**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

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| United States of America | ) | |
| | ) | Case No.8.03-CR-77-T-30 TBM |
| v. | ) | |
| | ) | |
| Sami Amin Al-Arian | ) | |
| | ) | |

**AMENDED MOTION TO DISMISS COUNTS 1, 2, 3 AND 4 OF THE INDICTMENT**

Comes now the accused Sami Amin Al-Arian in his pro per status and moves this court to dismiss Counts 1, 2, 3 and 4 of the indictment for violation of his rights to free speech, free association, and due process as set forth in the First and Fifth Amendments of the United States Constitution. In addition, the indictment relies on laws that were enacted *ex post facto*, thus violating the defendant's rights under Article 1, Section 9, clause 3 of the United States Constitution. The basis for this Motion is more fully laid out in the accompanying Memorandum.

Respectfully submitted,

Dated: Sept. 15, 2003

Sami Amin Al-Arian

SCANNED

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**AMENDED**
**MEMORANDUM IN SUPPORT OF MOTION TO**
**DISMISS COUNTS 1, 2, 3 AND 4 OF THE INDICTMENT**

## I. The Indictment

### A. Overview

Count (1) of the indictment charged a RICO conspiracy in violation of Title 18 U.S. Code 1962(d). Count I consists of 256 numbered paragraphs and is broken down as follows: a) Introduction, ¶¶ 1-23; b) The Enterprise, ¶¶ 24-25; c) The Racketeering Conspiracy Violation, ¶¶ 26-27; d) Means and Methods of the Conspiracy, ¶¶ 29-42; and e) Overt Acts, ¶¶ 43-256.

Count (2) of the indictment charges a conspiracy to murder and maim persons at places outside the United States in violation of Title 18 U.S. Code Section 956(A)1. Count II is also divided into sections as follows: a) Introduction; b) the Agreement; c) Means and Methods; and d) Overt Acts, which incorporates and realleges ¶¶ 191-255 of Count I.

Count (3) is likewise a conspiracy, and it is likewise broken into sections as follows: a) Introduction, which incorporates Part A of Count I; b) the Agreement; c)

Means and Methods; and d) Overt Acts, which incorporates and realleges ¶¶ 197 through 255 of Count I. All charges are in violation of Title 18 U.S. Code 2339(B).

Count (4) consists of the following: a) Introduction, which realleges Part A of Count 1 in addition to eight numbered paragraphs setting out acts undertaken by the Secretary of State and the President of the United States; b) The Agreement; c) Means and Methods, which realleges Part B of Count 3; and d) Overt Acts, which incorporates and realleges Part E of Count 1, ¶¶ 122-253, of the indictment. All charges are in violation of Title 18 U.S. Code 371.

Comes now the accused Dr. Sami Amin Al-Arian and moves to dismiss Counts 1 through 4 on the grounds that each of the alleged conspiracies contained in Counts 1 through 4 amount to an extraordinary violation of the United States Constitution.

The indictments constitute an unprecedented attack on the speech and association rights of this accused as expressed in the First Amendment to the United States Constitution, the due process rights as expressed in the Fifth Amendment, and the rights to protection from *ex post facto* laws as expressed in Article I, Section 9, clause 3.

**B. Count 1**

The introduction of Count 1 of the indictment purports to discuss an organization known as the Palestinian Islamic Jihad, or PIJ. It refers to the PIJ as a "terrorist organization." Paragraph 3 purports to discuss the organizational structure of the PIJ, and proceeds to discuss without any history or context such terms as "the Palestinian cause," "Jihad solution," "Martyrdom style," and "liberation." Paragraph 5 discusses, again without any historical references or context, the geographical boundaries of the State of

Israel and the geographic boundaries of an entity the indictment terms the "occupied territories."

Paragraph 5 leaves out any description of political or social relationships between Israel and the occupied terrorists. The introduction goes on to identify each of the defendants' nationalities and their immigration status. It discusses the Accused's relationship with the University of South Florida and several organizations which were established in Tampa, including the Islamic Concern Project, Inc. (ICP), the World and Islamic Studies Enterprise (WISE), and the Islamic Academy of Florida (IAF).

Finally, the introduction discusses Presidential Executive Order 12947 (January 23, 1995 and November 27, 1995) and the fact that as a result of the order, the PIJ, Hamas, Fathi Shiqaqi and Abd Al Aziz Awda, along with Ramadan Abdullah Shallah, were designated as terrorists and that in October of 1997 the Secretary of State, pursuant to the Anti-Terrorism and Effective Death Penalty Act, designated the PIJ, Hamas foreign terrorist organizations.

Section (B) purports to identify the Enterprise the PIJ is proclaimed to be a criminal enterprise engaged in the acts of violence including extortion, murder, money laundering, fraud and misuse of visa.

Section (C) connects the accused to the Alleged Enterprise and lists a series of crimes that the Enterprise is purportedly responsible for:

(a) multiple acts involving murder, in violation of Florida Statutes 782.04; 777.04(3);

(b) multiple acts involving extortion in violation of Florida Statutes 836.05, 777.011 and 777.04;

(c) acts indictable under Title 18, United States Code, Section 1956(a)(2) and (h) [money laundering];

(d) acts indictable under Title 18, United States Code, Section 1952 [interstate or foreign travel or transportation and use of any facilities in interstate or foreign commerce with the intent to promote and carry on an unlawful activity];

(e) acts indictable under Title 18, United States Code, Section 956 [conspiracy to kill, kidnap, maim or injure persons in a foreign country];

(f) acts indictable under Title 18, United States Code, Section 2339B [providing material support or resources to designated foreign terrorist organizations]; and

(g) acts indictable under Title 18, United States Code, Section 1546 [fraud and misuse of visas, permits, and other documents].

Section (D) regarding the Means and Methods of the Conspiracy is of particular interest with respect to this motion. (Directing the court's attention to ¶¶ 32 and 42 in particular.)

32. The Enterprise members would and did actively solicit and raise monies and funds and support for the PIJ and PIJ goals in various ways, including, but not limited to the following methods:

(a) conducting and attending fund-raising conferences and seminars;

(b) inviting known terrorists from outside the United States to speak at such conferences and seminars;

(c) traveling within the United States and to places outside the United States;

(d) sending letters and other documents requesting funds to individuals and countries in the Middle East and elsewhere;

(e) utilizing the Internet computer facilities to publish and catalog acts of violence committed by the PIJ

(f) advocating orally and in writing death to Israel and its supporters; and

(g) writings and/or disseminating articles concerning the PIJ.

42. The enterprise members, while concealing their association with the PIJ, would and did seek to obtain support from influential individuals in the United States under the guise of promoting and protecting Arab rights. The enterprise members would and did make false statements and misrepresent facts to representatives of the media.

The overt acts, Section E, can be characterized as follows: attendance at conferences; speeches at conferences; fraud on the INS; the transfer of money; violent acts by individuals declared as co-conspirators associated with the PIJ; the maintenance of and possession of documents; the receipt and sending of facsimiles; discussions of the financial status of the PIJ; discussions regarding the structure of the PIJ; discussions regarding the payment of money to families of martyrs; discussions involving travel; receipt and dissemination of information critical of American foreign policy; discussions regarding Executive Order 12947; plans to publish speeches and eulogies; possession of Senate Resolutions; discussions regarding the relationship between the PIJ and HAMAS;

discussions regarding articles favorable and unfavorable to PIJ; discussions regarding joy in leaving the United States; and a variety of other subjects.

**C. Count 2**

Count 2 in this regard is equally offensive. First it is directly related to Count I and follows the same pattern. Its introduction incorporates by reference the introduction to Count 2. Paragraph 2 sets out the agreement; this time it is a conspiracy to provide material support to a designated foreign terrorist organization, namely the PIJ.

It is alleged that the World and Islam Studies Enterprise, the Islamic Concern Project and the Islamic Academy of Florida were utilized as the base support for the PIJ to raise funds and to provide support to assist in the promotion of violent attacks designed to thwart the Middle East peace process.

Part C of Count 2 references 1988 as the year the Accused were involved with the financial affairs of the PIJ and claims that the Accused communicated with each other and others; gave travel and immigration advice; discussed amongst themselves and others of the arrest of PIJ operatives; received a list of names and bank account numbers for martyrs; circulated military reports; discussed terrorist attacks after they occurred; provided logistical support, etc.; received facsimiles; and advised associations how to conduct effective propaganda.

Part D of Count 2 refers to the overt acts by incorporating ¶¶ 191 through 255 from Count 1.

**D. Count 3**

Count 3 likewise attempts to criminalize speech and association. The introduction to Count 3 incorporates by relevance the introduction to Count 2. The agreement in

Count III is to murder and or maim. The methods and means incorporate by reference means and methods in Count I. Finally, overt acts 197 through 255 are incorporated by reference.

**E. Count 4**

Count 4 again incorporates Part (A) of Count I as its introduction. It then discusses Executive Order 12947 with regards to the making or receiving any contributions, goods or services to specially designated terrorist organizations.

The agreement in Count (A) is a conspiracy to violate Executive Order 12947 by making and receiving funds and goods and services to or for the benefit of the Palestinian Islamic Jihad, Abd. Al Aziz Awda, Fathi Shaqaqi and Ramadan Abdullah Shallah. Count (A) re-alleges Over Acts 122 through 255.

**II. Statutes Involved:**

Count 1 charges Sami Al-Arian with conspiracy to commit racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), Title 18 U.S. Code 1962(d).

Count 2 charges Sami Al-Arian with conspiracy to murder, maim, or injure persons at places outside the United States in violation of 18 U.S. Code Section 956(A)1.

Count 3 charges Sami Al-Arian with conspiracy to provide material support to a foreign terrorist organization in violation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S. Code Title 2339(B).

Count 4 charges Sami Al-Arian with conspiracy to make and receive contributions of funds, goods, or services to or for the benefit of specially designated terrorists in violation of Executive Order 12947, 60 FR 5079 (effective January 23, 1995)

and the Secretary of State's designation of the PIJ as a foreign terrorist organization (October 8, 1997).

## III. Introduction

### *A. In General*

The indictment in this completely ignores the historical context of what has been termed "the conflict in the Middle East." One need only examine the utilization of the term "occupied territory" in the indictment to understand how the indictment attempts to manipulate historical truth. While the phrase "occupied territory" is used in the indictment, it is utilized without any historical context or definition. The indictment fails to state who the occupier is, the purpose of the occupation, or the level of the occupation. The indictment never speaks to the nature of the occupation nor the life of or the nationality of the people who are the subject of the occupation. The indictment characterizes one side of this ongoing conduct as good and the other side as evil. While the indictment tracks the death of Israelis at the hands of Palestinians, it never references the deaths of Palestinians at the hands of Israelis. The indictment's historical oversights provide a framework by which the U.S. attempts to criminalize legitimate political expression. It is clear that the express purpose of the indictment is to chill any and all support for the Palestinian cause and any additional advocacy in favor of the rights of Arabs.

The government makes much of the violence in the Middle East in the indictment. If one were to believe the historical accuracy of this indictment, one would 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 have suffered as a result of the policies espoused by Israel and the United States. By telling only one half of the story of the Middle East to the grand jury and by basing an indictment for racketeering on one side of the story, the government seeks to criminalize the conduct of those who disagree with it.

Admittedly, circumstances may arise where the government has a legitimate basis for limiting one's freedom of speech and association in the interest of national security. For example, the government may limit an individual's associational freedom "if the government can prove that the individual charged was intentionally furthering the illegal goals of a group in which he was an active member." Joseph Furst, III *Guilt by Association and the AEDPA's Fund Raising Ban,* 16. N.Y. L. SCH. J. HUM. RTS. 475, 483 (1999). However, this interest is not so broad as to silence every voice that does not support the government's current political agenda. Rather, the government must meet its burden of showing that an organization's goal "rose to the level of instigating an illegal action, not just advocating a position." Id. at 483-484.

Absent a declaration of war by Congress, there is no legitimate government interest in curtailing the free marketplace of ideas by restricting political speech. Because of its potential to influence, dissenting political speech is particularly valuable when there has been no declaration of war. Once war has been declared, it is too late. In contrast, when there has only been an Executive Order or some other act that falls short of a Congressional declaration of war, then the political climate is ripe to receive as much discourse as possible to guide the nation's foreign policy goals. Thus, the government should err on the side of affording dissenting political speech *more* protection, and not *less*, during times of political upheaval, for this is the only kind of speech which

motivates the government towards change. Consequently, Dr. Al-Arian's speech should be afforded the utmost protection and should not be criminalized.

The government's position regarding foreign policy fluctuates such that the status of a so-called "enemy" of the United States is not static.[1] As a result, an individual could advocate a particular group's views one day without incident. However, if the government later determines those views provide material support for a designated "enemy" of the United States, then that individual may be criminally punished, even though he is merely articulating the very same views that were considered harmless just a short time ago. The freedom of speech and association does not disappear "simply because the organization with whom the American citizens wish to associate is politically unpopular or based outside the United States." Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75, 79 (2001).

Shortly after the 9/11 attack, President George W. Bush issued a statement "caution[ing] against discrimination against Arabs and Muslims," Susan Gellman, *Enduring and Empowering: The Bill of Rights in the Third Millenium: The First Amendment in a Time that Tries Men's Roles*, 75 LAW & CONTEMP. PROB. 87, 88 (2002), and vowing that the United States "[would] not allow this enemy to win the war by changing our way of life or restricting our freedoms." John W. Whitehead and Steven H. Aden, *Forfeiting Enduring Freedom" For "Homeland Security": A Constitutional*

[1] For example, the government historically restricted the civil liberties of "suspected republicans during the late 1700's, immigrant groups throughout the 1800's, unions during the late 1800's, socialists during the early 1900's, Japanese-Americans during the 1940's, and Communists during the 1950's." Lance A. Harke, *The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review*, 43 U. MIAMI L. REV. 667, 668 (1989); *see also* Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens,* 6 COMM. L. & POL'Y 75, 86-87 (2001).

*Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081 (2002), citing *After the Attacks: Bush's Remarks to Cabinet and Advisers*, N.Y. TIMES, Sept. 13, 2001, at A16. Nevertheless, freedoms *are* being restricted, most notably the fundamental interests in free speech and association. The government appears to be targeting Dr. Al-Arian's political speech for no other reason than the rights he seeks to advocate are those of a Middle Eastern organization. Accordingly, Dr. Al-Arian's circumstances provide a particularly strong case for the setting aside of his indictment.

*B. Avoiding Unfavorable Consequences: Chilling Political Speech*

The indictment represents the government's attempt to chill dissenting political speech. Not only does this contradict one of the earliest tenets of the Constitutional Convention, but it also goes against one of the hallmarks of freedoms cherished by people in this country. Americans would indeed be shocked to discover that discussing politics is only protected if limited to "approved" topics. Indeed, this is akin to South Africa's practice of "banning" people from speech and association with certain organizations for the purpose of advocating controversial views, the only difference being that officials in South Africa did not try to conceal what they were doing. Rather, they readily admitted they were handpicking "banned people." The United States, on the other hand, seeks to hide its motivation for singling out those who would advocate dissenting political views by carefully sandwiching their underlying motive amidst approximately 120 pages of an indictment. *See* ¶ 42 on page 13 of the Indictment.

The implications of the government's actions against Dr. Al-Arian are far-reaching. If the fundamental interest of freedom to associate with whomever one chooses

for the purpose of engaging in whatever type of political discourse one chooses, then what right may remain untouched? What topic will become "off limits" next? The public will likely choose to refrain from speech rather than become targets of the government's overzealous prosecution for threats to national security. This chilling effect on political communication and advocacy is inconsistent with "a democratic state that treasures a free marketplace of ideas." Lance A. Harke, *The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review,* 43 U. MIAMI L. REV. 667, 706 (1989). Indeed, the public "should not labor under the misconception that freedoms forsaken today might somehow be regained tomorrow." John W. Whitehead and 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, 1085 (2002). The only way to prevent the government from throwing all of the would-be speakers' First Amendment rights down a slippery slope is to put an end to the infringement as soon as possible. In other words, the court should throw out the indictment against Mr. Al-Arian lest it allow the nation to become a place where one can be criminally punished for speaking out against the current administration and the state of American foreign policy.

## IV. The Alleged Conspiracy

This is a conspiracy case where the vast majority of overt acts in each charged conspiracy involve what is no more than *prima facie* constitutional protected conduct. In this case, what is particularly offensive is paragraphs like ¶ 42. As evidence of the overbreadth of this indictment, the court need only look to ¶ 42 of Count 1.[2]

### *A. Conspiracy Law and the First Amendment in General:*

[2] The charges alleged in ¶ 42 of Count I are re-alleged in Count II and Count III.

In a conspiracy case involving constitutionally protected conduct, the normal conspiracy rules for attributing the behavior of one individual to another do not apply. "Guilt is personal," as Justice Harlan has said, *Scales* v. *United States,* 367 U.S. 203, 224 (1961), and as the court held in *United States* v. *Spock,* 416 F.2d 165, 179 (1st Cir. 1969) ("expressing ones views in broad areas is not foreclosed by knowledge of the consequences... one may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto."). Spock was cited with approval by the Second Circuit in *United States* v. *Rahman,* 189 F.3d 88, 117 (2d Cir. 1999); *see also United States* v. *Montour,* 944 F.2d 1019, 1024 (2d Cir. 1991) ("court... may not impute the illegal intent of alleged co-conspirators to the actions of the defendant") (citing *Spock, Scales,* and *Noto* v. *United States,* 367 U.S. 290, 298-300 (1961)). We develop these points below.

For the government to prosecute speech acts alleged to create a danger contemplated by Congress, individual intent to cause the danger contemplated, as well as a reasonable likelihood of success, must be alleged and proved with respect to each defendant. In cases where conspiracy is alleged, courts must scrupulously ensure that intent to create an unlawful outcome -- the critical element in distinguishing between the permissible expression of political views and the impermissible practice of disguising criminal actions within speech acts -- is personal rather than imputed.

The question, therefore, is whether this statute can withstand constitutional scrutiny as it vaguely sweeps into the prohibited realm all manner of normal and lawful activity. This is not a new issue in the law. An organization may have unlawful objectives and activities as well as constitutionally protected ones. When seeking to punish an

individual for participating in such a bifarious organization, the First Amendment requires precision of analysis. *See generally Spock, 416 F.2d at 172-73,179.*

*B. The Issue of* Strictissimi Juris

When the government seeks to prosecute a conspiracy to advocate imminent lawless action, courts have emphasized that special caution must be exercised in evaluating the necessary elements of a "speech crime" in such a case. This is necessary to ensure that both *mens rea* and causation remain individual, not imputed, elements. Courts apply the doctrine of *strictissimi juris* to ensure that "one in sympathy with the legitimate aims of an organization, but not specifically intending to accomplish them by resort to violence [is not] punished for [her] adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which [she] does not necessarily share." *Nota,* 367 U.S. at 299-300. As the Second Circuit framed the standard, "Under *strictissimi juris,* a court must satisfy itself that there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the illegal goals of the conspiracy and may not impute the illegal intent of alleged co- conspirators to the actions of the defendant." *Montour,* 944 F.2d 1019, 1024; *see Spock,* 416 F.2d at 173 ("The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof. ...The metastatic rules of ordinary conspiracy are at direct variance with the principle of strictissimi juris." (internal citations omitted); *see also United States v. Dellinger,* 472 F.2d 340,392-393 (7th Cir. 1970), *cert. denied,* 410 U.S. 970 (1973) (applying *Spock strictissimi juris* principle to evaluate individual counts against defendants who had also been charged with a conspiracy where the group's goals were both legal and illegal);

*People v. Biltsted,* 574 N.Y.S.2d 272,278 (N.Y.C. Crim. Ct. 1991) (holding *Spock* standard applicable in unlawful assembly prosecutions). In such cases,

> [a]n individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."

*Spock,* 416 F.2d at 173 (quoting *Scales,* 367 U.S. at 234).

## V. Acts of Pure Speech:

### *A. Pure Speech In General*

Government restrictions on private expression are subject to differing levels of judicial scrutiny depending, in part, on how closely the restriction affects "pure" speech. Thus, in reviewing a defendant's conviction for burning his draft card, the Supreme Court in *O'Brien,* 391 U.S. 376, held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Cf Buckley v. Valeo,* 424 U.S. 1,20-22 (1976) (distinguishing between the regulation of political candidate expenditures and supporter contributions on the basis of the fact that contributions, if limited but not eliminated, would still serve the symbolic function assigned to it as a proxy *for* substantive speech and associational party activities). By contrast, "where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon *speech or press as evidence of the. violation* may be sustained only when the speech or publication created a *"clear and present danger"* of attempting or accomplishing the prohibited crime." *Dennis* v. *United States,*

341 US. 494,505 (1951) (emphasis added); *see also Rahman,* 189 F.3d at 115 (citing *Dennis, Yates* v. *United States,* 354 U.S. 298 (1957), and *Brandenburg,* 395 U.S. 444, for the proposition that "the state may not criminalize the expression of views -even including the view that violent overthrow of the government is desirable"). In short, the State may not curtail the expression of individuals, even those who advocate the use of violent means to effect their political ends, unless the advocacy is specifically motivated to bring to fruition such violent conduct, and is likely to do so in the imminent future.

*B. Mens Rea And Speech*

The Supreme Court has held that to criminalize speech, the government must prove both *mens rea* --the defendant's personal intent to incite or produce lawlessness -- and temporal proximity --the defendant's likelihood of producing the intended lawless result. *See Brandenburg,* 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *see also Hess* v. *Indiana,* 414 U.S. 105, 108-09 (1973) (the state may not criminalize advocacy of the use of force or law-breaking unless the charged conduct is "intended to produce, and likely to produce, imminent disorder") (emphasis in original). Thus, in *Noto,* the Court rejected a lower court view

> that mere doctrinal justification of forcible overthrow, if engaged in *with the intent* to accomplish overthrow, is punishable per se under the Smith Act. That sort of advocacy, *even though uttered with the hope that it may ultimately lead to violent revolution,* is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis.
>
> 367 U.S. at 297 (emphasis added).

The intent element must be judged with scrupulous attention to personal, rather than collective guilt; personal motivation to bring forth violent or otherwise illegal ends cannot be conspiratorially imputed merely from the aims of the organization a defendant is accused of abetting. *Yates,* 354 U.S. at 329 (rejecting government argument that "the Communist Party of California, constituted the conspiratorial group, and that membership .in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party's affairs and thus inferentially parties to its tenets"). The Court has been scrupulous, as well, in emphasizing that the presence of either of these two elements is insufficient without the other. *See id.* at 321 (explaining that the "mere doctrinal justification of forcible overthrow, [even] *if engaged in with the intent to accomplish the overthrow,"* is not punishable absent evidence ... that action will occur") (emphasis added).

*C. Overbreadth and the Chilling Effect on Speech*

As mentioned earlier, the indictment seeks to punish Dr. Al-Arian for activities that are protected under the First Amendment. The indictment "sweep[s] unnecessarily broadly" and clearly "invade[s] the area of protected freedoms." *Gooding v. Wilson*, 405 U.S. 518 (1972). In this indictment, the government seeks to punish mere "meetings" with so-called "influential" people in the furtherance of Arab rights. Without more, there is nothing to indicate that the pursuit of Arab rights creates any sort of imminent threat to public safety. While occasions may arise when speech must be limited to protect the public safety, the 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 (1937). Therefore, a balance must be met

between maintaining the government's interest in preventing harmful speech and preserving the individual's constitutional rights. The government has failed to meet this balance in the present case.

The principles associated in this indictment are found in *Gooding v. Wilson,* 405 U.S. 518 (1972). By reversing a conviction for the use of speech which "tended to cause a breach of the peace," Id., the Court in *Gooding* reasoned that the statute reached far beyond "fighting words" and tried to criminalize a wide range of speech otherwise protected under the First Amendment. Id. As the Court stated:

> "[It] matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or prescribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' [the] transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

*Id.,* citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

In addition, the indictment is defective in that it fails to meet the requirements of *Scales v. United States*, 367 U.S. 203 (1961). In *Scales*, the Court affirmed a conviction under the Membership Clause of the Smith Act making it a felony to knowingly become or be a member of any organization that advocates the overthrow of the government by force or violence. Id. In *Scales*, the Court applied a test requiring "clear proof that a defendant specifically intends to accomplish [the aims of the organization] by resort to violence. 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 required specific intent to bring about the overthrow of the government as speedily as

circumstances would permit."Id. Applying the *Scales* test to the present case, one can see problems with the first four counts of conspiracy in the indictment. The language of ¶ 42 of Count I of the indictment would punish Sami Al-Arian for merely telling another individual that after September 11, 2001, people should not discriminate against Arabs or otherwise infringe on Arab rights. However, even if Dr. Al-Arian advocated certain beliefs and sought support for Arab rights from "influential people" regarding the promotion of those rights, this, without more, is not enough to satisfy the *Scales* test and consequently is not enough to criminalize his acts of speech.

The charges noted in ¶ 42 of Part D to Count I of the indictment are realleged *ad nauseum* throughout the indictment. Count II Part C explicitly references ¶ 42, and the rest of the indictment makes reference to ¶ 42 impliedly by using the same language seeking to criminalize political speech and association rights as used in ¶ 42.[3] Punishing activities such as those listed in ¶ 42 creates a chilling effect on speech. For example, punishing Mr. Al-Arian's conduct may prevent others from exercising their fundamental interest in speech that is constitutionally protected for fear that they, like Mr. Al-Arian, may be unduly punished for their actions. In other words, as the Court noted in *Gooding,* invalidation of a law for overbreadth is "necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.[4]

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[3] Directing the court's attention to Count III, Part B and Part C, ¶ 3(e), (g), (i), (m), (n), (r), (s), (u); and Count IV, Part C just to name a few.

[4] The inappropriateness of the government's overbroad and far-reaching attempts to silence the political speech and association of someone like Sami Al-Arian can best be understood by the Magistrate's comments regarding Sami Al-Arian's activities in the community. The Magistrate noted that all of the Defendants are prominent leaders and models of civic involvement in their respective communities. Family members, friends, associates and community leaders presented glowing testimonials about each

*D. Speech Creating a Clear and Present Danger*

*1. In General*

Each of the conspiracy charges alleged in the indictment refer to Executive Order 12749 and the "material support" provision of § 2339B of the AEDPA. In essence, however, these regulations are part of each of the first four conspiracy charges and are used to restrict the speech and associational rights of Sami Al-Arian in some way.

Applying the "clear and present" danger standard formulated in *Brandenburg* and the *strictissimi juris* construction of intent to the acts alleged in Counts I and II reveals that § 2339 of the AEDPA unconstitutionally restricts freedom of speech as applied to Sami Amin Al-Arian. The government has argued in other cases that by the terms of the statute, certain acts were undertaken 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 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,* 205 F .3d at 1133 (holding that prohibition of financial contributions to terrorist groups

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defendant's good character and high reputation. **Al-Arian's record of civic achievement both on the local level and national stage is particularly outstanding.** All defendants are well-educated. Al-Arian has a Ph.D. in computer engineering. All publicly preach and practice the ideals of good citizenship, tolerance, morality and devotion to their religious faith. **Their public achievements embody the proud history of our nation's immigrants living the American dream and contributing to our national mosaic.**

did not itself prohibit membership in and association with those groups). We may as well dispose of this argument at the outset.

*2. Sami Al-Arian as a "Banned Person"*

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. The actions mentioned in ¶ 42 consist mainly 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 would 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 law as it is applied in ¶ 42, a person may be criminally prosecuted for merely speaking to his Congressional representative about Arab rights or about the "wrong" view on Arab rights. This presents a multitude of due process problems that further illustrates why this type of overbreadth cannot be sustained.

Nowhere in ¶ 42 of 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. We are loathe to understand how discussing the advocacy of Arab rights creates a clear and present danger. If anything, discussion of

these matters would lead to a clear and present "danger" of promoting a different foreign policy and treating Arabs with respect in the community.[5]

The government's application of the Executive Order and § 2339 reflects the notion of a "banned person" in the South African tradition. Indeed, this is akin to South Africa's practice of "banning" people from speech and association with certain organizations for the purpose of advocating controversial views. The only difference being that officials in South Africa did not try to conceal what they were doing. Rather, they readily admitted they were handpicking "banned people." The United States, on the other hand, seeks to hide its motivation for singling out those who would advocate dissenting political views by carefully sandwiching their underlying motive amidst a lengthy indictment. *See* Count I, Part D, ¶ 42 on page 13 of the Indictment. Does speech become criminal just because at one time or another a person expressed a view advocating a foreign policy that respects Arab rights? Is Sami Al-Arian therefore a banned human being? Must his life consist of no political communication or association whatsoever?

## VI. Expressive Association:

### *C. In General*

Much of what the indictment alleges is pure speech; yet several other parts of the indictment specifically attack and seek to criminalize acts of expressive association. Recently, the Court ruled that the government may not legislate these rights away, even

[5] Historically, criminal law fulfilled due process requirements by giving notice the public of which acts were illegal so the public could make choices and conform their behavior accordingly. Criminal law violates due process when the law is tied to things as vague and changeable as foreign policy. Tying foreign policy to political speech and association and then using it to silence speech is particularly offensive. American involvement with Saddam Husseim provides a clear example of how drastically and suddenly U.S. foreign policy can change. At one time, the United States supported Husseim's attacks against the Iranians, and even supplied Husseim with weapons to be used in his fight. Now Americans are being shot by some of those very same guns.

in the interest of protecting others. For example, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that the New Jersey accommodations law violated the expressive association rights of the Boy Scouts, even though the law was enacted to protect other groups. The Court first explained that "[t]o determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.' The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private." Id.

In *Boy Scouts,* the group sought to instill values in young people "both expressly and by example," much like one of the goals of the PIJ is to instill certain beliefs in their organization. The Court argued it was "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Consequently, the Court held the Boy Scouts' actions were protected under the First Amendment. In reaching its conclusion, the Court noted that the statute "would significantly burden the organization's right to oppose or disfavor homosexual conduct. [Moreover], [t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." Id.

Thus, the statute was declared unconstitutional. Applied to the present case, the government has not identified an interest justifying the "severe intrusion" on the PIJ.

On the surface, it may seem like a misplaced analogy to compare the Boy Scouts with the PIJ. Aside from both being organizations held together by certain beliefs that are not accepted by the mass public, they are indeed quite different. However, the

question here is not whether the Boy Scouts and Sami Al-Arian are similar in all respects. Rather, the question revolves around the issue of whether expressive speech and association is protected under the First Amendment. If the answer is yes, then it is protected always, and not just for some individuals or groups but not others.

*D. Guilt by Association*

Similarly, the court in *Holy Land Foundation* emphasized that government blocks on funds to Hamas had "not restricted HLF's ability to express its viewpoints, even if these views include *endorsement* of Hamas." 219 F. Supp.2d at 82 (emphasis added). And in *Boim,* the court articulated a clear distinction between affiliation with the goals -- even the violent goals -- of a designated organization, which cannot constitutionally be proscribed, and material support of those goals:

> Under section 23398, and indeed under section 2333, HLF and QLI may, with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 23398 prohibits only the provision of material support (as the term is defined) to a terrorist organization.

*Boim,* 291 F .3d at 1026. Further, an intent to further terrorist goals cannot be imputed to an individual accused of materially supporting IG through specified speech acts without a personalized, specific showing:

> 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...

*Scales,* 367 U.S. at 224-25.

Even under the lesser *O'Brien* standard of intermediate scrutiny, which we contend is not appropriate here, these allegations fail. The *O'Brien* test requires: (1) The speech regulation must be in the government's constitutional power, (2) the governmental interest must be substantial and unrelated to the suppression of free expression, and (3) the burdening of First Amendment freedoms must be no greater than is essential to vindicate the interest. *O'Brien, 391 U.S. at 377; see also Holy Land Foundation,* 219 F. Supp.2d at 82 (applying *O'Brien* test to contributions to designated terrorist groups made allegedly in violation of executive blocking orders).

It is not clear, however, that the governmental interest, as manifest in § 2339, is unrelated to the suppression of free expression, at least as to the portion of the statute at issue here. Among the activities that fall within the definition of "material assistance" under § 2339A(b) are "expert advice and assistance," a phrase which sweeps into its scope a potentially broad range of communication activities that have no direct bearing on terrorist operations or activities. Once again, the indictment's vagueness must be counted against the government.

**VII. Vagueness and Overbreadth Arguments:**

*E. Because the term "material support" as used in the AEDPA is unconstitutionally vague, the charges pursuant to it cannot stand*

Executive Order 12947§(1)(ii)(B), 60 FR 5079 (Jan. 25, 1995), and AEDPA, 18 USCS 2339A (1996), define "material support" in "open-ended terms" and "inscrutable processes," making it difficult for the potential speaker to know which activities are protected and which will subject him to criminal prosecution. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1,7 (2003). In other words, "censorship and guilt by association have an even wider

chilling effect, making members of the pubic leery of engaging in any political activity that might potentially be condemned." Id. The AEDPA defines "material support" as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *See* AEDPA, § 2339B. However, the statute fails to define these elements in any meaningful way, leaving potential speakers guessing as to which types of otherwise protected conduct would run afoul of the statute. Consequently, the statute fails to meet the constitutional requirements for vagueness and overbreadth.

Sami Al-Arian's indictment provides a clear example the harms resulting from such vagueness and overbreadth. Several charges in Sami Al-Arian's indictment center around his acts of sending and receiving faxes; possessing or discussing information; communicating with "influential individuals" regarding Arab rights and allegedly making false statements to the media. ¶ 42, Count I, Part D. All of these acts are purported to be prohibited by the Executive Order and the AEDPA. However, if these acts of speech are criminalized, what speech rights are left for Sami Al-Arian? Is he left with nothing more than the right to his own private thoughts which he can only express to his reflection in the mirror? Perhaps one can understand the logic of wanting to prohibit contact with the PIJ, but it remains difficult to comprehend why the government seeks to reduce his speech rights to this extreme.

In order to satisfy constitutional requirements, a penal statute must 1) define the criminal offense with sufficient definiteness that ordinary people can understand what

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement;" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and 2) the legislature must "establish minimum guidelines to govern law enforcement" to avoid the creation of "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. These principles date as far back as 1876 when the Court noted in *United States v. Reese*, 92 U.S. 214, 221 (1876):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

The government has failed to heed the *Reese* Court's warnings in promulgating the definition of "material support." Thankfully, some courts have taken notice of these shortcomings where other branches of government have failed. In fact, courts have already ruled portions of this definition to be impermissibly vague in the *Humanitarian Law Project* cases. *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, 1204 (1998), *affirmed in Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000). In *Humanitarian Law,* the court struck down the terms "training" and "personnel" from the definition of "material support," reasoning that the terms did "not appear to allow persons of ordinary intelligence to determine what type of training or provision of personnel is prohibited [under the statute]." *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, 1204 (1998). It is reasonable to believe that if part of the definition of "material support" has already been adjudged impermissibly vague, then vagueness issues may exist with other parts of the definition, as well. For this reason, the court should err on the side of

caution and dismiss the indictment rather than run the risk of convicting an individual under an unconstitutional law.

It is essential that the court put a stop to the government's thoughtless slaughter of First Amendment rights under the guise of protecting the interests of national security before little remains of the freedom of speech save the right to talk about the weather (and even then, one may come under scrutiny if he blames the national weather service for incorrect weather forecasts). In the absence of court intervention, this indictment makes it clear that "[t]he material support prohibition could constitutionally apply to discussion, public or private, by members of a designated organization or those in their employ or under their control about operational issues, such as the status of a 'cease fire.' It would also cover public declarations . . ." Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 Md. L. Rev. 173, 203 (2003). Such an over-reaching ban on political speech could criminalize the mere act of casually telling someone about the need for protection of Arab rights in the post-9/11 era.

*B. Because the term "terrorist" lacks a discernable meaning, Dr. Al-Arian's indictment under this term should be dismissed*

As mentioned above, a statute which seeks to criminalize otherwise protected activities by vague and overbroad and unconstitutionally vague means cannot be upheld. Despite this, the government seeks to criminalize Mr. Al-Arian's otherwise protected speech based on a standardless statute. As a result of the reach and breadth of this indictment, it becomes obvious that the AEDPA does not contain an adequate provision for notice, thus running afoul of procedural due process rights. The only notice given to a group designated as a "foreign terrorist organization" is publication in the Federal

Register. Andy Pearson, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association,* 24 WM. MITCHELL L. REV. 1185, 1209 (1998). No pre-designation hearing is permitted; rather, the notice is only for purpose of appeal. Id. How then would the government advise a person who seeks to avoid prosecution under the AEDPA? Would the government advocate a complete lack of association with any person or organization? Clearly this cannot be the case.

Likewise, the AEDPA's procedure for designating a group as a "terrorist organization" violates procedural due process by failing to "provide the sufficient procedural requirements necessary for the government to restrict an individual's liberty and property interests." Id. at 1206. Moreover, appeal provisions are extremely deferential in favor of the government making judicial review "largely illusory" in that "[t]he terrorist organization can successfully appeal the distinction in court only if it can show that the designation was 'arbitrary, capricious, an abuse of discretion not in accordance with the law, or lacking in substantial support." Id. at 1209. Indeed, under the current provisions, "there is no way to measure activities which threaten the national security." Id. Absent minimal standards or discernable meanings, the procedure cannot be upheld. Consequently, the indictment should be dismissed.

*C. The Requirement of Strict Scrutiny Analysis*

In the alternative, if Dr. Al-Arian's indictment is upheld, at the very least, review of the charges against him should be subject to strict scrutiny. Because the government has reached so far beyond its legitimate powers by effectively making Sami Al-Arian a banned person to keep him from running afoul of the AEDPA, strict scrutiny should

apply. Intermediate scrutiny used by the *O'Brien* Court is inappropriate in this case because the alleged conduct is pure speech, not mixed speech and action.

*1. O'Brien Intermediate Scrutiny Does Not Apply*

Some courts confronted with "antiterrorism" provisions have retreated to intermediate scrutiny, relying on *O'Brien*, supra. Such a retreat is inappropriate here, as the alleged conduct is pure speech criminalized under an overbroad statute, not mixed speech and action. In *Humanitarian Law Project*, 205 F.3d at 1134-35, the court concluded that because the plaintiff's contributions to Hamas constituted expressive, but not exclusively speech-related, conduct, their regulation was entitled to intermediate scrutiny. *Cf Buckley*, 242 U.S. at 20. The Ninth Circuit asked whether a substantial governmental interest, unrelated to the content of expression was being promoted in a manner that restricted First Amendment freedoms no more than was necessary. According to the court, because the government had a substantial and legitimate interest in preventing international terrorism, and it restricted only those individuals "providing material support" to such groups, rather than those who merely express sympathy with them, the regulation could be upheld as applied. Additionally, the court concluded that "wide latitude" should be given to the political branches in determining the proper scope of the regulation, and that Congress may have rationally concluded that the difficulty of sorting out legitimate from illegitimate contributions was too great to justify limiting the regulations. Id at 1136; see also *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp.2d 57,82 (D.D.C. 2002) (holding that plaintiff's humanitarian contributions clearly implicated speech and nonspeech elements, and that pursuant to

*O'Brien*, "a sufficiently important government interest can justify incidental limitations on First Amendment freedoms").

*Humanitarian Law Project*, however, is readily distinguished from the prosecution of Sami Amin Al-Arian. First, the *Humanitarian Law Project* court drew on a large body of precedent distinguishing between pure speech and expression effected through political contributions to conclude that restricting such contributions is not regulation that touches upon core First Amendment protections. See *id.* at 1134. By contrast, none of the "material support" alleged to have been given by Sami Amin Al-Arian falls within the rubric of the contributions at issue in *Humanitarian Law Project*. *Cf 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."). All but two of the acts described in Count I of the indictment refer explicitly to words spoken or written by Sami Amin Al-Arian in connection with visits to and representation of Sheikh Abdel Rahman. Each of these acts falls within the rubric of Brandenburg, Hess, Yates, and other cases applying the strictest scrutiny to government attempts to attach criminal liability to the speech acts of a defendant for alleged nonspeech-related harms. Such a linkage is prohibited except under the narrowest circumstances, and has never been sustained in a case involving legal representation alleged to have been performed "legally."

The Court has repeatedly construed "measures restricting an individual's fundamental rights very rigidly and provides many safeguards to ensure fairness." Id. at 1210. As the Court observed in *Noto v. United States*, 367 U.S. 290 (1961), to do otherwise would create a danger that one who "sympathy[izes] with the legitimate aims

of such an [alleged terrorist] organization, but without the specific intent to further its illegal activities, might be punished for his adherence to lawful and constitutionally protected purposes." Id. at 299-300. Such prosecutions are not allowed under the Constitution.

The Secretary of State publishes a list of newly designated terrorist organizations annually. However, one third of the organizations on that list "are either Muslim groups or from the Middle East or North Africa." Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 71 (1999). It is interesting to note that while the government defends its actions by pointing to the criteria for designation as a "terrorist" organization, certain groups that certainly appear to fit the test are conspicuously excluded. For example, the IRA (Irish Republican Army) is not on the Secretary's list, despite the fact that the IRA has been linked to "terrorist activity" that would qualify the group as a "terrorist organization" under both Executive Order 12947 and AEDPA. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity,* 62 MD. L. REV. 173, 202 (2003). There are two possible explanations for the exclusion of the IRA from the list: 1) the PIJ is being singled out for discriminatory prosecution on the basis of its Middle-Eastern identity; or 2) the term "terrorist" lacks a discernable meaning. Both of these explanations cast doubt on the validity of the classification scheme and provide further support for the dismissal of the indictment against Dr. Al-Arian.

First, the Indictment is impermissibly vague. It would therefore authorize the government to introduce evidence of protected conduct in support of its allegations. We make this point at greater length below. Second, the statutory term "material assistance"

expressly includes core speech, and attorney representation. The government cannot make the word "material" mean anything it wishes, as the Red Queen was wont to do. *See* M. Tigar, *The Right of Property and the Law of Theft,* 62 TEX. L. REV. 1443,1466 (1984) (writer parodying Prussian legislative provisions on pilfering of wood suggests that "a box on the ear" would be more effectively punished if you called it murder).

In short, the government cannot avoid First Amendment scrutiny by simply using Congress's choice of phrase --"material assistance" --to define away the issue. Where Congress has condemned nonspeech activity --materially assisting the aims of terrorists -- and an individual is accused of doing this through speech, the individual acts that are alleged to be criminal must be scrutinized to avoid unconstitutional overreaching into First Amendment protected activity. *Dennis,* 341 U.S. at 505. As the Court explained in *Yates:*

> In other words, the Court of Appeals thought that the requirement of proving an overt act was an adequate substitute for the linking of the advocacy to action which would otherwise have been necessary. This, of course, is a mistaken notion, for the overt act will not necessarily evidence the character of the advocacy engaged in, nor, indeed, is an agreement to advocate forcible overthrow itself an unlawful conspiracy if it does not call for advocacy of action.

354 U.S. at 322-23.

Yes, these are perilous times, or so it is believed. The Constitution was written by those who had been through peril and it was written for all time. In *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943), written in time of war, Justice Jackson said:

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

## VIII. The Ex Post Facto Concerns Regarding the Conspiracy Counts in this Indictment:

According to the indictment, the only direct evidence of financial transactions all occurred *prior* to Executive Order 12947 and the Secretary of State's designation of the PIJ as a foreign terrorist organization pursuant to AEDPA. Other mention of financial activity consists of the government's allegations that conversations spoken in code actually concerned financial transactions. It is arguable that direct evidence of financial transactions which took place after January 23, 1995, or October 8, 1997, may be construed as providing "material support" to foreign terrorist organizations under AEDPA.[6] However, notwithstanding the *Humanitarian Law* cases, in order to reach the same conclusion in the present case, the government would have to correctly translate the alleged coded conversations as financial in nature and further explain why they should be criminalized years after they occurred. Despite this, the government still seeks to criminally punish Sami Al-Arian for acts that were not illegal at the time they took place. In effect, the government seeks to enforce an ex post facto law against Sami Al-Arian. This is something the Constitution will not allow.[7] In effect, the government seeks to enforce ex post facto and create a criminal sanction for speech and associative acts that occurred prior to the promulgation of Executive Order 12947 and the AEDPA.

The Constitution extends certain protections to citizens and non-citizens alike. Indeed, the Court has recognized that "aliens in the United States are entitled to the protections of all those provisions of the Bill of Rights not restricted to citizens." *Kwong*

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[6] *See generally Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, 1204 (1998), *affirmed in Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000) (upholding elements of the AEDPA's definition of "material support," such as "financial securities" and "financial services," but striking down elements of "training" and "personnel" as being unconstitutionally vague).

[7] U.S. CONST. ART. I §9 cl. 3. ("no bill of attainder or ex post facto law shall be passed.")

*Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (153). *See also* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 66 (1999). Further, "the First Amendment in particular 'acknowledges [no] distinctions between citizens and resident aliens [such that] [f]reedom of speech and of press is accorded aliens residing in this country.'" Akram at 66, *citing Kwong Hai Chew,* 344 U.S. at 596. Using the Court's logic, one can conclude that Dr. Al-Arian's speech was protected by the First Amendment. As such, he could not be prosecuted for acts of speech alone. It took three separate governmental acts to criminalize Dr. Al-Arian's speech and associational rights: 1) Executive Order 12947 in 1995; 2) AEDPA of 1996; and 3) the Secretary of State's designation of the PIJ as a "terrorist organization" in 1997. Thus, if it took the government three separate acts to criminalize this type of speech, the only logical conclusion is that Mr. Al-Arian's speech was a non-criminal exercise of his protected First Amendment rights *prior* to 1995, if not 1997. Accordingly, the portions of the indictment alleging speech acts which occurred prior to 1997 (Count I, Part A., ¶¶ 1-20 and Part C, ¶¶ 26-27, Part D ¶¶ 28-42 Part E ¶¶ 43-196); Count II, Part A, B, C (and D with reference to Count I, Part E, ¶¶ 191-196) should be stricken.

## IX. Conclusion

For the foregoing reasons and any others as may arise, we ask that this Court dismiss Counts 1, 2, 3 and 4 of the indictment.