the U.S. supply of prescription drugs. *Id*.

275. *Id*. at 144. Moreover, the Federal Food, Drug, and Cosmetic Act allows an appeal on a record to an agency's factual determination, such as the "level of tolerance for poisonous sprays on apple crops," under the substantial evidence test, thus "affording a considerably more generous judicial review than the 'arbitrary and capricious' test available in the traditional injunctive suit." *Id*. at 143.

276. 8 U.S.C. § 1189(b)(3) (2000).

277. Perhaps the decision in *Rahmani* should not come as such a surprise. Presiding Judge Robert M. Takasugi, along with his family, had been among the thousands incarcerated by the United States in Japanese internment camps during World War II. Michael R. Mitchell, *Hon. Robert M. Takasugi*, http://www.geocities.com/mraley.geo/rmt.html (last revised Oct. 22, 1997). Not surprisingly, five months after *Rahmani*, Judge Takasugi invalidated a new aviation law that prohibited non-U.S. citizens from

V. CONCLUSION

The AEDPA is a necessary tool to be used in America's quest to combat new age threats of terrorism. The Act works to prevent the United States from becoming a base for funding acts of terror. It deters terrorist organizations, such as the al Qaeda network, acting as multinational corporations with "operations, logistics, and financial cells . . . all interlinked and interdependent," from seeking aid in the very country they seek to destroy.[278] The AEDPA provides sufficient safeguards to assure that the constitutional rights of loyal American citizens or those who merely wish to express their affiliation with certain groups will not be compromised, but that the rights of active donors and participants may need to be.

For America to be successful in its quest to protect its national security, Americans must understand that the war against terrorism will not be won by a passive government. Radical views will not stay silent, and terrorist cells will not vanish. Far from advocating a complete confiscation of democratic principles and freedoms, Congress must be allowed to suppress the effectiveness of an enemy that is void of flesh and blood, name and face. Indeed, an encompassing hatred for the United States is now the true enemy. Our nation must not be afraid to fully use the Constitution to squash this sentiment.

The story continues. On July 22, 2003, a New York district court added its opinion to the murky AEDPA landscape. In *United States v. Sattar*,[279] the court held the following: (1) Section 2339A(b) is

working as airport passenger and baggage screeners under the Constitution. News Release, California District Judge Rules in Favor of Non-U.S. Citizen Airport Screeners, Consulate General of the Philippines New York (Nov. 18, 2002), *available at* http://philconsulateny.home.mindspring.com/news/news013.htm; *see also* Press Release, Court Denies Government Motion to Dismiss Airport Screeners' Case, National Asian Pacific American Legal Consortium (Nov. 15, 2002), *available at* http://www.napalc.org/programs/immigration/pr/2002-11-15_Gebin.htm.

278. *See* Phillip Carter, *Al Qaeda and the Advent of Multinational Terrorism: Why "Material Support" Prosecutions Are Key in the War on Terrorism*, *at* http://writ.news.findlaw.com/student/20030312_carter.html (Mar. 12, 2003) (describing the scope of al Qaeda's global Internet capacities, global money movement, and how the network "hides behind legitimate businesses and charities").

279. 272 F. Supp. 2d 348 (S.D.N.Y. 2003). Defendants Ahmed Abdel Sattar (also known as Dr. Ahmed), Yassir Al-Sirri, Lynne Stewart, and Mohammed Yousry "were charged in a five-count indictment on April 8, 2002." *Id*. at 352. Count two charged the defendants with "providing and attempting to provide material support and resources" to the Islamic Group (IG), which "existed as an international terrorist group dedicated to opposing nations, governments, institutions, and individuals that did not share [its]

unconstitutionally vague with regard to the statute's prohibition on providing material support or resources in the form of "communications equipment" and "personnel";[280] (2) only designated terrorist organizations, not individual defendants charged with providing material support to designated terrorist organizations, can challenge the underlying designation;[281] and (3) the AEDPA did not violate the defendant's First

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radical interpretation of Islamic law." *Id*. at 353. IG, while allegedly operating in the New York metropolitan area from the early 1990s until the 2002 indictment, defined "'jihad' as waging opposition against infidels by whatever means necessary" and considered the United States as an infidel. *Id*. The indictment listed IG's objectives in the United States as (1) establishing "a staging ground for violent acts against targets in the United States and abroad"; (2) "recruit[ing] and training of members"; and (3) "fundraising for jihad actions in the United States and overseas." *Id*. "[D]esignated as a foreign terrorist organization by the Secretary of State on October 8, 1997 [under § 1189]," IG was redesignated twice, first in October of 1999 and again on October 5, 2001. *Id*. In October 1995, IG's spiritual leader Sheikh Abdel Rahman was convicted for conspiring "to wage a war of urban terrorism against the United States, including the 1993 World Trade Center bombing and a plot to bomb New York City landmarks." *Id*. at 354. The indictment also charged that defendant Sattar served as a "vital link" between Rahman and the worldwide IG leadership, and that Sattar acted as an IG communications portal from New York City by maintaining frequent telephone contact with global IG leaders. *Id*. at 355.

280. *Id*. at 358–60. The indictment alleged:

> [T]he defendants and the unindicted co-conspirators provided communications equipment and other physical assets, including telephones, computers and telefax machines, owned, operated and possessed by themselves and others, to IG, in order to transmit, pass and disseminate messages, communications and information between and among IG leaders and members in the United States and elsewhere around the world . . . .

Id. at 356 (citation omitted). The government initially argued in its brief that the defendants were not charged simply for using their phones but rather for actively making communications equipment available to IG that otherwise would be unavailable to a designated foreign terrorist organization. *Id*. at 358. The government then "changed course" and argued that the use of the defendants' telephones alone constituted criminal conduct under the statute. *Id*. The district court used this change in the government's interpretation of § 2339B as the basis for holding the provision of "communications equipment" unconstitutionally vague: "[A] criminal defendant simply could not be expected to know that the conduct alleged was prohibited by the statute." *Id*. As to "personnel," the district court deferred to the Ninth Circuit decision in *Humanitarian Law Project v. Reno* rather than *United States v. Lindh*, stating: "The fact that the 'hard core' conduct in *Lindh* fell within the plain meaning of providing personnel yields no standards that can be applied to the conduct by alleged 'quasi-employees' in this case." *Id*. at 359; *see supra* Part III.B.3.

281. *Id*. at 363–64. The district court found that, first, the AEDPA clearly allows a designated foreign terrorist organization to challenge its designation in the Court of Appeals for the District of Columbia under § 1189(b), and second, individual defendants could not raise a terrorist organization's due process concerns because litigants "never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court." *Id*. at 364. The designation of IG as a foreign terrorist organization, thus, was irrelevant as to the defendants. *Id*. In review, the district court found the *Rahmani* holding, which allowed litigants to challenge the due process of designation, neither binding nor persuasive. *Id*. The court further distinguished *Rahmani* from *Dickinson v. United States*, 346 U.S. 389 (1953), and

Amendment associational rights.[282] More recently, on March 17, 2004, the District Court for the Central District of California held another component of § 2339A(b), the term "expert advice or assistance" added by the Patriot Act in 2001, impermissibly vague, becoming the first court to hold a part of the Patriot Act unconstitutional.[283]

As to *United States v. Rahmani*, the United States filed its appeal in the Ninth Circuit Court of Appeals on July 12, 2002.[284] On April 3, 2003, the government filed its reply brief, and while it makes reference to national security concerns, the government focuses on refuting the defendants' key arguments that the AEDPA violates First Amendment freedom of association and expression.[285] In a case of déjà vu, the

United States v. Mendoza-Lopez, 481 U.S. 828 (1987), cases "in which the defendants were allowed to challenge the administrative orders that formed the basis for their prosecution although the relevant statutes did not provide for judicial review," because "[r]aising the defense in the criminal cases provided those defendants the only meaningful review of the administrative proceeding affecting them." *Id*. at 365–66. In contrast, the AEDPA provides a designated organization, not defendants charged under the AEDPA, with judicial review of its own designation, and "that review is not to occur as a defense in a criminal proceeding." *Id*. at 366. Moreover, the validity of the designation is itself not an element of the offense of providing material support to designated organizations (the government only needs to prove that the defendants conspired to provide or did provide material support or resources to a designated organization), thus the defendants' due process right is not affected by their incapacity to challenge the designation process. *Id*. at 367–68.

282. *Id*. at 368. The district court deferred to *Humanitarian Law Project*, holding that the AEDPA does not interfere with First Amendment associational rights because "the material support restriction 'is not aimed at interfering with the expressive component of [the defendant's] conduct but at stopping aid to terrorist groups.'" *Id*. at 368 (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000)).

283. *See* Humanitarian Law Project v. Ashcroft, No. CV 03-6107 ABC (MCx), 2004 WL 547534, at *15 (C.D. Cal. Mar. 17, 2004); *see also Federal Judge Rules Part of Patriot Act Unconstitutional*, CNN.COM (Jan. 26, 2004) (quoting libertarian David Cole, who argued the case against the provision, as proclaiming "the ruling 'a victory for everyone who believes the war on terrorism ought to be fought consistent with constitutional principles'"), *at* http://www.CNN.com/2004/01/26/patriot.act.ap.

284. General Docket (No. 02-50355), U.S. Court of Appeals for the Ninth Circuit, U.S. v. Rahmani (filed July 17, 2002). After the district court ruling in *Rahmani*, one U.S. official said that there would "be serious problems if the decision stands on appeal." Ben Barber, *Judge Strikes Down Law Citing Groups as Terrorist*, WASH. TIMES, June 27, 2002, at A01. For example, the U.S. government would no longer be able to "prosecute those who give material support to groups . . . such as Hamas [also known as the Islamic Resistance Movement], al Qaeda, Islamic Jihad [also known as the al-Jihad] and Hezbollah [also known as Party of God and the Organization of the Oppressed on Earth]." *Id*.; *see also* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997).

285. Telephone Interview with Judith Heinz, Assistant United States Attorney, United States Attorneys Office Criminal Division, Los Angeles, Cal. (Nov. 26, 2003).

Ninth Circuit, as it did in *Humanitarian Law Project*, will again get a chance to uphold the AEDPA in the face of these challenges. This time, however, the court needs to do more. It needs to resurrect the AEDPA and give national security the credence it deserves.

ANKUSH AGARWAL

The Ninth Circuit received an amicus brief from the ACLU of Northern California on February 20, 2003, which was officially filed on July 30, 2003. *Id*. Oral argument took place on September 9, 2003, submitted to Ninth Circuit Justices Andrew J. Kleinfeld, Kim M. Wardlaw, and William A. Fletcher. *Id*.