

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Case No. 8:03-CR-77-T-30TBM

v.

SAMI AMIN AL-ARIAN, et al.,

Defendants.

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

FILED

**DEFENDANT'S MEMORANDUM OF LAW IN REPLY TO
GOVERNMENT'S OPPOSITION OF DEFENDANT'S MOTION TO DISMISS
COUNTS ONE THROUGH FOUR OF THE INDICTMENT**

In its Opposition Memorandum, the government goes to great lengths to make the point that this case is not about criminalizing speech and emphasizes that Dr. Al-Arian's speech is not the basis for the charges, yet the government's conduct belies this. In his testimony at the bond hearing for Al-Najjar, Agent West, author of the search warrants for Dr. Al-Arian's home and office in 1995, testified, essentially, that this case is indeed about the way he believes that speech and political discourse constitutes "material support" for the PIJ:

Q: And sir, do you believe holding conferences, arranging for conferences at which known or suspected terrorists attend provides support for the PIJ?

A: Yes.

Q: And sir, do you believe that - why do you believe they brought these, these people that we've identified now as, as, let's say the who's who of PIJ to these conferences? What do you believe the purpose was, if you have a belief?

A: Number one was to further the expansion of the PIJ ideology among Muslims here in the United States. And through that process, gaining support, both financial, political and when necessary other administrative or even material support for PIJ operations by allowing those leaders of the PIJ and other related terrorist organization leaders to come in and speak to audiences of, of Muslims here in the United States. They provided them a forum here in the United States

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to espouse their radical violent beliefs and that expanded their ability to, to have a support base here in the United States to include financial support.

A careful examination of the Indictment makes it clear that the government has focused almost exclusively on the public and private words of Dr. Al-Arian. This focus illustrates the dangers of a prosecution such as this, wherein an accused could be convicted merely because he advocated views that are contrary to United States foreign policy. One need merely to look at ¶ 42 of the Indictment to glean the excessive parameters of this indictment.

The conduct mentioned in ¶ 42 consists of speaking with “influential individuals” and representatives of the media, allegedly to promote the goals of the PIJ. The language of the Indictment provides no method of ascertaining how to distinguish “influential individuals” from those with whom it is “safe” to converse. This begs the question of whether the government could prohibit conversation with all those individuals who it deems “influential” and how a person will know if he has violated the law. Moreover, there is no way of telling which political issues are acceptable topics of conversation and which are criminal. In effect, according to the theory the prosecution advances in ¶ 42, a person may be criminally prosecuted and convicted for merely speaking to his Congressional representative about Arab rights or, rather, for advocating the “wrong” view on Arab rights.

Despite the government’s protestations to the contrary, the Indictment fails to allege that Dr. Al-Arian personally strived to pursue the goals of the PIJ by committing violent acts. Indeed, there is simply no allegation that Dr. Al-Arian acted with any specific intent to kill or harm any human being. However, the government steadfastly contends that the Indictment can withstand scrutiny simply on the basis of the

government's claim that Dr. Al-Arian was a member of the PIJ or actively expressed views that supported the PIJ. In support of that claim, the government fills the Indictment with examples of Dr. Al-Arian's perceived political discourse and personal beliefs – evidenced in his speeches and writings – as a substitute for specific intent, while paradoxically claiming that those words are not the basis of the instant prosecution.

Historical Context

Once again, in order to punish Dr. Al-Arian for his political beliefs, the government fails to place the struggle in the Middle East in context. The PIJ, among other things, seeks to end the occupation of Palestine by the State of Israel. In all honesty, portions of the PIJ seek to end the occupation by any means necessary. Agree or disagree, the goal of the PIJ is a political goal. Advocacy of a political goal is political speech. Indeed, such advocacy is precisely the type of speech that the First Amendment was designed to protect.

The essential premise of the Government's Opposition Memorandum is that speech may be restricted, or even effectively banned, if such speech is "inimical to the so-called and current national security interests of the United States." *See, e.g.,* Govt. Mem. at p. 16. This is certainly not a new concept as, throughout history, the U.S. government has sought to restrict controversial beliefs through the use of the criminal sanction. In World War I, Congress made it a crime to utter "any disloyal, profane, scurrilous, or abusive language ... as regards the form of government of the United States, or the Constitution, or the flag." Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359. Under the Sedition Act, thousands of people were prosecuted for speaking out against the war.

In 1919, the Secretary General of the Socialist Party was charged with conspiracy to violate the Espionage Act of 1917. Schenck's alleged violation was due to his advocacy to enlisted men and potential draftees suggesting the draft was wrong and urging men to assert their rights by opposing the draft. *Schenck v. United States*, 249 U.S. 47 (1919) Schenck was found guilty of causing and attempting to cause insubordination in the military forces of the United States and of obstructing the recruiting and enlistment of the armed forces during wartime. *Id.*

Fear and persecution of Communists began in the early part of last century and continued for at least fifty years with arrests, prosecutions and deportations during this period. Congress enacted more legislation aimed at restricting freedom of speech and association. For example, the Smith Act of the 1940s regulated the mere "advocacy, organizing and knowing membership" in controversial groups. During the 1950s, Congress enacted the McCarran-Walter Act, which required the registration of all Communist party members, prohibited any Party member from working in a defense facility or holding office with a labor organization, or, among other things, obtaining a passport.

The manner in which the government has charged this case and the acts the Indictment seeks to punish go so far as to infringe on fundamental liberties in a manner well beyond the scope that our traditions permit a democratic government to act. Now, instead of confining speech limitations to speech that poses an imminent danger or threat to the United States, the government seeks to restrict speech and advocacy that the government believes undermines a particular policy of the currently elected government.

While the Constitution is not a suicide pact, it continues to limit the government's ability to punish acts of speech, advocacy, and association.

This Indictment is the greatest assertion of the state's police power with respect to speech and association that has ever been attempted by the federal government. During the Cold War, the government only sought to restrict speech that posed an imminent threat to the existence of the United States. Laws were created to restrict the speech of those advocating the overthrow of the United States government and prohibiting any association with organizations advocating the same, namely the Communist Party. The current laws seek to restrict speech that merely seeks to change a particular policy of the U.S. government. This type of speech previously would have been considered a prime example of speech covered by the First Amendment. Under this government's limited view of the First Amendment, activity such as Martin Luther King's marches or speeches that held the country up to ridicule throughout the world could be barred as undermining the foreign policy of the U.S. government.

The danger of such a limitation is apparent to anyone who closely examines it, and it is particularly curious in light of the fact that U.S. foreign policy changes from day to day. For example, in the Iran-Iraq War (1980-1988), the United States supported Saddam Hussein when Iran's new post-revolutionary Islamic regime appeared to be the region's biggest threat; now he is the U.S.'s Public Enemy Number One. Furthermore, according to an article in the Washington Post,

[a] review of thousands of declassified government documents and interviews with former policymakers shows that U.S. intelligence and logistical support played a crucial role in shoring up Iraqi defenses against the "human wave" attacks by suicidal Iranian troops. The administrations of Ronald Reagan and George H.W. Bush authorized the sale to Iraq of numerous items that had both military and civilian applications, including

poisonous chemicals and deadly biological viruses, such as anthrax and bubonic plague.

Michael Dobbs, *US Had Key Role in Iraq Buildup*, Washington Post (December 30, 2002). During the Iran-Iraq War, officials from the U.S. Defense Intelligence Agency aided the Iraqi military (Saddam Hussein) in applying satellite imagery in order to target Iranian troop concentrations, with full knowledge that Saddam was using chemical weapons against the Iranian forces. It is in fact the case that the majority of the war crimes committed by Saddam's regime took place during the time he was supported by the U.S. government. Stephen Zunes, *Saddam's Arrest Raises Troubling Questions*, Foreign Policy in Focus (December, 2003).

By what standard is this Court to judge the Accused's speech when the speech is about the foreign policy of the United States which fluctuates on an Administration-by-Administration basis: punish today for speaking out against Saddam Hussein and tomorrow for speaking in his favor? Saddam Hussein was the same man during the Iran-Iraq War as he is today, and he committed the same atrocities and human rights violations then as those the U.S. government condemns him for today. The only difference is that at the earlier time, it was in the U.S. government's perceived political interests to support him.

Nor is this the sole example of great tectonic shifts in U.S. foreign policy. Our relations with China and its history of human rights violations is another example. Another example is the U.S. government's backing of Augusto Pinochet's 1973 coup in Chile. Apart from giving military, political and financial support to General Pinochet, the Central Intelligence Agency had already been engaged in a long campaign to defeat

democracy in Chile” for example, by giving money to groups plotting the military overthrow of the government.¹

In fact, circumstances like the United States’ involvement with Pinochet make the best case for why the U.S. government’s control of foreign policy matters should not go uncontested by speech and advocacy from another point of view. A U.S. government that has been caught deceiving, misleading, or withholding information about its activities from the American people should not censor arguments concerning the policy of the United States government, nor should those arguments form the basis of a criminal prosecution such as this one. Since it is unlikely that the federal government will willingly offer criticism of its own foreign policy, the only real critique of foreign policy will emanate from the discourse of those who are in opposition to this government’s policies. If there is no way for the American people to find out the truth of what the federal government is doing, then there would be no way for them to evaluate the government’s effectiveness and performance. This was the opinion of the Supreme Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971), i.e., the Pentagon Papers case.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government.

¹ The CIA maintained a close relationship with the Chilean secret police during Operation Condor, a conspiracy among several Latin American dictators to murder opponents living in exile. Papers concerning the CIA’s covert operations in Chile revealed evidence that the CIA assisted in the assassination of former Chilean Foreign Minister Orlando Letelier in 1976, in order to reinforce the rule of General Pinochet, who presided over a period of terror in Chile in which thousands died or disappeared. Christopher Lord, *The CIA, Chile and U.S. Foreign Policy*, www.speakout.com (November 20, 2000). Years later, the U.S. government disclaimed Pinochet and gradually came around to support bringing charges against him for a 1976 car bombing in the District of Columbia that killed a U.S. citizen, despite the government’s interest in hiding the fact that it had supported Pinochet’s coup.

Id. at 728. In the absence of freedom to speak and comment on the policies and actions of the U.S. government, the notion of a democratic government is meaningless. There can be no real freedom of choice where the knowledge required to make that choice is limited to the topics sanctioned by the current government.

It is simply no answer to scream from the rafters, “National Security.” The words “national security” cannot be used to swallow the essence of the First Amendment. The notion of national security does not place the political issues facing the world and the U.S. beyond discussion or advocacy.

[We] are asked to hold that despite the First Amendment’s emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of “national security. ...”

The word “security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.

Id. at 719. This was the opinion of the Court, even while recognizing that “[i]n the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations.”

The Al-Qaedaism of All “Foreign Liberation Organizations”

A. Al-Qaedaism Established

Due to the traumatic events of September 11, 2001, Al-Qaeda has taken on a significance analogous to that of the Communist Party in a former era of U.S. history. In the eyes of the federal government, Al-Qaeda has expanded from its status as a separate, distinct foreign terrorist group to a global organization with “cells” in every country that acts as an “umbrella” under which all other terrorist groups are subsumed. Even a possible connection with the word Al-Qaeda can justify any action, from deprivation of

civil liberties to declarations of war. Further, this single terrorist organization has come to be seen as “the” terrorist organization, after which the motivations, goals, and operational style of all other terrorist groups are modeled and necessarily resemble, regardless of the truth of that contention. The September 11 attack has not only increased the significance of the Al-Qaeda terrorist group itself, in the eyes of the federal government and the American people, but the fear and terror inspired by that attack have invoked a global war on terrorism. In this war, all so-called “terrorist” groups who are said to oppose the foreign policy or economic interests of the United States – no matter what their origins, goals, or operational style – are linked to Al-Qaeda, are said to operate in the same manner as Al-Qaeda, and share in the guilt Al-Qaeda bears for its actions on September 11, 2001.

As Ronald Spiers notes in his article, “Try Clear Thinking about ‘Terrorists,’” International Herald Tribune (January 14, 2003), this was not initially the case:

President George W. Bush responded to the event of Sept. 11, 2001, surefootedly at first. He identified the forces behind the destruction of the Twin Towers as an evil that had to be fought with patience and close international collaboration on many fronts. America could not just strike out with blind military force.

He swiftly distinguished between Islam and the perpetrators, so as to steer domestic sentiment away from seeing this as a cultural or religious conflict.

He distinguished between terrorism with a “global reach” and local movements fighting in pursuit of geographically specific objectives. He called for a “war” and began to build a multilateral coalition with a range of financial, intelligence, military, and police capabilities.

But Bush soon lost his way. The war metaphor took command. The distinction between Sept. 11 and local conflicts like those in Northern Ireland, Indonesia, Kashmir, Sri Lanka, or Palestine, amenable to negotiation and political solution, quickly began to blur.

Al Qaeda is fundamentally different: fluid, borderless, clandestine, undeterrable and without conventional forces or headquarters.

...

Letting this conflict become a broad war on “terror” has led to a loss of focus. The terrorists of Sept. 11 were criminals, pure and simple. They cannot be seen as freedom fighters struggling against injustice or occupation or for self-determination.

B. Al-Qaedaism as a Tool to Advance U.S. Foreign Policy Objectives²

With respect to this particular case, the big difference that the U.S. government and the American people should be concerned with is that **not one so-called terrorist act by the PIJ has been committed in the United States**. This was acknowledged by the United States’ own State Department, which in their 2002 Patterns of Global Terrorism report, stated, “The group has not yet targeted U.S. interests and continues to confine its attacks to Israelis inside Israel and the territories.” (U.S. Department of State, “2002 Patterns of Global Terrorism,” April 2003, p.117.)

However, this is not the only difference. The PIJ, like many other groups around the world and throughout history, is not an organization created for the purpose of simply terrorizing another group of people. The PIJ has one preeminent goal – Palestinian self-determination - that subsumes all the individual acts done in pursuit of that goal.

Furthermore, even the public press has acknowledged that the PIJ does other things besides commit acts of terrorism – that it engages in both legal and illegal activities.

² Since the September 11 attacks, the United States has blamed almost all violent acts by Islamic extremists in some part on Al-Qaeda, whether those attacks occurred in Iraq, Israel, Afghanistan, or the Philippines. The U.S. government has attempted to exaggerate the power, scope, and threat of Al-Qaeda operations to create the perception that all attacks against the U.S. and its allies are linked to Al-Qaeda. The consequent fear and concern this inspires in the American people paves the way for the government to implement new laws and regulations that make it easier for it to accomplish its foreign policy objectives.

The Bush administration has continuously attempted to link Al-Qaeda to any individuals or groups attacking U.S. interests in Iraq. The majority of the evidence supporting this connection is based on assertion, rather than fact. The Bush administration has worked hard to equate the war on Iraq with the war on terror in the eyes of the American people.

Likewise, the U.S. has attempted to tie attacks on its key ally in the Middle East, Israel, to Al-Qaeda. Yet the attacks by Palestinian militant groups pre-date the formation of Al-Qaeda. Further, these groups seek the creation of an independent Palestinian state, and, at most, the elimination of the state of Israel, not the Taliban-style government preferred by Al-Qaeda. Erich Marquardt, *Al-Qaeda's Exaggerated Organizational Strength*, Power and Interest News Report (September 2, 2003).

In today's world, the U.S. actually faces a number of internal movements and revolts targeted at a government friendly to the U.S. and, in some cases, the United States itself. The aim of each of these distinct groups is different according to its location – whether it be self-determination, the establishment of an Islamic government, or some other cause for which a group of people are willing to die and willing to kill in order to reach. The alleged links to Al-Qaeda have been merely a means utilized by the federal government to create public support for implementation of measures, such as the abrogation of First Amendment rights, all in the name of the “war on terrorism.”

C. Liberation Movements, NOT Terrorist Acts

Throughout history, we have seen many examples of the liberation of groups of people through the force of arms, not the least of which is the example of the American people freeing themselves from the British rule they viewed as oppressive. Furthermore, the tactics utilized by these groups often focused on guerrilla warfare, the types of warfare considered “terrorist” under modern theories of warfare and the types employed by the PIJ and other Palestinian liberation groups. For instance, in Zimbabwe, formerly Rhodesia, the native Africans were ruled by an all-white government in which they were not allowed to participate; they were subject to ordinances that allowed for the

inequitable distribution of land, and they were ruled by a white minority that dominated and oppressed them and divested them of their land. In response to this oppressive rule, they employed tactics of guerrilla warfare beginning in 1964. Their armed resistance to the British colonial regime consisted largely of attacks on white farmers and destruction of the property of white settlers. This continued, more or less, until the late 70s, at which point they attained independence from colonial rule.³

These means of resistance and rebellion, though they may seem brutal and harsh in light of modern techniques of warfare, are not so much chosen as thrust upon these oppressed people due to their lack of a superior military and conventional weapons of warfare. These native populations cannot face their oppressor on the open field of battle simply because they lack the means to do so, not because they have a particular penchant for unnecessarily cruel methods of warfare.

In Ireland, the Irish were subject to just such an oppressive rule by the British. The principal tool used to establish this control was land usurpation by the English, achieved through military action and legislative fiat. For the people of Ireland, this loss of land meant the loss of extensive and secure property, political disenfranchisement, and all the societal ills naturally resulting from such conditions, including inability to secure civil or human rights for themselves, wretched health and even starvation. Thus the world was confronted with the problems of Northern Ireland.

Similarly, the Palestinians have been subject to an oppressive rule based on an original acquisition of land by an outside power and the consequent abuses that followed. In the course of the armed conflict that erupted in the Middle East in June of 1967, the

³ The examples are unending: Ghana, Algeria, South Africa, Zimbabwe, India, Pakistan, to name a few. Almost all of these examples are in the Third World and involved colonized people of color.

Israeli military came to occupy Palestine, the West Bank, including East Jerusalem, and the Gaza Strip, maintaining these territories even in defiance of the opposition from the UN and numerous Security Council resolutions, which affirmed that peace in the Middle East should be based on the withdrawal of the Israeli armed forces from the occupied territory. Almost immediately upon occupation, Israel began imposing many repressive measures against the native Palestinian population. These measures, entailing grave violations of human rights, have inflicted enormous suffering and harm on the entire Palestinian civilian population.

Numerous forms of physical violence and ill treatment have been routinely and systematically used against the civilian population. These include summary executions by special undercover units and indiscriminate shootings with live ammunition or rubber-coated bullets by the Israeli army and by armed Jewish settlers, which has resulted in thousands of injuries and deaths. There have been numerous cases whereby the shootings by soldiers have resulted in massacres of Palestinian civilians, such as the massacre at Al-Haram Al-Sharif in October, 1990, and the massacre of 29 Palestinians in the Ibrahimi mosque in Hebron in February, 1994, by a settler.

The violence perpetrated against the Palestinian population includes random and/or excessive beatings, physical harassment and the use of tear gas in confined places. Arbitrary arrests, humiliation, delays and even the obstruction and outright denial of access to medical treatment have been daily occurrences at the checkpoints. Additionally, Israel uses torture in prisons for both repressive and interrogative purposes, and it is the *only* nation in the world to have codified and legalized the use of torture in interrogation.

Israel has also employed various forms of collective punishment against the Palestinians, including the imposition of curfews, sieges on entire villages or urban centers, often for prolonged periods of time, raids, home demolitions, blanket closures of schools and universities, the destruction of property, including agricultural and private land and the uprooting of trees and crops, and severe restrictions on the freedom of movement of persons and goods within the Occupied Palestinian Territory.

Other abuses by the Israeli occupying force include arbitrary detentions, deportation of civilians, illegal acquisition of Palestinian land,⁴ exploitation of natural resources, and destruction of the economic and social structure of Palestine. These abuses, which have persisted since 1967, are in flagrant violation of international humanitarian law and U.N. Resolutions. (U.S. Department of State, “2002 Human Rights Report for Israel and the Occupied Territories,” released March 31, 2003.) It is these abuses that have moved the Palestinian people to seek liberation from Israel and self-determination, in order that they may realize the inalienable rights secured to every human being and end the oppressive rule that keeps them in a state of poverty, fear, and social and political inferiority. This is a very different motivation than that which inspires Al-Qaeda to commit acts of terrorism in the United States and around the world.

⁴ In June 2002, the government of Israel decided to erect a physical barrier to separate Israel and the West Bank in order to prevent the uncontrolled entry of Palestinians into Israel. In most areas, the barrier is comprised of an electronic fence with dirt paths, barbed-wire fences, and trenches on both sides, at an average width of 60 meters. In some areas, a wall 6-8 meters high has been erected in place of the barrier system. Most of the barrier route was set in the West Bank and not along the Green Line. The areas in which the barrier has already been completed clearly reveal the extensive infringement of the rights of Palestinians living near the barrier. If construction of the barrier continues in the West Bank, in accordance with the recent Cabinet decision, further violation of the human rights of hundreds of thousands of Palestinian residents will occur. These violations constitute a flagrant breach of international law. The construction of the barrier has brought new restrictions on movement for Palestinians living near the barrier's route, in addition to the widespread restrictions that have been in place since the outbreak of the current Intifada. The Separation Barrier, *The Israeli Information Center for Human Rights in the Occupied Territories*, at www.btselem.org.

The PIJ may not be the friends of the United States, but they are not *our* enemies. They do not threaten the national security of the United States. They are part of an ongoing internal struggle that is encompassed within Israel and the occupied territories and has been going on a lot longer than Al-Qaeda has even been in existence. Fear of one very real terrorist threat cannot justify interference in the political struggles of other countries through the creation of imaginary threats, nor should it be allowed to prevent a full and complete discourse about these issues.

As previously noted on page 3, the Indictment fails to address the historical context of the Middle East crisis. It does not discuss the origin of the conflict between the Palestinians and Israelis, the violent acts committed by each side, and the injuries suffered by both sides. It simply applies the labels of “good” and “evil,” according to each side’s status as an ally or perceived enemy of the United States. While the Indictment tracks the death of Israelis at the hands of Palestinians, it fails to discuss the corresponding deaths of Palestinians at the hands of Israelis.

From reading this Indictment, one would be led to believe that the only people who have died or who have been killed as a result of the violence in the Middle East or over the occupied territory are Israelis or Americans, and that no Palestinians have died or suffered as a result of the policies espoused by Israel and the U.S. By only telling one side of the story, the Indictment makes it abundantly clear that the real motivation behind these charges is to punish those who disagree with the U.S. government. Query whether Dr. Al-Arian is required by his associations to remain silent in the face of the reality of the day-to-day treatment of the Palestinians at the hands of the Israelis. Or is he to be punished merely for expressing his views as to possible solutions for the ongoing dispute

between Israel and the Palestinians? Here his speech and association represent little or no threat to the existence of the United States. Clearly, even if the Palestinians liberated themselves and imposed an Islamic government in a future Palestinian state, it would pose no imminent threat to the U.S. We might not like it, but the overthrow of the U.S. is not a likely consequence.

The Government, in prosecuting Dr. Al-Arian, ought to speak in the indictment with some degree of candor. It should acknowledge the realities of the Middle East crisis – the fact that there is blame on both sides and that both sides have committed atrocities. The only real difference between the attacks committed by the Palestinians and those committed by the Israelis are ones of labeling and perception. When Palestinians attack Israelis, it is an act of terrorism. When Israelis attack Palestinians, it is a military operation. Yet these “military operations” are really only distinguishable by the superior military power of the Israelis, as the occupying force. The Palestinians resort to the alternative tactics of guerilla warfare and suicide bombings because they do not have the superior military power that the Israelis have. If they did, Israel might not be the current occupying power, since the fact of their current occupation is due to their superior military strength in their earlier wars against the Palestinians and neighboring countries.

An analogy might be made to the colonial soldiers in the American Revolution. Without the superior military strength of the British forces, the colonials had to resort to a kind of guerrilla warfare to make the best use of their “home field advantage.” Instead of ordered regiments, lined up to face each other on the field of battle, many skirmishes took place among the trees and forests, with colonists often making surprise attacks on unwary British troops. The British were of the opinion that this was a lower class of warfare and

that the Americans were not abiding by the traditional rules of warfare. But, when you are a rag-tag group of fighting men desperate in the belief that there is only one way to remove a superior oppressive force, you must play the hand you've been dealt. When a man is fighting for his own freedom and way of life against those who would threaten those fundamental rights of all human beings, he cannot justify not doing everything possible to win this freedom and beat back the oppressor. A man's freedom should not be sacrificed for the sake of pure formalism to a set of rules of war formulated by the oppressors themselves. Notably, those countries most involved in determining the applicable rules of war over the course of history have been those who have the least need to use the methods of war ruled out by them. Why resort to guerrilla warfare and suicide bombings if you have well-trained combat soldiers and real bombs?

Throughout the Indictment, there are a number of references to acts of violence associated with the PIJ. Yet, at no point – in the Indictment or in the Government's Opposition Memorandum, are these killings put in context. There is no account made of the atrocities committed by the other side in this ongoing war between the Palestinians and the Israelis. Just in the last year, the Israeli occupying forces have been responsible for hundreds of Palestinian deaths, including deaths of civilians. On Christmas day of this year, five people were killed in an Israeli airstrike, two of whom were civilians. On December 1, 2003, Israeli occupying forces killed 4 civilians during several incursions into the West Bank. On November 27, 2003, Israeli soldiers shot and killed 3 unarmed Palestinian civilians as they were heading to the home of a relative for the Eid holiday. On November 8, 2003, 9 Palestinians, including one child, were killed during Israeli raids into refugee camps. Aerial strikes on October 21, 2003 killed 7 civilians, including one

child and an on-duty doctor, and wounded 58 others. A day earlier, an aerial attack on Gaza City left 3 Palestinians dead. An attack on October 4, 2003 left two dead, including a nine-year-old child. This totals 38 dead in a matter of 3 months, mostly civilians and a few children.

In fact, recently there was a group of soldiers, members of an elite Israeli commando unit serving in the West Bank and Gaza Strip, who refused to serve because, as they state in a letter to Sharon, they could not “continue to stand silent” regarding military activities in the territories, which they said deprive “millions of Palestinians of human rights.” An Associated Press article noted that this decision reflects the growing discontent among Israeli soldiers opposed to the 36-year occupation of the West Bank and Gaza. Several months before, a group of pilots also wrote a letter condemning the airstrikes targeting Palestinian militants. *The Associated Press, Israeli Commandos Won't Serve in Mideast*, New York Times (December 22, 2003).

Attempts to kill suspected terrorists through aerial bombardment have killed dozens of Palestinian civilians. Human rights groups report that the Palestinians are brutalized, humiliated and prevented from obtaining medical care at the roadblocks that surround West Bank cities. Normal economic life is practically at a standstill. Israel's attempt to prevent terrorist attacks – or, rather, to punish Palestinians for them – have involved the military in many controversial policies. This letter is only the latest reflection of growing dissatisfaction among the Israelis regarding the country's inability to end its corrosive conflict with the Palestinians. *Id.*

Nor are the Palestinians the only ones responsible for the deaths of Americans. In March of 2003, an American college student in Gaza was killed when an Israeli bulldozer

ran over her. Rachel Corrie, 23, had come to Israel to protest Israeli occupation and, at the time she was killed, she had been trying to stop a bulldozer from tearing down a building in the Rafah refugee camp. According to a fellow protester, also an American, Rachel was alone in front of the house, waving for the bulldozer to stop. She fell down, but the bulldozer kept going. Fellow protesters yelled for the bulldozer to stop, but it ran over Rachel, then reversed and ran back over her. Interestingly, in an article on the incident published in the NY Times, a Palestinian human rights worker was quoted commenting that the killing should be a message to President Bush, who is “providing Israel with tanks and bulldozers, and now they killed one of his own people.” *American Protester Killed by Israeli Bulldozer in Gaza*, NY Times (March 16, 2003).

In reality, however, there are Israeli terrorist groups, notably Kach and its offshoot, Kahane Chai, that have used terrorism to pursue their goals of expanding Jewish rule across the West Bank and expelling the Palestinians. These groups have been outlawed in Israel for their Arab-hating ideology since 1994, the year when a Kahane supporter shot 29 Muslims to death while they prayed in a mosque. Kahanists have also shot, stabbed, and thrown grenades at Palestinians in Jerusalem and the West Bank. In addition to these two groups, the Machteret – a 1980s Jewish underground terror group with links to Kach – staged several attacks, including an unsuccessful May 1980 campaign to kill several Palestinian mayors, before being broken up. Furthermore, there are still a number of recent anti-Arab bomb plots, as well as the more common roadside shootings of Palestinians by Israeli extremists, that have not been connected to these groups, indicating the possibility of additional sources of acts of terrorism in the Israeli population. *Kach, Kahane Chai: Israel extremists*, Council on Foreign Relations,

Terrorism: Questions and Answers, . Thus, it would be incorrect to say that Palestinians are the only source of terrorist acts, as they are known in the traditional sense, and the popular perception to the contrary has more to do with anti-Arab attitudes than with truth.

With respect to the AEDPA itself, the discrimination between Arabs and Israelis is quite evident. Kach and Kahane Chai have raised money seemingly unimpeded by the AEDPA. Though they are considered to be a violent and dangerous foreign terrorist organizations, they have been able to freely and publicly fundraise in the U.S. They avoid authorities by simply changing organizational names, suggesting these groups are subject to minimal scrutiny by the federal authorities. The seeming indifference of the authorities towards these groups suggests to the American people that these groups are not dangerous and, therefore, Jews and Israelis avoid the consequent stigmatization now inflicted upon Arabs in the U.S. Dean E. Murphy, *Terror Label No Hindrance to Anti-Arab Jewish Group*, N.Y. Times, Dec. 19, 2000, at A1.

It is disingenuous to argue that the Palestinians are not as victimized by the ongoing dispute in the Middle East as the Israelis. In fact, the Palestinians are more likely to be victimized given the superior military strength of the Israelis and their status as the occupying force. Yet, the United States supports Israel, financially and otherwise. It is difficult to understand how the financial support of the U.S. and the American people does not constitute “material support” to a foreign terrorist organization or country. The only way to understand it is to say that whether or not a foreign organization will be designated as a “terrorist organization” depends on its affinity with U.S. foreign policy and the rights of individuals to free speech and association can be limited on that basis.

There is, in fact, no threat to the United States itself or to the American people, but only a threat to the foreign policy of the U.S. This Indictment represents the Government's attempt to silence the critics of a foreign policy that is not even-handed and, as such, is about as wise as our previous support of Saddam Hussein.

The Law

1. Pure Speech

The Government asserts in Opposition Memorandum that speech is no basis for criminal liability, but the presence of the allegations concerning "pure speech" in the Indictment suggests that it is at least one of the bases of liability.

Furthermore, the Government asserts that the "[t]he 'clear and present danger' test is generally understood to apply only to content-based speech restrictions that target 'pure speech' or advocacy." Govt. Mem. at pgs. 18-19. The Government asserts that because its interest in this case is "unrelated to expression or the suppression of speech, and is content neutral, the court need not apply the imminent lawless action test of Brandenburg v. Ohio, 395 U.S. 444-49 (1969), and its progeny. Id." Precisely what is the interest the Government seeks to protect by rendering criminal the speech and associations of Dr. Al-Arian? If the Government's interest was truly unrelated to speech, then it would not have inundated its Indictment with acts of speech, particularly the ones cited above, which concentrate on the more inflammatory beliefs and ideas expounded upon by Dr. Al-Arian and those with whom he associates.

Moreover, to claim that the regulation is content-neutral is decidedly disingenuous considering the fact that it is precisely the content of the speech that the government claims proves the crime. The contested regulations do not prohibit

advocacy, support of, and association with all foreign organizations, or even all foreign organizations that have ever engaged in acts of terrorism or violence, but only those foreign organizations designated by the Secretary of State in his or her practically limitless discretion. And, thus far, the Secretary of State has utilized this unfettered discretion to create a list of “foreign terrorist organizations,” the majority of which is composed of Arab or Muslim groups.

In fact, there is a transparent preference, reflected in the list, for designating those groups who disagree with U.S. foreign policy or those in opposition to allies of the United States. Though the list is supposed to consist of organizations threatening the national security of the United States, it often lists organizations involved in internal struggles in other countries and promoting political, social or religious goals in those places that are wholly distinct from any interests or associations of the United States. These groups do not set themselves in opposition to the United States, except insofar as the U.S. has inserted itself into the middle of their internal struggle and in opposition to that particular group. Even then, that opposition is mainly confined to mere abstract opposition to the foreign policy of the United States with respect to their internal struggle and not plots of terrorism on U.S. soil. The focus of these foreign organizations remains on the political, social, and religious struggles going on within their own country or area of interest.

Having established that the regulation of speech involved in this case is content-based, it is clear that the appropriate standard is the *Brandenburg* formulation of the “clear and present danger” test. Applying this standard, as well as the *strictissimi juris* construction of intent, to the acts alleged in Counts 1 through 4 reveal that each of these

alleged criminal charges unconstitutionally restricts freedom of speech as applied to Dr. Al-Arian. The government has argued in this and other cases that, by the terms of the statute, certain acts were taken with the requisite intent to further the illegal aims of the terrorist organization, because, unlike the membership clause cases under the Smith Act, the statute specifies that only provision of “material support and resources” is punishable. See Govt. Mem. at pgs. 17-18; *Boim v. Quranic Literacy Institute and Holy-Land Foundation for Relief and Development*, 291 F.3d 1000, 1022 (7th Cir. 2002) (stating that the arguments that the material aid laws potentially penalize individuals for political association absent a showing of specific intent “beg the question ... because section 2333 [the civil remedy arm of the material aid statutes] does not seek to impose liability for association alone but rather for involvement in acts of international terrorism”) *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) (holding that the prohibition of financial contributions to terrorist groups did not itself prohibit membership in and association with these groups). However, the Indictment cannot withstand challenge because much of the conduct contemplated as criminal consists of speech that does not create a clear and present danger.

Nowhere in the Indictment is it alleged that this speech created some kind of increased probability of lawless action. In addition, there is no allegation that the supposed danger was imminent. The Government fails to address how discussion and advocacy concerning Arab rights creates a clear and present danger that the U.S. Government has a right to restrict. The precedent is clear that an individual can advocate the overthrow of the U.S. government as long as this advocacy does not create a “clear and present” danger of that actually occurring. See, e.g. *Scales v. United States*, 367 U.S.

203(1961). In this case, no one is suggesting an overthrow of the U.S. government. Dr. Al-Arian, at most, can be characterized as advocating a change in U.S. foreign policy. Before the recent anti-terrorism legislation and the hysteria associated with it, this is exactly the sort of speech that would have received the most protection under the First Amendment. The reason for this is suggested by Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Contrary to the intent of the Supreme Court, evidenced in many cases since Holmes' opinion in *Abrams*, the anti-terrorism legislation seeks to remove certain ideas from the "marketplace of ideas." The "clear and present" danger test is designed to prevent just such a mistake: that the government, in the guise of preventing "danger," will in fact suppress expression because it disapproves of the substantive message.

2. Money as Speech

The Government attempts to distinguish the conduct of Dr. Al-Arian from the "pure speech" and "pure expressions of belief" it deems entitled to constitutional protection. It asserts that it is specifically Dr. Al-Arian's financial support and fundraising for the PIJ that the conduct proscribed by § 2339 of the AEDPA, and it maintains that such conduct "falls outside the protective bounds of the U.S. Constitution." (Govt. Mem. at 12.) In sum, the overt acts in the Indictment the Government claims support its allegations include:

allegations that the defendant raised money for the PIJ, *see, e.g.*, Ind. ¶¶ 43(6), (62), (197), (200), (201), (219), (235); sent money and financial support to relatives of convicted PIJ terrorists and PIJ “martyrs,” *see, e.g.*, Ind. ¶¶ 43(19), (31), (62), (97); provided logistical support to the PIJ by organizing its finances and activities on the ground in the Occupied Territories, *see, e.g.*, Ind. ¶¶ 43(24-28), (33), (185), (227)...”

Govt. Mem. at 11. Yet these very activities have long been recognized by Supreme Court jurisprudence as activities intrinsically intertwined with the First Amendment right to free speech.

In *Buckley v. Valeo*, 424 U.S. 1, 14-19 (1976), the Court dealt with the issue of contribution and expenditure limitations in federal election campaign regulations. It found that such limitations

operate in the area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957).

...

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

An individual’s freedom to speak about political beliefs is significantly affected by the freedom to contribute money. In the Court’s words, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Id.* at 19. Therefore, any restriction on the individual’s ability to contribute money or other financial support to organizations advocating on behalf of those political beliefs necessarily involves that individual’s free speech rights under the First Amendment.

Making a financial contribution to an organization is a means of showing support for the goals and guiding beliefs of that organization. The contribution provisions considered in *Buckley* are very similar to the fundraising ban in the AEDPA. Although the limitations on campaign contributions were upheld by the Court in *Buckley*, AEDPA's total ban on contributions would not likely survive a similar level of scrutiny. Though such contributions might be similarly limited, it is not likely they could be completely prohibited without satisfying strict scrutiny or the clear-and-present danger test. Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 Ind. L.J. 693, 700 (1998).

The Government's application of the O'Brien test was misplaced because it was based on the fundamentally incorrect premise that the alleged financial contributions and fundraising efforts by Dr. Al-Arian were purely conduct and unrelated to communication or expression. In *Buckley*, the Supreme Court expressly held that fundraising activities are protected by the First Amendment. It found that the giving of money qualifies as a form of "speech" worthy of protection. 424 U.S. at 19. Rather than applying the O'Brien test, the Government should have looked to the strict scrutiny test applied by the Supreme Court in *Buckley* since, as noted earlier, the campaign financing restrictions reviewed in *Buckley* limited expressive rights just like the AEDPA's anti-fundraising provisions limit political expression. Since the Court found the campaign restrictions in *Buckley* to be related to expression, it certainly follows that the AEDPA's fundraising ban should be found to be expressive in nature. Joseph Furst, *Guilt by Association and The AEDPA's Fund-Raising Ban*, 16 N.Y.L. Sch. J. Hum. Rts. 475, 490-91 (1999).

To satisfy the strict scrutiny test, the government must show that the ban is “necessary to serve a compelling interest and that it is narrowly drawn to achieve that end.” *Burson v. Freeman*, 504 U.S. 191, 200 (1991). In the case of the AEDPA, the government is singling out organization advocating ideas in conflict with U.S. foreign policy and prohibiting individuals from expressing their support for these organizations through financial contributions. While occasions may arise when speech must be limited to protect the public safety, the Supreme Court has repeatedly emphasized the importance of protecting speech as a “fundamental liberty” and “an indispensable condition of nearly every form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 326 (1937). The question, then, is whether the government’s interest in eradicating speech characterized as terrorist is sufficiently compelling.

The contribution and fundraising ban is equally unlikely to survive the second prong of this test since it is not the least restrictive means of accomplishing this goal. First of all, there has been no determination made that the money contributed would actually be used for the activities the government seeks to eradicate. Rather, in enacting the material support statute, Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247.

It is true that money is fungible, but this is true of all money and all groups. If this premise were accepted, it would mean that legislatures could penalize material support of any organization that has ever engaged in any illegal activity, without regard to the purpose and use of the particular material support. The state could make it a crime to

provide social services to gang members, to pay dues to the Communist party, or to make a donation to the Republican Party, on the grounds that each of these organizations has engaged in criminal activity and may do so in the future. Likewise, it could be said that providing material support to these organizations would free up resources that could then be used to further the group's illegal ends. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.I.L.Rev. 1, 12 (2003).

Moreover, the freeing up argument exaggerates the extent to which donations to a group's lawful activities are in practice translated into illegal activities. For example, no one would suggest that the millions of dollars donated to the ANC in the 1980s to support its lawful anti-apartheid work were simply transformed into bombs and weapons for its military wing. *Id.* In this particular case, the only allegations of the specific use to which money donated to the American arm of the PIJ was put referred to donations to the families of martyrs and salaries of employees.

There are also "overt acts" listed in the Indictment referring to the payment of money to the families of martyrs. *See, e.g.*, ¶¶ 43(31), (62), (70), (71), (73), (97), (101), (130), (186), (217), (246). In its Opposition Memorandum, the Government specifically asserts that these acts are one basis of Dr. Al-Arian's liability. Govt. Mem. at p. 11. However, the connection between these charitable contributions and the provision of "material support" to foreign terrorist organizations is unclear and unproven. The money here is not alleged to have gone to any terrorists, nor even to any organization itself; it is the Government's assertion that money went to the widowed wives and children of those who supported and died for a cause that Dr. Al-Arian, and others believe in.

However, even if these “martyrs” are seen as morally reprehensible and universally condemned by all society, there is still no logical reason why this should prevent an individual or organization from donating to those in need. The sins of the father should not be visited upon the son. Ezekiel 18:20. This notion of vicarious guilt is alien to the traditions of American jurisprudence and to our long-standing adherence to the concept of personal responsibility. Nevertheless, there seems to be an implicit idea, with respect to these donations, that they are a sort of “payment” made to the families of the martyrs in exchange for services rendered. Still, there are no allegations that Dr. Al-Arian or anyone else made any such deal with these persons, nor is there evidence offered showing this to be the case. In fact, allegations in the indictment repeatedly refer to the financial difficulties the PIJ experienced and to the fact that it was by no means certain that these families would get any money at all, since this commodity was so difficult to come by.

One great difficulty for domestic Arab groups is that the foreign “terrorist” organizations they contribute to also fund religious and charitable projects. Hamas operates orphanages, retirement homes, hospitals, women’s clinics, religious colleges, sports clubs, kindergartens and vocational schools, providing benefits to tens of thousands of Palestinians. Another “foreign terrorist organization,” Hezbollah, operates 3 hospitals, 9 schools, and 13 dental clinics, as well as providing drinking water to Beirut slums and rebuilding roads and houses destroyed by fighting. Now, U.S. citizens, Arabs and others in the U.S. can no longer contribute to such worthy causes. While it is true these organizations have ties to paramilitary activity, they also provide many services to the community. To prohibit Arab support to these groups is to deny the reality that the

Palestinian cause, or a conservative Islamic movement, is part of many Arabs' associative ties. The stigma does not only attach when one is found guilty of contributing to a terrorist organization, but also when one is merely investigated or accused of association with a group being investigated, thereby reinforcing the damaging stereotypes. Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 Fordham L.Rev. 2825, 2873-74 (2001).

As previously noted, most organizations identified as terrorist do not exist simply for the purpose of terrorism, but, rather, they ultimately have a political purpose or goal – in the case of the PIJ, obtaining self-determination for Palestinians in the occupied territories. These organizations, then, utilize different means to achieve that end goal, some of which may be considered as terrorist by the opposing side.⁵ But it does not follow that all organizations utilizing violence as a means of attaining their ends will automatically turn any donation funding their lawful activities into money to support acts of terrorism. *Id.* “According to a senior Israeli military officer, even Hamas, the organization reportedly responsible for an untold number of unspeakable suicide bombings in Israel, spends 95% of its resources on a broad range of social services.” *Id.*, citing Serge Schmemmann, *Cradle to Grave: Terror Isn't Alone as a Threat to Mideast Peace*, N.Y. Times, Mar. 3, 1996, at D1.

Furthermore, in many situations, a complete ban would not leave open alternative avenues of expression because the only way for some individuals to support a foreign organization may be through the donation of money. Peter Erlinder, *Cure is Worse than Disease: Antiterrorist Law Threatens American Freedom*, Star Trib., Oct. 20, 1997, at

⁵ Nelson Mandela, hailed as a hero by most of the world, was considered a terrorist by the South African apartheid government.

13A. In certain places, relief organizations have no choice but to work with and through organizations likely to be deemed “terrorist organizations” by the Secretary of State. Often, these relief organizations must pay bribes and fees to these groups in order to get the much-needed goods and services to the people who need them. Now these relief organizations will be forced to ignore the welfare and human rights of people around the world or help them and thereby subject themselves to criminal liability. Andy Pearson, *The Antiterrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association*, 24 Wm. Mitchell L. Rev. 1185, 1211-12 (1998).

Finally, even if the AEDPA’s fundraising ban were to have some impact on reducing incidents of terrorism, that impact, at best, would be uncertain. Conflicts such as those in Northern Ireland, the Middle East, Europe and South America have gone on for centuries and are perpetuated by internal dynamics that have little to do with whether or not or in whose direction the U.S. or the American people throw in their support. However, it is certain that the impact of such a law on American political freedoms would be devastating. *Id.*

There are alternatives that can be utilized by the government to limit the negative effects of terrorism without banning free speech. The government should use the tools it already possesses to prosecute terrorist attempts and conspiracies instead of this provision that threatens free speech and could place an individual in jail for 10 years without any showing of intent. Beall, at 701. The government has “sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

A. Defendant's Right of Association

The enactment of § 2339(B) of the AEDPA poses an imminent threat to individuals' freedom of association as it eliminates the need for individual proof of guilt and returns to the "guilt by association" standard of a former era in U.S. history. The principal of individual culpability was developed at a time when the right of association was most threatened, during the McCarthy era. At that time, many Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or otherwise connected with the Communist Party. Though initially the Court did not do much to deter anti-Communist initiatives, eventually the Court developed a rule that halted these efforts. It held that the government may not impose criminal or civil liability on an individual merely because of his association with an organization that engages in both legal and illegal activities unless it proves that it was the individual's specific intent to further the organization's illegal ends. David Cole, *Hanging with the Wrong Crowd: of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 215 (1999).

These anti-Communist initiatives took the form of guilt by association, as they subjected Communist Party members and supporters to criminal liability because the Communist Party itself had engaged in illegal activities, without proof that the individual supported those activities. In a series of cases, the Supreme Court rejected this rationale as grounds for civil or criminal liability and required proof of each individual's own intent to pursue the organization's illegal ends. *Id.* at 216.

The most extensive discussion of this principle is in *Scales v. United States*, 367 U.S. 203(1961), in which the Court first assessed the Smith Act's membership

provisions, which made it a crime to be a member of the Communist Party. As the Court noted in *Scales*, guilt by association alone is an impermissible basis upon which to deny First Amendment rights. *Id.* at 229.

There must be clear proof that a defendant “specifically intend[s] to accomplish [the aims of the organization] by resort to violence.” *Noto v. United States, post*, at p. 299. Thus, the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent “to bring about the overthrow of the government as speedily as circumstances would permit.” Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.

It was in *Scales* that the Supreme Court’s prohibition against guilt by association had its decision, with the Court ultimately declaring it to be “alien to the traditions of a free society and to the First Amendment itself.” As the Court stated:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.”

Id. The *Scales* court specifically sought to avoid exactly what § 2339B of the AEDPA seeks to do – punish individuals without clear proof that the individual actually intended the illegal acts of the organization and sought to further those goals.

The elements of the *Scales* test must be judged “strictissimi juris” because otherwise, there is a danger that an individual sympathizing with the lawful goals of such an organization, but without the specific intent to further its unlawful activities, might be punished for his adherence to legitimate and constitutionally protected purposes. *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

The AEDPA's material support provision is a classic case of guilt by association. It imposes liability regardless of the particular individual's own intentions, based solely on the individual's association with others who may have committed illegal acts. Furthermore, this liability is imposed very selectively. The law does not apply a neutral prohibition on all material support to foreign organizations, or even to all foreign organizations utilizing violence. Rather, the statute prohibits material support to those organizations designated by the Secretary of State, in his or her virtually unfettered discretion. The Secretary of State may designate any organization that has ever used or threatened to use a weapon against person or property and whose interests are contrary to our foreign policy, national defense, or economic interests. Therefore, though thousands of groups fit the profile for designation under the terms of the statute, only those organizations that have failed to curry the political favor of the United States are actually designated. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.I.L.Rev. 1, 10 (2003). Had this law been on the books in the 1980s, the many Americans who donated money to the African National Congress (ANC) for its lawful political struggle against apartheid would be subject to criminal liability since, during those years, the ANC was designated a terrorist organization by our State Department.

Though this issue clearly involves the same question of association with unfavorable groups that was addressed by the courts in the McCarthy era, the government in this case has sought to redefine the issue. In its Opposition Memorandum, the government contends that the material support provision does not punish membership per se, but only material support. Govt. Mem. at p. 19. In reality, however, the distinction

between association and material support is illusory. An organization could not survive without the material support of its members, and it would certainly be an empty right to be able to join an organization but not support it. It would seem that the government is trying to get around the protection afforded individuals by the right of association by punishing the incidents of membership – paying dues, volunteering, fundraising, or monetary contributions – rather than directly punishing the fact of membership itself. The government should not be allowed to use this law to make a formalistic end-run around the firmly established right of association.

This is the reason the Court has continued to acknowledge that soliciting and making contributions are acts of association protected by the First Amendment. As the Supreme Court stated, “The right to join together ‘for the advancement of beliefs and ideas’ ... is diluted if it does not include the right to pool money through contributions, for funds are often essential of ‘advocacy’ is to be truly or optimally effective.” *Buckley*, 424 U.S. at 65-66. The Court has permitted the capping of political campaign contributions, whereas the material support law is analogous to a law permitting the Federal Election Commission to criminalize all donations to any political party that it determines is involved in illegal activity and contravenes U.S. policy. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.I.L.Rev. 1, 10-11 (2003). Unlike earlier cases, where the government merely sought to end fundraising, here the government seeks to punish the Defendant.

Clearly, the AEDPA’s fundraising ban is an unconstitutional burden on an individual’s right of association and a severe encroachment on free speech. Under this statute, individuals will be forced to choose between going to jail or contributing to a

designated organization, even if their only objective was to pursue the legal aims of that group. They must choose to refrain from conduct that clearly has a strong expressive component. Joseph Furst, *Guilt by Association and The AEDPA's Fund Raising Ban*, 16 N.Y.L. Sch. J. Hum. Rts. 475, 498-99 (1999). Such a law also creates the risk of a chilling effect on membership in controversial, non-designated groups, as the Secretary's practically limitless discretion allows for the distinct possibility that he or she may designate organizations as terrorist merely because they are politically unpopular. Indeed, there is the possibility that the illegal actions of one or a few members on the fringe of an organization could induce the Secretary to designate the entire organization as a "terrorist organization."

B. Due Process Rights and Protection of Speech-Related Conduct

Section 2339 of the AEDPA also violates Dr. Al-Arian's Fifth Amendment right to due process of law because it does not require proof that a person charged with violating the statute had a "guilty intent" when he provided "material support" to a designated organization. In *Scales*, the Supreme Court stated that:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause.

367 U.S. at 224-25. "*Scales* analyzed the *relationship* between a person's '*status or conduct*' with an organization and 'the underlying substantive illegal conduct in order to determine whether that relationship is indeed too tenuous to permits its use as the basis of criminal liability.'" *Humanitarian Law Project*, citing *Scales*, 367 U.S. at 226. In doing so, the *Scales* Court found that "personal guilt" must be established, even as to active

members of the Communist Party, “because the Court read the statute to reach only ‘active members having also a guilty knowledge and intent.’” *Id.* at 228.

This due process right of proof of personal guilt has been applied in cases where a person was convicted because of the connection of his *conduct* to a proscribed organization. In *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961), for example, the Court assessed the constitutionality of a conviction under the Smith Act where the defendant had engaged in a number of activities to support the Communist Party:

Hellman was an exceedingly active member of the Party. He served as an organizer for the states of Montana and Idaho. He regularly attended state and regional meetings. He taught extensively in Party schools, recruited members into the Party, organized youth camps, participated in the Party underground and distributed Party literature. The evidence shows that Hellman also sold subscriptions to Party publications, solicited contributions for the Party, requested persons to attend Party meetings, and concealed his own membership in the Party by signing a non-Communist affidavit.

Id. at 813. The court stated that “[i]f Hellman’s activity as a knowledgeable member of the Party was of a kind which is *explainable on no other basis* than that he personally intended to bring about the overthrow of the Government as speedily as circumstances would permit, personal illegal intent could properly be inferred.” However, the court found that although these acts established that Mr. Hellman was an active member of the Communist Party, they did not “give rise to the reasonable inference that he specifically intended to overthrow the Government by force and violence at the first propitious moment.” *Id.*

Notably, the acts of speech, conduct, and association attributed to Mr. Hellman are almost exactly the same as those attributed to Dr. Al-Arian. And in *Hellman*, the court found that Mr. Hellman’s fundraising and other activities in support of the Communist

Party were insufficient to prove that the defendant had the requisite specific intent to pursue the unlawful ends proscribed by the statute. Another interesting point is that Mr. Hellman's association was with an organization whose "ends" included the overthrow of the U.S. government whereas Dr. Al-Arian's alleged association is with an organization that merely challenges the foreign policy of the U.S. in its pursuit of its own political goals in another area of the world.

In *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (en banc), *aff'd on other grounds*, 381 U.S. 437 (1965), the court applied the due process principle of "personal guilt" in determining the constitutionality of Section 504 of the Labor Management Reporting Act, 29 U.S.C. § 504, which made it a crime for a member of the Communist Party to hold office in a labor union. The statute did not require proof that the Communist member union officer had the "intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party. ..." *Id.* at 492. The "evil the statute was designed to prevent" was the anticipated efforts of the union official to use his authority to illegally disrupt interstate commerce, conduct that the government attributed to the Communist Party. The court found that:

The relationship between the *conduct or status* punished and the evil intended here to be prevented is not sufficiently close or substantial to meet the requirements of either the First or Fifth Amendments unless § 504 can be construed as requiring proof either that the defendant has specific intent to use his union office to attempt to disrupt interstate commerce or that he is an active member of the Communist Party with specific intent to promote unlawful party advocacy and action directed towards overthrow of the Government.

Id. at 496 (emphasis added). Therefore, the court struck down § 504 as unconstitutional.

A particular point of interest in this case is the argument made by the government, that "criminality is not based solely on attribution from association; there is an

individually and knowingly performed act – that of becoming a union officer – for which punishment is imposed.” *Id.* This argument is analogous to that made by the Government in its Opposition Memorandum, that defendant is not subject to criminal liability because of his association with a disfavored group, but because he provided that group with the resources and materials that facilitated the group’s activities. In *Brown*, the court gave this argument short shrift.

The court observed that the “gist of the offense” was not the act of becoming a union officer, but, rather, “the advocacy in which the organization was engaged.” *Id.*

So here, the gist of the offense (and, indeed, the sole basis for federal concern) lies in the anticipated efforts of the individual to use union authority or influence to bring about union action which would interfere with commerce. This, to quote from *Scales*, supra, is “the underlying substantive illegal conduct.” It is the relationship of Communist union officers to this potential disruptive and illegal activity which alone can justify the punishment imposed by § 504. In our judgment that relationship is not sufficiently substantial to justify, under the due process clause, imposition of criminal punishment on the basis of union officership combined with Communist Party membership per se.

Id. Thus, the court found that it was, in actuality, the defendant’s association with the Communist Party that was the essence of the offense and, this being the case, it was requisite that the government show a more substantial relationship “between the conduct or status punished” and the harm sought to be prevented. *Id.*

Similarly, the court in this case should dismiss any contention by the Government that the relatively few allegations of “conduct” alleged in the Indictment – amidst the vast majority of “speech” allegations – are not the true basis of the charges, or “gist of the offense.” Rather, it is Dr. Al-Arian’s alleged association with, and speech on behalf of, the PIJ that constitutes the basis for the Government’s concern in this matter. This being the case, the court here should follow the *Brown* court in requiring that the Government

prove that there was an intent on the part of Dr. Al-Arian to further the illegal activities of the PIJ and that he took action directed towards those illegal ends.

C. Banned Speech and Banned Persons

The reality of the government's application of Executive Order 12947 and § 2339 of the AEDPA statute is that once an individual, such as Dr. Al-Arian, is identified as being a member or supporter of a designated "foreign terrorist organization," such as the PIJ, then if that individual makes a speech, raises funds, seeks to influence politicians or obtain political support, or advocates in any way on behalf of his cause, then he can be seen as giving "material support" to that organization. This sort of treatment is reminiscent of the South African practice of "banning" individuals from speech and association for advocating controversial beliefs and opinions.

More than 2000 people were "banned" in South Africa from 1950 to 1990. These individuals were labeled communist or "terrorist," and considered a threat to security and public order. The banned person would, in effect, be a public nonentity – confined to his house, limited to visits of one non-family member at a time, prohibited from holding office in any organization or from speaking or writing for an organization. These people were barred from certain places as well, such as law courts, schools, and newspaper offices.

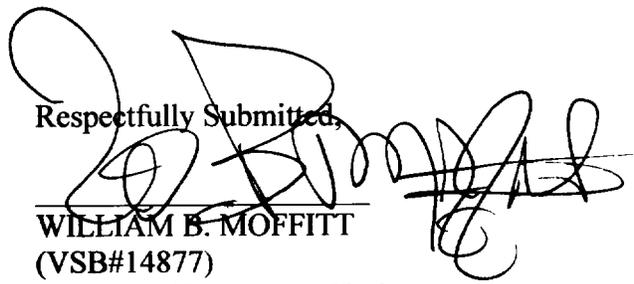
The analogy to Dr. Al-Arian in this case is clear. The allegations in the Indictment are so overwhelmingly speech-oriented that it is difficult to avoid the conclusion that once Dr. Al-Arian was labeled as a member and/or supporter of the PIJ, he was effectively barred from advocating on its behalf. Further, this restriction was not limited to Dr. Al-Arian's public discourse, in conferences or in newsletters, for example, but applied to his

private discourse as well, since many of the "overt acts" in the Indictment consist of private conversations Dr. Al-Arian had on the telephone. In essence, once Dr. Al-Arian was known to be an associate of the PIJ, he had to censor himself, both publicly and privately, with respect to any matters related to that organization.

Thus, Dr. Al-Arian has become a "peculiar societal animal," who has an opinion but who cannot express it because that opinion is considered to be criminal. Moreover, that opinion concerns the foreign policy of the United States, a topic that anyone familiar with First Amendment case law would have thought a highly appropriate subject of political debate. Arguably, it still is, but only if you agree with the United States government.

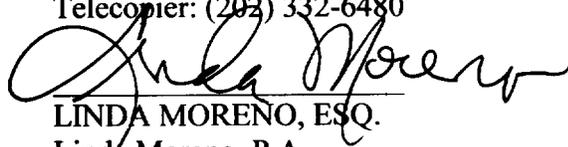
Dated: January 12, 2004

Respectfully Submitted,



WILLIAM B. MOFFITT
(VSB#14877)

Asbill Moffitt & Boss Chtd.
The Pacific House
1615 New Hampshire Avenue, N.W.
Washington, D.C. 20009
Telephone: (202) 234-9000
Telecopier: (202) 332-6480



LINDA MORENO, ESQ.

Linda Moreno, P.A.
1718 E. 7th Avenue
Suite 201
Tampa, Florida 33629
Florida Bar Number 112283
Telephone: (813) 247-4500
Telecopier: (813) 247-4551

Counsel for Dr. Al-Arian

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U. S. Mail this 12th day of January, 2004 to:

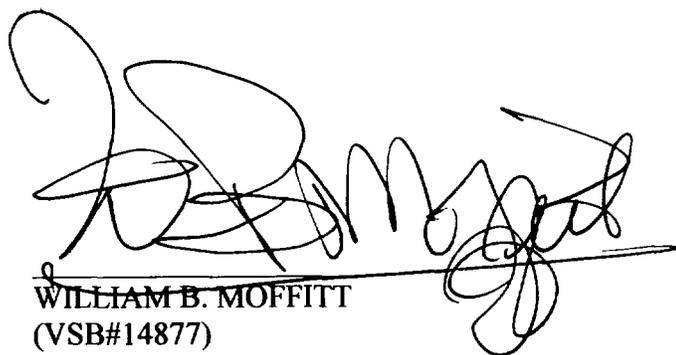
Walter Furr, Esq. &
Terry A. Zitek, Esq.
Office of the U.S. Attorney
400 N. Tampa St., Suite 3200,
Tampa, Florida, 33602;

Daniel W. Eckhart, Esq.
Office of the U.S. Attorney
80 N. Hughey Ave., Suite 201
Orlando, Florida, 32801

Kevin Beck, Esq. &
M. Allison Guagliardo, Esq.
Assistant Federal Public Defenders
400 N. Tampa St., Suite 2700,
Tampa, Florida, 33602;

Steven Bernstein, Esq.,
P.O. Box 1642,
Gainesville, Florida, 32602; and,

Bruce Howie, Esq.,
Piper, Ludin, Howie & Werner, P.A.
5720 Central Ave.,
St. Petersburg, Florida, 33707,



WILLIAM B. MOFFITT
(VSB#14877)
Asbill Moffitt & Boss, Chtd.
The Pacific House
1615 New Hampshire Avenue, N.W.
Washington, D.C. 20009
Telephone: (202) 234-9000
Telecopier: (202) 332-6480