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Terrorism and the Law: Cases and Materials

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**TERRORISM AND
THE LAW
CASES AND MATERIALS**

Second Edition

■ ■ ■

By

Gregory E. Maggs

Professor of Law

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Preface to the Second Edition

This text considers legal aspects of a broad range of instruments that governments have used for fighting terrorism, including criminal penalties, economic sanctions, immigration restrictions, military force, and civil liability. It addresses not just the steps taken in reaction to the 9/11 attacks, but also to many other counter-terrorism measures by the United States and other nations in recent years. To offer a global and comparative perspective, the materials include cases from foreign countries and international tribunals.

The Second Edition addresses many new legal developments that have occurred since publication of the original edition in May 2005, including new Supreme Court decisions and federal legislation. It includes more than 15 new cases, covers new federal laws including the Military Commission Act of 2006 and the Detainee Treatment Act of 2005, and has new explanatory text and notes. The edition incorporates most of the materials from the 2006-2009 supplements.

This book originally grew out of a set of readings that I prepared for the George Washington/Oxford University Program in International Human Rights during the summer of 2004. I am very grateful to the Program Directors, Professors Ralph Steinhardt and Andrew Shacknove, for inviting me to participate. I benefitted greatly from the comments of the students and the other faculty members participating in the program. In addition, Professor Jose Carillo generously invited me to participate in his Human Rights Clinic at the George Washington University Law School, where I had the opportunity to discuss issues related to this book and to meet students and attorneys involved in defending persons accused of offenses related to terrorism.

As an officer in the U.S. Army Reserve, Judge Advocate General's Corps, I have worked on several terrorism-related policies and cases. Most significantly, I assisted a team involved in drafting the rules for trials by military commissions and I also have advised the military commissions prosecution team on various issues. The other military attorneys with whom I have worked have educated me on many subjects addressed in these materials and tremendously increased my interest in them. But the views stated in this book are my own, and do not represent the official views of the U.S. Department of Defense or Department of the Army.

I am extremely grateful to Professor Ronald Rotunda for his advice and assistance throughout the entire process of developing this book. (In fact, I have attempted to replicate here the format of his very successful *Modern*

Constitutional Law casebook). I am also thankful to Professors Bradford Clark, Jerome Barron, Mary Cheh, Geoff Corn, Peter Raven-Hansen, Jonathan Turley, and John Yoo for sharing their ideas on the subject of terrorism with me. My father, Professor Peter B. Maggs, helped me with this project in many ways, especially by translating excerpts from a decision of the Constitutional Court of the Russian Federation regarding the use of force in the Chechen Republic (included at 205 below). Colonel Mark Harvey, U.S. Army retired, a former judge on the U.S. Army Court of Criminal Appeals and Clerk of Court for the U.S. Military Commissions, gave me accurate and useful guidance on many military law issues. My research assistant Emily Lerner also made many valuable contributions. All errors are my fault.

Please note that in editing the cases and other materials excerpted in this book, I have indicated omitted paragraphs by three asterisks (“* * *”) and omitted sentences or portions of sentences by ellipses (“. . .”). I have placed in brackets (“[]”) any text that I have added when editing quoted materials. I have omitted footnotes without indication, but have retained the original numbering of the footnotes that remain. Please consult the actual sources when conducting further research.

GREGORY E. MAGGS

Washington, D.C.
October 2009

Summary of Contents

PREFACE	iii
TABLE OF CONTENTS	viii
TABLE OF CASES	xv

PART I. CRIMINAL PROSECUTION OF SUSPECTED TERRORISTS

Chapter 1. Terrorism and the Criminal Law	1
1-1. Introduction	1
1-2. Ordinary Criminal Laws Applied to Terrorists	5
1-3. Laws Aimed Specifically at Terrorism	9
1-4. Treason and Sedition	18
Chapter 2. Extra-Territorial Criminal Jurisdiction	31
2-1. Federal Legislation	31
2-2. Limits on Extra-Territorial Jurisdiction	33
Chapter 3. Withholding Evidence and Witnesses	48
3-1. The Accused's Rights	48
3-2. The Prosecution's Dilemma	49
Chapter 4. Practical Problems in Criminal Prosecution	76
4-1. Lack of Sufficient Evidence	76
4-2. Difficulty Capturing Suspected Terrorists	91
4-3. Providing Security for Trials	96
4-4. Determining the Appropriate Punishment	103

PART II. CIVIL RESPONSES TO TERRORISM

Chapter 5. Immigration Law and Terrorism	123
5-1. Exclusion of Suspected Terrorists	123
5-2. Immigration Sweeps	133
5-3. Public Information	142
5-4. Deportation and Human Rights	152
Chapter 6. Economic Sanctions	163
6-1. Unilateral Sanctions	163

6-2. Multilateral Sanctions	174
-----------------------------------	-----

PART III. AUTHORITY TO USE MILITARY FORCE

Chapter 7. Using Military Force in Foreign Countries	177
7-1. Military Force as a Response to Terrorism	177
7-2. Military Force and the U.N. Charter	179
Chapter 8. Domestic Use of Military Force	202
8-1. Military Assistance to Law Enforcement	202
8-2. Applicability of General Laws	207
Chapter 9. Targeted Killing of Suspected Terrorists	214
9-1. Civilian and Military Rules	214
Chapter 10. Group Punishments	235
10-1. Demolition of Homes	235
10-2. Deportation of Suspected Terrorists	244
Chapter 11. Searches for National Security Purposes	253
11-1. Searching Physical Spaces	253
11-2. Searching Computer Databases	266
11-3. Monitoring Communications	269

PART IV. MILITARY DETENTION AND INTERROGATION OF SUSPECTED TERRORISTS

Chapter 12. Classifications of Detainees	271
12-1. Possible Classifications	271
12-2. Process for Making Classifications	276
12-3. Citizenship and Prisoner of War Status	323
Chapter 13. Aspects of Detention	335
13-1. Duration	335
13-2. Conditions	371
Chapter 14. Interrogation of Detainees	381
14-1. Legal Principles	381
14-2. Interrogation Policies and Techniques	383

PART V. MILITARY TRIAL AND PUNISHMENT OF SUSPECTED TERRORISTS

Chapter 15. Access to the Civilian Courts	415
15-1. Federal Habeas Corpus Jurisdiction	415
15-2. Diplomacy and the Courts	452

Chapter 16. Authority for Military Trials	463
16-1. Military Commissions	463
16-2. Constitutional Limitations	464
16-3. Military Commissions and Terrorism	489
Chapter 17. Combatant Immunity	505
17-1. Principle and Exceptions	505
Chapter 18. Offenses Triable by Military Commissions	515
18-1. Nature of Offenses Triable	515
18-2. Definitions of Offenses	542
Chapter 19. Trial and Appellate Procedures	548
19-1. Requirements of the Geneva Conventions	548
19-2. Requirements of Other Conventions	576

PART VI. COMPENSATION

Chapter 20. VICTIMS OF TERRORISM	580
20-1. Claims against Terrorists and Their Sponsors	580
20-2. Claims against the Government for Not Providing Security	587
20-3. Claims against Private Parties for Not Providing Security	602
20-4. Claims against Insurers	629
Chapter 21. VICTIMS OF RESPONSES TO TERRORISM	645
21-1. Claims against the Government	645
21-2. Claims against Private Parties	668

APPENDICES

A. Selected Federal Anti-terrorism Statutes	690
B. The United Nations and the U.N. Charter	703
C. Geneva Convention III	711
D. Geneva Convention IV	727
E. International Covenant on Civil and Political Rights	734
F. European Convention on Human Rights	737
G. United Nations Covenant Against Torture	742

INDEX	744
-------------	-----

Table of Contents

PREFACE	iii
SUMMARY OF CONTENTS	v
TABLE OF CASES	xv

PART I. CRIMINAL PROSECUTION OF SUSPECTED TERRORISTS

Chapter 1. Terrorism and the Criminal Law	1
1-1. Introduction	1
<i>Notes</i>	4
1-2. Ordinary Criminal Laws Applied to Terrorists	5
<i>Kasi v. Virginia</i>	6
<i>Notes</i>	9
1-3. Laws Aimed Specifically at Terrorism	9
<i>United States v. Hammoud</i>	11
<i>Notes</i>	17
1-4. Treason and Sedition	18
<i>United States v. Rahman</i>	19
<i>Notes</i>	30
Chapter 2. Extra-Territorial Criminal Jurisdiction	31
2-1. Federal Legislation	31
U.S. Attorney's Manual § 9-2.136	31
<i>Notes</i>	33
2-2. Limits on Extra-Territorial Jurisdiction	33
<i>United States v. Yousef</i>	33
<i>Notes</i>	46
Chapter 3. Withholding Evidence and Witnesses	48
3-1. The Accused's Rights	48
3-2. The Prosecution's Dilemma	49
<i>United States v. Moussaoui</i>	50
<i>Notes</i>	63
<i>People v. El Motassadeq</i>	65
<i>Note</i>	70
<i>United States v. Koubriti</i>	71
<i>Notes</i>	75

Chapter 4. Practical Problems in Criminal Prosecution	76
4-1. Lack of Sufficient Evidence	76
9/11 Commission Report Excerpt	76
<i>Notes</i>	79
<i>United States v. Abu Ali</i>	80
<i>Note</i>	84
National Security Letters	84
<i>Doe v. Mukasey</i>	86
<i>Notes</i>	91
4-2. Difficulty Capturing Suspected Terrorists	91
<i>United States v. Bin Laden</i>	92
<i>Notes</i>	95
4-3. Providing Security for Trials	96
<i>United States v. Koubriti</i>	96
<i>Notes</i>	103
4-4. Determining the Appropriate Punishment	103
<i>United States v. McVeigh</i>	104
<i>Notes</i>	118
<i>United States v. Meskini</i>	119
<i>Notes</i>	122

PART II. CIVIL RESPONSES TO TERRORISM

Chapter 5. Immigration Law and Terrorism	123
5-1. Exclusion of Suspected Terrorists	123
<i>Notes</i>	125
<i>Adams v. Baker</i>	126
<i>Note</i>	132
5-2. Immigration Sweeps	133
Report of the Inspector General	133
<i>Notes</i>	136
<i>Ashcroft v. Iqbal</i>	138
<i>Note</i>	142
5-3. Public Information	142
<i>Center for Nat'l Security Studies v. U.S. Dep't of Justice</i> ...	143
<i>Note</i>	151
5-4. Deportation and Human Rights	152
<i>Bellout v. Ashcroft</i>	152
<i>Notes</i>	156
<i>Arar v. Ashcroft</i>	158
<i>Note</i>	162

Chapter 6. Economic Sanctions	163
6-1. Unilateral Sanctions	163
<i>Kashani v. Tsann Kuen China Enterprise Co.</i>	164
<i>Notes</i>	174
6-2. Multilateral Sanctions	174
U.N. Security Council Resolution No. 1267	175
<i>Notes</i>	176
PART III. AUTHORITY TO USE MILITARY FORCE	
Chapter 7. Using Military Force in Foreign Countries	177
7-1. Military Force as a Response to Terrorism	177
<i>Notes</i>	179
7-2. Military Force and the U.N. Charter	179
<i>Notes</i>	182
<i>Nicaragua v. United States of America</i>	183
<i>Notes</i>	189
<i>Islamic Republic of Iran v. United States of America</i>	190
<i>Notes</i>	194
<i>Israeli Separation Barrier Case</i>	195
<i>Notes</i>	201
Chapter 8. Domestic Use of Military Force	202
8-1. Military Assistance to Law Enforcement	202
<i>Notes</i>	202
<i>Padilla ex rel. Newman v. Bush</i>	202
<i>Note</i>	203
<i>Problems</i>	204
<i>Decision of the Const'l Court of the Russian Federation</i> ...	205
<i>Note</i>	207
8-2. Applicability of General Laws	207
<i>Attorney-General for Northern Ireland's Reference</i>	207
<i>Note</i>	213
Chapter 9. Targeted Killing of Suspected Terrorists	214
9-1. Civilian and Military Rules	214
Report of the Special Rapporteur	216
<i>Notes</i>	219
<i>Public Committee Against Torture v. Israel</i>	220
<i>Notes</i>	226
<i>McCann v. United Kingdom</i>	226
<i>Notes</i>	234
Chapter 10. Group Punishments	235
10-1. Demolition of Homes	235

<i>Almarin v. IDF Commander in Gaza Strip</i>	235
<i>Notes</i>	243
10-2. Deportation of Suspected Terrorists	244
<i>Ass'n for Civil Rights in Israel v. Minister of Defence</i>	244
<i>Notes</i>	251
Chapter 11. Searches for National Security Purposes	253
11-1. Searching Physical Spaces	253
<i>United States v. Green</i>	253
<i>Notes</i>	257
<i>McWade v. Kelly</i>	258
<i>Note</i>	266
11-2. Searching Computer Databases	266
<i>Notes</i>	268
11-3. Monitoring Communications	269
NSA Program to Detect and Prevent Terrorist Attacks	269
<i>Notes</i>	270

PART IV. MILITARY DETENTION AND INTERROGATION OF SUSPECTED TERRORISTS

Chapter 12. Classifications of Detainees	271
12-1. Possible Classifications	271
<i>Notes</i>	274
12-2. Process for Making Classifications	276
<i>Hamdi v. Rumsfeld</i>	279
<i>Notes</i>	305
Detainee Treatment Act of 2005	306
<i>Parhat v. Gates</i>	307
<i>Padilla v. Hanft</i>	315
12-3. Citizenship and Prisoner of War Status	323
<i>In re Territo</i>	323
<i>Public Prosecutor v. Oie Hee Koi</i>	325
<i>Notes</i>	334
Chapter 13. Aspects of Detention	335
13-1. Duration	335
<i>Notes</i>	336
<i>Lawless v. Ireland</i>	337
<i>Murray v. United Kingdom</i>	351
<i>Marab v. Commander of IDF Forces in the West Bank</i>	360
13-2. Conditions	371
<i>United States v. Reid</i>	371
<i>Notes</i>	380

Chapter 14. Interrogation of Detainees	381
14-1. Legal Principles	381
14-2. Interrogation Policies and Techniques	383
A. Northern Ireland	383
<i>Republic of Ireland v. United Kingdom</i>	383
<i>Note</i>	390
B. Israel	390
<i>Public Committee Against Torture in Israel v. Israel</i>	390
<i>Notes</i>	402
C. U.S. Department of Defense	402
U.S. Department of Defense News Release No. 596-04	403
<i>Notes</i>	408
Detainee Treatment Act of 2005	409
<i>Notes</i>	410
U.S. Army Field Manual 2-22.3	411
D. U.S. Central Intelligence Agency	412
<i>Notes</i>	414

**PART V. MILITARY TRIAL AND PUNISHMENT OF
SUSPECTED TERRORISTS**

Chapter 15. Access to the Civilian Courts	415
15-1. Federal Habeas Corpus Jurisdiction	415
<i>Johnson v. Eisentrager</i>	418
<i>Note</i>	430
<i>Boumediene v. Bush</i>	430
<i>Notes</i>	444
<i>Munaf v. Geren</i>	446
<i>Note</i>	451
15-2. Diplomacy and the Courts	452
<i>Application of Abbasi</i>	452
<i>Note</i>	462
Chapter 16. Authority for Military Trials	463
16-1. Military Commissions	463
<i>Notes</i>	464
16-2. Constitutional Limitations	464
<i>Ex Parte Milligan</i>	465
<i>Ex Parte Quirin</i>	473
<i>Notes</i>	488
16-3. Military Commissions and Terrorism	489
Military Order of November 13, 2001	489
<i>Notes</i>	492
<i>Hamdan v. Rumsfeld</i>	493

Notes	502
Military Commissions Act of 2006	503
Notes	503
Chapter 17. Combatant Immunity	505
17-1. Principle and Exceptions	505
<i>United States v. Lindh</i>	506
Notes	513
Chapter 18. Offenses Triable by Military Commissions	515
18-1. Nature of Offenses Triable	515
<i>Application of Yamashita</i>	515
Notes	525
<i>Hamdan v. Rumsfeld</i>	525
Notes	542
18-2. Definitions of Offenses	542
Military Commissions Act of 2006	543
Notes	544
<i>United States v. Al Bahlul</i>	545
Notes	546
Chapter 19. Trial and Appellate Procedures	548
19-1. Requirements of the Geneva Conventions	548
<i>Application of Yamashita</i>	548
Notes	550
<i>Hamdan v. Rumsfeld</i>	552
Notes	573
Military Commissions Act of 2006	573
Notes	576
19-2. Requirements of Other Conventions	576
Note	576
<i>Sadak v. Turkey</i>	577
Note	579

PART VI. COMPENSATION

Chapter 20. VICTIMS OF TERRORISM	580
20-1. Claims against Terrorists and Their Sponsors	580
<i>Ministry of Defense and Support for the Armed Forces</i> <i>of the Islamic Republic of Iran v. Elahi</i>	580
<i>Price v. Socialist People's Libyan Arab Jamahiriya</i>	581
<i>Boim v. Holy Land Foundation for Relief & Development</i> ..	585
20-2. Claims against the Government for Not Providing Security	587
<i>A v. United Kingdom & Ireland</i>	588
<i>Macharia v. United States</i>	595

<i>Note</i>	601
20-3. Claims against Private Parties for Not Providing Security	602
<i>Stanford v. Kuwait Airways</i>	602
<i>In re September 11 Litigation</i>	613
<i>Notes</i>	628
20-4. Claims against Insurers	629
<i>World Trade Ctr. Properties v. Hartford Fire Ins. Co.</i>	629
<i>Notes</i>	643
Chapter 21. VICTIMS OF RESPONSES TO TERRORISM	645
21-1. Claims against the Government	645
<i>El-Shifa Pharmaceuticals Indus. v. United States</i>	646
<i>Notes</i>	664
<i>Farrell v. Secretary of State for Defence</i>	665
<i>Notes</i>	668
21-2. Claims against Private Parties	668
<i>Hatfill v. New York Times</i>	668
<i>El-Masri v. United States</i>	682
APPENDICES	
A. Selected Federal Anti-terrorism Statutes	690
B. The United Nations and the U.N. Charter	703
C. Geneva Convention III	711
D. Geneva Convention IV	727
E. International Covenant on Civil and Political Rights .	734
F. European Convention on Human Rights	737
G. United Nations Covenant Against Torture	742
INDEX	744

Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are in Roman type. Reference are to pages. Cases cited in principal cases and within other quoted materials are not included.

- A v. United Kingdom & Ireland**, 8 Eur. H.R. Rep. CD49 (1986), **588**
- Abbasi, Application of**, [2002] EWCA Civ 1598, [2002] All ER (D) 70, 2002 WL 31452052, **452**
- Abu Ali, United States v.**, 528 F.2d 210 (4th Cir. 2008), **80**, 445
- Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004), 445
- Adams v. Baker**, 909 F.2d 643 (1st Cir. 1990), **126**
- Ahrens v. Clark, 335 U.S. 188 (1948), 416
- Ajuri v. Government of Israel, HCJ 7015/02 (2002), 251
- Al Bahlul, United States v.**, Mil. Com'n Order No. 1 (2008), **545**
- Almarin v. IDF Commander in Gaza Strip**, HCJ 2722/92 (1992), **235**
- Application of (see party name)**
- Arar v. Ashcroft**, 532 F.3d 157 (2d Cir. 2008), **158**
- Ashcroft v. Iqbal**, 129 S. Ct. 1937 (2009), **138**, 162
- Association for Civil Rights in Israel v. Minister of Defence**, HCJ 5973/92 (1992), **244**
- Attorney-General for Northern Ireland's Reference**, [1977] A.C. 105, **207**
- Beit Sourik Village Council v. Government of Israel, HCJ 2056/04 (2004), 244, 201
- Belbacha v. Bush, 520 F.3d 452 (D.C. Cir. 2008), 157
- Bellout v. Ashcroft**, 363 F.3d 975 (9th Cir. 2004), **152**
- Bin Laden, United States v.**, Indictment No. 98CR-X (S.D.N.Y. Nov. 5, 1998), **92**
- Bin Laden, United States v., No. S(7) 98 Cr. 1023 (S.D.N.Y. Oct. 18, 2001), 119
- Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. 2009), 444
- Boim v. Holy Land Foundation for Relief and Development**, 549 F.3d 685 (7th Cir. 2009) (en banc), **585**
- Booker, United States v., 543 U.S. 220 (2005), 122
- Boumediene v. Bush**, 128 S. Ct. 2229 (2008), 158, 315, **430**
- Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), 417
- Brady v. Maryland, 373 U.S. 83 (1963), 48
- Case Concerning Oil Platforms (see**

- Islamic Republic of Iran v. United States of America)**
- Case Concerning Military and Paramilitary Activities in and against Nicaragua (see Nicaragua v. United States of America)**
- Center for Nat'l Security Studies v. U.S. Dep't of Justice**, 331 F.3d 918 (D.C. Cir. 2003), **143**
- Chandler v. United States, 171 F.2d 921 (1st Cir. 1949), 202
- Chavez v. Martinez, 538 U.S. 760 (2003), 381
- D'Aquino v. United States, 180 F.2d 271 (9th Cir. 1950), 18
- Decision of the Constitutional Court of the Russian Federation**, July 31, 1995, No. 10-P, **205**
- Doe v. Holder, 2009 WL 2432320 (S.D.N.Y. 2009), 91
- Doe v. Mukasey**, 549 F.3d 861 (2d Cir. 2008), **86**
- Edwards v. Arizona, 451 U.S. 477 (1981), 381
- El-Masri v. United States**, 479 F.3d 296 (4th Cir. 2008), **682**
- El-Shifa Pharmaceuticals Indus. v. United States**, 378 F.3d 1346 (Fed. Cir. 2004), **646**
- El-Shifa Pharmaceutical Industries Co. v. United States, 55 Fed. Cl. 751 (Fed. Cl. 2003), 664
- Ex Parte (see name of party)**
- Farrell v. Secretary of State for Defence**, [1980] 1 All ER 166, [1980] 1 WLR 172, 70 Cr App Rep 224 (H.L. 1979), **665**
- Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950), 18
- Goba, United States v., 240 F. Supp. 2d 242 (W.D.N.Y. 2003), 5
- Green, United States v.**, 293 F.3d 855 (5th Cir. 2002), **253**
- Guantanamo Detainee Cases, In re**, 355 F. Supp. 2d 43 (D.D.C. 2005), 305
- Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), 276, 416, **493**, **525**, 542, 544, 548, **552**, 576, 713
- Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), 276
- Hamdi v. Rumsfeld, 542 U.S. 507 (2004), 269, 416, 271, 273, **279**, 306, 335, 336, 371, 488, 493
- Hammoud, United States v.**, 381 F.3d 316 (4th Cir. 2004) (en banc), 11
- Hammoud, United States v., 543 U.S. 1097 (2005), 17
- Hammoud, United States v., 405 F.3d 1034 (4th Cir. 2005) (en banc), **18**
- Harvard Law Sch. Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986), 126
- Hatfill v. New York Times Co.**, 416 F.3d 320 (4th Cir. 2005), **668**
- Hatfill v. The New York Times Co., 532 F.3d 312 (4th Cir. 2008), 682
- Igartua-De La Rosa v. United States, 386 F.3d 313 (1st Cir. 2004), 734
- In re (see party/case name)
- Iqbal v. Ashcroft**, 129 S. Ct. 1937 (2009), **138**
- Islamic Republic of Iran v. United States of America**, 2003 ICJ 161, **190**
- Israeli Separation Barrier Case (see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)**
- Johnson v. Eisentrager**, 339 U.S. 763 (1950), **418**
- Kaczynski, United States v., 239 F.3d 1108 (9th Cir. 2001), 4

- Kashani v. Tsann Kuen China Enterprise Co.**, 13 Cal. Rptr.3d 174 (App. 2004), **164**
- Kasi v. Virginia**, 508 S.E.2d 57 (Va. 1998), **6**
- Khalid v. Bush**, 355 F. Supp. 2d 311 (D.D.C. 2005), 305
- Koubriti, United States v.**, 336 F. Supp. 2d 676 (E.D. Mich. 2004), **71**
- Koubriti, United States v.**, 252 F. Supp. 2d 418 (E.D. Mich. 2003), **96**
- Kiyemba v. Obama**, 555 F.3d 1022 (D.C. Cir. 2009), 158
- Lawless v. Ireland**, 1 Eur. H.R. Rep. 15 (1961), **337**
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**, 2004 I.C.J. No. 131, **195**
- Lindh, United States v.**, 212 F. Supp. 2d 541 (E.D. Va. 2002), **506**, 30
- Macharia v. United States**, 334 F.3d 61 (D.C. Cir. 2003), **595**
- Marab v. The Commander of IDF Forces in the West Bank**, HCJ 3239/02, **360**
- McCann v. United Kingdom**, 21 Eur. H.R. Rep. 97 (1996), **226**, 234, 668
- McVeigh, United States v.**, 153 F.3d 1166 (10th Cir. 1998), **104**
- McWade v. Kelly**, 460 F.3d 260 (2d Cir. 2006), **258**
- Merryman, Ex parte**, 17 F. Cas. 144, 153 (C.C. Md. 1861), 445
- Meskini, United States v.**, 319 F.3d 88 (2d Cir. 2003), 10, **119**
- Milligan, Ex parte**, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866), **465**, 488
- Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi**, 129 S. Ct. 1732 (2009), **580**
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Terrorism and the Law

Cases and Materials

Second Edition

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Chapter 1

TERRORISM AND THE CRIMINAL LAW

1-1. INTRODUCTION

What is terrorism and how does it concern the law?

The term “terrorism” has no settled meaning. In fact, one scholar has counted twenty-two different definitions of terrorism in federal law alone. *See* Nicholas J. Perry, *The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249 (2004). In *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), the United States Court of Appeals for the Second Circuit addressed the difficulties of defining terrorism and explained various approaches that domestic and international law have used. The court said:

Confusion on the definition of “terrorism” abounds. *See, e.g.*, Craig S. Smith, *Debate Over Iraq Raises Fears of a Shrinking Role for NATO*, N.Y. Times, Jan. 26, 2003, at L26 (quoting Celeste A. Wallander, senior fellow at the Center for Strategic and International Studies, as stating that even among members of the North Atlantic Treaty Alliance (“NATO”) there is no consensus “on how to define transnational terrorism”).

Terrorism is defined variously by the perpetrators’ motives, methods, targets, and victims. Motive-based definitions suffer from confusion because of the attempt to carve out an exception for assertedly legitimate armed struggle in pursuit of self-determination. For example, under one of the various United Nations resolutions addressing terrorism, armed and violent acts do not constitute “terrorism” if committed by peoples seeking self-determination in opposition to a violently enforced occupation. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations Among Co-operating States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 21, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970). This attempt to distinguish “terrorists” from “freedom fighters” potentially could legitimate as non-terrorist certain groups nearly universally recognized as terrorist, including the Irish Republican Army, Hezbol-

lah, and Hamas. See *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1002 (7th Cir. 2002) (describing Hamas); *Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 120 (2d Cir. 1996) (describing Hezbollah); *Matter of Requested Extradition of Smyth*, 863 F. Supp. 1137, 1139-40 (N.D.Cal. 1994) (describing the Irish Republican Army).

By contrast, the European Convention on the Suppression of Terrorism defines terrorism solely based on the methods of violence the perpetrator employs, and explicitly removes political judgment of the acts by defining most violent acts as “non-political” (regardless of the perpetrator’s claimed motive). European Convention on the Suppression of Terrorism, Nov. 10, 1976, Europ. T.S. No. 90. Thus, in Article I, the Convention defines as terrorism any offenses, *inter alia*, “involving the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb if this use endangers persons,” a definition that may fail to circumscribe the offense adequately. The Arab Convention on the Suppression of Terrorism (Cairo, Apr. 22, 1998), *reprinted in* International Instruments Related to the Prevention and Suppression of International Terrorism, 152-73 (United Nations 2001), while condemning terrorism, takes a uniquely restrictive approach to defining it, stating that offenses committed against the interests of Arab states are “terrorist offenses,” while offenses committed elsewhere or against other peoples or interests are not. *Id.* at Art. I.3 (defining “terrorist offence” as any of several defined violent actions that occur “in any of the Contracting States, or against their nationals, property or interests”). The Convention further defines as legitimate (non-terrorist) “[a]ll cases of struggle by whatever means, including armed struggle,” unless such struggles “prejudic[e] the territorial integrity of any Arab State.” *Id.* at Art. II(a).

United States legislation has adopted several approaches to defining terrorism, demonstrating that, even within nations, no single definition of “terrorism” or “terrorist act” prevails. There are numerous statutes defining “terrorism” or “acts of terrorism.” See, e.g., 18 U.S.C. § 2331 (defining terrorism by motive, stating that “international terrorism” is comprised of certain acts that “appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping”); 50 U.S.C. § 1801(c)(2) (substantially the same); 6 U.S.C. § 444(2)(B) (defining terrorism by its effect on United States interests, stating that “acts of terrorism” are any acts that are “unlawful” and that cause damage to any “person, property, or entity” in the United States, or to any United States-flag craft or air carrier); 8 U.S.C. § 1182(a)(3)(B)(ii) (in the context of what acts cause an alien to be excludable based on participation in “terrorist activity,” defining “terrorist activ-

ity” apart from any nexus to United States interests, as “any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State)” and that involves, *inter alia*, attacks on third parties to influence the policy of any government, attacks on aircraft and other vessels, or the use of chemical, biological or nuclear weapons).

Still other definitions of “terrorism” may focus on the victims of the attacks or the relationship between the perpetrators and the victims. *See, e.g.*, Alex P. Schmid & Albert J. Jongman, *Political Terrorism* 1-2 (1988) (“Terrorism is a method of combat in which . . . symbolic victims serve as an instrumental target of violence. These instrumental victims share group or class characteristics which form the basis for their selection for victimization. Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear (terror).”)

Id. at 107 n. 42. (More of the decision in *United States v. Yousef* is reprinted on page 33 below.)

But even without a precise definition, some general agreement exists. For instance, few would dispute that the term “terrorism” accurately describes the attacks of September 11, 2001, the 1998 bombing of the United States’ embassies in Kenya and Tanzania, the 1994 Oklahoma City Bombing, the 1993 bombing of the World Trade Centers, and many other notorious incidents discussed in these materials. In addition, most examples of terrorism appear to have something important in common. Whether by taking hostages, hijacking aircraft, detonating bombs, assassinating political leaders, murdering civilians, or sabotaging buildings and equipment, terrorists generally seek to achieve some kind of political end. By inflicting pain and by threatening future harm, terrorists hope to influence others to do whatever it is that they want.

Terrorism concerns the law in several ways. First, the law obviously prohibits terrorist acts of various kinds, like murder, hijacking, and destruction of property. Second, and sometimes more controversially, the law limits and regulates governmental responses to terrorism. The law for example, specifies requirements for fair trials, it constrains methods of investigation, and it may prohibit certain forms of military action against suspected terrorists. Third, the law may impose civil liability on terrorists, those who support terrorists, those who fail to provide protection against terrorists, and others.

This book addresses a variety of subjects. Part I, which consists of chapters 1 through 4, concerns the use of the criminal justice system to counter terrorism. Part II, which consists of chapters 5 and 6, considers two civil responses to terrorism, immigration controls and sanctions. Part III, which includes chapters 7 through 11, addresses the authority to use military force

against terrorists. Part IV, which includes chapters 12 through 14, treats the subjects of military detention and interrogation of terrorists. Part V, which includes chapters 15 through 19, covers the military trial and punishment of terrorists. And Part VI, which includes chapters 20 and 21, concludes by discussing possible bases for compensating victims of terrorism and victims of military and other responses to terrorism.

Notes

1. One provision of the U.S. Code defines terrorism simply as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2). How inclusive is this general definition? Can a terrorist have a pecuniary motive instead of a political motive? Are all terrorists members of groups or agents of someone else? Can nations commit terrorism? Are the victims of terrorism always non-combatants? The following notes provide illustrations that raise these kinds of questions.

2. *The Unabomber Case*. From 1978 to 1995, a former Berkeley mathematics professor named Theodore John Kaczynski mailed packages containing bombs to scientists and business executives. In total, the explosives killed 3 people and injured 29 others. While his identity was still unknown, the FBI code-named its investigation “UNABOM.” Based on this code-name, the media began calling the perpetrator of the attacks the “Unabomber.” Kaczynski had carried out the bombings to protest the development of technology. In 1995, he announced that he would stop his attacks if a nationally circulated newspaper or magazine would publish a 35,000-word manifesto explaining his anti-technology views. Several months later, the Washington Post printed the document. This publication ultimately led to Kaczynski’s capture. The manifesto cited a number of unusual books, and the FBI searched library records to determine who had checked them out. In addition, Kaczynski’s brother recognized the manifesto as something similar to what Kaczynski previously had written; he informed investigators and received a \$1 million reward. The FBI found Kaczynski living alone in a primitive cabin in the Montana woods. To avoid the death penalty, Kaczynski entered an agreement in which he pleaded guilty to thirteen counts of explosives charges, including transporting, mailing, and using explosives in violation of 18 U.S.C. §§ 844(d), 924(c) & 1716. He received a sentence of life in prison without the possibility of parole. *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001), cert. denied 535 U.S. 1043 (2002). Was Kaczynski, who acted alone, a terrorist under the definition in note 1?

3. *The D.C. Area Snipers*. In the fall of 2002, two men, John Allen Muhammad and Lee Malvo, frightened the population of Washington, D.C., and surrounding areas. One of them fired shots from a hole in the trunk of their car at unsuspecting members of the public, whom they apparently chose

at random. In total, the two men are suspected of killing 10 persons and wounding 3 others. Both have been convicted of serious offenses. Malvo has been sentenced to life imprisonment and Muhammad has been sentenced to death. Malvo asserted at his sentencing that the two men were attempting “to extort \$10 million from the government in order to start a multiracial utopia in the woods of Canada.” But at Muhammad’s sentencing hearing, prosecutors asserted that the goal was “to create a cover so that Muhammad could kill his ex-wife and get his children back.” Carol Morello, *Victims’ Relatives Still Ask, “Why?”; Snipers’ Motives Remain Unresolved*, Wash. Post, Mar. 11, 2004, at A11. Under either motive, would Malvo or Muhammad be considered terrorists under the definition in note 1?

4. *The U.S.S. Cole Bombing*. On October 12, 2000, a United States Navy vessel, the *U.S.S. Cole*, was refueling in Aden Harbor, Yemen. Two men brought a rubber boat alongside the ship. The boat contained explosives, which the men detonated. The explosion created a hole forty feet across in the side of the ship. The blast killed 17 crew members and wounded 40 others. The United States suspects that Usama bin Ladin and agents of the al-Qaida¹ terrorist network orchestrated the attack. See *United States v. Goba*, 240 F. Supp. 2d 242 (W.D.N.Y. 2003). Would this attack on military forces qualify as an act of terrorism under the definition in note 1?

1-2. ORDINARY CRIMINAL LAWS APPLIED TO TERRORISTS

In many instances, the difficulties of defining terrorism may not matter. Prosecutors often do not need to worry about the definition of terrorism or rely on special anti-terrorism legislation when charging suspected terrorists. On the contrary, most acts of terrorism violate ordinary criminal laws of general application. For example, murder is murder, whether it is committed by a

1. More information about Usama bin Laden and al-Qaida appears in the excerpted indictment in *United States v. Bin Laden* on page 92 below. Please note that the non-excerpted text and notes in this book spell the name of the terrorist network as “al-Qaida.” I have chosen this spelling because both the United States federal government and the United Nations tend to use it. See, e.g., U.S. Dep’t of State, Foreign Terrorists and Terrorist Organizations, 69 Fed. Reg. 75587-02 (Dec. 17, 2004) (Public Notice 4936); U.N. Security Council Resolution No. 1526 (2004). Various works, including many judicial opinions, use other spellings, including “al Qaeda” and similar variations. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (using “al

Qaeda”). Some sources capitalize the initial “a” and some do not; and some include a hyphen after the “l” and some do not.

In Arabic, the name of the terrorist network is القاعِدة , which means “the base.”

See Hans Wehr, *Dictionary of Modern Arabic* 780 (1973). Although pronunciations differ throughout the Arabic speaking world, this combination of a definite article and noun is pronounced in modern standard Arabic as *al qā·ida*, a quadrisyllabic utterance in which [·] is a glottal stop, [q] is an unvoiced uvular stop, [ā] is a vowel of extended length, and [·] is a voiced pharyngeal fricative.

terrorist, a mobster, or an armed robber. The same is true for assault, kidnapping, arson, and many other offenses that terrorists might commit.

Yet a decision to charge and then try a suspected terrorist as though he or she were just another criminal suspect raises important questions. Is it irrelevant whether a person is a terrorist? Is equality of treatment of suspected terrorists and other suspected criminals necessary to preserve the fairness of the trial for the accused? Or does treating terrorism the same as other forms of crime overlook important distinctions, some of which might benefit suspected terrorists?

KASI v. VIRGINIA

Supreme Court of Virginia
508 S.E.2d 57 (Va. 1998)

COMPTON, Justice.

On Monday, January 25, 1993, near 8:00 a.m., a number of automobiles were stopped in two north-bound, left-turn lanes on Route 123 in Fairfax County at the main entrance to the headquarters of the Central Intelligence Agency (CIA). The vehicle operators had stopped for a red traffic light and were waiting to turn into the entrance.

At the same time, a lone gunman emerged from another vehicle, which he had stopped behind the automobiles. The gunman, armed with an AK-47 assault rifle, proceeded to move among the automobiles firing the weapon into them. Within a few seconds, Frank Darling and Lansing Bennett were killed and Nicholas Starr, Calvin Morgan, and Stephen Williams were wounded by the gunshots. All the victims were CIA employees and were operators of separate automobiles. The gunman, later identified as defendant Mir Aimal Kasi, also known as Mir Aimal Kanshi, fled the scene.

At this time, defendant, a native of Pakistan, was residing in an apartment in Reston with a friend, Zahed Mir. Defendant was employed as a driver for a local courier service and was familiar with the area surrounding the CIA entrance.

The day after the shootings, defendant returned to Pakistan. Two days later, Mir reported to the police that defendant was a “missing person.”

On February 8, 1993, the police searched Mir’s apartment and discovered the weapon used in the shootings as well as other property of defendant. Defendant had purchased the weapon in Fairfax County three days prior to commission of the crimes.

On February 16, 1993, defendant was indicted for the following offenses arising from the events of January 25th: Capital murder of Darling as part of

the same act that killed Bennett, Code § 18.2-31(7); murder of Bennett, Code § 18.2-32; malicious wounding of Starr, Morgan, and Williams, Code § 18.2-51; and five charges of using a firearm in commission of the foregoing felonies, Code § 18.2-53.1.

Nearly four and one-half years later, on June 15, 1997, agents of the Federal Bureau of Investigation (FBI) apprehended defendant in a hotel room in Pakistan. Defendant had been travelling in Afghanistan during the entire period, except for brief visits to Pakistan.

On June 17, 1997, defendant was flown from Pakistan to Fairfax County in the custody of FBI agents. During the flight, after signing a written rights waiver form, defendant gave an oral and written confession of the crimes to FBI agent Bradley J. Garrett.

Following 15 pretrial hearings, defendant was tried by a single jury during ten days in November 1997 upon his plea of not guilty to the indictments. The jury found defendant guilty of all charges and, during the second phase of the bifurcated capital proceeding, fixed defendant's punishment at death based upon the vileness predicate of the capital murder sentencing statute, Code § 19.2-264.4.

On February 4, 1998, after three post-trial hearings, during one of which the trial court considered a probation officer's report, the court sentenced defendant to death for the capital murder. Also, the court sentenced defendant to the following punishment in accord with the jury's verdict: For the first-degree murder of Bennett, life imprisonment and a \$100,000 fine; for each of the malicious wounding, 20 years' imprisonment and a \$100,000 fine; and for the firearms charges, two years in prison for one charge and four years in prison for each of the remaining four charges.

* * *

[Kasi raised over 90 issues on appeal. The Court's discussion of all but the following issues is omitted.]

Next, defendant contends the trial court erroneously denied permission for defendant to contact a juror for questioning and to conduct an inquiry about the jury's deliberations. The issue arose against the following background.

Prior to trial, the court denied permission for defendant to contact potential jurors. The names of the jurors were not made public by agreement of counsel. At the beginning of the penalty stage on November 11, the court entered an order prohibiting the disclosure of "the name, address, identity or image" of any juror after considering "the need to protect jurors, the absolute right of jurors not to discuss the case, and protection of the confidentiality of juror deliberations."

On November 20, six days after the jury's sentencing verdict was rendered, a newspaper published an article reporting information gleaned from an interview with one juror about the penalty stage deliberations. The article quoted the juror as stating, for example, that some jurors "thought the crime was vile because Kasi, an immigrant, 'had attacked the American way of life.'" Also, the juror reportedly labeled defendant a "terrorist," a term the court had prohibited the participants from attaching to defendant during the trial proceedings.

On January 6, 1998, defendant moved to set aside the sentencing verdict, alleging juror misconduct on the basis of the article. He also asked for permission to subpoena the juror for interrogation. After a hearing, the trial court, assuming the news article accurately reported the juror's statements, denied both motions. The court ruled that the reported information "relates to the mental impressions of the jury and the way that they deliberated and considered the evidence." Hence, according to the court, inquiry of the jury was not allowed. The trial court was correct.

Virginia has been more careful than most states to protect the inviolability and secrecy of jury deliberations, adhering to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct. *Jenkins*, 244 Va. at 460, 423 S.E.2d at 370. Generally, we have limited findings of prejudicial juror misconduct to activities of jurors that occur outside the jury room. *Id.* Here, the alleged misconduct clearly occurred within the confines of the jury room, and a post-trial investigation into the allegations was unwarranted.

Finally, defendant contends the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and that the death sentence was excessive or disproportionate to the penalty imposed in similar cases. While not directly addressing those issues, defendant asks the Court to "commute this death sentence to life in prison without parole."

The defendant bases his plea for commutation on an argument laced with hyperbole, and threats inappropriate in an appellate brief. He reaches conclusions having absolutely no foundation in this record. For example, he says the death sentence resulted from the "open hostility" of the trial judge and because the prosecutors "were diligent in maligning the defense team repeatedly in the media." The record shows otherwise. The trial court in all the proceedings was thorough, even-handed, and considerate of all counsel, and presided in a manner that was fair both to the Commonwealth and the defendant. The Commonwealth's Attorney was diligent, well-prepared, and did not exceed the bounds of conduct expected of an aggressive prosecutor.

The defendant says that because his crimes were "political," he somehow is entitled to First Amendment protection, and that his death sentence should be commuted to avoid possible violent acts of reprisal. As the Attorney

General observes, defendant received the death sentence, not because he had a political motive, but because he murdered two innocent men, and maimed three others, in an extremely brutal and premeditated manner. As the defendant moved among the stopped automobiles, he shot through the rear window of the Darling vehicle, severely wounding Darling in the torso. In a few seconds, defendant appeared at the front of the Darling vehicle and fired at him again, destroying a part of his head. Darling also suffered at least one gunshot wound to his lower leg, resulting in a compound fracture. There is nothing “arbitrary” about a death sentence imposed under the circumstances of this case and, thus, there is no basis for commutation.

* * *

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, we will affirm the trial court’s judgment.

Notes

1. Kasi was concerned about two problems. One is that a juror may have labeled him as a terrorist. Another is that the court did not take his political motivations into account as a mitigating factor in determining his sentence. Why might Kasi have thought he was prejudiced? Are these concerns somewhat inconsistent?

2. Consider again the federal statute that defines terrorism as “politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2). Under this definition, would Kasi be a terrorist? Was he charged with being a terrorist? Note that upon his capture, Kasi reportedly said that “he shot five people outside CIA headquarters in 1993 to protest U.S. policies toward Muslims in the Middle East, including the bombing of Iraq.” Wendy Melillo & Brooke A. Master, *Kasi Shot Five Near CIA to Protest U.S. Policy, Prosecutor Says*, Wash. Post, Nov. 6, 1997, at B1.

1-3. LAWS AIMED SPECIFICALLY AT TERRORISM

Although ordinary criminal laws of general application already prohibit many of the kinds of acts that terrorists commit, Congress has enacted significant criminal legislation specifically aimed at terrorism. The U.S. Criminal Code, in fact, now contains an entire chapter addressing the subject. *See* 18 U.S.C., pt. I, ch. 113B. Several of the provisions of this chapter are reprinted

in the Appendix A on page 690 below, and several cases in this book discuss them.

How do these laws aimed specifically at terrorism differ from ordinary criminal laws? The short answer is that they do not differ very much. Most of the federal legislation concerning terrorism does not actually apply just to terrorists. Instead, the legislation applies to everyone who commits the specific acts that it prohibits. For example, the offense of “Terrorist Acts Abroad Against United States Nationals” can be committed by anyone who kills, kidnaps, or assaults a person within the United States as part of “conduct transcending national boundaries” provided certain jurisdictional requirements are met. 18 U.S.C. § 2332b(a)(1). The prosecution does not have to prove a terrorist motive or an affiliation with a terrorist organization. Instead, it only has to prove that the defendant committed one of the offenses that the law prohibits. It just so happens that international terrorists are most likely to commit these kinds of offenses.

Very few federal laws require the federal government to prove that anyone is a “terrorist” or has a connection to a “terrorist organization.”¹ But one important exception is the frequently charged offense of “Providing Material Support to Designated Terrorist Organizations” in violation of 18 U.S.C. § 2339B. Section 2339B says:

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a *foreign terrorist organization*, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

Id. § 2339B(a)(1) (emphasis added).

What is a “terrorist organization” for the purposes of § 2339B? This is not an open-ended question. Instead, the Act defines a terrorist organization as “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.” *Id.* § 2339B(g)(6). Section 219 of the Immigration and Nationality Act authorizes the Secretary of State to designate a group as a “foreign terrorist organization” if the group meets the following criteria:

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section

1. The U.S. Sentencing Guidelines provide for an enhancement “[i]f the offense is . . . a federal crime of terrorism.” U.S.S.G. § 3A1.4. (This provision is addressed in *United States v. Meskini*, 319 F.3d 88 (2d Cir. 2003), reprinted on page 119 below). A “fed-

eral offense of terrorism” is any one of certain listed federal offenses if committed “to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” 18 U.S.C. § 2332b(g)(5).

1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22), 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.

8 U.S.C. § 1189(a)(4).²

Pursuant to this law, the Secretary of State routinely designates groups as terrorist organizations. The list varies over time, but it has included the Basque Fatherland and Liberty (ETA) organization, HAMAS (Islamic Resistance Movement), Hizballah (Party of God), the Kurdistan Workers' Party (PKK), al-Qaida, the Real IRA, the Revolutionary Armed Forces of Colombia (FARC), and the Shining Path (Sendero Luminoso, SL), and others. *See* U.S. Dep't of State, Alphabetical Listing of Blocked Persons, Blocked Vessels, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics, 74 Fed. Reg. 29742-01 (Jun. 23, 2009). The following case interprets the statute and addresses its constitutionality.

UNITED STATES v. HAMMOUD

U.S. Court of Appeals for the Fourth Circuit
381 F.3d 316 (4th Cir. 2004) (en banc)

WILLIAM W. WILKINS, Chief Judge.

Mohammed Hammoud appeals the sentence imposed following his convictions of numerous offenses, all of which are connected to his support of Hizballah, a designated foreign terrorist organization (FTO). Hammoud also challenges two of his 14 convictions. . . .

I. *Facts*

The facts underlying Hammoud's convictions and sentence are largely undisputed. We therefore recount them briefly.

A. *Hizballah*

Hizballah is an organization founded by Lebanese Shi'a Muslims in response to the 1982 invasion of Lebanon by Israel. Hizballah provides various forms of humanitarian aid to Shi'a Muslims in Lebanon. However, it is also a strong opponent of Western presence in the Middle East, and it

2. *See* 8 U.S.C. § 1182(a)(3) (defining "terrorist activity" to include highjacking, hostage taking, using biological, chemical, or nuclear devices, etc.); 22 U.S.C. § 2656f(d)(2) (defining "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents").

advocates the use of terrorism in support of its agenda. Hizballah is particularly opposed to the existence of Israel and to the activities of the American government in the Middle East. Hizballah's general secretary is Hassan Nasserallah, and its spiritual leader is Sheikh Fadlallah.

B. Hammoud

In 1992, Hammoud, a citizen of Lebanon, attempted to enter the United States on fraudulent documents. After being detained by the INS, Hammoud sought asylum. While the asylum application was pending, Hammoud moved to Charlotte, North Carolina, where his brothers and cousins were living. Hammoud ultimately obtained permanent resident status by marrying a United States citizen.

At some point in the mid-1990s, Hammoud, his wife, one of his brothers, and his cousins all became involved in a cigarette smuggling operation. The conspirators purchased large quantities of cigarettes in North Carolina, smuggled them to Michigan, and sold them without paying Michigan taxes. This scheme took advantage of the fact that Michigan imposes a tax of \$7.50 per carton of cigarettes, while the North Carolina tax is only 50¢. It is estimated that the conspiracy involved a quantity of cigarettes valued at roughly \$7.5 million and that the state of Michigan was deprived of \$3 million in tax revenues.

In 1996, Hammoud began leading weekly prayer services for Shi'a Muslims in Charlotte. These services were often conducted at Hammoud's home. At these meetings, Hammoud—who is acquainted with both Nasserallah and Fadlallah, as well as Sheikh Abbas Harake, a senior military commander for Hizballah—urged the attendees to donate money to Hizballah. Hammoud would then forward the money to Harake. The Government's evidence demonstrated that on one occasion, Hammoud donated \$3,500 of his own money to Hizballah.

Based on these and other activities, Hammoud was charged with various immigration violations, sale of contraband cigarettes, money laundering, mail fraud, credit card fraud, and racketeering. Additionally, Hammoud was charged with conspiracy to provide material support to a designated FTO and with providing material support to a designated FTO, both in violation of 18 U.S.C.A. § 2339B (West 2000 & Supp. 2004). The latter § 2339B charge related specifically to Hammoud's personal donation of \$3,500 to Hizballah.

At trial, one of the witnesses against Hammoud was Said Harb, who grew up in the same Lebanese neighborhood as Hammoud. Harb testified regarding his own involvement in the cigarette smuggling operation and also provided information regarding the provision of "dual use" equipment (such as global positioning systems, which can be used for both civilian and military activities) to Hizballah. The Government alleged that this conduct was part of the

conspiracy to provide material support to Hizballah. Harb testified that Hammoud had declined to become involved in providing equipment because he was helping Hizballah in his own way. Harb also testified that when he traveled to Lebanon in September 1999, Hammoud gave him \$3,500 for Hizballah.

C. Conviction and Sentence

The jury convicted Hammoud of 14 offenses, . . . [including]: money laundering and conspiracy to commit money laundering, *see* 18 U.S.C.A. § 1956(a)(1), (h) (West 2000 & Supp. 2004); transportation of contraband cigarettes, *see* 18 U.S.C.A. § 2342 (West 2000); and providing material support to a designated FTO, *see* 18 U.S.C.A. § 2339B.

* * *

II. Constitutionality of 18 U.S.C.A. § 2339B

Section 2339B, which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, provides for a maximum penalty of 15 years imprisonment for any person who “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so.” 18 U.S.C.A. § 2339B(a)(1). The term “material support” is defined as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C.A. § 2339A(b) (West 2000).

Hammoud maintains that § 2339B is unconstitutional in a number of respects. Because Hammoud failed to bring these challenges before the district court, our review is for plain error. . . .

A. Freedom of Association

Hammoud first contends that § 2339B impermissibly restricts the First Amendment right of association. *See* U.S. Const. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”). Hammoud concedes (at least for purposes of this argument) that Hizballah engages in terrorist activity. But, he also notes the undisputed fact that Hizballah provides humanitarian aid to citizens of Lebanon. Hammoud argues that because Hizballah engages in both legal and illegal activities, he can be found criminally liable for providing material support to Hizballah only if he had a specific intent to further the organization’s illegal aims. Because § 2339B lacks such a specific intent requirement, Hammoud argues that it unconstitutionally restricts the freedom of association. . . .

It is well established that “[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982); *see Scales v. United States*, 367 U.S. 203, 229 (1961) (noting that a “blanket prohibition of association with a group having both legal and illegal aims . . . [would pose] a real danger that legitimate political expression or association would be impaired”). Therefore, it is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals. Any statute prohibiting association with such an organization must require a showing that the defendant specifically intended to further the organization’s unlawful goals. *See Elfbrandt v. Russell*, 384 U.S. 11, 15-16 (1966). Hammoud maintains that because § 2339B does not contain such a specific intent requirement, his conviction violates the First Amendment.³

Hammoud’s argument fails because § 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO. Therefore, cases regarding mere association with an organization do not control. Rather, the governing standard is found in *United States v. O’Brien*, 391 U.S. 367 (1968), which applies when a facially neutral statute restricts some expressive conduct. Such a statute is valid

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Section 2339B satisfies all four prongs of the *O’Brien* test. First, § 2339B is clearly within the constitutional power of the government, in view of the government’s authority to regulate interactions between citizens and foreign entities. *See Regan v. Wald*, 468 U.S. 222, 244(1984) (holding that restrictions on travel to Cuba do not violate the Due Process Clause). Second, there can be no question that the government has a substantial interest in curbing the spread of international terrorism. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000). Third, the Government’s interest in curbing terrorism is unrelated to the suppression of free expression. Hammoud is free to advocate in favor of Hizballah or its political objec-

3. Hammoud relies in part on cases holding that a donation to a political advocacy group is a proxy for speech. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976) (per curiam). Hizballah is not a political advocacy group, however. Therefore, while providing monetary support

to Hizballah may have an expressive component, it is not the equivalent of pure political speech. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134-35 (9th Cir. 2000) (rejecting argument that material support prohibition is subject to strict scrutiny review under *Buckley* and similar cases).

tives—§ 2339B does not target such advocacy.

Fourth and finally, the incidental effect on expression caused by § 2339B is no greater than necessary. In enacting § 2339B and its sister statute, 18 U.S.C.A. § 2339A, Congress explicitly found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” AEDPA § 301(a)(7). As the Ninth Circuit reasoned,

[i]t follows that all material support given to [foreign terrorist] organizations aids their unlawful goals. Indeed, . . . terrorist 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. Further, . . . 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 (footnote omitted). In light of this reasoning, the prohibition on material support is adequately tailored to the interest served and does not suppress more speech than is necessary to further the Government’s legitimate goal. We therefore conclude that § 2339B does not infringe on the constitutionally protected right of free association.

B. *Overbreadth*

Hammoud next argues that § 2339B is overbroad. A statute is overbroad only if it “punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep.” *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (internal quotation marks omitted). The overbreadth must be substantial “not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.” *Id.* at 120. It is also worth noting that when, as here, a statute is addressed to conduct rather than speech, an overbreadth challenge is less likely to succeed. *See id.* at 124 (“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).”).

Hammoud argues that § 2339B is overbroad because (1) it prohibits mere association with an FTO, and (2) it prohibits such plainly legitimate activities as teaching members of an FTO how to apply for grants to further the organization’s humanitarian aims. As discussed above, § 2339B does not prohibit mere association with an FTO and therefore is not overbroad on that basis. Regarding Hammoud’s second overbreadth argument, it may be true that the material support prohibition of § 2339B encompasses some forms of expres-

sion that are entitled to First Amendment protection. *Cf. Humanitarian Law Project*, 205 F.3d at 1138 (holding that “training” prong of material support definition is vague because it covers such forms of protected expression as “instruct[ing] members of a designated group on how to petition the United Nations to give aid to their group”). Hammoud has utterly failed to demonstrate, however, that any overbreadth is substantial in relation to the legitimate reach of § 2339B. *See Hicks*, 539 U.S. at 122 (“The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists.” (alteration & internal quotation marks omitted)).

C. Vagueness

Hammoud next argues that the term “material support” is unconstitutionally vague. “The void-for-vagueness doctrine requires that penal statutes define crimes so that ordinary people can understand the conduct prohibited and so that arbitrary and discriminatory enforcement is not encouraged.” *United States v. McLamb*, 985 F.2d 1284, 1291 (4th Cir. 1993). In evaluating whether a statute is vague, a court must consider both whether it provides notice to the public and whether it adequately curtails arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357-58.

Section 2339B easily satisfies this standard. As noted above, the term “material support” is specifically defined as a number of enumerated actions. Hammoud relies on *Humanitarian Law Project*, in which the Ninth Circuit ruled that two components of the material support definition—“personnel” and “training”—were vague. *See Humanitarian Law Project*, 205 F.3d at 1137-38. The possible vagueness of these prongs of the material support definition does not affect Hammoud’s conviction, however, because he was specifically charged with providing material support in the form of currency. *See United States v. Rahman*, 189 F.3d 88, 116 (2d Cir. 1999) (per curiam) (rejecting vagueness challenge because allegedly vague term was not relevant to Appellant’s conviction). There is nothing at all vague about the term “currency.”

D. Designation of an FTO

Hammoud’s final challenge to the constitutionality of § 2339B concerns his inability to challenge the designation of Hizballah as an FTO. Section 2339B(g)(6) defines “terrorist organization” as “an organization designated [by the Secretary of State] as a terrorist organization under [8 U.S.C.A. § 1189 (West 1999 & Supp. 2004)].” Section 1189(a)(8) explicitly prohibits a defendant in a criminal action from challenging a designation. Hammoud argues that his inability to challenge the designation of Hizballah as an FTO is a violation of the Constitution.

Hammoud primarily argues that § 1189(a)(8) deprives him of his constitutional right to a jury determination of guilt on every element of the charged offense. *See United States v. Gaudin*, 515 U.S. 506, 509-10 (1995) (holding that the Fifth and Sixth Amendments “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”). This right has not been violated, however. “[I]n determining what facts must be proved beyond a reasonable doubt the . . . legislature’s definition of the elements of the offense is usually dispositive . . .” *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). Here, Congress has provided that the *fact* of an organization’s designation as an FTO is an element of § 2339B, but the *validity* of the designation is not. Therefore, Hammoud’s inability to challenge the designation is not a violation of his constitutional rights. *See United States v. Bozarov*, 974 F.2d 1037, 1045-46 (9th Cir. 1992) (holding that defendant’s inability to challenge administrative classification did not violate due process because the validity of the classification was not an element of the offense).

Hammoud next argues that § 1189(a) violates the nondelegation doctrine because the designation of an organization as an FTO is not subject to judicial review. In the first place, it is not clear whether the nondelegation doctrine requires any form of judicial review. *Compare Bozarov*, 974 F.2d at 1041-45 (rejecting claim that a congressional delegation of authority was unconstitutional because the agency’s action was not subject to judicial review), *with Touby v. United States*, 500 U.S. 160, 168-69 (1991) (rejecting claim that temporary regulation violated nondelegation doctrine on basis that permanent regulation was subject to judicial review and temporary regulation could be challenged in criminal proceedings). In any event, an FTO designation is subject to judicial review—the designation may be challenged by the organization itself, *see* 8 U.S.C.A. § 1189(b).

* * *

IX. Conclusion

For the reasons set forth above, we reject each of Hammoud’s challenges to his convictions and sentence. We therefore affirm the judgment of the district court in its entirety.

AFFIRMED

Notes

1. The U.S. Supreme Court vacated the Fourth Circuit’s decision based on a sentencing issue not addressed in the excerpt above. *See Hammoud v. United States*, 543 U.S. 1097 (2005). The Fourth Circuit, on remand, con-

cluded that “the order of the Supreme Court does not affect our resolution of Hammoud’s challenges to his convictions.” *United States v. Hammoud*, 405 F.3d 1034 (4th Cir. 2005) (en banc).

2. Why would Congress generally want to avoid making courts decide who is a “terrorist” or what is “terrorism”?

3. Is there a practical reason that laws prohibiting the financing of terrorist organizations ultimately may be more important in preventing terrorism than laws prohibiting terrorist acts?

4. The *Hammoud* opinion says that courts may review the designation of a group as a “foreign terrorist organization” but only if the designated group itself brings a challenge. Is it likely that any of the organizations designated as a “foreign terrorist organization” by the Secretary of State actually would challenge its designation?

5. Might 18 U.S.C. § 2339B and cases like *Hammoud* have the unintended effect of deterring legitimate charitable donations? See Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations and Global Philanthropy*, 45 Wm. & Mary L. Rev. 1341, 1395 (2004) (arguing that “[i]t is not inconceivable that the government could overzealously charge, although not necessarily indict or convict, even an innocent donor or charitable organization with one or more criminal offenses if the government found that donations ultimately were collected for and/or were funneled to a terrorist or terrorist organization.” (footnotes omitted)). How might Congress address this concern?

1-4. TREASON AND SEDITION

Following World War II, the United States prosecuted a few of its citizens for treason. Famous cases involved “Tokyo Rose” (Iva Ikuko D’Aquino) and “Axis Sally” (Mildred Elizabeth Gillars), who had made propaganda radio broadcasts for the Japanese and German governments during the War. See *D’Aquino v. United States*, 180 F.2d 271 (9th Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950). Both were convicted and served lengthy prison terms. In recent years, some American citizens or permanent residents have participated in terrorist acts aimed against the people or the government of the United States. The question arises whether their acts also might constitute either treason or some form of sedition.

UNITED STATES v. RAHMAN
U.S. Court of Appeals for the Second Circuit
189 F.3d 88 (2d Cir. 1999)

PER CURIAM:

INTRODUCTION

These are appeals by ten defendants convicted of seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism. Among the activities of some or all of the defendants were rendering assistance to those who bombed the World Trade Center, *see United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of all four defendants), planning to bomb bridges and tunnels in New York City, murdering Rabbi Meir Kahane, and planning to murder the President of Egypt. We affirm the convictions of all the defendants. We also affirm all of the sentences, with the exception of the sentence of Ibrahim El-Gabrowni, which we remand for further consideration.

BACKGROUND

* * *

I. The Government's Case

At trial, the Government sought to prove that the defendants and others joined in a seditious conspiracy to wage a war of urban terrorism against the United States and forcibly to oppose its authority. The Government also sought to prove various other counts against the defendants, all of which broadly relate to the seditious conspiracy. The Government alleged that members of the conspiracy (acting alone or in concert) took the following actions, among others, in furtherance of the group's objectives: the attempted murder of Hosni Mubarak, the provision of assistance to the bombing of the World Trade Center in New York City on February 26, 1993, and the Spring 1993 campaign of attempted bombings of buildings and tunnels in New York City. In addition, some members of the group were allegedly involved in the murder of Rabbi Meir Kahane by defendant Nosair.

The Government adduced evidence at trial showing the following: Abdel Rahman, a blind Islamic scholar and cleric, was the leader of the seditious conspiracy, the purpose of which was "*jihad*," in the sense of a struggle against the enemies of Islam. Indicative of this purpose, in a speech to his followers Abdel Rahman instructed that they were to "do *jihad* with the sword, with the cannon, with the grenades, with the missile . . . against God's enemies." Govt. Ex. 550 at 22. Abdel Rahman's role in the conspiracy was generally limited to overall supervision and direction of the membership, as he made efforts to remain a level above the details of individual operations. However, as a cleric and the group's leader, Abdel Rahman was entitled to dispense "*fatwas*," religious opinions on the holiness of an act, to members

of the group sanctioning proposed courses of conduct and advising them whether the acts would be in furtherance of *jihad*.

According to his speeches and writings, Abdel Rahman perceives the United States as the primary oppressor of Muslims worldwide, active in assisting Israel to gain power in the Middle East, and largely under the control of the Jewish lobby. Abdel Rahman also considers the secular Egyptian government of Mubarak to be an oppressor because it has abided Jewish migration to Israel while seeking to decrease Muslim births. Holding these views, Abdel Rahman believes that *jihad* against Egypt and the United States is mandated by the Qur'an. Formation of a *jihad* army made up of small "divisions" and "battalions" to carry out this *jihad* was therefore necessary, according to Abdel Rahman, in order to beat back these oppressors of Islam including the United States. Tr. 2197.

Although Abdel Rahman did not arrive in the United States until 1990, a group of his followers began to organize the *jihad* army in New York beginning in 1989. At that time, law enforcement had several of the members of the group under surveillance. In July 1989, on three successive weekends, FBI agents observed and photographed members of the *jihad* organization, including (at different times), Nosair, Hampton-El, Mahmoud Abouhalima, Mohammad Salameh, and Nidal Ayyad (the latter three of whom were later convicted of the World Trade Center bombing, *see Salameh*, 152 F.3d at 161), shooting weapons, including AK-47's, at a public rifle range on Long Island. Although Abdel Rahman was in Egypt at the time, Nosair and Abouhalima called him there to discuss various issues including the progress of their military training, tape-recording these conversations for distribution among Abdel Rahman's followers. Nosair told Abdel Rahman "we have organized an encampment, we are concentrating here." Govt. Ex. 851 at 2-3.

On November 5, 1990, Rabbi Meir Kahane, a former member of the Israeli parliament and a founder of the Jewish Defense League, gave a speech at the Marriot East Side Hotel in New York. Kahane was a militant Zionist, who advocated expelling Arabs from Israel. The content of this speech was a plea to American Jews to emigrate and settle in Israel. Nosair and possibly Salameh and Bilal Alkaysi, another member of the group, attended the speech. After the speech, as Kahane stood talking with the crowd, two shots were fired and Kahane was hit in the neck and chest.

Nosair, whom witnesses observed with a gun in hand immediately after the shooting, then ran toward the rear door of the room, trailed by one of the onlookers. At the door, 70-year-old Irving Franklin sought to impede Nosair's flight. Nosair shot Franklin in the leg, and fled the room. Outside the hotel Nosair encountered uniformed postal police officer Carlos Acosta. Acosta tried to draw his weapon and identify himself, but before he could fire, Nosair fired two shots at him. The first of these shots hit Acosta in the chest but was

deflected into his shoulder by a bullet-proof vest he was wearing, and the second just missed Acosta's head. Despite being shot, Acosta returned fire, hitting Nosair in the neck. Nosair fell to the ground, dropping his weapon, a .357 caliber magnum revolver, at his side. Acosta recovered the weapon and detained Nosair. Ballistics testing showed that the weapon recovered from Nosair was the weapon that fired projectiles found in the room in which Kahane and Franklin had been shot, as well as in the area Acosta had been shot.

Subsequent to these events, law enforcement personnel executed search warrants for Nosair's home, car, and work lockers. Among the items seized in these searches was a handwritten notebook, in which Nosair stated that to establish a Muslim state in the Muslim holy lands it would be necessary:

to break and destroy the morale of the enemies of Allah. (And this is by means of destroying) (exploding) the structure of their civilized pillars. Such as the touristic infrastructure which they are proud of and their high world buildings which they are proud of and their statues which they endear and the buildings in which they gather their heads (leaders).

Tr. 3962-63.

[Additional evidence, discussed at length in the court's opinion, showed that Rahmen, Nosair, and the other defendants plotted to bomb the United Nations complex in New York, to assassinate Egyptian President Hosni Mubarak, to attack the FBI headquarters and the Lincoln and Holland Tunnels in New York. Some of them also purchased bomb making components for carrying out these plots, including fuel, fertilizer, and 55-gallon drums. The FBI arrested the men before they could carry out their plans.]

* * *

III. Verdicts and Sentences

The jury trial in the case ran from January 9, 1995, to October 1, 1995. The jury returned verdicts finding defendants guilty on all submitted charges, except that Nosair and El-Gabrownny obtained not guilty verdicts on the Count Five bombing conspiracy charges. The defendants were sentenced as follows: Abdel Rahman and Nosair, life imprisonment; El-Gabrownny, 57 years; Alvarez, Hampton-El, Elhassan, and Saleh, 35 years; Amir Abdelgani and Khallafalla, 30 years; Fadil Abdelgani, 25 years. . . .

DISCUSSION

I. Constitutional Challenges

A. Seditious Conspiracy Statute and the Treason Clause

Defendant Nosair (joined by other defendants) contends that his conviction for seditious conspiracy, in violation of 18 U.S.C. § 2384, was illegal because

it failed to satisfy the requirements of the Treason Clause of the U.S. Constitution, Art. III, § 3.

Article III, Section 3 provides, in relevant part:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The seditious conspiracy statute provides:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2384.

Nosair contends that because the seditious conspiracy statute punishes conspiracy to “levy war” against the United States without a conforming two-witness requirement, the statute is unconstitutional. He further claims that because his conviction for conspiracy to levy war against the United States was not based on the testimony of two witnesses to the same overt act, the conviction violates constitutional standards.

It is undisputed that Nosair’s conviction was not supported by two witnesses to the same overt act. Accordingly the conviction must be overturned if the requirement of the Treason Clause applies to this prosecution for seditious conspiracy.

The plain answer is that the Treason Clause does not apply to the prosecution. The provisions of Article III, Section 3 apply to prosecutions for “treason.” Nosair and his co-appellants were not charged with treason. Their offense of conviction, seditious conspiracy under Section 2384, differs from treason not only in name and associated stigma, but also in its essential elements and punishment.

In the late colonial period, as today, the charge of treason carried a “peculiar intimidation and stigma” with considerable “potentialities . . . as a political epithet.” See William Hurst, *Treason in the United States* (Pt. II), 58 Harv. L. Rev. 395, 424-25 (1945).

At the time of the drafting of the Constitution, furthermore, treason was punishable not only by death, but by an exceptionally cruel method of execution designed to enhance the suffering of the traitor. See 4 William Black-

stone, *Commentaries* *92 (observing that the punishment for treason is “terrible” in that the traitor is “hanged by the neck, then cut down alive,” that “his entrails [are then] taken out, and burned, while he is yet alive,” “that his head [is] cut off,” and that his “body [is then] divided into four parts”). In contrast, lesser subversive offenses were penalized by noncapital punishments or less brutal modes of execution. *See id.* at *94-*126. The Framers may have intended to limit the applicability of the most severe penalties—or simply the applicability of capital punishment for alleged subversion—to instances of levying war against, or adhering to enemies of, the United States. *See Hurst, supra*, at 425 n. 141 (indicating that at least some delegates “regarded the effort to limit the application of the death penalty for subversive crimes as the central motive of the restrictive definition of treason”). Today treason continues to be punishable by death, while seditious conspiracy commands a maximum penalty of twenty years imprisonment.

In recognition of the potential for political manipulation of the treason charge, the Framers may have formulated the Treason Clause as a protection against promiscuous resort to this particularly stigmatizing label, which carries such harsh consequences. It is thus possible to interpret the Treason Clause as applying only to charges denominated as “treason.”

The Supreme Court has identified but not resolved the question whether the clause applies to offenses that include all the elements of treason but are not branded as such. *Compare Ex Parte Quirin*, 317 U.S. 1, 38 (1942) (suggesting, in *dictum*, that citizens could be tried for an offense against the law of war that included all the elements of treason), with *Cramer v. United States*, 325 U.S. 1, 45 (1945) (noting in *dictum* that it did not “intimate that Congress could dispense with [the] two-witness rule merely by giving the same offense [of treason] another name.”) The question whether a defendant who engaged in subversive conduct might be tried for a crime involving all the elements of treason, but under a different name and without the constitutional protection of the Treason Clause, therefore remains open. And we need not decide it in this case, because the crime of which *Nosair* was convicted differs significantly from treason, not only in name and punishment, but also in definition.

Seditious conspiracy by levying war includes no requirement that the defendant owe allegiance to the United States, an element necessary to conviction of treason. *See* 18 U.S.C. § 2381 (defining “allegiance to United States” as an element of treason). *Nosair* nevertheless maintains that “[t]he only distinction between the elements of seditious conspiracy under the levy war prong and treason by levying war is that the former requires proof of a conspiracy while the latter requires proof of the substantive crime.” *Reply Brief for Nosair* at 9. Noting that the requirement of allegiance appears explicitly in the treason statute, but not in the Treason Clause, *Nosair* suggests that allegiance to the United States is not an element of treason within the contem-

plation of the Constitution. He concludes that, for constitutional purposes, the elements constituting seditious conspiracy by levying war and treason by levying war are identical, and consequently that prosecutions for seditious conspiracy by levying war must conform to the requirements of the Treason Clause.

The argument rests on a false premise. The Treason Clause does not, as Nosair supposes, purport to specify the elements of the crime of treason. Instead, in addition to providing evidentiary safeguards, the Clause restricts the conduct that may be deemed treason to “levying war” against the United States and “adhering to their Enemies, giving them Aid and Comfort.” It does not undertake to define the constituent elements of the substantive crime.

Moreover, any acceptable recitation of the elements of treason must include the breach of allegiance. The concept of allegiance betrayed is integral to the term “treason,” and has been since well before the drafting of the Constitution. See 3 Holdsworth, *History of English Law* 287 (noting that “the idea of treachery” has been part of the treason offense since the reign of Edward III). In both “its common-law and constitutional definitions the term ‘treason’ imports a breach of allegiance.” *Green’s Case*, 8 Ct.Cl. 412, 1872 WL 5731 (1872). Treason “imports a betraying.” *Id.* (quoting 3 *Tomlin’s Law Dictionary* 637). Blackstone, too, noted that treason, “in it’s [*sic*] very name . . . imports a betraying, treachery or breach of faith.” 4 Blackstone, *supra*, at *75. Early on, our Supreme Court recognized that “[t]reason is a breach of allegiance, and can be committed by him only who owes allegiance.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820) (Marshall, C.J.). Nor is there any doubt that the delegates to the Constitutional Convention “used [the term ‘treason’] to express the central concept of betrayal of allegiance.” Hurst, *supra*, at 415.

Nosair’s suggestion that the statutory definition of treason added the requirement of allegiance is mistaken. The reference to treason in the constitutional clause necessarily incorporates the elements of allegiance and betrayal that are essential to the concept of treason. *Cf. Wiltberger*, 18 U.S. at 97 (noting that the inclusion of the words “owing allegiance” in a statute punishing treason are surplusage because the concept is implicit in the term). The functions of the Clause are to limit the crime of treason to betrayals of allegiance that are substantial, amounting to levying war or giving comfort to enemies, and to require sufficiently reliable evidence. Treason, in other words, may not be found on the basis of mere mutterings of discontent, or relatively innocuous opposition. The fact that the Treason Clause imposes its requirements without mentioning the requirement of allegiance is not a basis for concluding that treason may be prosecuted without allegiance being proved. That any conviction for treason under the laws of the United States requires a betrayal of allegiance is simply implicit in the term “treason.” Nosair was

thus tried for a different, and lesser, offense than treason. We therefore see no reasonable basis to maintain that the requirements of the Treason Clause should apply to Nosair's prosecution. *Cf. United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (rejecting argument that "oppose by force" prong of Section 2384 conflicts with Treason Clause).

B. Seditious Conspiracy Statute and the First Amendment

Abdel Rahman, joined by the other appellants, contends that the seditious conspiracy statute, 18 U.S.C. § 2384, is an unconstitutional burden on free speech and the free exercise of religion in violation of the First Amendment. First, Abdel Rahman argues that the statute is facially invalid because it criminalizes protected expression and that it is overbroad and unconstitutionally vague. Second, Abdel Rahman contends that his conviction violated the First Amendment because it rested solely on his political views and religious practices.

1. Facial Challenge

a. *Restraint on Speech*. Section 2384 provides:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2384.

As Section 2384 proscribes "speech" only when it constitutes an agreement to use force against the United States, Abdel Rahman's generalized First Amendment challenge to the statute is without merit. Our court has previously considered and rejected a First Amendment challenge to Section 2384. *See United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955). Although *Lebron*'s analysis of the First Amendment issues posed by Section 2384 was brief, the panel found the question was squarely controlled by the Supreme Court's then-recent decision in *Dennis v. United States*, 341 U.S. 494 (1951). In *Dennis*, the Court upheld the constitutionality of the Smith Act, which made it a crime to advocate, or to conspire to advocate, the overthrow of the United States government by force or violence. *See* 18 U.S.C. § 2385; *Dennis*, 341 U.S. at 494. The *Dennis* Court concluded that, while the "element of speech" inherent in Smith Act convictions required that the Act be given close First Amendment scrutiny, the Act did not impermissibly burden the expression of protected speech, as it was properly "directed at advocacy [of overthrow of the government by force], not discussion." *See id.* at 502.

After *Dennis*, the Court broadened the scope of First Amendment restrictions on laws that criminalize subversive advocacy. It remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action. Thus, in *Yates v. United States*, 354 U.S. 298, 318 (1957), *overruled in part on other grounds*, *Burks v. United States*, 437 U.S. 1, 7 (1978), the Court interpreted the Smith Act to prohibit only the advocacy of concrete violent action, but not “advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end.” And in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), the Court held that a state may proscribe subversive advocacy only when such advocacy is directed towards, and is likely to result in, “imminent lawless action.”

The prohibitions of the seditious conspiracy statute are much further removed from the realm of constitutionally protected speech than those at issue in *Dennis* and its progeny. To be convicted under Section 2384, one must conspire to *use* force, not just to *advocate* the use of force. We have no doubt that this passes the test of constitutionality.

Our view of Section 2384’s constitutionality also finds support in a number of the Supreme Court’s more recent First Amendment decisions. These cases make clear that a line exists between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (“A physical assault is not . . . expressive conduct protected by the First Amendment”); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (“[T]hreats of violence are outside the First Amendment”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence”); *Watts v. United States*, 394 U.S. 705, 707 (1969) (Congress may outlaw threats against President, provided that “[w]hat is a threat [is] distinguished from what is constitutionally protected speech.”); *see also Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997) (upholding constitutionality of Freedom of Access to Clinic Entrances Act, as Act prohibits only use of force, physical obstruction, or threats of force); *Terry v. Reno*, 101 F.3d 1412, 1418-20 (D.C. Cir. 1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995) (same).

b. *Vagueness and Overbreadth*. Abdel Rahman also contends that Section 2384 is overbroad and void for vagueness. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

(i) *Overbreadth*. A law is overbroad, and hence void, if it “does not aim specifically at evils within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech or of the press.” *Thornhill v. Alabama*, 310 U.S. 88, 97

(1940). Particularly when conduct and not speech is involved, to void the statute the overbreadth must be “real [and] substantial . . . judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-800 & 800 n. 19 (1984).

We recognize that laws targeting “sedition” must be scrutinized with care to assure that the threat of prosecution will not deter expression of unpopular viewpoints by persons ideologically opposed to the government. But Section 2384 is drawn sufficiently narrowly that we perceive no unacceptable risk of such abuse.

Abdel Rahman argues that Section 2384 is overbroad because Congress could have achieved its public safety aims “without chilling First Amendment rights” by punishing only “substantive acts involving bombs, weapons, or other violent acts.” Abdel Rahman Br. at 67. One of the beneficial purposes of the conspiracy law is to permit arrest and prosecution before the substantive crime has been accomplished. The Government, possessed of evidence of conspiratorial planning, need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators. Accordingly, it is well established that the Government may criminalize certain preparatory steps towards criminal action, even when the crime consists of the use of conspiratorial or exhortatory words. *See, e.g., United States v. Jeter*, 775 F.2d 670, 678 (6th Cir. 1985). Because Section 2384 prohibits only conspiratorial agreement, we are satisfied that the statute is not constitutionally overbroad.

(ii) *Vagueness*. Abdel Rahman also challenges the statute for vagueness. A criminal statute, particularly one regulating speech, must “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, 357, (1983); *see also Hoffman Estates*, 455 U.S. at 499. Abdel Rahman argues that Section 2384 does not provide “fair warning” about what acts are unlawful, leaving constitutionally protected speech vulnerable to criminal prosecution.

There is indeed authority suggesting that the word “seditious” does not sufficiently convey what conduct it forbids to serve as an essential element of a crime. *See Keyishian v. Board of Regents*, 385 U.S. 589, 598 (1967) (noting that “dangers fatal to First Amendment freedoms inhere in the word ‘seditious,’” and invalidating law that provided, *inter alia*, that state employees who utter “seditious words” may be discharged). But the word “seditious” does not appear in the prohibitory text of the statute; it appears only in the caption. The terms of the statute are far more precise. The portions charged against Abdel Rahman and his co-defendants—conspiracy to levy war against the United States and to oppose by force the authority thereof—do not involve

terms of such vague meaning. Furthermore, they unquestionably specify that agreement *to use force* is an essential element of the crime. Abdel Rahman therefore cannot prevail on the claim that the portions of Section 2384 charged against him criminalize mere expressions of opinion, or are unduly vague.

2. Application of Section 2384 to Abdel Rahman's Case

Abdel Rahman also argues that he was convicted not for entering into any conspiratorial agreement that Congress may properly forbid, but "solely for his religious words and deeds" which, he contends, are protected by the First Amendment. In support of this claim, Abdel Rahman cites the Government's use in evidence of his speeches and writings.

There are two answers to Abdel Rahman's contention. The first is that freedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes. Numerous crimes under the federal criminal code are, or can be, committed by speech alone. As examples: Section 2 makes it an offense to "counsel[]," "command[]," "induce[]" or "procure[]" the commission of an offense against the United States. 18 U.S.C. § 2(a). Section 371 makes it a crime to "conspire . . . to commit any offense against the United States." 18 U.S.C. § 371. Section 373, with which Abdel Rahman was charged, makes it a crime to "solicit[], command[], induce[], or otherwise endeavor[] to persuade" another person to commit a crime of violence. 18 U.S.C. § 373(a). Various other statutes, like Section 2384, criminalize conspiracies of specified objectives, *see, e.g.*, 18 U.S.C. § 1751(d) (conspiracy to kidnap); 18 U.S.C. § 1951 (conspiracy to interfere with commerce through robbery, extortion, or violence); 21 U.S.C. § 846 (conspiracy to violate drug laws). All of these offenses are characteristically committed through speech. Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible. *See United States v. Spock*, 416 F.2d 165, 169-71 (1st Cir. 1969).

The evidence justifying Abdel Rahman's conviction for conspiracy and solicitation showed beyond a reasonable doubt that he crossed this line. His speeches were not simply the expression of ideas; in some instances they constituted the crime of conspiracy to wage war on the United States under Section 2384 and solicitation of attack on the United States military installations, as well as of the murder of Egyptian President Hosni Mubarak under Section 373.

For example:

Abdel Rahman told Salem he “should make up with God . . . by turning his rifle’s barrel to President Mubarak’s chest, and kill[ing] him.” Tr. 4633.

On another occasion, speaking to Abdo Mohammed Haggag about murdering President Mubarak during his visit to the United States, Abdel Rahman told Haggag, “Depend on God. Carry out this operation. It does not require a fatwa . . . You are ready in training, but do it. Go ahead.” Tr. 10108.

The evidence further showed that Siddig Ali consulted with Abdel Rahman about the bombing of the United Nations Headquarters, and Abdel Rahman told him, “Yes, it’s a must, it’s a duty.” Tr. 5527-29.

On another occasion, when Abdel Rahman was asked by Salem about bombing the United Nations, he counseled against it on the ground that it would be “bad for Muslims,” Tr. 6029, but added that Salem should “find a plan to destroy or to bomb or to . . . inflict damage to the American Army.” Tr. 6029-30.

Words of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry. The fact that his speech or conduct was “religious” does not immunize him from prosecution under generally-applicable criminal statutes. . . .

Abdel Rahman also protests the Government’s use in evidence of his speeches, writings, and preachings that did not in themselves constitute the crimes of solicitation or conspiracy. He is correct that the Government placed in evidence many instances of Abdel Rahman’s writings and speeches in which Abdel Rahman expressed his opinions within the protection of the First Amendment. However, while the First Amendment fully protects Abdel Rahman’s right to express hostility against the United States, and he may not be prosecuted for so speaking, it does not prevent the use of such speeches or writings in evidence when relevant to prove a pertinent fact in a criminal prosecution. The Government was free to demonstrate Abdel Rahman’s resentment and hostility toward the United States in order to show his motive for soliciting and procuring illegal attacks against the United States and against President Mubarak of Egypt. *See Mitchell*, 508 U.S. at 487 (“The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”); *United States v. Hoffman*, 806 F.2d 703, 708-09 (7th Cir. 1986) (evidence of religious affiliation relevant to show defendant’s motive to threaten President, because defendant leader of religious group was imprisoned by Government at time of threats).

Furthermore, Judge Mukasey properly protected against the danger that Abdel Rahman might be convicted because of his unpopular religious beliefs that were hostile to the United States. He explained to the jury the limited use it was entitled to make of the material received as evidence of motive. He instructed that a defendant could not be convicted on the basis of his beliefs or the expression of them—even if those beliefs favored violence. He properly instructed the jury that it could find a defendant guilty only if the evidence proved he committed a crime charged in the indictment.

We reject Abdel Rahman’s claim that his conviction violated his rights under the First Amendment.

* * *

[The court’s discussion of numerous other issues in the case is omitted.] We have considered all of the other claims raised on appeal by all of the defendants, beyond those discussed in this opinion, and conclude that they are without merit. The convictions of all ten defendants are affirmed. With the exception of the sentence of defendant El-Gabrownny, which is remanded for further proceedings as set forth in this opinion, the sentences of all the other defendants are affirmed.

Note

In 2001, when the United States went to war in Afghanistan, it fought against the forces of the Taliban, a group of mostly young Islamists who had taken over much of the country. During the fighting, the United States captured an American citizen named John Walker Lindh who was a foot soldier for the Taliban. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). Lindh ultimately pleaded guilty to breaching a federal regulation against providing aid to the Taliban, 31 C.F.R. § 545.204, and thus violating 50 U.S.C. § 1705(b), and to an explosives offense in violation of 18 U.S.C. § 844(h)(2). He received a prison sentence of 20 years. (More about his case appears on page 506 below.) If the government had charged Lindh with treason or seditious conspiracy, what would it have had to prove? Why might the government have decided not to charge Lindh with those offenses?