

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 :
 :
v. :
 :
SAMI AMIN AL-ARIAN, :

CASE NO: 8.03-CR-77-T-30 TBM

**GOVERNMENT’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT SAMI AMIN AL-ARIAN’S AMENDED MOTION TO DISMISS
COUNTS ONE THROUGH FOUR OF THE INDICTMENT**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following Memorandum of Law in Opposition to Defendant Sami Amin Al-Arian’s Amended Motion to Dismiss Counts One through Four of the Indictment:

Increasingly concerned that terrorist organizations have established footholds in the United States and have used the U.S. as a staging ground for those who seek to commit acts of terrorism against persons in other countries, beginning in 1992, the U.S. government instituted a series of laws and measures to stem the flow of financial and logistical support from this country to terrorist organizations overseas. Among those measures are the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter the “Act” or the “AEDPA”), Pub. L. 104-132, 110 Stat. 1214-1319 (1996), which prohibits, in relevant part, the knowing provision of “material support and resources” to designated foreign terrorist organizations (see 18 U.S.C. § 2339B(a)(1)), and Executive Order 12947, which prohibits transactions with designated terrorist groups that threaten to disrupt the Middle East Peace Process. These laws provide the federal government

the fullest possible basis, consistent with the U.S. Constitution, to prevent persons from providing assistance to groups that commit terrorist acts overseas -- acts which ultimately undermine the national security of the United States.

The defendant in this case, Sami Amin Al-Arian, is charged with conspiring to violate the AEDPA, Executive Order 12947, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Neutrality Act. These charges stem from the defendant's role as leader of the Palestinian Islamic Jihad ("PIJ") in the United States; a terror group that has indiscriminately killed civilians overseas, including several U.S. citizens. The indictment alleges among other things, that defendant-Al Arian and his co-defendants secretly established PIJ cells in different countries, participated in the management of PIJ financial and logistical affairs, and solicited and raised monies and funds to support the PIJ and their operatives in the Middle East, in order to assist the PIJ's engagement in, and promotion of, violent attacks designed to thwart the Middle East Peace Process. The indictment reflects that the defendant was an integral member of the conspiracy and was fully aware and did intend to further the PIJ's violent acts.

Ignoring virtually all the allegations in the indictment, the defendant has moved to dismiss Counts One through Four, arguing principally that the indictment constitutes an "unprecedented attack" on his speech and association rights as embodied by the First Amendment. See Memorandum in Support of Motion to Dismiss Counts 1, 2, 3, and 4 of the Indictment (hereafter "Def. Mem.") at 2. The defendant, however, is no boy scout (see Def. Mem. at 23), and the U.S. Constitution is not a "suicide pact." See Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964). The offenses alleged in the indictment involve violence, not expression. Indeed, in leading and assisting the PIJ, and in funding the bloodshed in the Middle

East, the defendant abandoned the world of “political” discourse and association, in the First Amendment sense.

The defendant’s remaining constitutional claims are also without merit. Accordingly, the defendant’s motion to dismiss the indictment should be denied.

BACKGROUND

A. The Antiterrorism and Effective Death Penalty Act

In 1996, following continued terrorist actions throughout the world, including many directed at United States interests by PIJ, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Title III of that Act, 110 Stat. 1247, entitled “International Terrorism Prohibition,” was designed to cut off monetary and other support for such terrorist activities. Specifically, the AEDPA authorizes the Secretary of State (hereafter “the Secretary”), in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a “foreign terrorist organization” (“FTO”) if the Secretary finds that “(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in 8 U.S.C. § 1182(a)(3)(B)) or terrorism (as defined in 22 U.S.C. § 2656 f(d)(2), or retains the capability and intent to engage in terrorist activity or terrorism; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” AEDPA, § 302; 8 U.S.C. § 1189(a)(1). In his discretion, the Secretary may renew the designation of an FTO every two years if the organization continues to satisfy the criteria of the statute. See 8 U.S.C. § 1189(a)(5).

Designation of a group as a “foreign terrorist organization” under the AEDPA has the effect, *inter alia*, of making it illegal for persons within the U.S. or subject to the jurisdiction of

the U.S. to “knowingly” provide, attempt to provide, or conspire to provide “material support or resources” to a designated group. See AEDPA, § 303; 18 U.S.C. § 2339B(a)(1). The statute defines “material support or resources” to mean “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine and religious materials.” 18 U.S.C. §§ 2339A(b); 2339B(g)(4).¹ As noted by Congress, the prohibition “is on the act of donation. There is no proscription on one’s right to think, speak, or opine in concert with, or on behalf of, such an organization.” H.R. Rep No. 383, 104th Cong., 1st Sess. 44 (1995) (hereafter “House Report”).²

In enacting the AEDPA, Congress found that “international terrorism is a serious and deadly problem that threatens the vital interests of the United States.” AEDPA, § 301(a)(1), 110 Stat. 1247. The provision proscribing “material support” to a foreign terrorist organization was intended to “strictly prohibit terrorist fundraising in the United States” and to make clear that the United States was “[not] to be used as a staging ground for those who seek to commit acts of terrorism against persons in other countries.” House Report at 42. The AEDPA reflects Congress’s judgment that “[s]everal terrorist groups have established footholds within ethnic or resident alien communities in the United States,” and that “[m]any of these organizations operate under the cloak of a humanitarian or charitable exercise * * * and thus operate largely without

¹ The definition was modified by the USA PATRIOT Act, Pub. L. No. 107-56, § 805(a)(2), Oct. 26, 2001, 115 Stat. 377, 380, 381.

² The House Report relates to H.R. 1710, a predecessor bill to AEDPA’s antiterrorism provisions.

fear of recrimination." Id. The Act itself contains a congressional finding 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." AEDPA, § 301(a)(7), 110 Stat. 1247. See also House Report at 45 ("The foreign organizations that are designated as terrorist are criminal enterprises"). After extensive hearings, Congress determined that "[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further terrorist activities abroad." House Report at 45.

The AEDPA meticulously prescribes the procedures under which a group designated as a foreign terrorist organization may seek judicial review of the Secretary's designation. For example, a designated organization's request for judicial review under the AEDPA must be filed with the U.S. Court of Appeals for the District of Columbia Circuit no later than 30 days after publication of the designation in the Federal Register. See AEDPA, § 302(b); 8 U.S.C. § 1189(b)(1). Any review by the D.C. Circuit is to be "based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." Id.; 8 U.S.C. § 1189(b)(2). A designation may only be set aside if it is arbitrary or capricious, or otherwise contrary to law. See id., as amended by the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 356, 110 Stat. 3009-644 (1996). Finally, the AEDPA provides that a defendant in a criminal action may not raise any question concerning the validity of a particular designation as a defense or objection at any trial or hearing. See 8 U.S.C. § 1189(a)(8). On October 8, 1997, on October 8, 1999, and again on October 5, 2001, the Secretary of State designated PIJ a

“foreign terrorist organization” under the AEDPA. See 62 Fed. Reg. 52,650 (1997); 64 Fed. Reg. 55,112 (1999); 66 Fed. Reg. 51,088.³ At no time did the PIJ seek judicial review of its designation as a foreign terrorist organization under the AEDPA.

B. The International Emergency Economic Powers Act

In addition to its designation as an FTO under the AEDPA, the PIJ is also the subject of separate restrictions imposed under the authority of the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701-1706. IEEPA was enacted in 1977 as part of a comprehensive revision of the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 et seq., to clarify “the President’s authority to regulate international economic transactions during national emergencies” in peacetime. See S. Rep. No. 466, at 1 (1997), reprinted in 1977 U.S.C.C.A.N. 4540, 4541. Under IEEPA, the President is granted wide latitude “to deal with an unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States, if [he] declares a national emergency with respect to that threat.” 50 U.S.C. § 1701(a). In particular, the President is authorized “to investigate, regulate, * * * prevent or prohibit * * * transactions” in times of declared national emergencies. See 18 U.S.C. § 1702(a)(1)(B).

Pursuant to the authority conferred by IEEPA, on January 23, 1995, President William Jefferson Clinton issued Executive Order 12947 and declared a national emergency with respect to “the grave acts of violence committed by terrorist groups” opposed to the Middle East peace process and designated PIJ as a Specially Designated Terrorist organization (“SDT”) that

³ The PIJ was recently re-designated as an FTO on October 2, 2003. See 68 Fed. Reg. 56,860.

threatened the national security, foreign policy, and economy of the United States. See 60 Fed. Reg. 5079 (1995). The Executive Order imposed sanctions on the group by blocking all property and interests in property of the PIJ subject to the jurisdiction of the United States, and prohibiting the making or receiving of any contribution of funds, goods, or services to or for the benefit of the group. See Exec. Order 12947 § 1(a) & (b). Pursuant to the same Executive Order, AL-ARIAN's co-defendants, ABD AL AZIZ AWDA and RAMADAN ABDULLAH SHALLAH were named SDTs on January 23, 1995 and November 17, 1995, respectively.⁴

Section 1705(b) of IEEPA provides that whoever "willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter," commits a felony. To that end, the Secretary of the Treasury promulgated the Terrorism Sanctions Regulations to implement Executive Order 12947. See 31 C.F.R. Part 595. Effective January 25, 1995, these regulations prohibit, among other things:

- (a) dealing in property or interests in property of a SDT, including the making or receiving of any contributions of funds, goods, services to or for the benefit of a SDT;
- (b) making a "charitable contribution or donation of funds, goods, services, or technology" to or for the benefit of a SDT;
- (c) any transaction for the purpose of, or which has the effect of, evading or avoiding, or which facilitates the evasion or avoidance of the Terrorism Sanctions Regulations;
- (d) any conspiracy formed for the purpose of engaging in a prohibited transaction.

⁴Fathi Shiqaqi, the deceased former Secretary General of the PIJ, was designated along with AWDA in January 1995.

C. The Palestinian Islamic Jihad

The Palestinian Islamic jihad is “[c]ommitted to the creation of an Islamic Palestinian state and the destruction of Israel through holy war.” See Department of State, Patterns of Global Terrorism (April 2003), at 117. As referenced in the indictment, the PIJ rejects “any peaceful solution to the Palestinian cause” and affirms the “martyrdom style as the only choice for liberation.” See Indictment (“Ind.”) at ¶ 3. The group is responsible for the murder of over 100 people in Israel and the Occupied Territories, including at least two Americans, Alisa Flatow, age 20, and Shoshana Ben-Yishai, age 16. Id. at ¶¶ 43(151), 43(234).

D. The Indictment

On February 19, 2003, the Grand Jury for the Middle District of Florida returned a fifty-count indictment against the defendant and seven co-defendants. Relevant to the instant motion, Count I alleges a conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962, and alleges several racketeering predicate acts, including murder (Fla. Stat. 782.04; 777.04(3)); extortion (Fla. Stat. 836.05; 777.011; 777.04); money laundering (18 U.S.C. § 1956(a)(2) and (h)); violations of the Travel Act (18 U.S.C. § 1952); violations of the Neutrality Act (18 U.S.C. § 956); provision of material support to an FTO (18 U.S.C. § 2339B); and fraud and misuse of visas (18 U.S.C. § 1546). See Ind. at ¶ 26. Count II alleges a conspiracy to murder, maim, or injure persons at places outside of the U.S., in violation of the Neutrality Act, 18 U.S.C. 956(a)(1). Count III alleges a conspiracy to provide material support or resources to the PIJ, a designated FTO, in violation of 18 U.S.C. § 2339B. Count IV alleges a conspiracy to violate IEEPA, in violation of 18 U.S.C. §§ 371, 1701 and 31 C.F.R. Part 595.

On September 15, 2003, defendant filed the instant amended motion to dismiss Counts One through Four of the Indictment.

I. COUNTS ONE THROUGH FOUR OF THE INDICTMENT DO NOT VIOLATE THE DEFENDANT'S FIRST AMENDMENT RIGHTS TO FREEDOM OF EXPRESSION AND ASSOCIATION

Focusing almost exclusively on ¶ 42 of the indictment, the defendant claims that the indictment violates the First Amendment because its “express purpose * * * is to chill any and all support for the Palestinian cause and any additional advocacy in favor of the rights of Arabs.”⁵ Def. Mem. at 8. He insists that the alleged conspiracies “involve what is no more than *prima facie* constitutional [sic] protected conduct” (Def. Mem. at 12), and that the indictment must therefore be invalidated (1) because it targets acts of “pure speech” without regard to whether he specifically intended to accomplish the illegal aims of the PIJ (Def. Mem. at 13-19), and (2) because the “much of the conduct contemplated as criminal consists of speech that does not create a clear and present danger.” Def. Mem. at 21. With respect to his freedom of association claim, the defendant argues that both the indictment and the statutes charged inflict guilt by association and thus violate the First Amendment. See Def. Mem. at 24. Finally, the defendant asserts that the term “material support” as employed by the AEDPA is unconstitutionally vague and overbroad. See Def. Mem. at 25-33.

⁵ The defendant devotes a substantial portion of his memorandum questioning the wisdom of the U.S. government's policy concerning the conflict in the Middle East, suggesting that it is both biased against Arabs and capricious. See Def. Mem. at 8-11. However much the defendant may disagree with U.S. foreign policy, “such policy questions are firmly lodged in the political branches of government.” Palestinian Information Office v. Schultz, 853 F.2d 932, 934 (D.C. Cir. 1988) (citing Regan v. Wald, 469 U.S. 222, 242 (1984)).

As explained more fully below, the defendant's claims are baseless. The defendant is not accused of speaking out in favor of Arab rights, or of associating with a politically unpopular group, or of praising terrorism and the PIJ. See Def. Mem. at 11-12. Instead, he is charged with being an organizer of the PIJ who assisted in the financial and logistical support operations of the PIJ. Not only is this type of conduct properly proscribed by § 2339B of the AEDPA and Executive Order 12947, but it also falls outside the protective bounds of the U.S. Constitution. As the Supreme Court has held, the "First Amendment does not protect violence." NACCP v. Claiborne, 458 U.S. 886, 916 (1982). Consistent with this principle, First Amendment claims similar to those raised by the defendant in this case have been repeatedly rejected by other courts that have considered them. See People's Mojahedin Organization of Iran v. Department of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003); Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1024-27 (7th Cir. 2002); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133-36 (9th Cir. 2002); United States v. Sattar, 272 F. Supp. 2d 348, 361-62 (S.D.N.Y. 2003); United States v. Lindh, 212 F. Supp. 2d 541, 569-74 (E.D. Va. 2002).

A. The Indictment Does Not Violate Defendant's Right to Freedom of Speech

Despite his contorted efforts to argue to the contrary, the allegations in the indictment belie the defendant's claim that the government is attempting to target his "pure speech." At the outset, it bears emphasizing that "it has never been deemed [a violation of the First Amendment] to make a course of conduct illegal merely because the conduct was in part, initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). For example, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact * * *

are entitled to no constitutional protection.” Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). Moreover, the Supreme Court has thoroughly rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” United States v. O’Brien, 391 U.S. 367, 376 (1968).

Even a cursory review of the charges in this case reveals that the defendant’s activities went beyond “pure” expressions of belief. The overt acts alleged in Part E of Count One of the indictment (some of which are re-alleged in Counts Two through Four), 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,”⁶ 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); and, worked with other terror organizations such as HAMAS to accomplish acts of violence, see, e.g., Ind. ¶¶ 43(29), (49), (84), (95), (107). These overt acts underscore that the conduct giving rise to liability under § 2339B and Executive Order 12947 encompasses the defendant’s provision of valuable goods, services, and material support to the PIJ, and not the defendant’s beliefs, speech, or mere membership in the PIJ.⁷ As the Courts of

⁶ In its consideration of a constitutional challenge to § 2339B, the Ninth Circuit specifically noted that “even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.” Humanitarian Law Project, 205 F.3d at 1136.

⁷ Some of the overt acts alleged in the indictment refer to telephone conversations, speeches, and writings whereby the defendant expressed his support for the PIJ. These overt acts, however, were included to show the defendant’s motive and intent to provide financial and logistical support to the PIJ. While the First Amendment protects the defendant’s right to

Appeals for the D.C., Seventh, and Ninth Circuits have held in the context of First Amendment challenges to § 2339B, this type of conduct does not implicate speech rights: there is no constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorist can purchase weapons and explosives. See People's Mojahedin Organization of Iran, 327 F.2d at 1244-45; Boim, 291 F.3d at 1026; Humanitarian Law Project, 205 F.3d at 1133. See also Holyland Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003) ("the law is established that there is no constitutional right to fund terrorism").

To be sure, the First Amendment protects the expressive component of seeking and donating funds. See Buckley v. Valeo, 424 U.S. 1, 44-45 (1976). The government, however, "generally has a freer hand in restricting expressive conduct" than pure speech. Texas v. Johnson, 491 U.S. 397, 406 (1989). Thus, even assuming arguendo that the defendant's conduct is entitled to some constitutional protection, the government's efforts in this case to regulate the provision of financial and other assistance to foreign terrorist organizations -- as embodied by the restrictions of § 2339B and Executive Order 12947 -- do not warrant the application of strict scrutiny. See Def. Mem. at 29-30. The restrictions are content neutral and are "not aimed at interfering with the expressive component of their conduct but at stopping aid to terrorist groups." Humanitarian Law Project, 205 F.2d at 1135. See also People's Mojahedin Organization of Iran, 327 F.3d at 1244 ("[i]t is conduct and not communication that [§ 2339B]

express his hostility to the United States and its foreign policy, "it does not prevent the use of [his] speeches or writings in evidence when relevant to prove a pertinent fact in a criminal prosecution." United States v. Rahman, 189 F.3d 88,118 (S.D.N.Y. 1999). See also Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

controls”); Sattar, 272 F. Supp. at 361-62. Where, as here, “a regulation * * * serves purposes unrelated to the content of expression,” see Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), the intermediate standard of review of United States v. O’Brien, 391 U.S. 367 (1968) applies. See also Wise Enterprise, Inc. V. Unified Govn’t of Athens-Clarke County, Georgia, 217 F.3d 1360, 1363 (11th Cir. 2000) (“[t]he O’Brien standard applies when a governmental entity seeks to regulate non-communicative elements of an activity and thereby imposes incidental burdens on protected expression”) (internal quotation and citation omitted).

Under United States v. O’Brien, a court must evaluate (1) whether the regulation is within the power of the government; (2) whether it supports an important or substantial government interest; (3) whether it is unrelated to suppressing free expression; and, (4) whether the incidental restriction on First Amendment activity is no greater than necessary. Id. at 376-77. Applied to the case at bar, the O’Brien test requires that the defendant’s freedom of speech claim be rejected. See People’s Mojahedin Organization of Iran, 327 F.3d at 1244 (upholding § 2339B against free speech challenge); Boim, 291 F.3d at 1027 (same); Humanitarian Law Project, 205 F.2d at 1135 (same).

First, a decision to restrict the dealings of U.S. persons with a hostile foreign entity is plainly within the constitutional power of the Government. See Humanitarian Law Project, 205 F.3d at 1135; Palestine Information Office v. Schultz, 853 F.2d 932, 941 (D.C. Cir. 1988); discussion infra at 16 (citing additional cases). Moreover, it is within the constitutional power of the government to control the flow of funds and goods to and from this country and within the banking system of the United States. See Teague v. Regional Comm’r of Customs, 404 F.2d 441, 445 (2d Cir. 1968) (upholding regulations “designed to limit the flow of currency to specified

hostile nations” despite the fact that regulations “impinge[d] on first amendment freedoms”).

Second, “the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that that interest is substantial.” Humanitarian Law Project, 205 F.3d at 1135. “Although that interest has been made all the more imperative by the events of September 11, 2001, the terrorist threat to national security was substantial * * * in 1996 when Congress passed section 2339B.” Boim, 291 F.3d at 1027. The same is true of the President’s declaration of a national emergency in 1995, when Executive Order 12947 was issued. The President specifically found that “the grave acts of violence committed by terrorist groups” such as the PIJ, constituted “an unusual and extraordinary threat to the national security, foreign policy and economy of the United States.” E.O. 12947. As the Supreme Court has indicated, the “legitimacy of the objective of safeguarding our national security is ‘obvious and unarguable.’” Haig v. Agee, 453 U.S. 280, 305 (1981) (citation omitted).

Third, the goals of § 2339B and Executive Order 12947, are unrelated to any exercise of First Amendment rights. See Boim, 291 F.3d at 1027 (finding that § 2339B “is unrelated to suppressing free expression”). Neither provision regulates speech about, or mere association with, terrorist organizations, and does not prohibit the provision of material support to domestic groups. See discussion infra at 17. Their purpose, instead, is to interdict the financial and material resources on which foreign terrorist organizations (which operate beyond the control of the United States, often with the support of state sponsors) depend to sustain their terrorist activity. See Humanitarian Law Project, 205 F.3d at 1135 (§ 2339B “is unrelated to suppressing free expression because it restricts the actions of those who wish to give material support to the groups, not the expression of those who advocate or believe the ideas that the group supports”).

In fact, the legislative history of the AEDPA reflects that Congress was extremely sensitive to ensuring that the restrictions imposed by the AEDPA not impose on First Amendment freedoms. See House Report at 43-45 (reviewing First Amendment case law). Moreover, IEEPA itself limits the President's authority, inter alia, to regulate personal communications that do not involve a transfer of anything of value and the flow of any informational materials. See 50 U.S.C. § 1702(b)(1) & (3).

Fourth, both § 2339B and Executive Order 12947 are narrowly tailored to accomplish these important goals. As indicated previously, the AEDPA seeks to prevent international terrorists from obtaining funds and assets from U.S. sources. Congress, in the course of extensive hearings on the AEDPA, determined that an outright ban on all transactions was necessary to achieve this objective. Since Congress found that terrorist organizations frequently operate under the cover of charitable entities, there was no way to assure that contributions to such groups will be applied to humanitarian purposes. Even where funds are applied to such benevolent uses, cash contributions free up other resources of the organization for terrorist activities. See House Report at 81. As the Ninth Circuit indicated in Humanitarian Law Project v. Reno:

Congress explicitly incorporated a finding into the statute 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." AEDPA § 301(a)(7), 110 Stat. At 1247. It follows that all material support given to such organizations aids their unlawful goals * * * * [T]errorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used * * * * We will not indulge in speculation about whether Congress was right to come to the conclusion it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion.

205 F.3d at 1136. Similar concerns animated the President's decision to restrict all donations to SDTs under Executive Order 12947. See E.O. 12947 § 3 (limiting donations of food, clothing, and medicine out of concern that such donations would impair the President's authority to deal with the declared national emergency).

In addition to failing to apply the O'Brien analysis, the defendant utterly ignores Supreme Court cases upholding the government's authority to place restrictions and outright bans on dealings with foreign entities whose activities are inimical to the national security interests of the United States. Such restrictions and bans -- like those at issue here -- do not violate the First Amendment. For example, in Regan v. Wald, 468 U.S. 242(1984), the Court upheld a prohibition on dealings with Cuba, designed to cut off the flow of currency to that nation. Rejecting the argument that it deprived citizens of the freedom to travel protected by the Due Process Clause, the Court reasoned that "matters relating to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. at 242. The Court found that the Executive's restrictions on dealing with Cuba must be sustained because of "the President's decision to curtail the flow of hard currency to Cuba -- currency that could then be used in support of Cuban adventurism -- by restricting travel." Id. at 243. See also, Zemel v. Rusk, 381 U.S. 1, 16 (1965).

Lower courts have likewise rejected arguments that restrictions designed to deprive hostile foreign powers of resources violate First Amendment rights. See, e.g. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996) (rejecting First and Fifth Amendment challenge to Cuban travel ban); Walsh v Brady, 927 F.2d 1229, 1234-35 (D.C. Cir. 1991) (rejecting First Amendment challenge to prohibition against payments to Cuba); Farrakhan v.

Reagan, 669 F. Supp. 506, 512 (D.D.C. 1987), aff'd., 851 F.2d 1500 (D.C.Cir. 1988) (rejecting First Amendment claim by organization wishing to transfer funds to Libya). As the court reasoned in United States v. Lindh, 212 F. Supp 2d. at 571, “there is no principled reason for according different constitutional treatment to restrictions to supplying goods or services to a foreign entity depending whether the entity is a hostile foreign state or an international terrorist organization * * * * If the First Amendment is not offended in one case, it is not offended in the other.”

The law review articles and cases the defendant does cite in his memorandum are simply inapposite. The defendant’s reliance on those articles and decisions rests entirely on his erroneous assertion that § 2339B and Executive Order 12947 seek to impose liability on the basis of membership alone and that the provisions look to target “pure speech” or expression of views. Specifically, decisions such as Scales v. United States, 367 U.S. 203, 230 (1961), and Noto v. United States, 367 U.S. 290, 299-300 (1961), address situations in which persons are subject to punishment by mere membership in a group or by merely advocating the views of an organization that engages in illegal activities. Indeed, the requirement of judging intent *strictissimi juris* grew out of the Supreme Court’s decisions in Scales and Noto, which evaluated penalties based on membership as such under the Smith Act, 18 U.S.C. § 2385. See Scales, 367 U.S. at 230; Noto, 367 U.S. at 299-300. See also United States v. Cerilli, 603 F.2d 415, 421 (3d Cir. 1979) “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.” United States v. Mountour, 944 F.2d 1019, 1024 (2d Cir. 1991). Courts use *strictissimi juris* only under very special circumstances.” Montour, 944 F.2d at 1024.

As noted previously, the principal conduct which gives rise to the defendant’s liability in this case includes managing the financial and logistical operations of the PIJ and soliciting and raising monies and funds to support the PIJ and their operatives in the Middle East, in order to assist the PIJ’s engagement in, and promotion of, violent attacks (see, e.g., Ind. Count Three, ¶ 3(a)). Defendant, thus, is not charged with merely “advocating” the use of force, but of actually working to further the illegal goals of the conspiracies alleged in the indictment to provide support to the PIJ and its violent activities. See United States v. Rodriguez, 803 F.2d 318, 319, 321 (7th Cir. 1986) (rejecting claim that *strictissimi juris* required the government “to prove the elements of specific intent to use force and also prove active membership in the FALN,” an “armed clandestine terrorist organization seeking independence from Puerto Rico,” where the defendant knowingly and intentionally became a member of the conspiracy). Moreover, since “both the ends sought and the means used by [the PIJ] were illegal,” the *strictissimi juris* principle simply does not apply to this case. See United States v. Markiewicz, 978 F.2d at 812; Montour 944 F.2d at 1024; see also United States v. Spock, 416 F.2d 165, 169 (1st Cir. 1969) (“We approach the constitutional problem on the assumption * * * that the ultimate objective of defendants’ alleged agreement, viz., the expression of opposition to the war and the draft, was legal”).

Similarly, the defendant’s reliance on cases involving the application of the “clear and present danger” doctrine is also misplaced. See Def. Mem. at 20. The “clear and present danger” test is generally understood to apply only to content-based speech restrictions that target

“pure speech” or advocacy. Cf. Jacobsen v. U.S. Postal Service, 993 F.2d 649, 658-59 (9th Cir. 1993) (noting that “the difference between a regulation that is not Constitutional and one that is, is that ‘the first is aimed at the communicative impact of the conduct proscribed, it will be unconstitutional unless the government shows that the message triggering the regulations a clear and present danger * * * the second is aimed at the noncommunicative impact of conduct, it is constitutional, even as applied [to someone expressing a particular view]” (quoting Laurence H. Tribe, American Constitutional Law, 798 (2d ed. 1988)). Because the government’s interest in this case is unrelated to expression or the suppression of speech, and is content neutral, the court need not apply the incitement to imminent lawless action test of Brandenburg v. Ohio, 395 U.S. 444-49 (1969), and its progeny. Id. (“we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action”). Instead, it is well-established that content neutral restrictions are properly analyzed (as in this case) under the framework set forth in United States v. O’Brien, supra. See Texas v. Johnson, 491 U.S. at 406.

B. The Indictment Does Not Violate the Defendant’s Right of Association

As with his free speech claims, the defendant’s freedom of association claim seriously distorts the gravamen of the offenses charged against him in the indictment. The defendant is not accused of merely associating with a disfavored group. See Boim, 291 F.2d at 1027 (noting in construing § 2339B that “Congress did not attach liability for simply joining a terrorist organization or espousing its views”). He is accused of conspiring with others to provide the PIJ with the resources and materials that facilitate the group’s violent activities. See discussion supra at 9-12. See also Palestinian Information Office, 853 F.2d at 941 (“[n]o court has ever

found in the right to freedom of association a right to represent a foreign entity on American soil.”)(emphasis in original). As the court explained in United States v. Lindh, supra, “[t]he First Amendment’s guarantee of associational freedom is no license to supply terrorist organizations with resources or material support in any form * * * * Those who choose to furnish such material support to terrorists cannot hide or shield their conduct behind the First Amendment.”

212 F. Supp. 2d at 459. More specifically:

The [AEDPA] does not prohibit being a member of one of the designated groups and vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the group for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.

Humanitarian Law Project, 205 F.3d at 1133. Accord Sattar, 272 F.Supp. 2d at 368 (rejecting “associational rights” claim and quoting Humanitarian Relief with approval).

Courts have also rejected the notion -- as asserted by the defendant here -- that § 2339B imposes guilt by association. See Def. Mem. at 25. For example, in Humanitarian Law Project v. Reno, supra, the Ninth Circuit resisted any analogy to cases based on association alone – “in other words, merely for membership in a group for espousing its views. 205 F.3d at 1133.

According to the court, section 2339B and related laws “authorize[] no such thing. The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends.” Id. What is prohibited by the statute, however, “is the act of giving material support, and there is no constitutional right to facilitate terrorism by

giving terrorists the weapons and explosives with which to carry out their grisly missions.” Id.⁸
See also Lindh, 212 F. Supp. 2d at 571 (same).

C. The AEDPA Is Not Unconstitutionally Overbroad or Vague

Mechanically invoking the terms “overbreadth” and “vagueness,” the defendant also argues in his memorandum that the term “material support” as used in the AEDPA is unconstitutional because it sweeps into its scope a potentially broad range of activities. See Def. Mem. at 25. He claims the § 2339B leaves “[p]otential speakers guessing as to which types of otherwise protected conduct would run afoul of the statute,” (see Def. Mem. at 26), and speculates that without this Court’s intervention, § 2339B could “criminalize the mere act of casually telling someone about the need for protection of Arab rights in the post 9/11 era.” Def. Mem. at 28. The defendant further asserts that, “[i]t is reasonable to believe that if part of the definition of ‘material support’ has already been adjudged impermissibly vague [by the Ninth Circuit in Humanitarian Law Project v. Reno, supra], then vagueness issues may exist with other parts of the definition, as well.” See Def. Mem. at 27-28. These claims are specious.

In Humanitarian Law Project v. Reno, supra, the Ninth Circuit held that, in a civil action for injunctive relief, a district court did not abuse its discretion in finding that two of the activities included within the AEDPA’s definition of “material support” -- providing “training” and “personnel” -- were susceptible to constructions that could embrace constitutionally --

⁸ If the defendant’s “freedom of association” argument is correct, Regan v. Wald and the other foreign entity cases cited previously were all wrongly decided, because none of those decisions focused on, or discussed the supposed constitutional need for, a “specific intent” in upholding restrictions on bans or dealings with foreign entities. Rather, those cases upheld broad prohibitions on such dealings regardless of the intent of the U.S. citizen who wished to travel to, deal with, or give money, to entities such as Libya or Cuba.

protected activity.⁹ 205 F.3d at 1138. But see United States v. Lindh, 212 F. Supp. 2d at 573-74 (rejecting vagueness challenge to the term “personnel”). As the Supreme Court recently observed in Virginia v. Hicks, 123 S.Ct. 2191 (2003), however, “[t]he First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges” developed “out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally-protected speech -- especially when the overbroad statute imposes criminal sanctions.” Id. at 2196 (citation omitted) Noting that “there are substantial costs created by the overbreadth doctrine when it blocks application of the law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct,” the Court reiterated its holding in Broadrick v. Oklahoma, 413 U.S. 501, 613-15 (1973), that “[t]o ensure that these costs do not swallow the social benefits of declaring a law ‘overbroad,’ we have insisted that a law’s application to protected speech be ‘substantial,’ not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications, * * * before applying the ‘strong medicine’ of overbreadth invalidation.” Hicks, 123 S.Ct. at 2197 (quoting Broadrick, 413 U.S. at 613).

The defendant “bears the burden of demonstrating ‘from the text of [the law] and from actual fact,’ that substantial overbreadth exists.” Hicks, 123 S. Ct. at 2198 (quoting New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 14 (1988)). The defendant has made no such showing here. Instead, the defendant again relies on a gross distortion of the indictment to argue that § 2339B sweeps into its scope so-called “communication activities,” such as sending

⁹ After the Ninth Circuit ruled on the preliminary injunction, the district court in Humanitarian Law Project issued its final judgment, finding the terms unconstitutionally vague. The government has appealed that ruling; the issued has been briefed and argued and the government is awaiting a final ruling on the merits. Humanitarian Law Project v. Ashcroft, No. 02-55082 (9th Cir.)

and receiving faxes; possessing or discussing information; [and] communicating or with 'influential individuals' regarding Arab rights." Def. Mem. at 26 (quoting ¶ 42, Count I, Part D). As demonstrated previously, this conduct does not give rise to the defendant's liability in this case.

Moreover the defendant cannot establish that § 2339B as a whole, prohibits a "substantial" amount of protected speech. See Hicks, 123 S.Ct. at 2199. As the Supreme Court has observed, "[e]ven where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct.'" Osborne v. Ohio, 495 U.S. 103, 112 (1995) (quoting New York v. Ferber, 458 U.S. 747, 770 n. 25 (1982)).¹⁰ Notwithstanding the defendant's musings with respect to hypothetical situations in which Section 2339B might bring constitutionally-protected activity within its sweep (see Def. Mem. at 28), most of the activity that it plainly embraces -- providing combatants, currency or monetary instruments, false documentation, communications equipment, weapons, explosives, and other lethal substances to terrorist organizations -- plainly falls outside the ambit of activity protected by the First Amendment. In short, because AEDPA's "legitimate reach dwarfs its arguably impermissible

¹⁰ In fact, the Supreme Court observed in Hicks that

the overbreadth doctrine's concern with "chilling" protected speech "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." Broadrick, 413 U.S. at 615. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).

123 S.Ct. at 2199.

applications,” (Ferber, 458 U.S. at 773), the defendant’s overbreadth claim must be summarily rejected.

Similarly, “speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid ‘in the vast majority of its intended applications.’” Hill v. Colorado, 530 U.S. 703, 733 (2000), (quoting United States v. Raines, 362 U.S. 17, 23 (1960)). Even where vagueness claims implicate activity protected by the First Amendment, “if the statute’s deterrent effect on legitimate expression is not both real and substantial and if the statute is readily subject to a narrowing construction * * * the litigant is not permitted to assert the rights of third parties.” Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (internal quotation and citation omitted). Here, despite the Ninth Circuit’s speculation that the terms “personnel” and “training” may encroach upon First Amendment interests, most of the activities prohibited by the AEDPA neither lack specificity nor implicate First Amendment activity. See 18 U.S.C. §2339A(b). Notably, where, as here, the statute contains a scienter requirement, vagueness concerns are ameliorated. See Hill, 530 U.S. at 732 (noting that the statute applied to a person who “knowingly” engaged in the proscribed conduct).

In short, neither § 2339B’s prohibition on the provision of “material support or resources” to a foreign terrorist organization, nor Executive Order 12947’s prohibition on the provision of “goods or services” to the PIJ violates the First Amendment.

II. THE AEDPA DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Almost as an afterthought, the defendant argues that the AEDPA should be struck on due process grounds. See Def. Mem. at 28-29, 32. He claims that the AEDPA is a “standardless statute” (see Def. Mem. at 28), with the term “terrorist” lacking any discernable meaning. See Def. Mem. at 32. He also claims that the AEDPA “does not contain an adequate provision of notice” to a group designated as a “foreign terrorist organization,” and is therefore violative of procedural due process. See Def. Mem. at 28-29. The defendant’s due process argument essentially boils down to the defendant’s implicit belief that the PIJ should not have been designated, at least not without his input. These arguments need not detain the court long.

The defendant’s claims that the AEDPA is a “standardless,” is contradicted by the plain language of the statute. As noted previously, a group is designated a “foreign terrorist organization” if the Secretary of the State, in consultation with the Attorney General and the Secretary of the Treasury, that “(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.” The term “terrorist activity” itself is defined in section 8 U.S.C. § 1182(a)(3)(B) and includes, inter alia, the highjacking or sabotage of any conveyance; a violent attack on an internationally protected person; an assassination; and, the use of an explosive, firearm or other weapon or dangerous device with the intent to endanger the safety of individuals.¹¹ (As reflected in the indictment, the PIJ has claimed responsibility for a number of

¹¹ As the Seventh Circuit has observed, “[g]iven the stringent requirements that must be met before a group is designated a foreign terrorist organization, Congress carefully limited its

such activities. See Ind. ¶¶ 31, 43 (110), (111), (112), (117), (146) and (152) (not exhaustive)).

Contrary to the aspersions the defendant attempts to cast on the list of FTOs itself, the government notes that there are a number non-Muslim groups on the list, including the Real IRA. See Def. Mem. at 32.¹²

Similarly, while the defendant laments his apparent inability to challenge a finding that a particular group threatens the national security of the United States (see Def. Mem. at 29), this restriction merely reflects a proper respect for the separation of powers. As the D.C. Circuit recently recognized in People's Mojahedin Organization of Iran v. Department of State, supra, the determination whether "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States," required under 8 U.S.C. § 1189(a)(1)(C) constitutes a "nonjusticiable question." 327 F.3d at 1244. This, it explained, is because "[s]uch questions concerning the foreign policy decisions of the Executive Branch present political judgments," that are "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Id. (quoting Chicago So. Airlines,

prohibition on funding as narrowly as possible in order to achieve the government's interest in preventing terrorism." Boim, 291 F.3d at 1027.

¹² In addition to the Real IRA, the current list of designated foreign terrorist organizations include groups from Japan (Aum Shinrikyo), Spain, (Basque Fatherland and Liberty, a.k.a. ETA); Israel (Kahane Chai, a.k.a. Kach); Sri Lanka (Liberation Tigers of Tamil Eealm, a.k.a. LTTE); Colombia (Revolutionary Armed Forces of Colombia, a.k.a. FARC); Greece (Revolutionary Organization 17 November); and Peru (Shining Path), among several others. See 68 Fed. Reg. 56,860.

Inc., v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948)).¹³

The defendant's attempt to vicariously assert the PIJ's due process rights must also be rejected because it disregards the fundamental standing principle that a "plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (2975); *see, e.g., Haitian Refugee Ctr. V. Gracey*, 809 F.2d 794, 809 (D.C. Cir. 1987) (because due process rights do not protect a relationship between a third party and a litigant, "[a] litigant can never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court." A similar attempt to vindicate the rights of an FTO was rejected by the district court in United States v. Sattar, *supra*. See 272 F. Supp. 2d at 364. In dismissing the claim, the court reasoned, that "it is for [the FTO], not the defendants, to raise [the FTO's] due process concerns before a court as provided for under the statute. Litigants, including the defendants, 'never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court.'" Id. at 364 (quoting Center for Reproductive law and Policy v. Bush, 304 F.3d 183, 196 (2d. Cir. 2002)). See also Humanitarian Law Project v. Reno, 205 F.3d

¹³ The fact that the Secretary of State is required to determine whether the terrorist activity of a particular organization "threatens the security of United States also raises no meaningful First Amendment concerns. In conducting United States foreign policy, the Executive Branch necessarily draws distinctions between foreign States and has frequently imposed prohibitions on dealings with selected regimes. The Executive's decision to permit financial dealings with nations whose policies and actions it regards as consistent with United States interests, while forbidding contacts with Cuba, North Korea, Libya, and Iraq, cannot plausibly be claimed to violate the First Amendment. *See Walsh v. Brady*, 927 F.2d at 1234-35 (utilizing an O'Brien analysis to reject a First Amendment attack against the prohibition on payments to Cuba); Farrakhan, 669 F. Supp. at 512. The political branches are similarly free, as a constitutional matter, to distinguish among violent, foreign, non-governmental organizations based on the impact of their activities on United States interests.

at 1137 (holding that a due process challenge to designation procedures “must be raised in an appeal from a decision to designate a particular organization”).¹⁴

For all these reasons, the defendant’s due process challenge to the AEDPA must fail.¹⁵

III. THE INDICTMENT DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

At the very end of his memorandum, the defendant claims that the government “seeks to enforce an *ex post facto* law” against him by alleging acts of speech which occurred prior to 1997 (Def.’s Mot. to Dismiss, at 34-35). The defendant fails to tailor this argument to the particular charges, although he ostensibly argues only that allegations in Count One and Two should be stricken (*Id.* at 35, specifying allegations pertaining to speech acts before 1997 that should be stricken). Moreover, in making his *ex post facto* argument, the defendant obliquely raises several other issues. In the interests of efficiency, the government will attempt to provide the court a more particularized response and analysis of the applicable law.

First, the defendant misapprehends the legal standard applicable to a motion to dismiss when he complains that the only “direct” evidence of financial transactions alleged in the indictment occurred prior to 1995, and that in order to prevail on a proving that the defendant

¹⁴ Nor is it of consequence for standing purposes that the designation procedure deters individuals, such as the defendant, from making monetary contributions to FTOs. “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Wrath*, 422 U.S. at 499. See also *Palestine Information Office v. Shultz*, 853 F.2 at 943 (denying right of Palestine Liberation Organization employees to challenge closure of PLO office in Washington on the ground that action infringed on employment termination rights).

¹⁵Co-defendant HATIM NAJI FARIZ also asserts due process challenges to the AEDPA and the IEEPA (FARIZ’s “Motion to Dismiss Counts Three and Four of the Indictment”). The United States respectfully asks the Court to consider its response to FARIZ’s motion in conjunction with this memorandum in opposition.

provided material support to the PIJ, 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.”¹⁶ (Id. at 34). These arguments amount to thinly-veiled attacks on the government’s proof, not on the sufficiency of the allegations, and as such, they must fail.

As a general matter, on a motion to dismiss an indictment before trial, review of an indictment is governed by Rule 7 (c)(1) of the Federal Rules of Criminal Procedure, which requires that “[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” As the Eleventh Circuit has repeatedly held: “An indictment is sufficient ‘if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution of the offense.’” United States v. Steele, 147 F. 3d 1316, 1320 (11th Cir. 1998) (quoting United States v. Dabbs, 134 F.3d 1071, 1079 (11th Cir. 1998)). Indeed, the Eleventh Circuit has held that “ordinarily, the pleading of the allegations in terms of the statute is sufficient.” United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1082 (5th Cir. 1978).

¹⁶On a related note, the defendant also misapprehends the nature of conspiracy law. Because each of the first four counts allege a conspiracy, the government need only prove that a conspiracy existed, the defendant knew of the conspiracy, and that he intended to join or associate himself with the objective of the conspiracy. United States v. Gold, 743 F.2d 800, 824 (11th Cir. 1984). Moreover, “[d]irect proof of a formal agreement is not necessary to establish the existence of a conspiracy since ‘the very nature of conspiracy frequently requires that the existence of an agreement be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.’” Id., (quoting United States v. Ayala, 643 F.2d 244, 248 (5th Cir. Unit A 1981)). His assertion, therefore, that the indictment is somehow deficient because of a perceived lack of “direct” evidence after a certain point in time is specious and premature.

The law, however, does not “compel that the indictment track the statutory language.” Chilcote, 724 F.2d at 1505. The Eleventh Circuit has explained that when courts analyze a challenge to the sufficiency of an indictment, they give the indictment “a common sense construction” and the validity of the indictment is to be determined by practical, rather than technical considerations. United States v. Poirier, 321 F.3d 1024, 1029 (11th Cir. 2003) (indictment sufficient because a common sense interpretation of indictment indicated that relevant documents were confidential despite express statement that they were so), quoting United States v. Gold, 743 F.2d 800, 812 (11th Cir. 1984). Moreover, “[a]llegations in a conspiracy count need not be stated with the specificity required of a substantive count.” See e.g., United States v. Clark, 649 F.2d 534, 539 (7th Cir. 1981).

Federal Rule of Criminal Procedure 12 allows a defendant to submit, by pre-trial motion, “any defense, objection, or request that the court can determine without a trial of the general issue.” The validity of an indictment therefore is tested *by its allegations*, not by whether the government can prove its case. See Costello v. United States, 350 U.S. 359 363 (1956). The Eleventh Circuit has specifically held that “[i]n judging the sufficiency of the indictment, the court must look to the allegations and, taking the allegations to be true, determine whether a criminal offense has been stated.” United States v. Fitapelli, 786 F. 2d 1461, 1463 (11th Cir. 1986). In other words, “[i]t follows that a pretrial motion to dismiss the indictment cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue.” United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987) (“Rule 12 is not intended to authorize ‘speaking motions’ through which the truth of the allegations in an indictment are challenged.”); United States v. Triumph Capital

Group Inc., 260 F. Supp. 2d 444, 458 (D. Conn. 2002) (denying motion to dismiss RICO conspiracy charge because defendants' argument that the government could not prove the existence of an agreement between or among the defendants amounted to a challenge of proof, not to the sufficiency of the allegations). The proper inquiry then is not whether the government has alleged "direct" as opposed to "circumstantial" evidence, nor whether the government will prevail at trial; rather, all that is required is for the government to provide the defendant with sufficient information to understand the nature of the charges against him and prepare for trial. Each of the first four charges in the instant indictment meets and surpasses that standard.

Second, the defendant's primary contention, that allegations of "speech acts" occurring prior to 1997 violate the *ex post facto* clause, is likewise based on faulty logic and a misapprehension of the law. While it is true that the designation of the PIJ as an SDT in 1995, and the subsequent designation of the PIJ as an FTO in 1997, have provided the government with additional legal authority to consider when making charging decisions, these statutes in no way "criminalized" acts of speech—they merely made it a criminal violation to facilitate and support terrorism. The defendant therefore applies faulty logic when he relies upon these statutes to argue that his speech was a "non-criminal exercise of his protected First Amendment rights prior to 1995, if not 1997." (Defendant's Motion to Dismiss at 35).

To the extent the indictment refers to acts of speech, it does so in the context of overt acts or means and methods of a conspiracy. An overt act need not, taken by itself, be criminal in character. Yates v. United States, 354 U.S. 298, 334 (1957) (*overruled on other grounds*, United States v. Burks, 437 U.S. 1 (1978)); United States v. Jones, 642 F.2d 909, 914 (11th Cir. 1981). "The function of an overt act in a conspiracy prosecution is simply to manifest 'that the

conspiracy is at work.” Yates, 354 U.S. at 334, quoting Carlson v. United States, 187 F.2d 366, 370 (10th Cir.1951) . The overt acts alleged in the instant indictment tell the story of the conspiracy, in greater detail than is required under the law.¹⁷

Similarly, the “means and methods” portion of an indictment provide the defendant with information about the alleged conspiracy. In United States v. Jimenez, 824 F. Supp. 351, 370 (S.D.N.Y. 1993), the court analyzed the defendant’s motion to strike as surplusage information in the “means and methods” portion of a conspiracy charge. After discussing the general rule that motions to strike supposed surplusage are rarely granted, *id.*, at 369, the court held that since the “means and methods” portion of the indictment explained the “alleged structure” of the conspiracy and the “alleged roles” of each defendant, it contained information that was both relevant and admissible, and therefore not subject to a motion to strike. Similarly, the means and methods portions of the instant indictment provide the defendant with additional information to use in preparation of his defense.

Contrary to the defendant’s assertions, the inclusion in the indictment of overt acts alleged to have occurred prior to the designations of PIJ in 1995 and 1997¹⁸, whether or not they involve acts of speech, do not violate the *ex post facto* clause. The defendant’s argument is premised on the notion that the government cannot plead “pre-enactment” conduct as part of a

¹⁷Moreover, because 18 U.S.C. 2339B does not require proof of an overt act to commit the offense of conspiracy to violate the section, the government is not required to allege or prove the commission of an overt act in connection with Count Three. See Salinas v. United States, 522 U.S. 52, 63 (1997) (no overt act requirement unless specifically required by statute).

¹⁸The 1995 designation is relevant to Count Four, and the 1997 designation is relevant to Count Four.

crime. This argument, however, does not take into account the *continuing* nature of a conspiracy, and fails to recognize the not uncommon situation wherein a conspiracy begins before the enactment of the relevant statute and continues after the conduct is criminalized, or the analogous situation wherein a conspiracy begins outside the limitations period but continues into that period. These situations implicate neither the Constitution's *ex post facto* clause, which prohibits Congress from enacting a statute that makes an act a crime that was legal when committed, nor the statute of limitations, which prohibits bringing a charge related to conduct completed outside the relevant period. A conspiracy is deemed to continue as long as the purposes of the conspiracy have neither been abandoned nor accomplished and the defendant has not made an affirmative showing that the conspiracy has terminated. United States v. Gonzalez, 921 F.2d 1530, 1548 (11th Cir. 1991) (citing United States v. Coia, 719 F.2d 1120, 1124 (11th Cir.1983)). "The *ex post facto* clause is not violated, however, when a defendant is charged with a conspiracy that continues after the effective date of the statute." United States v. Hersh, 297 F.3d 1233, 1244 (11th Cir. 2002); United States v. Paradies, 98 F.3d 1266, 1284 (11th Cir. 1996) (holding that defendant's conviction for conduct that continued after the effective date of the statute did not violate *ex post facto* clause.); United States v. Harris, 79 F.3d 223, 228 (2d Cir. 1996) ("It is well-settled that when a statute is concerned with a continuing offense, the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute."); see also United States v. Terzado-Madruga, 897 F.2d 1099, 1124 (11th Cir. 1990) ("Since conspiracy is a continuous crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not violate the *ex post facto* clause.").

When a conspiracy statute requires proof of an overt act, the government may provide evidence showing that an overt act occurred after the enactment of the statute. Hersh, 297 F.3d at 1244-45. The Eleventh Circuit has also held that for purposes of pleading and proving a non-overt act conspiracy statute (such as RICO conspiracy and a Section 2339B conspiracy), the government only has to show that the conspiracy continued into the limitations period. United States v. Arnold, 117 F.3d 1308, 1313 (11th Cir. 1997); Gonzalez, 921 F. 2d at 1548.

Consistent with these principles, it is permissible for the government to allege conduct occurring before the effective date of the statute to demonstrate the conspiracy's genesis, its purpose and its operation over time, and to prove the intent and purpose of the conspirators' later acts. United States v. Monaco, 194 F.3d 381, 386 (2d. Cir. 1999); United States v. Ferrara, 458 F.2d 868, 874 (2d Cir. 1972).¹⁹ For example, in United States v. Hersh, 297 F.3d 1233, 1245 (11th Cir. 2002), the court addressed a challenge to an indictment that charged the defendants

¹⁹ The Second Circuit has also held that pre-enactment conduct is admissible even if it is not otherwise illegal. "None of the cases permitting the court to consider pre-enactment behavior of the conspirators was based on the fact that it was violative of some other federal statute at the time. The reason it was admitted was to assist the trier of fact to determine the existence and purpose of the conspiracy and to illumine the intent and purpose of the post-enactment behavior." United States v. Smith, 464 F.2d 1129, 1133 (2d Cir. 1972). In Smith, the defendants entered into the conspiratorial agreement before the effective date of the statute. The court explained that

[t]he appellants were not charged or convicted of entering into an illicit agreement but rather of conspiring to collect extensions of credit by extortionate means. Mr. Justice Holmes a long time ago distinguished between the transitory character of an agreement and the continuous nature of the conspiracy which follows. In differentiating between a contract in restraint of trade and a conspiracy in restraint of trade, he pointed out, 'A conspiracy is constituted by an agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.'

Id. at 1132-33, (quoting United States v. Kissel, 218 U.S. 601, 608 (1910)).

with conspiring to travel in foreign commerce for the purpose of engaging in sexual acts with minors. Eighteen overt acts in furtherance of the conspiracy were alleged. Significantly, only *two* of these acts, were alleged to have occurred after the date of amendment of the relevant statute which criminalized their behavior. *Id.* The court held that “because the government proved that the overt act of travel with the intent to engage in sexual acts with minors occurred after [the amendment of the statute], the conspiracy lasted past the statute’s amendment, and no *ex post facto* concerns exist.” *Id.* at 1247. For each of the conspiracies alleged in the indictment, the government has also alleged post-enactment conduct demonstrating that the conspiracy continued after the effective date of the statute, or after the limitations period began. The defendant’s motion on these grounds should therefore be denied.

Because pre-enactment behavior may be relevant to conspiratorial conduct occurring after the effective date of the statute, overt acts alleging such behavior should be considered when viewing the indictment as a whole and should not be stricken from the indictment. In order for the Court to strike portions of the indictment as surplusage under Federal Rule of Criminal Procedure 7(d), it must be clear that the language is *both* “not relevant to the charge” *and* “inflammatory and prejudicial.”²⁰ United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). This standard is “most exacting,” *id.*, and has been “strictly construed against striking surplusage.” United States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998). Accordingly, courts may not strike an allegation from the indictment if the allegation is admissible and relevant to the

²⁰Generally when adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5th Cir. 1960). Thus, the challenged allegations must be considered in light of the rest of the indictment.

charges regardless of how prejudicial the allegation is to the defendant. See United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990).

IV. CONCLUSION

In conclusion, contrary to defendant's motion, the Indictment does not violate the defendant's first amendment right to freedom of expression and association, the AEDPA does not violate the due process clause, and, the Indictment does not violate the ex post facto clause. Accordingly, defendants' Amended Motion to Dismiss Counts One Through Four of the Indictment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by facsimile and U.S. mail this 27th day of October, 2003, to the following:

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