

**IMPLEMENTATION OF THE USA PATRIOT ACT:  
PROHIBITION OF MATERIAL SUPPORT UNDER  
SECTIONS 805 OF THE USA PATRIOT ACT  
AND 6603 OF THE INTELLIGENCE REFORM  
AND TERRORISM PREVENTION ACT OF 2004**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED NINTH CONGRESS  
FIRST SESSION

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**TUESDAY, MAY 10, 2005**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. The distinguished gentleman from Virginia, the Ranking Member, Mr. Scott, is on his way. And I think in the interest of time, since the panelists are standing at the ready, we will start, and Mr. Scott will be here presently.

Today, the Subcommittee on Crime, Terrorism, and Homeland Security will conduct its eighth hearing on the USA PATRIOT Act and related laws. This hearing focuses on two issues: One, the Inspector General's biannual report on whether the Department of Justice has abused the PATRIOT Act; and two, the prohibition on material support to terrorists, as amended by the PATRIOT Act and the Intelligence Reform and Terrorism Prevention Act.

Section 1001 of the PATRIOT Act requires the Inspector General to review all information alleging civil liberties abuses by employees of the Department of Justice. The IG has found no such abuses by employees of the Department using the PATRIOT Act.

As to the matter on providing material support to terrorists, this prohibition predates the PATRIOT Act. It was created in 1996 in the Anti-Terrorism and Effective Death Penalty Act. The 1996 act in part was in response to the Oklahoma City and the first World Trade Center terrorist attacks, and made it illegal to knowingly provide material support to a group designated as a foreign terrorist organization, better known as an "FTO."

In 1998, a group led by the Humanitarian Law Project cancelled—challenged the constitutionality of the ban, arguing that it violated the first amendment. Both the Ninth Circuit District Court and the appeals courts rejected most of the first amendment claims.

The appeals court, for instance, rejected the free association claim, finding that the statute does not prohibit membership in a group or support for the political goals of a group. The appeals court pointed out that what the law prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions.

The Ninth Circuit also rejected the plaintiff's contention that the law could be interpreted to prohibit the giving of material support to the so-called terrorist group's non-violent, humanitarian, and political activities; concluding that the first amendment did not create a right to give funds to terrorist groups. Money is fungible, and the court recognized that when someone makes a donation to terrorist groups there's no way to tell how the donation is used.

The court did find that the language was too vague in areas, and focused on the terms "training" and "personnel." The Ninth Circuit also found in another case that the term "expert advice or assistance" was unconstitutionally vague. "Expert advice or assistance" was language from the USA PATRIOT Act. The Congress has corrected these vagueness problems in the Intelligence Reform and Terrorism Prevention Act of 2004.

In fact, on December 21, 2004, the Ninth Circuit Court of Appeals recognized this correction in lifting an injunction that had barred the Government from prosecuting a Los Angeles group if the group aided organizations labeled as supporting terrorism. According to an Associated Press story dated December 22 of last year, the court said its December 1 decision in *Humanitarian Law Project v. the Department of Justice* was based partly on the Intelligence Reform and Terrorism Prevention Act of 2004, which President Bush signed into law on December 17, 2004.

The hearing today will examine the need for the ban on material support and the concerns about the prohibition, as well as the Inspector General's report on civil liberty abuses. I look forward to hearing testimony from the witnesses on their support of and concerns about these provisions.

And now I'm pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. And thank you, Mr. Chairman. And I appreciate your holding this hearing on the issues surrounding the material support provision of the USA PATRIOT Act, and again want to thank you for holding the hearings. The fact that we're actually deliberating on this, I think, will give us the opportunity to have a much better work product than what was slapped together right at the last minute on the floor of the House.

This provision, the material support provision, has proved troublesome in its application; particularly troublesome in the context of humanitarian and disaster relief efforts, where aid workers are severely hampered by bizarre implications of a provision that attempts to make an exception for medical and humanitarian relief, but not for food and water or medical supplies to provide the medical procedures to provide the relief.

Various aspects of the provision have been found to be unconstitutional by several courts. We have not had a definitive ruling from

the U.S. Supreme Court, so many of the issues are still being litigated.

We've made some fixes to the provision with the 9/11 bill we passed last year, but there still appear to be problems. Moreover, that fix was sunsetted to expire in 2006. So it's timely that we're revisiting it at this time.

Some of the issues, Mr. Chairman, that we need to look at include how an organization gets designated as a terrorist organization to begin with; how you get off the list; what kind of notice is required for someone to have. There are a lot of different issues where I'm afraid a lot of innocent people and people of good will making donations to organizations they thought were humanitarian organizations in fact might get caught up in this provision. So we look forward to our testimony by witnesses, Mr. Chairman. And again, thank you for holding the hearing.

Mr. COBLE. I thank the gentleman from Virginia. We've been joined by the distinguished gentleman from Texas, Mr. Gohmert, and the distinguished gentleman from Massachusetts, Mr. Delahunt. Good to have you all with us.

Gentlemen, it's the practice of the Subcommittee to swear in all witnesses appearing before it. So, if you would, please stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative.

We're pleased to have our panel with us today, as well as those in the audience in the hearing room here. Our first witness today is the Honorable Glenn Fine, Inspector General of the Department of Justice. Prior to being nominated and confirmed as Inspector General, Mr. Fine worked in several capacities within the Office of Inspector General, and has previously served as an Assistant United States Attorney. He is a graduate of Harvard College and the Harvard School of Law and, as a Rhodes Scholar, earned a bachelor's and master's degree at Oxford University.

Our second witness is Mr. Gregory Katsas, Deputy Assistant Attorney General for the Civil Division of the Department of Justice. Prior to joining the Department, Mr. Katsas was an attorney in private practice. He is a graduate of Princeton University and the Harvard School of Law, and served as a law clerk to Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit; Justice Clarence Thomas, both when he served on the U.S. Court of Appeals for the D.C. Circuit and on the U.S. Supreme Court.

Our third witness is Mr. Barry Sabin, who I thank for appearing before us for a second time in this series of hearings on the USA PATRIOT Act. Mr. Sabin is Chief of the Counterterrorism Section for the Criminal Division of the Justice Department. Before beginning this role, Mr. Sabin served in the United States Attorney's Office in Miami, Florida. Mr. Sabin received his bachelor's and master's degrees from the University of Pennsylvania, and his law degree from the New York University School of Law.

And our final witness—and, sir, I have the phonetical pronunciation, but I'm going to ask you to help me.

Mr. ARULANANTHAM. It's Ahilan Arulanantham.

Mr. COBLE. Thank you, sir. It's good to have you with us. And you serve as staff attorney in the Southern California Office of the American Civil Liberties Union. Prior to joining the ACLU's Southern California Office, this gentleman was Assistant Federal Public Defender in El Paso, and worked as a fellow at the ACLU Immigrants Rights Project in New York. He is a graduate of the Yale Law School, and a former law clerk for Judge Steven Rhinehart of the United States Court of Appeals for the Ninth Circuit.

Gentlemen, good to have you all with us.

And I'm sorry I wasn't able to pronounce your name, but thank you for your assist.

And I want to apologize to all of you again. I am still plagued with this damnable pollen attack that comes every spring, so you all bear with me. I know it doesn't sound very favorable.

Gentlemen, as we have told you all previously, we operate under the 5-minute rule here. We have examined your testimony, and it will be reexamined. And if you'll keep your eyes on those panels that appear on the table with you, when the amber light reflects in your eye, that is your warning that you have about a minute to go. So if you could stay within the 5-minute time frame, we would be appreciative. And in the sense of fairness, a fair and balanced approach, we impose the 5-minute rule against ourselves, as well. So if you could, confine your answers as tersely as possible.

Mr. Fine, we will start with you, sir.

**TESTIMONY OF THE HONORABLE GLENN A. FINE, INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF JUSTICE**

Mr. FINE. Mr. Chairman, Congressman Scott, and Members of the Subcommittee, I appreciate the Committee's invitation to testify this morning about the work of the Department of Justice Office of the Inspector General. I have been asked to address the OIG's responsibilities under section 1001 of the PATRIOT Act. That section requires the OIG to receive and review complaints of civil rights and civil liberties violations by Department of Justice employees. It also requires the OIG to publicize our duties and provide semi-annual reports to Congress on the implementation of section 1001.

Since passage of the PATRIOT Act in October 2001, the OIG has issued six such semi-annual reports to Congress; most recently, in March of this year. Each of these reports is available publicly on the OIG's website.

In my written statement, I discuss in detail three issues. First, I describe the procedures the OIG has implemented regarding our section 1001 duties. Second, I discuss the numbers and types of complaints we have received, the cases we have investigated, and the outcomes of those investigations. Third, I summarize a series of OIG reviews that relate to our civil rights and civil liberties oversight responsibilities.

I will not repeat my written statement here. But instead, will highlight for the Committee a few key points. First, the OIG has aggressively implemented and widely publicized our duties under section 1001. For example, we established a special e-mail address where people can report section 1001 complaints to us. We've developed a poster in English and Arabic that explains how to file com-



plaints with the OIG, and we disseminated the poster to all Federal Bureau of Prison facilities and a variety of other organizations.

We placed advertisements on television, radio, and in newspapers about our section 1001 duties and how to contact us with complaints. We created and distributed fliers about our duties in Arabic, Urdu, Punjabi, Spanish, and Vietnamese. And we reached out to groups involved in civil rights and civil liberties issues.

As a result of these efforts, the OIG has received more than 7,000 complaints during the past 3 years. I discuss the disposition of these complaints in my written statement. Many of the complaints involve matters outside of the Department of Justice's jurisdiction and, consequently, we referred them to the appropriate entity, such as the Department of Homeland Security or local authorities. Many complaints, on their face, do not warrant investigation. Still others discuss management issues, such as complaints from Federal prisoners about the type of food served or cell assignments, and we refer those complaints to the components for appropriate handling.

However, other complaints present serious allegations that warrant investigation. In several of these cases we have substantiated misconduct by DOJ employees, including one case in which we found a disturbing pattern of discriminatory actions against Muslim inmates by officials at a BOP facility.

One of the questions we frequently receive is whether we have received any complaints alleging abuse of a provision in the PATRIOT Act. To date, none of the allegations we have received, with one possible exception, have related to the use of a provision of the PATRIOT Act. The one possible section is the Brandon Mayfield matter.

In our ongoing review of the Mayfield case, the OIG is investigating the FBI's conduct in connection with the misidentification of a latent fingerprint found on evidence from the March 2004 Madrid train bombing. The FBI incorrectly identified the print as belonging to Brandon Mayfield, an attorney in Portland, Oregon. As a result of the misidentification, the FBI initiated an investigation of Mayfield that resulted in his arrest and detention for approximately 2 weeks. Mayfield was released when the Spanish National Police matched the fingerprint on the evidence to an Algerian national.

The OIG is investigating the cause of the erroneous fingerprint identification and the FBI's handling of the matter, including any use of the PATRIOT Act in this case. We plan to issue a report describing the results of our investigation when it is completed.

I also want to briefly note that our office has conducted other reviews that go beyond the requirements of section 1001, but that relate to civil rights and civil liberties issues. For example, we investigated the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks, and we found significant problems in the way the Department handled these detainees.

We focused in particular on the treatment of detainees at the Metropolitan Detention Center in Brooklyn, New York, where we found, among other things, that many detainees were held in unduly harsh conditions; that some were physically and verbally

abused; that detainees did not receive timely notice of charges against them; and that meetings between some detainees and their attorneys were improperly taped.

We recommended that certain MDC staff members be disciplined for their conduct. Unfortunately, a year and a half after issuance of our report, the BOP still is reviewing the matter and has not imposed any discipline.

Finally, I want to note for the Committee an ongoing OIG review that is examining the observations by FBI employees of interrogation techniques used on detainees held at the U.S. military facilities in Guantanamo Bay and elsewhere. The OIG is examining whether and to whom FBI employees reported any observations of abuse of interrogation of detainees, how those reports were handled, and whether any FBI employees participated in abusive interrogations.

In sum, since passage of the PATRIOT Act, the OIG has undertaken our critical duties under section 1001, and we will continue to make these important duties a high priority.

That concludes my statement, and I would be glad to answer any question about the OIG's work.

[The prepared statement of Mr. Fine follows:]

#### PREPARED STATEMENT OF THE HONORABLE GLENN A. FINE

Mr. Chairman, Congressman Scott, and Members of the Subcommittee on Crime, Terrorism, and Homeland Security:

I appreciate the opportunity to testify before the Committee this morning as it examines various provisions of the USA PATRIOT Act (Patriot Act), Public Law 107-56. I am here to discuss one section in particular—Section 1001, the section that directs the Office of the Inspector General (OIG) in the U.S. Department of Justice (DOJ or Department) to undertake a series of actions related to complaints of civil rights or civil liberties violations allegedly committed by DOJ employees. It also requires the OIG to provide semiannual reports to Congress on the implementation of the OIG's responsibilities under Section 1001.

Since passage of the Patriot Act, the OIG has reported to Congress about our Section 1001 activities on six occasions, most recently in March of this year. Each of these reports is available publicly on the OIG's website.

In my remarks today, I plan to address three primary issues. First, I will describe how the OIG is implementing its oversight responsibilities under Section 1001. Next, I will discuss the types of civil rights and civil liberties complaints we have received since passage of the Patriot Act, the cases we have investigated, and the outcomes of those investigations. Third, I will highlight findings in a series of OIG reviews that go beyond the explicit requirements of Section 1001 but that are related to our civil rights and civil liberties oversight responsibilities.

#### I. BACKGROUND

Section 1001 of the Patriot Act provides the following:

The Inspector General of the Department of Justice shall designate one official who shall—

- (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
- (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
- (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

As an independent entity in the Department of Justice, the OIG has statutory jurisdiction to review programs and personnel in all DOJ components (with one exception), including the Federal Bureau of Investigation (FBI), the Drug Enforcement

Administration (DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorneys' Offices, and other DOJ components.<sup>1</sup>

After passage of the Patriot Act, the OIG created the Special Operations Branch in its Investigations Division to manage the OIG's investigative responsibilities outlined in Section 1001. Staff in this OIG unit receive civil rights and civil liberties complaints via mail, e-mail, telephone, and facsimile, and each complaint is reviewed by an Investigative Specialist and a supervisor. The complaints are entered into an OIG database and a decision is made concerning its disposition. The more serious civil rights and civil liberties allegations that relate to actions of DOJ employees or DOJ contractors normally are assigned to an OIG Investigations Division field office, where OIG special agents conduct investigations of criminal violations and administrative misconduct.<sup>2</sup> Matters that involve broader issues, such as widespread allegations of detainee abuse, often are assigned to the OIG's Oversight and Review Division for review.

Publicizing the fact that we review allegations from individuals of civil rights and civil liberties abuses by Department employees is an important part of our responsibilities under the Patriot Act. Over the past three years, the OIG has met its Section 1001 advertising requirements in a variety of ways, including providing information on the OIG's website about how individuals can report violations of their civil rights or civil liberties and establishing an e-mail address ([inspector.general@usdoj.gov](mailto:inspector.general@usdoj.gov)) where individuals can send complaints of civil rights and civil liberties violations. The vast majority of the complaints we receive are sent to our e-mail address.

In addition, the OIG developed a poster, translated in Arabic, that explains how to file a civil rights or civil liberties complaint with the OIG. The OIG disseminated approximately 2,500 of these posters to more than 150 national and local Muslim and Arab organizations in 50 cities, including the Council on American-Islamic Relations, Sikh Mediawatch and Resource Task Force, and the American-Arab Anti-Discrimination Committee. We also provided the posters to the BOP, which placed at least two in each of its facilities. The OIG also provided 400 copies of the poster to the Immigration and Naturalization Service (INS), prior to its transfer to the Department of Homeland Security (DHS) in March 2003 for distribution to its offices around the country.

The OIG has aired television advertisements in areas of the country with high concentrations of Arab speakers. The text of this advertisement was spoken in Arabic and scrolled in English. The OIG also purchased blocks of time on ANA Television Network, Inc., an Arab cable television station with outlets around the country. The segment aired 48 times during prime time in June and July 2003.

The OIG also submitted public service announcements to 45 radio stations in cities across the country including New York, Los Angeles, Sacramento, Chicago, Detroit, Houston, Dallas, and Washington, D.C. In addition, we purchased airtime for 44 radio advertisements on Arab/Muslim American radio stations in New York, Chicago, Los Angeles, Detroit, and Dallas. These advertisements, in both English and Arabic, were 60 seconds long.

On several occasions, the OIG has purchased newspaper advertisements in Arab community newspapers highlighting its role in investigating allegations of civil rights and civil liberties abuses. Finally, the OIG created flyers translated into several languages, including Arabic, Urdu, Punjabi, Spanish, and Vietnamese. Special agents in OIG Investigations Division field offices have distributed these flyers to organizations and businesses that have frequent contact with individuals who speak these languages.

In addition to advertising the OIG's role in reviewing claims of civil rights and civil liberties violations, the OIG has reached out in other ways to provide information to the public about our Section 1001 responsibilities, including meeting with groups involved in civil rights and civil liberties issues.

<sup>1</sup> The one exception is that the Department's Office of Professional Responsibility has the jurisdiction to review alleged misconduct by Department attorneys or law enforcement personnel that relates to the exercise of attorneys' authority to investigate, litigate, or provide legal advice. See Attorney General Order 2492-2001.

<sup>2</sup> It is important to note that the OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline.

## II. CIVIL RIGHTS AND CIVIL LIBERTIES COMPLAINTS

As described below, the OIG received thousands of complaints each year. Given the number of complaints received compared to our limited resources, the OIG does not investigate all allegations, but instead refers the less serious complaints involving DOJ employees to internal affairs offices in DOJ components, such as the FBI Inspection Division, the DEA Office of Professional Responsibility, and the BOP Office of Internal Affairs for appropriate handling. For a majority of the referrals related to Section 1001, the OIG required the components to report the results of their investigations to the OIG. In most cases, the OIG notifies the complainant of the referral.

However, many of the complaints received by the OIG alleging civil rights or civil liberties abuses do not merit investigation or involve matters outside the Department of Justice's jurisdiction. Complaints that identify a specific issue for investigation are forwarded to the appropriate investigative entity. For example, complaints of mistreatment by airport security staff are sent to the DHS OIG. We also have forwarded complaints to other OIGs, including the Department of Veterans Affairs, Department of State, United States Postal Service, Department of Defense, Central Intelligence Agency, and the Equal Employment Opportunity Commission. In addition, we have referred complainants to a variety of police department internal affairs offices that have jurisdiction over the subject matter of those complaints.

When an allegation received from any source involves a potential violation of federal civil rights statutes by a DOJ employee, the OIG normally discusses the complaint with the DOJ Civil Rights Division. In some cases, the Civil Rights Division accepts the case for possible prosecution and requests additional investigation by either the OIG or the FBI. In other cases, the Civil Rights Division declines prosecution.

### *A. Analysis of Civil Rights and Civil Liberties Complaints*

The total number of civil rights and civil liberties complaints processed by the OIG from enactment of the Patriot Act in October 2001 through December 2004 was 7,136. After reviewing the complaints, the OIG determined that 3,902 of the 7,136 complaints did not warrant an investigation or review.<sup>3</sup> The OIG also determined that an additional 2,144 complaints made allegations against agencies or entities outside of the DOJ, including other federal agencies, local governments, or private businesses. The OIG concluded that 970 of the remaining 1,090 complaints that fell within the OIG's jurisdiction raised purely management issues, and the OIG referred those complaints to a variety of DOJ components for handling.<sup>4</sup> For 120 of these remaining complaints, the OIG determined that an investigation or further review was warranted, either by the OIG or a DOJ component. The OIG opened investigations into 30 of these matters and referred the remaining 90 complaints to the components.

One of the questions we frequently receive about our Section 1001 activities is whether we have received any complaints alleging abuse of a provision in the Patriot Act. None of the allegations we have received alleging misconduct by a Department employee, with one possible exception, related to use of a provision of the Patriot Act. The one possible exception, described later in this testimony, is the Brandon Mayfield matter.

### *B. Examples of Substantiated Cases*

The OIG has taken its Section 1001 duties seriously, and has aggressively investigated various allegations of civil rights violations. While many of the complaints are not substantiated, the OIG has substantiated various allegations of civil rights and civil liberties abuses. The following are examples of investigations completed by the OIG pursuant to its Section 1001 responsibilities in which allegations of abuse were substantiated:

- The OIG investigated allegations by Muslim inmates that staff at a BOP prison, including the warden, discriminated against these inmates and engaged in retaliatory actions. The OIG substantiated many of the allegations against the warden and other BOP staff, and we found a disturbing pattern of dis-

<sup>3</sup>For example, some of the complaints were frivolous on their face, alleging that government agents were broadcasting signals that interfere with a person's dreams or that prison officials had laced prison food with hallucinogenic drugs.

<sup>4</sup>For example, some inmates complained about the general conditions at federal prisons, such as the poor quality of the food or the lack of hygiene products. These complaints were forwarded to the BOP for its review.

criminy and retaliatory actions against Muslim inmates by BOP officers at this facility.

For example, we found that members of the prison's executive staff, including the warden, unfairly punished Muslim inmates who complained about the conditions of confinement or who cooperated with the OIG's investigation. A Muslim inmate who had filed complaints relating to his treatment at the prison was placed in the Special Housing Unit for four months for what we determined were specious reasons. In a separate incident, our review found that 5 days after the OIG interviewed a Muslim inmate, the warden inappropriately and unjustly ordered the inmate transferred to the Special Housing Unit for more than 120 days.

- The OIG investigated claims that an INS Supervisory Detention Enforcement Officer (SDEO) entered a gas station operated by an Arab-American and demanded paper towels. When the attendant replied that he did not have paper towels, the SDEO displayed his credentials, asked the attendant if he was American, and requested his immigration documents. The investigation also revealed that the SDEO requested a colleague to query an immigration database for information on the attendant. We found that the SDEO improperly displayed his credentials for other than official purposes and inappropriately caused an INS database to be queried. We provided our report of investigation to the DHS for appropriate action.
- The OIG investigated allegations raised by approximately 20 inmates that a BOP correctional officer verbally abused inmates with ethnic and racial slurs and inappropriate comments. After the BOP facility's investigation concluded that the allegations were unsubstantiated, the BOP's Office of Internal Affairs referred the matter to the OIG. When the OIG interviewed the correctional officer, he admitted to not being completely candid with BOP investigators, to verbally abusing the Muslim inmate, and to throwing the inmate's Koran into the trash can.
- The OIG investigated allegations that a BOP correctional officer used excessive force and failed to follow BOP policy in handling and restraining a Muslim inmate when the inmate was removed from his cell to be escorted to the Medical Unit for examination. The OIG concluded that the correctional officer used poor judgment in handling the inmate and failed to follow BOP policy when the correctional officer immediately entered the inmate's cell and used force to subdue the inmate instead of waiting for assistance and preparing a plan for a safer entry into the cell.
- The OIG learned that an electronic communication (EC) from one FBI field office to other FBI field offices around the country identified the names and addresses of the proprietors and customers of a Muslim-based website. The EC listed the proprietors' and customers' names by FBI field office and stated that the field offices should take whatever action they deemed appropriate. The OIG received a copy of the EC from an FBI employee concerned about the lack of predication or apparent basis on the face of the EC for the information to be sent for investigation to FBI field offices. We asked the FBI Inspection Division to review the incident and report back to us. The FBI Inspection Division notified us that the FBI recognized that the EC raised First Amendment concerns. The FBI subsequently retracted the EC and directed its field offices to conduct no further investigative action based on the EC. The Inspection Division also informed us that the FBI had concluded that the EC should have been reviewed by the legal advisor for the originating field office prior to being disseminated and that in the future such an EC will be subject to legal review.

### *C. Examples of Cases Not Substantiated*

The following are examples of investigations completed by the OIG pursuant to its Section 1001 responsibilities in which allegations of abuse were not substantiated:

- The OIG investigated allegations that unidentified correctional officers and the warden of a BOP facility threatened to "gas" inmates of Middle Eastern ancestry if war broke out in the Middle East. A BOP inmate further alleged that BOP staff members retaliated against him for reporting these allegations by placing him in segregation, denying him medical treatment, and eventually transferring him to another institution. The OIG investigation did not substantiate the allegations.

- The OIG investigated allegations that four individuals of Arab descent were detained improperly by FBI agents at the U.S. port of entry in the Virgin Islands. The OIG investigation did not substantiate any misconduct by the FBI agents.
- The OIG investigated allegations that FBI agents conducted an illegal search of an Arab American's apartment and, during the search, vandalized the apartment, stole items, and called the complainant a terrorist. The complainant alleged that even though the FBI found no evidence linking him to terrorism, approximately four months later the FBI recruited his friend to plant drugs in the complainant's home. According to the complainant, FBI agents came to his home, conducted a consent search, and arrested him after finding the drugs. During the OIG interview of the complainant, he recanted his allegations.
- The OIG investigated allegations that an Arab-American immigration detainee was beaten, threatened by officers, denied adequate medical treatment, and forced to eat pork on a regular basis even though it was against his religion. The OIG interviewed the jail staff and reviewed the complainant's INS and medical records. The jail's Food Services Administrator told the OIG that the jail has had a 100 percent non-pork diet for approximately one year. In addition, prison dental records show that the victim signed consent forms to have his badly infected teeth removed. Regarding the alleged assault by the correctional officers, the OIG investigation revealed conflicting information from the victim, witnesses, and officers, and the OIG could not substantiate the detainee's alleged injuries. The OIG presented the results of its investigation to attorneys in the Civil Rights Division, who declined prosecution.
- The OIG investigated allegations of misconduct relating to dialysis treatment of Muslim inmates at a BOP medical center. The OIG had received letters from two inmates alleging that inmate patients were required to take injections of porcine (pork) heparin as part of their dialysis treatment, despite the patients' religious objections to pork. While we did not substantiate misconduct by BOP employees, the OIG found deficiencies in the medical center's management of information and communications affecting the use of heparin for the inmates' treatment. The OIG provided several recommendations to the BOP relating to these deficiencies, and the BOP agreed to adopt these recommendations.

### III. OTHER ACTIVITIES RELATED TO THE OIG'S CIVIL RIGHTS AND CIVIL LIBERTIES OVERSIGHT RESPONSIBILITIES

The OIG has more than simply responded individually to each complaint of misconduct. Rather, we have conducted several reviews that go beyond the explicit requirements of Section 1001 in order to implement more fully our civil rights and civil liberties oversight responsibilities. Given the multi-disciplinary nature of our staff, the OIG can extend its oversight beyond traditional investigations of misconduct to evaluate DOJ programs. Using this approach, the OIG has conducted reviews that address, in part, issues relating to our duties under Section 1001.

#### A. *Brandon Mayfield Matter*

The OIG currently is investigating the FBI's conduct in connection with the erroneous identification of a latent fingerprint found on evidence from the March 2004 Madrid train bombing. The FBI's fingerprint examiners erroneously concluded that the fingerprint belonged to Brandon Mayfield, an attorney in Portland, Oregon. As a result of the misidentification, the FBI initiated an investigation of Mayfield that resulted in his arrest as a "material witness" and his detention for approximately two weeks. Mayfield was released when Spanish National Police matched the fingerprints on the evidence to an Algerian national. The OIG is examining the cause of the erroneous fingerprint identification and the FBI's handling of the matter. The Department's Office of Professional Responsibility is reviewing the conduct of the prosecutors in the case.

The OIG's report will examine the causes of the misidentification. In connection with this aspect of the report, the OIG has consulted with national fingerprint experts to assist in the evaluation of the causes identified by the FBI and the international panel the FBI assembled to review the case. The OIG report also will examine the corrective actions taken by the FBI Laboratory since the misidentification came to light.

In addition, the OIG report will address issues arising from the FBI's investigation and arrest of Brandon Mayfield, including the FBI's use of FISA in this case; any use of or implication of the Patriot Act in this case; the FBI's participation in

the preparation of the material witness and criminal search warrants; and Mayfield's conditions of confinement while he was held as a material witness.

*B. Review of FBI Conduct Relating to Detainees in Military Facilities in Guantanamo Bay and Elsewhere*

In late 2004, the OIG initiated a review to examine FBI agents' observations of interrogation techniques used on detainees held at the U.S. military's prison facilities in Guantanamo Bay and other military facilities. The OIG is examining whether FBI staff participated in any abusive interrogation techniques of detainees at these military detention facilities, whether and to whom FBI employees reported their observations of these interrogation techniques, and how those reports were handled.

OIG investigators have reviewed thousands of pages of documents from the FBI and the Department of Defense (DOD); interviewed dozens of FBI agents, supervisory FBI personnel, and DOJ officials; and traveled to Guantanamo Bay to interview detainees, FBI personnel, and DOD military personnel. In addition, the OIG plans to survey FBI employees who have served in an overseas area controlled by the U.S. military during the past two years as part of its review of this matter.

*C. Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*

After the September 11 terrorist attacks, the Department used federal immigration laws to detain many aliens in the United States who were suspected of having ties to the attacks or connections to terrorism, or who were encountered during the course of the FBI's investigation into the attacks. In the 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally.

The OIG received allegations of mistreatment by these detainees. Rather than handling each one separately, we examined in a systematic fashion the treatment of these detainees, including their processing, the bond decisions, the timing of their removal from the United States or their release from custody, their access to counsel, and their conditions of confinement. The OIG's 198-page report, released in June 2003, focuses in particular on detainees held at the BOP's Metropolitan Detention Center (MDC) in Brooklyn, New York.

Our report found significant problems in the way the Department handled the September 11 detainees. Among the report's findings:

- The FBI in New York City made little attempt to distinguish between aliens who were subjects of the FBI terrorism investigation (called "PENTTBOM") and those encountered coincidentally to a PENTTBOM lead. The OIG report concluded that, even in the chaotic aftermath of the September 11 attacks, the FBI should have expended more effort attempting to distinguish between aliens who it actually suspected of having a connection to terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead.
- The INS did not consistently serve the September 11 detainees with notice of the charges under which they were being held within the INS's goal of 72 hours. Our review found that some detainees did not receive these charging documents for weeks or more than a month after being arrested. This delay affected the detainees' ability to understand why they were being held, obtain legal counsel, and request a bond hearing.
- The Department instituted a policy that all aliens in whom the FBI had an interest in connection with the PENTTBOM investigation required clearance by the FBI of any connection to terrorism before they could be removed or released. The policy was based on the belief—which turned out to be erroneous—that the FBI's clearance process would proceed quickly. The OIG review found that instead of taking a few days as anticipated, the FBI clearance process took an average of 80 days, primarily because it was understaffed and not given sufficient priority by the FBI.
- In the first 11 months after the terrorist attacks, 84 September 11 detainees were housed at the MDC in Brooklyn under highly restrictive conditions. These conditions included "lock down" for at least 23 hours per day; escort procedures that included a "4-man hold" with handcuffs, leg irons, and heavy chains when the detainees were moved outside their cells; and a limit of one legal telephone call per week and one social call per month.

- BOP officials imposed a communications blackout for September 11 detainees immediately after the terrorist attacks that lasted several weeks. After the blackout period ended, the MDC's designation of the September 11 detainees as "Witness Security" inmates frustrated efforts by detainees' attorneys, families, and even law enforcement officials to determine where the detainees were being held. We found that MDC staff frequently—and mistakenly—told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the opposite was true.
- With regard to allegations of abuse at the MDC, the evidence indicated a pattern of physical and verbal abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners. The OIG conducted a supplementary investigation of these allegations (discussed below).

The OIG report offered 21 recommendations addressing issues such as developing uniform arrest and detainee classification policies, improving information-sharing among federal agencies on detainee issues, improving the FBI clearance process, clarifying procedures for processing detainee cases, revising BOP procedures for confining aliens arrested on immigration charges who are suspected of having ties to terrorism, and improving oversight of detainees housed in contract facilities.

In responding to the report, the Department took significant steps to implement the OIG's recommendations. For example, the Department developed protocols for making more timely decisions on whether an alien is "of interest" to the FBI or whether the alien should be handled according to routine immigration procedures. In addition, the BOP implemented a policy to retain for six months, rather than 30 days, videotapes depicting inmate movements outside their prison cells.

However, the Department still has not taken action on all the recommendations. Despite the agreement by the Department and the DHS to enter into a memorandum of understanding (MOU) to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees, this MOU has not yet been established. We have been informed that discussions between the Department and the DHS over the language of the MOU still are ongoing.

#### *D. Supplemental Report on September 11 Detainees' Allegations of Abuse at the MDC in Brooklyn, New York*

In December 2003, the OIG issued a Supplemental Report that examined in detail allegations made by detainees held in connection with the Department's terrorism investigation that some MDC correctional staff members at the MDC physically and verbally abused them.

The Supplemental Report concluded that certain MDC staff members abused some of the detainees. We did not find evidence that the detainees were brutally beaten, but we found evidence that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished the detainees by keeping them restrained for long periods of time. We concluded that the way these MDC staff members handled detainees was, in many respects, unprofessional, inappropriate, and in violation of BOP policy.

In addition, we found systemic problems in the way detainees were treated at the MDC, including staff members' use of a t-shirt taped to the wall in the facility's receiving area designed to send an inappropriate message to detainees, audio taping of detainees meetings with their attorneys, unnecessary and inappropriate use of strip searches, and banging on detainees' cell doors excessively while they were sleeping.

During our investigation, we examined approximately 30 detainees' allegations of physical and verbal abuse against approximately 20 MDC staff members. In our review of these allegations, we interviewed more than 115 individuals, including detainees, MDC staff members, and others.

We also reviewed MDC videotapes, including hundreds of tapes showing detainees being moved around the facility and tapes from cameras in detainees' cells. During the course of our investigation, MDC officials repeatedly told us that videotapes of general detainee movements no longer existed. That information was inaccurate. In late August 2003, the OIG found more than 300 videotapes at the MDC spanning the period from October through November 2001.

The OIG developed evidence that approximately 16 to 20 MDC staff members, most of whom were assigned to the ADMAX SHU, violated BOP policy by physically or verbally abusing detainees, and we recommended that the BOP consider discipline for them.

In addition, we made seven systemic recommendations to the BOP, ranging from developing guidance to train correctional officers in appropriate restraint techniques



to educating BOP staff concerning the impropriety of audio recording meetings between inmates and their attorneys.

The BOP has reacted favorably to the systemic recommendations, and has taken appropriate action to implement them. However, the BOP still has not imposed discipline on anyone in response to our report.

The BOP initiated its own investigation based on the OIG's findings to determine whether discipline is warranted. Yet, more than a year later, the BOP review still is ongoing. We believe that this delay is too long and that appropriate discipline should have been imposed in a more timely fashion.

Finally, in February 2005, the BOP discovered additional videotapes from the MDC relevant to the OIG's supplemental review that had not been provided previously to the OIG. Some of the videotapes included additional instances of video- and audio-taped meetings between detainees and their attorneys at the MDC. Others concerned detainee movements. The OIG and the BOP are reviewing the newly discovered videotapes, and the OIG is investigating why the MDC had not previously provided these videotapes.

#### *E. Review of BOP Security Policies Regarding the Search Religious Headwear*

In another review, the OIG examined the BOP's policies on searching religious headwear worn by visitors to BOP facilities. This review arose out of a complaint to the OIG from a Sikh attorney who was denied access to his client being held at the MDC in Brooklyn, New York, because he refused to remove his turban for inspection. The Sikh's religious practice requires him to wear his turban in public at all times.

The OIG review examined the BOP's policies regarding religious headwear in light of the BOP's interest in ensuring security at its facilities. The OIG interviewed the Sikh attorney, officials at the MDC, BOP managers, and representatives from Sikh Mediawatch and Resource Task Force.

During our review, BOP Headquarters issued a memorandum to all Regional Directors and Wardens that clarified how the BOP's search policies should be interpreted and applied to the search of religious headwear. While this memorandum effectively addressed the Sikh attorney's complaint, the OIG recommended that the BOP take additional steps to ensure that its search policies are consistently applied throughout the BOP to all visitors who wear religious headwear. In response to our report, the BOP revised its official policies by outlining a standard procedure for searching religious headwear. The BOP also addressed the searching of religious headwear during its staff annual refresher training in 2004.

#### *F. Review of the BOP's Process for Selecting Muslim Clerics*

In May 2004, the OIG released a report that examined the BOP's procedures for selecting individuals who provide Islamic religious services to federal inmates. The OIG initiated its review in response to concerns from several members of Congress about the selection of Muslim chaplains. Our investigation examined the recruitment, endorsement, selection, and supervision of Muslim chaplains, contractors, and volunteers who work with the approximately 9,000 BOP inmates who seek Islamic religious services.

The OIG review found that while the BOP has made some improvements in how it selects and supervises Muslim religious services providers, a number of deficiencies remained, including that:

- the BOP and the FBI had not adequately exchanged information regarding the possible connections to terrorism of Muslim organizations that endorse applicants for BOP religious service positions;
- once contractors and certain volunteers gain access to BOP facilities, ample opportunity existed for them to deliver inappropriate and extremist messages without supervision from BOP staff members; and
- BOP inmates often lead Islamic religious services, subject only to intermittent supervision from BOP staff members, which increases the possibility that inappropriate messages can be delivered to inmates.

The OIG review made 16 recommendations to help the BOP improve its process for selecting, screening, and supervising Muslim religious services providers. These recommendations include improving and increasing the information flow between the BOP and the FBI regarding the radicalization and recruitment of inmates; requiring that all chaplain, religious contractor, and certain volunteer applicants be interviewed by at least one individual knowledgeable of the applicant's religion; implementing additional security screening requirements for religious services providers; supervising more closely inmate-led religious services; using more effectively the expertise of its current Muslim chaplains to screen, recruit, and supervise Mus-

lim religious services providers; and developing a strategy specifically targeted towards recruiting additional Muslim chaplains and contractors.

The BOP agreed with all of the report's recommendations. It has implemented procedures to integrate into the interview process experts who are knowledgeable of applicants' religious beliefs and practices; implemented further security screening requirements for religious services providers; assigned an additional staff member as liaison with the FBI to increase and improve information-sharing between the two agencies; restructured its endorsement requirements for religious services providers; and modified its requirements for the supervision of chapel areas.

#### *G. Review of the FBI's Implementation of Attorney General Guidelines*

The OIG is completing a review of the FBI's implementation of four sets of Attorney General guidelines that govern the exercise of FBI investigations: Attorney General's Guidelines Regarding the Use of Confidential Informants; Attorney General's Guidelines on FBI Undercover Operations; Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations; and Revised Department of Justice Procedures for Lawful, Warrantless Monitoring of Verbal Communications.

The OIG review of the FBI's implementation of the revised investigative guidelines is designed to assess the FBI's compliance with the guidelines and to evaluate the procedures that the FBI employed to ensure that the revised guidelines were properly put into practice. Adherence to these guidelines could implicate civil rights or civil liberties issues under Section 1001.

As part of this review, the OIG surveyed three groups of special agents in the FBI's 56 field offices who play key roles in responding to questions about and promoting adherence to the guidelines: Confidential Informant Coordinators; Undercover Coordinators; and Division Counsel, who serve as chief legal advisers in the field. The team also surveyed Criminal Division Chiefs of the 93 U.S. Attorneys' Offices to address guidelines' provisions requiring routine approval, concurrence, or notification to U.S. Attorneys' Offices relating to significant Guidelines-related authorities or developments. In addition, the OIG team visited 12 FBI field offices to review FBI investigative and administrative files reflecting use of the authorities or operational techniques authorized by the guidelines. Finally, the OIG reviewed hundreds of FBI documents and interviewed senior FBI officials at Headquarters and in field offices.

#### IV. CONCLUSION

Since passage of the Patriot Act, the OIG has taken steps to fulfill its duties under Section 1001. We have created the infrastructure within the OIG to evaluate the hundreds of complaints we receive each reporting period, have conducted extensive public outreach about our duties, and have opened investigations on the most serious allegations that fall within our jurisdiction.

In addition, we have completed a series of reviews examining important issues related to our civil rights and civil liberties oversight responsibility. We also have several ongoing reviews that implicate these issues.

That concludes my statement, and I would be pleased to answer any questions about the OIG's work.

Mr. COBLE. Thank you, Mr. Fine.

Mr. Katsas.

#### **TESTIMONY OF GREGORY KATSAS, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE**

Mr. KATSAS. Mr. Chairman, Congressman Scott, Members of the Subcommittee, thank you for inviting me to testify about the statutes prohibiting the provision of material support to terrorists or designated foreign terrorist organizations.

Those statutes reflect strong bipartisan consensus that in order to fight terrorism effectively, we must attack it at its source. The material support provisions do that by preventing terrorist groups from raising money and obtaining the property, personnel, and expertise necessary to commit acts of terrorism.

As you know, Mr. Chairman, the statute prohibiting the provision of material support to designated foreign terrorist organizations was signed into law by President Clinton in 1996. Under Attorney General Reno, Attorney General Ashcroft, and now Attorney General Gonzales, the Department of Justice has vigorously defended the constitutionality of that important provision.

In 2000, the Court of Appeals for the Ninth Circuit broadly upheld this provision against various constitutional challenges. The Ninth Circuit squarely rejected a claim that the statute impermissibly imposes guilt by association, and likewise held that the Constitution does not require proof that donors to foreign terrorist organizations specifically intend to aid the unlawful purposes of those organizations.

As the Ninth Circuit explained, the statute prohibits the act of giving material support, and there is no constitutional right to facilitate terrorism. Any incidental burdens on speech, the court held, were no greater than necessary to achieve Congress' important purpose of combatting international terrorism. In December of last year, the en banc court reaffirmed those holdings.

Unfortunately, the Ninth Circuit also held that the terms "personnel" and "training," as set forth in the statutory definition of material support, were unconstitutionally vague. The Justice Department disagreed with that holding but, nonetheless, urged the Congress to enact clarifying amendments.

As you know, Congress recently did just that. In section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Congress directly addressed the Ninth Circuit's concerns by providing specific definitions of the terms "training," "personnel," and "expert advice or assistance." Congress' action in providing these definitions was a careful response to the Ninth Circuit and reflects highly productive cooperation between the Executive Branch and the Legislative Branch on this important matter.

These clarifying amendments were immediately beneficial to us in our pending litigation. In light of them, the Ninth Circuit has vacated an injunction regarding the terms "personnel" and "training," and more recently vacated a separate injunction regarding the term "expert advice or assistance." The constitutionality of the amended definitions is now before the district court in California, and we are confident that the amended provisions are constitutional.

Unfortunately, Mr. Chairman, section 6603 of the 2004 act is set to expire at the end of 2006. Allowing that provision to expire would be unfortunate, because the definitions in the material support statute would then revert back to language that the Ninth Circuit had held was constitutionally suspect. For that reason, the Department strongly supports the permanent codification of section 6603.

Once again, Mr. Chairman, I want to thank you for inviting me here to testify, and I look forward to any questions the Subcommittee might have about the constitutionality of the material support provisions. Thank you.

[The joint prepared statement of Mr. Katsas and Mr. Sabin follows on page 18.]

Mr. COBLE. Thank you, Mr. Katsas.

Mr. Sabin.

**TESTIMONY OF BARRY SABIN, CHIEF, COUNTERTERRORISM  
SECTION, CRIMINAL DIVISION, UNITED STATES DEPART-  
MENT OF JUSTICE**

Mr. SABIN. Mr. Chairman, Ranking Member Scott, Members of the Subcommittee, I appreciate the opportunity to testify at this important hearing. I am pleased to discuss with you the Justice Department's efforts in investigating and in prosecuting terrorists and in protecting the American people from future terrorist attacks, owing to the important tools Congress has provided us over the years. Specifically, I will focus on our use of the material support statutes, title 18, United States Code, sections 2339A and B, which have been at the heart of the Department's prosecutive efforts.

Working together with the intelligence community and our international allies, law enforcement agents and prosecutors have made significant progress in our counterterrorism mission through the use of the criminal justice system. This progress in national security investigations through article III courts, whether depicted in jury trials, plea dispositions, or legal rulings, has been infused by the importance we place on preserving and protecting our constitutional liberties.

As I discussed in my written statement, the Justice Department's commitment to successfully bringing prosecutions in the criminal justice system is critically dependent upon the material support statutes which have provided, and continue to provide, the Government the ability to address terrorist supporters and their logistical support networks at the earliest stages of terrorist planning.

The material support statutes, as enhanced and clarified by the USA PATRIOT Act in 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004 just a few months ago, are critical features of our current approach to counterterrorism. Rather than criminalizing the violent acts used by terrorists, these statutes recognize that there are important components of the terrorist infrastructure that stop short of actual attacks. The front-line terrorists cannot operate without their supporters and their logistical support networks. The material support statutes are designed to reach these individuals and their logistical infrastructure.

Section 2339A, passed in 1994, criminalizes knowingly providing material support or resources to a particular crime of terrorism, such as a bombing plot. Section 2339A thus focuses upon how the material support or resources are to be used.

Section 2339B, which became operational in October 1997, criminalizes the knowing provision of material support or resources to a foreign terrorist organization, such as al Qaeda or Hamas, irrespective of the providers' violent intent. Section 2339B thus primarily focuses upon who receives the material support or resources.

A number of victories in recent months illustrate these powerful law enforcement tools and how they operate in practice. On April 27 of 2005, a New Jersey jury convicted Hemant Lakhani, a United Kingdom national, on all counts in the indictment. Among these charges, Lakhani was convicted of attempting to provide material

support to terrorists, pursuant to section 2339A, for his role in attempting to sell an anti-aircraft missile to a man whom he believed represented a terrorist group intent on shooting down a United States commercial airliner.

On April 22 of 2005, a jury convicted Ali Al-Timimi, a speaker and spiritual leader in Northern Virginia, of all ten counts alleged against him. This prosecution was the second phase of the Northern Virginia jihad case involving a group of individuals who were encouraged and counseled by Al-Timimi to go to Pakistan to receive military training from Lashkar-e-Taiba in order to fight against American troops.

The first phase of the criminal prosecution involved direct convictions under the material support statutes. Al-Timimi's firearm convictions were based upon, in part, the material support statutes which served as the predicate crimes of violence for the firearms offenses.

On March 10 of 2005, after a 5-week jury trial, a jury in Brooklyn, New York, convicted two Yemeni citizens of a variety of material support charges, including conspiring to provide material support to al Qaeda and Hamas.

These cases demonstrate some important principles. First, that United States prosecutors and investigators, like our colleagues in the intelligence community and the military, must rely upon our international partners to be successful. The Al-Moayad prosecution was significantly aided by our German colleagues, who worked alongside the FBI in the undercover operation and made the arrests that ultimately culminated in the extradition of the defendants to the United States from Germany. German officials testified about their actions in Federal court in Brooklyn.

In the Lakhani prosecution, witnesses from the United Kingdom and Russia testified in New Jersey Federal court about the assistance they provided the United States counterparts. In the Al-Timimi prosecution, the British and Australians provided significant assistance.

In turn, the United States has reciprocated. For example, last week two convicted conspirators from the Northern Virginia jihad case testified via video-teleconference in an Australian court proceeding.

Second, successful indictments and prosecutions often lead to further successes in combatting terror. We are able to leverage the intelligence collected from cooperators in our criminal cases to discover and track down leads and new evidence. In the Al-Moayad trial, prosecutors presented the testimony of Yaya Goba, one of the convicted defendants in the Lackawanna case. Successful prosecutions beget more prosecutions.

The changes recently enacted in the Intelligence Reform Act have built upon and enhanced the work of prior Congresses. Together, this legislation has provided law enforcement and prosecutors with a solid framework within which to pursue the goal of prevention, disruption, and eventual eradication of terrorism within our borders and beyond.

We, as prosecutors in the Justice Department, have more work to do to eliminate this deadly threat. And we urge you in Congress

to continue to build upon and enhance the legal tools needed to accomplish our mutual goals.

Mr. Chairman, thank you for inviting us here and providing us the opportunity to discuss how the material support statutes are being used around the country, consistent with our constitutional values, to fight terrorism in the criminal justice system. Together, we will continue our efforts to secure justice and defeat those who would harm this country.

[The joint statement of Mr. Katsas and Mr. Sabin follows:]

JOINT PREPARED STATEMENT OF GREGORY KATSAS AND BARRY SABIN

Mr. Chairman, Ranking Member Scott, Members of the Subcommittee, we appreciate the opportunity to testify at this important hearing. We are pleased to discuss with you the Justice Department's efforts in investigating and prosecuting terrorists and in protecting the American people from future terrorist attacks, owing to the important tools Congress has provided us over the years. Specifically, we will focus on our use of the material support statutes, Title 18, United States Code Sections 2339A and 2339B, which have been at the heart of the Department's prosecutive efforts.

Working together with the intelligence community and our international allies, law enforcement agents and prosecutors have made significant progress in our counterterrorism mission through the use of the criminal justice system. This progress in national security investigations through Article III courts, whether depicted in jury trials, plea dispositions or legal rulings, has been infused by the importance we place on preserving and protecting our constitutional liberties. As we discuss below, the Justice Department's commitment to successfully bringing prosecutions in the criminal justice system is critically dependent upon the material support statutes which have provided, and continue to provide, the government the ability to address terrorist supporters and their logistical support networks at the earliest stages of terrorist planning.

The material support statutes, as enhanced and clarified by the USA PATRIOT Act in 2001, and the Intelligence Reform and Terrorism Prevention Act of 2004 just a few months ago, are critical features of the law enforcement's current approach to counterterrorism. Rather than criminalizing the violent acts used by terrorists, these statutes recognize that there are important components of the terrorist infrastructure that stop short of actual attacks. We know from experience that terrorists need funding and logistical support to operate. They need to raise funds, open and use bank accounts to transfer money, and to communicate by phone and the Internet. They need travel documents. They need to train and recruit new operatives, and procure equipment for their attacks. People who perform these services and fill these positions who occupy the position in the terrorism division of responsibility might not themselves be bomb-throwers. But the front-line terrorists cannot operate without their supporters and their logistical support networks. The material support statutes are designed to reach these individuals and their logistical infrastructure.

Even before the most recent amendment, these provisions criminalized the act of knowingly providing "material support or resources" to terrorist acts and to foreign terrorist organizations, or FTOs, designated by the Secretary of State. "Material support or resources" addresses a broad range of conduct—all along the terrorist chain—including providing financial services, lodging, safe houses, false documentation or identification, weapons, communications equipment, and explosives. Section 2339A, passed in 1994, criminalizes knowingly providing material support or resources to a particular crime of terrorism, such as a bombing plot. Section 2339A thus focuses upon how the material support or resources are to be used.

Section 2339B, which became operational in October 1997, criminalizes the knowing provision of material support or resources to a foreign terrorist organization such as al Qaeda or Hamas, irrespective of the providers' violent intent. Section 2339B thus focuses upon who receives the material support or resources. There are presently 40 designated FTOs ranging from Al Qaeda to Abu Musab al-Zarqawi's Jama—at al-Tawhid wa—al-Jihad to the Palestinian rejectionist groups, such as the Palestinian Islamic Jihad, to narco-terrorist groups, such as the Revolutionary Armed Forces of Columbia (FARC).

Thanks to Congress, the material support laws contain the inchoate offenses of attempt and conspiracy, which allow law enforcement the legal basis to intervene at the very early stages of terrorist planning, potentially several steps removed from the execution of particular attacks. This capability is crucial to the prosecution of

terrorist supporters who may not themselves be prone to violence. By allowing for the prosecution of someone who intends to provide support to terrorists and takes an affirmative step in that direction, we can successfully interdict the support without waiting for it to reach the terrorist, let alone waiting until it culminates in a terrorist attack.

Over the past several years, our concerted efforts have led to the identification, disruption or demise of terrorist support conspiracies throughout the country. Some of these cases have involved individuals who are operational. Many have not. The material support statutes you have provided us which criminalize such conduct has assisted the Justice Department in securing criminal charges and convictions against terrorists and their supporters.

#### CONVICTIONS

A number of victories in recent months illustrate these powerful law enforcement tools and how they operate in practice.

On April 27, 2005, a New Jersey jury convicted Hemant Lakhani, a United Kingdom national, on all counts in the indictment. Among these charges, Lakhani was convicted of attempting to provide material support to terrorists, pursuant to 18 U.S.C. Section 2339A, for his role in attempting to sell an antiaircraft missile to a man whom he believed represented a terrorist group intent on shooting down a United States commercial airliner.

On April 22, 2005, a jury convicted Ali Al-Timimi, a speaker and spiritual leader in Northern Virginia, of all ten counts alleged against him. This prosecution was the second phase of the Northern Virginia jihad case involving a group of individuals who were encouraged and counseled by Al-Timimi to go to Pakistan to receive military training from Lashkar-e-Taiba in order to fight against American troops. The first phase of prosecution involved direct convictions under the material support statutes; Al-Timimi's firearms convictions were based upon, in part, the material support statutes which served as the predicate crimes of violence for the firearms offenses.

On March 10, 2005, after a five-week trial, a jury in Brooklyn, New York, convicted two Yemeni citizens, Mohammed Ali Hasan Al-Moayad and Mohsen Yahya Zayed, of a variety of material support charges including conspiring to provide material support to al Qaeda and Hamas, pursuant to 18 U.S.C. 2339B. Al-Moayad, the imam of a large Yemeni mosque and an influential political leader, was caught on undercover tape recordings discussing the collection of monies from the al Farook mosque in Brooklyn and his desire to distribute the monies to al Qaeda and Hamas to finance violent *jihad*.

These cases demonstrate some important principles:

First, that United States prosecutors and investigators, like our colleagues in the intelligence community and the military, must rely upon our international partners to be successful. The Al-Moayad prosecution was significantly aided by our German colleagues, who worked alongside the FBI in the undercover operation, and made the arrests that ultimately culminated in the extradition of the defendants to the United States from Germany. German officials testified about their actions in federal court in Brooklyn. In the Lakhani prosecution, witnesses from the United Kingdom and Russia testified in New Jersey federal court about the assistance they provided their United States counterparts. In the Al-Timimi prosecution, the British and Australians provided significant assistance. In turn, the United States has reciprocated and, for example, last week two convicted conspirators from the Northern Virginia jihad case testified via video-teleconference in an Australian court proceeding.

Second, successful indictments and prosecutions often lead to further successes in combating terror. We are able to leverage the intelligence collected from cooperators in our criminal cases to discover and track down new leads and evidence. The Al-Moayad investigation uncovered his contacts in Brooklyn, including a Brooklyn associate who had transferred over \$20 million overseas through the bank account of his tiny ice cream store. Those Brooklyn associates have been charged with various federal crimes ranging from unlicensed money remitting to making false statements as part of the Department's disruption approach. In the *Al-Moayad* trial, prosecutors presented the testimony of Yaya Goba, one of the convicted defendants in the Lackawanna case. Successful prosecutions beget more prosecutions.

On February 10, 2005, a Manhattan jury in *United States v. Sattar* found all defendants guilty on all counts, which also involved material support charges. Ahmed Abdel Sattar, an Islamic Group (AGAI) leader and associate of the Blind Sheikh Omar Abdel Rahman, was convicted of plotting to kill and kidnap persons in a foreign country, in a trial which included evidence highlighting his crucial participa-

tion in drafting and disseminating a legal fatwah in Sheik Abdel Rahman's name urging the murder of Jews wherever found. Lynne Stewart, a criminal defense attorney who has represented the Sheik, and Mohammed Yousry, an Arabic interpreter for the Sheik, were convicted on both substantive and conspiracy counts of providing, and concealing the provision of, material support or resources, knowing that such support was to be used in carrying out a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A.

We also have continued to achieve convictions through guilty pleas. In February of this year, prosecutors in Detroit obtained a guilty plea from a Hizballah financier. The defendant, whose brother is the organization's Chief of Military Security in Southern Lebanon, admitted that he helped others raise money for Hizballah.

Last year, we obtained an important cooperation guilty plea to violations of both Sections 2339A and 2339B, among other charges, from a Pakistani-American involved in al-Qaeda related procurement, training and recruitment. The defendant, Mohammed Junaid Babar, arranged for a month-long jihadi training camp, at which attendees received training in basic military skills, explosives and weapons. Among the attendees were individuals who were plotting to bomb targets abroad.

#### INDICTMENTS

The operation of the material support statutes is also illustrated by a number of pending prosecutions. Last month, the Department announced the unsealing of an indictment that made important use of Section 2339A to charge three individuals for their alleged participation in terrorist plots to attack the financial sectors in New York, New Jersey and the District of Columbia. Dhiren Barot, Nadeem Tarmohamed and Qaisar Shaffi, all British nationals, are charged with assisting in a plot to attack the New York Stock Exchange and the Citigroup building in New York, the Prudential Building in New Jersey, and the International Monetary Fund and World Bank buildings in Washington, D.C.

Prosecutors in Miami superseded another indictment charging a Section 2339A violation, adding Kihah Jayyoussi as a defendant. A U.S. citizen, Jayyoussi was arrested on March 27, 2005 at the airport in Detroit upon his return from a trip to Qatar. According to the superseding indictment, Jayyoussi, Adham Hassoun and Mohammed Youssef conspired to fund and support violent jihad abroad. These cases demonstrate how Section 2339A can be used in the absence of admissible evidence that the particular support was provided to a group that had been formally designated as foreign terrorist organization.

Another § 2339A case involves Babar Ahmad and Azzam Publications, charged in Connecticut in October, 2004. Ahmad, a resident of the United Kingdom, allegedly operated and directed Azzam Publications and its family of Internet websites, located in the United States and around the world, to recruit and assist the Chechen mujahideen and the Taliban and to raise funds for violent jihad overseas. Along with other Internet media allegedly created and operated by Ahmad, these sites gave instructions for travel to Pakistan and Afghanistan to fight with these groups and for surreptitious transfer of funds to the Taliban; they also solicited military items for these groups, including gas masks and night vision goggles.

Ahmad has been charged with crimes that include providing material support to terrorists under 18 U.S.C. 2339A. We describe this indictment to you—in part—to highlight the use of the Internet by those who support their violent goals through, among other conduct, recruitment. This is criminal conduct and is not protected by the, not rights protected by the First Amendment. The government must meet the challenges posed by the technology of the twenty-first century through the use of all our tools, including criminal investigation and prosecution.

Meanwhile, we have a couple of important pending § 2339B cases. In Florida, the trial of four of the defendants in the *Sami al Arian* case is scheduled to begin next week. In a 53-count indictment, Sami Al-Arian and eight other defendants, including Ramadan Shallah, the acknowledged worldwide leader of the Palestinian Islamic Jihad (PIJ), have been charged with using facilities in the United States, including the University of South Florida, as the North American base for PIJ, providing material support to PIJ, and conspiring to murder individuals abroad, among other offenses. PIJ was designated as a foreign terrorist organization in 1997, and has claimed responsibility for suicide bombings in the Middle East that have killed U.S. citizens.

In August 2004, a Chicago grand jury indicted Mousa Marzook, Abdelhaleem Ashqar, and Mohammad Salah for participating in a 15-year racketeering conspiracy in the United States and abroad to illegally finance Hamas's terrorist activities in Israel, the West Bank, and Gaza Strip, including providing money for the purchase of weapons. The indictment, which for the first time identifies Hamas as



a criminal enterprise, also charges Salah under 18 U.S.C. § 2339B for providing material support to Hamas. All three defendants allegedly used bank accounts in the United States to launder millions of dollars for Hamas, which has publicly claimed credit for engaging in suicide bombings that resulted in the deaths of Americans and other foreign nationals in Israel and the West Bank, as well as Israeli military personnel and civilians.

These cases, plus the other matters that have already resulted in convictions, demonstrate the manner in which we have come to rely upon the material support statutes.

#### LEGAL VICTORIES

We have also obtained important, favorable appellate court rulings in recent months that are vital to the enforcement of Section 2339B. In *United States v. Afshari* and *United States v. Hammoud*, a panel of the Ninth Circuit and the en banc Fourth Circuit, respectively, held that a criminal defendant charged with providing material support to a designated FTO under Section 2339B may not challenge the validity of the underlying FTO designation in the course of the criminal prosecution. The *Afshari* district court opinion, which was overturned by the appellate court, had raised the untenable specter of multi-district challenges to an FTO designation and the resulting criminalization of terrorist conduct in one district but not another. The appellate courts agreed with the government in both cases that the validity of an FTO designation is not an element of the offense under 18 U.S.C. 2339B, consistent with language explicit in the FTO statute to that effect.

Furthermore, in *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit held *en banc* that there is no First Amendment right to provide material support to the ostensibly humanitarian or political activities of a designated FTO. Similarly, in *United States v. Hammoud*, the Fourth Circuit en banc rejected claims that the material support prohibition contained in Section 2339B impermissibly encroached on First Amendment rights of free association and expression. In the words of the Ninth Circuit, “giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.”

#### THE FUTURE AND THE INTELLIGENCE REFORM ACT

Looking to the future, we are confident that the amendments to the material support statutes and foreign terrorist organization provisions of the Immigration and Nationality Act, passed by Congress and signed by the President in December, will significantly enhance the capabilities of prosecutors to eradicate terrorist activity at early planning stages. These amendments—contained in the Intelligence Reform and Terrorism Prevention Act of 2004—provide prosecutors important new and enhanced tools in the fight against terrorism here and abroad. We wish to thank the members of this Subcommittee for ensuring that these important amendments were included in the intelligence reform legislation, and in particular wish to commend Congressman Green for his leadership on this issue.

Significantly, the definition of “material support or resources” was expanded to encompass all property—whether tangible or intangible—and all services, except for medicine and religious materials. The definition formerly was limited to specified types of material support and “other physical assets.” Congress’s action to clarify this definition assures that no form of terrorist assistance or activity will escape the reach of the statute.

The amendments also clarify the meaning of the terms “personnel,” “training,” and “expert advice or assistance,” as used in the definition of “material support or resources.” These changes should eliminate some of the uncertainty generated by adverse court decisions rejecting the government’s interpretation of those terms. For example, it is now clear that the provision of “personnel” to a terrorist act or organization includes providing *oneself*. Congress also clarified that no one could be prosecuted for providing “personnel” under section 2339B unless the individual(s) were provided to manage, supervise or otherwise direct the terrorist organization or, conversely, to work under its direction or control. These changes respond to a few court decisions which opined that the term “personnel” could be vague. The amendments also defined the terms “training,” and “expert advice or assistance,” in response to perceived constitutional problems identified by the Ninth Circuit or the district court in *Humanitarian Law Project*. We are hopeful that these amendments will achieve their desired effect, especially in light of the Ninth Circuit’s recent orders in *HLP* vacating the district courts’ injunctions against enforcement of the terms “training,” “personnel,” and “expert advice or assistance” and remanding to the district court in light of changes made by the December legislation.

Two other changes to the material support statutes are also significant. First, the recent amendments expand the jurisdictional basis for material support charges. Under the old jurisdictional provisions, Section 2339B was limited to activity occurring within the United States, and to overseas activity committed by persons “subject to the jurisdiction of the United States.” Now, among other things, Section 2339B also reaches conduct by any lawful permanent resident alien anywhere in the world, as well as stateless persons who habitually reside in the United States. Jurisdiction also extends to conduct by an alien offender *outside* the United States who is later brought to the country or found here, regardless of whether the alien is a permanent resident alien. The rationale for the latter expansion is that those aliens outside the United States who furnish material support or resources to an FTO endanger the national security of the United States and should be subject to prosecution if they are present here.

The amendments also clarify the knowledge requirement of Section 2339B. That section now expressly says that the defendant must either know that the organization is a designated FTO or that it engages in certain terrorist conduct. The government is not required to show that the material support was provided for the express purpose of furthering the FTO’s terrorist activities, a standard at odds with the purposes of Section 2339B.

The Intelligence Reform Act also created a new “material support” offense, 18 U.S.C. 2339D, that explicitly criminalizes the receipt of military-type training from a foreign terrorist organization. Under the statute, “military-type training” includes “training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on [sic] the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction[.]” 18 U.S.C. § 2339D(c)(1).

Section 2339D fills an arguable gap in 18 U.S.C. § 2339B, which criminalizes *providing* material support, including training, to a foreign terrorist organization, but does not explicitly prohibit *receiving* training from a foreign terrorist organization, as Section 2339D now does. Thus, for post-enactment conduct, the prosecutor has a charging option that is a narrowly tailored fit and improves our ability to apprehend those who threaten our homeland.

Section 2339D is also a potent remedy for the serious problems created by the steady flow of recruits to terrorist training camps. Various investigations have uncovered individuals who have traveled overseas to training camps to receive military-style training. These individuals, who in many cases have received firearms and explosives training, appear to be preparing to conduct terrorist activity or violence and pose a clear threat here and abroad.

#### MATERIAL SUPPORT TO TERRORISM PROHIBITION IMPROVEMENTS ACT

The amendments to the material support statutes contained in Intelligence Reform and Prevention Act of 2004 are currently scheduled to sunset at the end of 2006. As described above, these amendments are critical to maintaining the efficacy of the material support statutes as a potent prosecutorial tool in combating terrorism. The Department therefore supports renewing these revisions to the material support statutes and we commend Senator Kyl for introducing the Material Support to Terrorism Prohibition Improvements Act (MSTPIA), which would do just that.

Although the Department has not yet had a chance to evaluate thoroughly all of the provisions in the proposed legislation, repealing the sunset on those amendments to the material support statutes contained in the Intelligence Reform and Terrorism Prevention Act would represent a significant step forward, ending uncertainty in this area of the law and ensuring that prosecutors will not lose a critical tool.

The proposed legislation also contains another important provision, which the Department strongly supports. Under current law, those aliens who have received military-type training from or on behalf of a terrorist organization may be deported from the country. Such aliens, however, are not inadmissible. This anomaly in the law does not make any sense, and the proposed legislation would fix this problem by rendering inadmissible those aliens who have received military-type training from or on behalf of a terrorist organization. To put it simply, such aliens represent a clear and present danger to the safety of the American people and should not be allowed to enter nor remain present in the United States.

The legislation proposed in the Senate also contains other worthwhile provisions, and the Department looks forward to working with members in the Senate and the House on this important piece of legislation.

## CONCLUSION

The changes recently enacted in the Intelligence Reform Act have built upon, and enhanced, the work of prior Congresses in the USA PATRIOT Act, the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Violent Crime Control and Law Enforcement Act of 1994. Together, this legislation has provided law enforcement and prosecutors with a solid framework within which to pursue the goal of prevention, disruption and eventual eradication of terrorism within our borders and beyond. We, as prosecutors in the Justice Department, have more work to do to eliminate this deadly threat, and we urge you in Congress to continue to build upon and enhance the legal tools needed to accomplish our mutual goals.

Mr. Chairman, thank you again for inviting us here and providing us the opportunity to discuss how the material support statutes are being used around the country, consistent with our constitutional values, to fight terrorism in the criminal justice system. We would also like to thank this Committee for its continued leadership and support. Together, we will continue our efforts to secure justice and defeat those who would harm this country.

Mr. COBLE. Thank you, Mr. Sabin.

Mr. Arulanantham? Am I close?

Mr. ARULANANTHAM. You're absolutely right, Chairman.

Mr. COBLE. Thank you, sir. Good to have you with us, Mr. Arulanantham.

**TESTIMONY OF AHILAN T. ARULANANTHAM, STAFF ATTORNEY, SOUTHERN CALIFORNIA OFFICE, AMERICAN CIVIL LIBERTIES UNION**

Mr. ARULANANTHAM. I'd like to thank the Subcommittee for giving me this opportunity. I'm a staff attorney at the ACLU of Southern California. I work on cases involving the material support of terrorism. But I'm also here today because I saw firsthand, with my own eyes, how these material support of terrorism laws can impede important humanitarian efforts.

I was born and raised in the U.S., but my family is from Sri Lanka. And I was on a plane going to that country on December 26 of 2004, when the tsunami struck. It killed 40,000 people in Sri Lanka, alone. I landed the next day, and spent the next 3 weeks doing relief work there with a variety of different humanitarian organizations. The things that I saw changed me forever.

I saw and spoke with mothers and fathers who had watched their children just get dragged away by the ocean. I saw whole villages—nurseries, hotels, roads, trees, everything—just washed away by the sea. And the situation on the ground in Sri Lanka was terrible. The tsunami would have been terrible, no matter where it had hit; but it was worse in Sri Lanka because that's a country that's been torn by civil war for about 20 years. And now about a fifth of the territory of Sri Lanka is controlled by a group called the "Liberation Tigers of Tamil Eelam," LTTE, and that's a designated terrorist organization under the State Department's list.

As a result, it is illegal to give material support to the LTTE. It's a violation of the criminal laws, and also deportable under the immigration laws. Now, in the territory that it controls, the LTTE is, for all practical purposes, the government. They run courts; they run health clinics; they run orphanages. They even have their own traffic police. But the tsunami didn't differentiate between the areas of Sri Lanka under LTTE control and the areas under government control. Thousands of people in the LTTE-held areas were

killed. Thousands more were displaced, and desperately in need of food, shelter, clothing, and medicine.

But the material support laws don't have a general exception for humanitarian assistance. So for example, if somebody wants to, say, give any property or service, intangible or otherwise, to a designated group, that's criminalized under the current material support laws.

Now, there is an exception for medicine and for religious materials, but in my experience on the ground out there, I found that exception to be sorely inadequate. The most serious medical problems that we saw, and which I understand is common in a situation of massive displacement, is the spread of infectious diseases. And this happens through things like bad drinking water; inadequate sanitation, like inadequate toilets; or lack of shelter. But the material support laws don't have exceptions for those things.

So for example, if a public health expert wanted to talk to the LTTE about how to set up their refugee camps so as to decrease the spread of infectious diseases, that could be expert advice or assistance under the PATRIOT Act provisions added to the material support laws. Similarly, if somebody wanted to give toilets for the LTTE to put into their refugee camps, the camps that they run, that could be any property, tangible or intangible. People who want to train health workers of the LTTE to do trauma counseling for children—which is so important when children have seen their parents washed away in the ocean—are arguably giving training or personnel under the statute as its currently defined. You can give them medicines for life-saving surgery, but you can't send a surgeon if there is nobody there to do the surgery to save people's lives.

Now, these concerns are not just theoretical. I talked to people when I was there. I talked to doctors who were scared to go to work in the LTTE-held territories because they were worried about criminal liability under our laws. I talked to humanitarian groups that were scared to operate in those areas and to do projects in those areas.

And as I understand it, the law is actually going to get much worse on this subject, with the passage of the REAL ID Act; because under the immigration material support laws, it's soon going to be true that an organization that actually gives material support will itself be a terrorist organization. So a doctor who goes to work for a humanitarian organization that itself works with the LTTE will be engaging in material support, even if they never go to the LTTE or contact a person who is with the LTTE.

Now, we believe that the solution to this problem is to make clear that the law does not punish genuine, real humanitarian assistance, by requiring the Government to show an intent to further terrorist activity. Now, an intent standard wouldn't prevent the Government from doing important prosecutions against terrorists. I mean, in the examples that Mr. Sabin was giving, for example, if somebody's sending an anti-aircraft missile, everyone knows that's not humanitarian assistance. And juries in this country are not going to be sympathetic to implausible claims by sham humanitarian groups.

But there are other humanitarian groups and individuals who have to work with terrorist organizations; not because they like them or believe in them or support their ideology, but because it's the only way to help the people who are unfortunate enough to live under those organization's control. And this is not a hypothetical concern. I remember the faces of the people in those camps. Their needs were very, very real.

This Congress has an opportunity now to correct some of the unintended consequences of the material support laws. And I believe that's what we're talking about here. And I hope, Chairman, that the Committee will take the opportunity to do that. Thank you very much.

[The prepared statement of Mr. Arulanantham follows:]

PREPARED STATEMENT OF AHILAN T. ARULANANTHAM

Chairman Coble, Ranking Member Scott and members of the Subcommittee:

Thank you for giving me the opportunity to speak today at this critical oversight hearing on two amendments to the law criminalizing material support of terrorism: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004.

I am a staff attorney at the ACLU of Southern California, where I have worked on several cases involving the issue of material support of terrorism. However, I am also here today because I have seen first-hand, with my own eyes, how those laws have impeded humanitarian relief operations in the worst natural disaster in recent memory.

I was born and raised in the United States, but my parents and extended family are from Sri Lanka. I was on a plane to visit relatives there last December, in the air between Los Angeles and Singapore, when the tsunami struck—killing 40,000 people in Sri Lanka alone. I landed there a day later, and spent the next three weeks doing relief work with several different humanitarian organizations.

The suffering and devastation I saw was unimaginably horrible. My first mission was to a displaced persons camp in eastern Sri Lanka, with a relief team from the Hospital Christian Fellowship. At that camp we treated about 200 people. Every person I spoke with had lost at least one family member to the tsunami. I spoke with mothers and fathers who had been unable to keep hold of their children as they were sucked away by the sea, and parents who had been forced to choose, in a split second, which of their children to save because they could not grab on to all of them. I met children who saw their families, their homes, their villages—everything they had known—disappear in an instant. Seeing the destruction of whole towns, places of worship, roads, trees—everything—was a humbling experience that is indelibly etched in my memory.

If this had happened anywhere in the world, even here, the devastation and its aftermath would have been terrible to behold. But it was made worse because it happened in Sri Lanka—a country that has been torn by civil war for over twenty years. About one fifth of the territory of Sri Lanka is controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the government of Sri Lanka. The LTTE has been designated as a Foreign Terrorist Organization by the State Department pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. As a result, it is a violation of law to give material support to that group. Material support is defined very broadly, as I will discuss below, and consequences for violating the law are severe. Non-citizens face deportation, while citizens and non-citizens alike face civil forfeiture and criminal penalties up to twenty years in prison. 8 U.S.C. § 1227(a)(4)(B); 18 U.S.C. § 2339B.

Although the LTTE is designated as a terrorist organization, in the territory it controls it functions as a government. The LTTE runs a court system, a police force, orphanages, a set of health clinics, and even its own traffic police. It is for all practical purposes the government for well over 500,000 people who live in the LTTE-controlled areas. And, because the LTTE governs its territory as an authoritarian military regime, it exerts a significant amount of control over all of the institutions in its territory. As with civil war situations around the globe—Somalia, Indonesia, Sudan, Ethiopia, to name a few—providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by—and dealing directly with—a group that is designated as, or at least meets the very broad definition of, a foreign terrorist organization.

Unlike our material support laws, the tsunami did not differentiate between areas under the LTTE's control and those controlled by the Sri Lankan government. Thousands of people living in LTTE-held territory died, and hundreds of thousands more were displaced into camps, many having lost some or all of their family members and in urgent need of food, shelter, and medical care. In fact, because the LTTE controls large segments of the eastern seaboard of the island, which was most directly hit by the tsunami, people in LTTE territory were some of the most severely affected.

Sadly, though, our material support laws contain no exception for support even if it is necessary to save the lives of people who happen to live in LTTE-held territory. In fact there is no exception for humanitarian assistance at all, except for "medicine and religious materials." While this exception is important, it is sorely inadequate to meet the needs of people caught in humanitarian crises.

For example, in the first few days of relief work, we focused on treating people's immediate medical needs—injuries, wounds, dehydration, respiratory infections—with medicines and dressings. Such assistance would probably fit under the exception for "medicine." But within a week, the most serious public health problems for the hundreds of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spreads through contaminated water, inadequate sanitation, and exposure from a lack of shelter. To prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such goods which are not "medicine" but nonetheless serve an absolutely critical medical function.

Yet our material support laws do not appear, as a practical matter, to allow humanitarian organizations to provide such vital resources to people living under the LTTE's control, because such resources generally cannot be provided without providing "material support" to the LTTE as the statute defines that term. For example, as currently written the law defines material support to include "any property, tangible or intangible, . . . or service." This definition appears to encompass much of what I saw was needed for humanitarian relief work, including water, water purification systems, sanitation equipment such as toilets, all forms of shelter (including even children's clothing), and many of the materials needed for longer-term reconstruction such as boats and building materials. Because the law makes no distinction between lethal aid—such as weapons or ammunition—and non-lethal aid, a group seeking to provide toilets to the LTTE's health ministry to take to camps in an area under its control may be violating the material support laws.

The statute also criminalizes the provision of expert advice or assistance (if derived from specialized knowledge).<sup>1</sup> Thus, a public health expert who wants to advise the LTTE—and the LTTE is the government for all practical purposes in the areas it controls—about how to set up camps so as to minimize the spread of diseases, such as dysentery or cholera, probably cannot do so under the statute. Indeed, even training psychological counselors working with the LTTE in their territory—which is a crucial need for children who lost parents in the tsunami—may violate the "training" or "personnel" provisions, as long as the training imparts a "specific skill" and the counselors work under the LTTE's "direction and control."

As a result, qualified people who have the willingness and ability to help those affected by the disaster are scared to do so. I have spoken personally with doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the "expert advice," "training," and "personnel" provisions of the law. I also know people who feared to send funds for urgent humanitarian needs, including clothing, tents, and even books, because they thought that doing so might violate the material support laws. I have also consulted with organizations, in my capacity as an ACLU attorney, that seek to send money for humanitarian assistance to areas controlled by designated groups. I have heard those organizations express grave concerns about continuing their work for precisely these reasons.

Unfortunately, the fears of these organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under LTTE control are not entitled to an injunction against prosecution under the material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support, for merely giving food and shelter to people who belong to a "terrorist organization" even if that group is not designated. See *Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299–301 (3d Cir. 2004).

<sup>1</sup> See 18 U.S.C. §§ 2339A, 2339B, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, at § 6603, Pub. L. No. 108–458 and the USA PATRIOT Act § 805, Pub. L. No. 107–56.

Last year, Congress passed a law that was supposed to clarify the intent needed to prosecute for “material support.” Under section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, the government must prove that assistance was provided knowing that the organization had been designated as a “foreign terrorist organization” or that the organization had been involved in international terrorism. This amendment did not provide comfort to the doctors, relief workers and organizations with whom I worked. Many in the humanitarian aid community are well aware of the LTTE’s designation, which has been the subject of a number of high-profile court decisions. Even without knowing of the designation, anyone with even a passing understanding of Sri Lanka knows that the LTTE and the government are involved in a violent conflict. Knowledge that the LTTE has engaged in violent acts would probably satisfy the intent requirement under current law. To provide desperately needed drinking water, blankets, clothing or tents in LTTE-held areas may require working with the LTTE officials who are the de facto government in that area. Thus, our law puts aid workers in the untenable position of having to choose between providing assistance, knowing they are exposing themselves and their organizations to a risk of exclusion from the United States, deportation, civil forfeiture or even criminal prosecution, or leaving desperate victims of natural calamity to face the disaster on their own.<sup>2</sup>

Indeed, the current material support provision with its limited exceptions and extremely broad intent requirement leads to truly irrational results. A humanitarian organization may send medicine to aid in life-saving surgeries, but arguably cannot send a doctor to perform those surgeries. Medicine is useless to people dying of starvation, but the law contains no exception for food.

Most worrisome of all, under provisions currently part of the REAL ID Act, the situation will likely become even worse. A provision of that bill will alter the definition of what constitutes a “terrorist organization” in the Immigration and Nationality Act such that humanitarian groups that provide material support to designated terrorist organizations will themselves be defined as terrorist organizations. Thus, a doctor who goes to work for a humanitarian group that works with both parties to the conflict in Sri Lanka will violate the immigration code’s material support laws, even if he or she never has any contact with a designated terrorist organization at all. This change is of critical importance. The law will soon provide an extremely broad definition of what constitutes a terrorist organization—a definition that will include groups that engage in absolutely no violent activities of any kind. Such expansion must be accompanied by a corresponding narrowing in the definition of what constitutes material support if we are to prevent our laws from prohibiting entirely innocent and vitally important humanitarian activity.

The solution to this problem is for Congress to clarify the law by requiring the government to prove that individuals charged under the material support laws actually *intended to further terrorist activity* when they provided humanitarian assistance. Without such a standard, humanitarian organizations and individual volunteers are deterred from providing vitally needed assistance to victims of disasters like the tsunami. The people who managed to survive the tsunami should not be deprived of basic necessities such as food and shelter in their hour of greatest need simply because they happen to live in an area under the control of a designated terrorist organization. Denying humanitarian assistance to such people does not make us safer; giving basic necessities to these devastated people simply does not undermine our nation’s security.

The government has argued that a rule requiring proof that an individual actually intended to further terrorist activity will allow bad actors who provide support to terrorist groups to escape liability. However, proof of intent has proved a workable standard in a variety of legal contexts. Reckless disregard of the risk that resources will be misused could still serve as a basis for prosecution, and “deliberate ignorance” or willful blindness to such misuse could also be punished. Indeed, implausible claims that a group did not intend to support a terrorist group are unlikely to succeed in front of juries concerned about the threat of terrorism. However, groups that carefully screen and monitor projects to ensure that aid is sent only to those who truly need it, audit their programs through detailed receipts and written acknowledgements from beneficiaries, or send their own personnel to ensure that

<sup>2</sup>The government may point to the exception in 18 U.S.C. § 2339B(j) for activities that would otherwise constitute providing “personnel,” “training” or “expert advice or assistance” if permitted by the Attorney General and Secretary of State. This exception, of course, makes vital assistance dependent on the politics of the incumbent administration. Furthermore, the exception still bars much-needed humanitarian aid because it does not cover food, water, blankets or other genuine humanitarian items. Finally, there will not be enough time, in many humanitarian crises, to obtain a special license even if the licensing system is working well.

aid is provided as intended will be able to continue their work. If a humanitarian organization can show that its work does not further terrorist activity, it should be free to continue providing life-saving services in conflict areas such as Sri Lanka.

I was working in Manhattan on September 11, 2001, and I felt the horror of the terrorist attacks in a very personal way. I believe we must do everything we can to make our country safe from the scourge of terrorism. However, as I sit here before you today, the faces of the people I saw in the camps in Sri Lanka flash before me, and I know their need. We do not have to choose between national security and our commitment to help those who are suffering around the globe. Amending our material support laws to allow vital humanitarian work to go unimpeded would allow us to fulfill those ideals without undermining our safety. The victims of the tsunami deserve nothing less.

Mr. COBLE. Thank you, Mr. Arulanantham. Good to have all of you with us.

We've been joined by the distinguished lady from California, Ms. Waters, and the distinguished gentleman from Ohio, Mr. Chabot. And as I said, folks, keep in mind, we have the 5-minute rule against us, as well. So if you could, be terse in your responses.

Mr. Fine, have you detected any civil liberties violations by the Justice Department for any PATRIOT Act provision?

Mr. FINE. What I can say, as I reported in my statement, we have publicized our duties, we have asked for complaints, and we have received no complaints, with the exception of possibly one, the Brandon Mayfield matter, that alleged a violation of the use of a provision of the PATRIOT Act.

Mr. COBLE. I went to Guantanamo with another Member of our Subcommittee, and we were invited to examine an interrogation. And there's been some talk that that may have been staged. Are you familiar with any of this information?

Mr. FINE. We are reviewing allegations about abusive interrogation techniques in Guantanamo; particularly what the FBI saw, what the FBI reported, how those reports were handled, and whether any FBI agent possibly participated in any abusive techniques. We have an ongoing review of that. Our folks have been down to Guantanamo. So we're actively reviewing the matter.

Mr. COBLE. Well, it appeared to be regular to me. But admittedly, they had control of the apparatus. But it appeared to be in order, as I observed it.

Mr. Arulanantham, you state that the LTTE has engaged in violent acts. Do you think that the LTTE is a terrorist organization?

Mr. ARULANANTHAM. Well, yes, Your Honor—excuse me, Your Honor—excuse me, Chairman. I'm used to litigating in court.

Mr. COBLE. You just promoted me,

Mr. Arulanantham.

Mr. ARULANANTHAM. Yes, Chairman, under the statute, if an organization is designated, and even if it's not designated, if it's two or more people that have engaged in the use of a weapon for a violent purpose or something like that, it's a terrorist organization. Apart from that, there's no doubt the LTTE has a huge armed fighting force. There's absolutely no doubt about it, Your Honor—Chairman.

Mr. COBLE. Well, Mr. Sabin and Mr. Katsas, let me propose a hypothetical for you. Has the Department of Justice prosecuted—it may or may not be a hypothetical. Has the Department of Justice prosecuted anyone for aiding the victims in the tsunami tragedy, regardless of where they lived?



Mr. SABIN. No. No criminal prosecutions have been filed in that regard.

Mr. COBLE. Do you want to weigh in on that, Mr. Katsas?

Mr. KATSAS. That's correct.

Mr. ARULANANTHAM. Mr. Chairman?

Mr. COBLE. Yes, sir.

Mr. ARULANANTHAM. May I have an opportunity just briefly to comment on that? Which is just to say that I do think it's important to note that a lot of humanitarian organizations fear engaging in activity because they're worried about criminal liability. So I think if the law makes something illegal, that's going to be a concern in terms of humanitarian groups, whether or not they're actually prosecuted as a practical matter later on down the line. It deterred people from doing things in Sri Lanka, Your Honor—Mr. Chairman.

Mr. COBLE. I know that I recall having seen U.S. service personnel extending aid to the victims during that episode—at the time, I guess, when you were there.

Mr. ARULANANTHAM. Yes, Mr. Chairman. I think the tsunami struck both in southern Sri Lanka and in northeast Sri Lanka. It's the northeastern part of the country that is where the conflict zone is and where the LTTE operates. I am fairly certain from the time that I was there that there were no American military service personnel in the northeast part of the country. I know Kofi Annan was not allowed to go to the northeast part of the country. And that was where a lot of the really horrible damage was.

Mr. COBLE. Mr. Sabin and Mr. Katsas, I'm going to come back to you all again. Should the Government be required to show that a donor specifically intended to aid terrorist activity when he or she gives assistance? Say, to al Qaeda, for example.

Mr. SABIN. No. Should the—one more time, Chairman? I'm sorry.

Mr. COBLE. Should the Government be required to show that the donor specifically—with intent.

Mr. SABIN. There should be—there is a knowing requirement in the statute. To impose a specific intent requirement would be contrary to what was the standard passed in the Intelligence Reform Act back in December, and would be a significant problem for criminal prosecutions.

If I can expound, Congress passed the material support statutes. The legislative intent was to not distinguish, for groups like Hamas or al Qaeda, humanitarian versus the military type activities. Specific legislative intent, I would refer you to Senator Feinstein's comments, "I simply do not accept that so-called humanitarian works by terrorist groups can be kept separate from their other operations. I think the money will ultimately go to bombs and bullets, rather than babies; or, because money is fungible, free up other funds to be used on terrorist activities."

So you have the concept of fungibility; the idea that in order to address the entirety of the terrorist support, it is the network; not just Richard Reed, who was operational on the plane, but those individuals who are providing the means, writing the checks, providing the identification, the means by which those violent activities could occur.

We cannot separate between Hamas' humanitarian works—which frees up the resources so that they can do their deadly operations. It also provides legitimacy. If you have groups of individuals providing to al Qaeda monies for so-called social services or humanitarian services, that provides legitimacy for the group that is continuing to conduct violent action.

Mr. COBLE. Well, now my red light—it appears, Mr. Katsas, if you will hold that, I will get a second round. Don't forget where you are. But my red light is on, so I will yield to the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I guess this is for Mr. Sabin. How do you get on the list to begin with, the FTO list?

Mr. SABIN. There's an administrative process that has been scrutinized by the D.C. Circuit. It is a designation by the Secretary of State of the United States, in consultation with the Attorney General and the Secretary of Treasury. An administrative record is compiled, and the designation occurs after publication. There are presently 40 foreign terrorist organizations so designated under that procedure.

Mr. SCOTT. You said "foreign." Can an American group be designated?

Mr. SABIN. No. By definition, it is a foreign terrorist organization. So it must be a foreign entity; it must be a terrorist organization with harm or threat to the interests of the United States national security; and it must be an organization, as opposed to individuals.

A separate structure exists under the International Emergency Economic Powers Act, known as "IEEPA," involving individuals.

Mr. SCOTT. If you feel you are wrongfully designated, can you try to get off the list?

Mr. SABIN. Yes, an organization has the ability to challenge that in court. And such challenges have occurred in the D.C. Circuit—in the D.C. court system.

Mr. SCOTT. And if they don't bother to try to get off the list, anyone who donates to that organization is committing a Federal crime?

Mr. SABIN. The system that Congress has passed is a transparent mechanism by which individuals who have the requisite, knowing intent to provide funds or any kind of material support or resources to that foreign terrorist organization would be committing a violation of U.S. law.

Mr. SCOTT. Now, this intent, do you have to know that it's been designated?

Mr. SABIN. Yes. As delineated in the Intelligence Reform and Terrorism Prevention Act, and as the Ninth Circuit Court of Appeals articulated, you have to know that the entity has been designated, or that it has engaged in terrorist activity. So there is a knowing requirement that has been articulated by Congress, by the courts, and executed and implemented by the Justice Department.

Mr. SCOTT. Yes, but the knowing is knowing that it's been designated.

Mr. SABIN. It's "or." It's "or." Either designated, or that you knew that they were involved in terrorist activity.

Mr. SCOTT. Okay. If you make a charitable contribution for what you think is humanitarian aid, tsunami relief, to an organization that's on the list, that's easy, if you knew it was on the terrorist list. What if you didn't know it was a terrorist organization, but in fact it is a terrorist organization?

Mr. SABIN. We would have to prove a knowing violation. So that if under your hypothetical the Government can't meet its burden of proof beyond a reasonable doubt that it was a knowing violation of the statute, we cannot bring and obtain a conviction under this law.

Mr. SCOTT. Well, in one of the examples that was given, you're trying to get humanitarian relief, and the only game in town is a terrorist organization.

Mr. SABIN. Myself and Mr. Katsas can explain that in detail. When we talk about the tsunami relief, let's break that down into specific components. We applaud the generosity and the spirit of the American people in order to provide funds for those kinds of victims. You cannot—who is the assistance being provided to? Is it the foreign terrorist organization? If “Yes,” then it is a violation of the statute.

If it is being provided to an individual who is a victim, and that victim is also under the direction and control of the foreign terrorist organization, yes, it would be a violation of the criminal statute.

If that victim is in the area, but is not a member under the direction and control of the foreign terrorist organization, it would not be a violation of criminal law to bring a charge.

What kind of assistance is being provided? In addition to whom it's being provided, what are you providing? Are you providing—

Mr. SCOTT. Well, what about expertise? The example was given, you can give expertise on medical care.

Mr. SABIN. And you could also provide expertise regarding how you should conduct a military operation for the area.

Mr. SCOTT. That's right. Now, let's talk about the medical advice. Is that covered?

Mr. SABIN. No, because explicitly, in section 2339B, medicine is exempted from the parameters of criminal violation.

Mr. SCOTT. Well, what about food? Food is not exempt; is that right?

Mr. SABIN. It is not exempt.

Mr. SCOTT. So if you're providing expertise on how to deliver food, is that a Federal crime?

Mr. SABIN. It will depend upon the circumstances, to whom you are providing and what your knowledge is of that individual who you are providing it to. And if there is any problem over clarity under 2339B violation, Congress provided, under Subsection J in the Intelligence Reform and Prevention Act, a mechanism by which you can seek guidance as to whether your conduct is violative of the statute.

Mr. SCOTT. Did you want to comment,

Mr. Arulanantham?

Mr. ARULANANTHAM. I did, if briefly, Representative, two things. First, just the very last thing that Mr. Sabin said, the licensing scheme in Subsection J doesn't cover food. So for example, if you

wanted to provide advice about how to deliver food aid, or clothing, or tents, or water purification systems, the statute doesn't allow you to do that. Second—

Mr. SCOTT. It doesn't allow—you mean you would be committing a Federal crime if you did?

Mr. ARULANANTHAM. That's correct. You'd be committing a Federal crime, punishable by up to 20 years in prison, for doing that. In addition, in the humanitarian law project case, the Government succeeded—as we've all been talking about—succeeded in winning the injunction against a doctor who wanted to give advice about public health services—you know, that the injunction had to be dissolved so that that could be criminally prosecuted.

And I think the ambiguity in the statute is that it distinguishes—it says “medicines,” but it doesn't appear to cover medical expertise or actually medical services, or the conducting of medical—you know, of medical activity.

And I think it's also important to realize that, as I said, medical problems are not limited to medicines. Medicine doesn't do you any good if you're starving. It doesn't do you any good if you can't get any drinking water. And this statute doesn't cover those things. It doesn't exempt them.

Mr. SCOTT. Thank you.

Mr. COBLE. Then gentleman's time has expired.

In order of appearance, the gentleman from Texas is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. And thank you for your testimony, gentlemen.

I was curious, Mr. Fine, when you mentioned there was an investigation ongoing on how Mayfield was inappropriately identified. And I'm just curious, having heard lots of testimony on FBI standards for identifying fingerprints, you know, the points of comparison and what-not—whether it's seven, ten—that are utilized, how long does it take to figure that out, as to how he was inappropriately identified?

Mr. FINE. We know how he was inappropriately identified, in terms of the inaccurate fingerprint. What we want to do is to consult with experts and to determine whether their systems are appropriate; whether there's a broader problem in the FBI fingerprint lab. And we also want to determine what exactly happened in the Mayfield case: what happened as a result of the inaccurate fingerprint identification; how he was investigated; how he was treated; and whether any provision of the PATRIOT Act was implicated. So we have a very thorough review of this matter ongoing.

Mr. GOHMERT. Okay. Has any of that information about how the fingerprint was inappropriately identified gone out to, like, State and local law enforcement?

Mr. FINE. I think the FBI has done its own review of it, and they have had some experts opine on that. We are actually looking at that, as well. The extent to which the FBI has disseminated it more widely, I don't know; although I do believe that that initial review has been fairly well known in the fingerprint community.

Mr. GOHMERT. All right. Mr. Katsas, you mentioned, I believe, as I understood you, that if the PATRIOT Act provision that we're talking about were eliminated, that it would revert back to lan-

guage the Ninth Circuit has called suspect. Was that your statement? What language specifically was that that they called suspect?

Mr. KATSAS. There are three elements in the definition of material support that have generated litigation against the Department. One is the provision addressing personnel, a second is the provision addressing expert advice or assistance, and a third is the provision addressing training.

Each of those cases was the subject of pending litigation. And in our view, each of those provisions was constitutional as originally written; but there were courts that had disagreed, including the Ninth Circuit with respect to personnel and training.

We were continuing to litigate those cases but, given the difficulty in the courts, we thought it perfectly appropriate to seek clarifying amendments from the Congress which would serve our narrow litigation interests in the cases but, much more importantly, would serve the public interest of providing as clear a notice as possible, consistent with the vigorous enforcement of this scheme.

Congress enacted clarifying language that the Executive Branch was happy with, that I assume you all were happy with, and that caused the Ninth Circuit in the pending cases to order the district court to take a second look and—

Mr. GOHMERT. That goes a little beyond just the specific language they found suspect. Of course, you're probably aware of scholarly writings that called the Ninth Circuit opinions suspect, too, but that's another hearing.

Anyway, Mr. Fine, could you clarify for us the abuse related to the PATRIOT Act of people being interrogated? Is that more an abuse of detainees under common law or general standards, or is that actually a violation of the PATRIOT Act?

Mr. FINE. What I was referring to, Congressman, in terms of our Guantanamo review, did not implicate the PATRIOT Act. What it implicated was what the FBI saw, and whether there was abusive interrogation techniques ongoing. That was not a provision of the PATRIOT Act that's at issue, but it is something that we believe is important to review. And it has civil rights and civil liberties implications and we, at the request of—on our own, but also at the urging of several Members of Congress, as well, decided to do a review of that matter.

Mr. GOHMERT. Well, the Chairman had asked the question, had you seen or heard of any information that the interrogation that the Chairman observed when he was at Guantanamo was staged. And I didn't hear an answer to that particular question.

Mr. FINE. We are not doing a review of everything that the military did with regard to the interrogations. We have gone down to Guantanamo, and we have asked our own questions about what the FBI observed. With regard to whether interrogations were staged for Members of Congress, I don't know the answer to that but we have an ongoing review.

Mr. GOHMERT. Okay, but the specific question, have you seen or heard of any information that indicated that they were staged, yes or no?

Mr. FINE. I think there have been some allegations of that, yes.

Mr. GOHMERT. Okay. Thank you. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Yes, thank you, Mr. Chairman.

I want to commend Mr. Fine. And I wish you would please convey back to the members of your staff my high regard for the integrity and the independence that they have demonstrated. And your reports I give serious weight to.

Mr. FINE. Thank you very much. I appreciate that.

Mr. DELAHUNT. I would like to also know whether you feel, or whether you make the determination, in response to the answer by my friend from Texas, Mr. Gohmert, that you have jurisdiction about the so-called staged interviews.

Mr. FINE. Well, we have limited jurisdiction, as you know. We have jurisdiction over the Department of Justice and any actions taken by Department of Justice employees. If there was any participation in any action by a Department of Justice employee in that regard, we would have jurisdiction. On the other hand, if it was the military, we would not.

Mr. DELAHUNT. Right. I would hope that you would thoroughly investigate, because I think that's a very serious matter. If the Congress of the United States is being misled—I don't want to use the word "deceived"—in terms of information regarding whether it implicates the PATRIOT Act or whatever, I think it's important that we know that.

Mr. FINE. Congressman, if we have any indication of that, we would bring that forward.

Mr. DELAHUNT. And I would also commend to the Chairman the fact that the Bureau of Prisons is still reviewing, after a year and a half, your recommendation regarding treatment of inmates, or detainees. I find that just totally unacceptable, a year and a half. And I would hope that the Bureau of Prisons—or the Department of Justice would convey to the Bureau of Prisons that it's time to respond. A year and a half is far too long. Let's just get that done.

Mr. Sabin.

Mr. SABIN. Yes, sir.

Mr. DELAHUNT. In terms of the concerns that were expressed by the representative of the ACLU, I don't know whether you have a position or not. But how does the concept of a waiver by the President or his designee, because that—that could be issued in terms of crisis. Let's call it a humanitarian waiver. So that situations such as the efforts in South Asia, particularly regarding the tsunami, we wouldn't have the basis, if you will, for the deterrence by individuals acting. Do you have any opinion on that?

Mr. SABIN. And that is what I believe Congress intended in 2339B, Subsection J.

Mr. DELAHUNT. Well, they might have intended it, but, you know, the problem is—and I'm sure you realize—you cannot, by re-defining definitions, account for every potential situation. What I'm suggesting is that it's at the initiative of the Government, rather than asking an NGO to rely on some mechanism to seek clarification.

In other words, the President or his designee would be able, in the kind of situations that occurred back in December of last year,

to respond, so that we don't get into—particularly into situations that timeliness is of such a critical aspect, where we're fudging around whether doctors can do this or doctors can do that, because—let's not make this a legalistic argument, is my issue.

Mr. SABIN. We recognize the desire to inspire the American opportunity to provide assistance where people are in need of assistance. The United States Government—and I don't want to get into foreign policy considerations but—has the ability to interact with the Sri Lankan government. But because a group that has been determined to be a violent terrorist group has de facto control, they can go to the Sri Lankan government and work—

Mr. DELAHUNT. I understand they can go to the Sri Lankan government. But we have NGOs, where we have people that are in absolutely desperate straits. And because NGOs are deterred and we know, I think—can you agree with me that there is a chilling effect? I'm sure they have counsel, and counsel is suggesting or recommending to them, "Go slow on this issue." Meanwhile, we have people, you know, in such dire straits, and there's such a tremendous loss of life that it doesn't, I think, serve American national interests, and it certainly doesn't, you know, serve the best interests of those people.

Mr. SABIN. And all I'm saying, in terms of my role as a criminal prosecutor, is that there are mechanisms and procedures that the United States Government has by which that assistance can be provided. In terms of the chilling effect, I don't want to speculate—

Mr. DELAHUNT. You don't want to chill. Right.

Mr. SABIN. I don't want to chill the ability for that kind of assistance to get to the victims. But I do not want the structure that is so vital, that is at the heart of what we have used in our post-9/11 world to prevent these kinds of activities by groups that are designated as violent terrorist groups—

Mr. DELAHUNT. I understand that. But what I'm suggesting is that we vest—that Congress revisit this issue and vest in the President of the United States the ability to make that decision given the crisis of the moment.

Mr. SABIN. You could have the Secretary of State de-designate that organization from the foreign terrorist list.

Mr. DELAHUNT. I'm not going that far. What I'm saying is I've got to deal—we have to deal, as the American people, with the reality on the ground. And you don't have time to pick up the phone, call your lawyer, and seek advice and guidance when you have at risk tens of thousands, if not hundreds of thousands, of people.

Mr. SABIN. And all I'm saying is that you can provide mechanisms by providing that to the appropriate government, and not the terrorist organization.

Mr. ARULANANTHAM. Mr. Chairman, may I have an opportunity to comment on this?

Mr. COBLE. Since I had Mr. Katsas to wait for the second round, will you just hold that thought. But the gentleman's time has expired.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. COBLE. The distinguished gentleman from Ohio is recognized for 5 minutes, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. Just one observation before I get into the questions. You know, there have been a lot of kind of wild allegations—not in this Committee; I'm not referring to anybody here—but much of them kind of inflamed over the Internet; you know, that Congress passed the PATRIOT Act a few years ago, a knee-jerk reaction to 9/11, and basically turned the Federal Government loose on the American public to trample on civil liberties and abuse people left and right. And you know, the facts, as have been coming out in this Committee, I think point to something very different.

And I think one of the wisest things that Congress did in passing that legislation was to sunset certain portions of the PATRIOT Act, so that Congress would have to exercise oversight. And this is the eighth hearing that we've had in this Subcommittee alone relative to that oversight. And I want to commend the Chairman for his diligence in utilizing this Committee to participate in that oversight process.

I think this has been a very helpful process. And if in fact portions of the PATRIOT Act—if it's determined they should be modified or rejected and not—you know, that they not remain law in this country, then so be it. But I just again want to say that I thought that was very important that we did require this oversight, and this whole process that we've been going through is part of that.

Let me in my first question here refer to section 6603J, and quote, "No person may be prosecuted under this section in connection with the term 'personnel,' 'training,' or 'expert advice or assistance,' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General."

So let me ask the panel, and any of the members are welcome to respond, if the humanitarian groups are concerned that they might be prosecuted or they might be at some risk, can they not go to the State Department and get permission to provide that aid? Mr. Katsas?

Mr. KATSAS. We think they can.

Mr. CHABOT. They can?

Mr. SABIN. The answer is "Yes."

Mr. CHABOT. Okay. Yes, sir?

Mr. ARULANANTHAM. Yes, Representative, a couple of features about this I think are important to note. The first is, it's only personnel, training, or expert advice or assistance. So as I said earlier, it doesn't cover a huge amount of the vital services that I saw that were necessary there and that humanitarian organizations I think would say are necessary. Food is not there. You know, clothing isn't there; tents; shelter. A whole set of vitally important services are not covered by this provision. Water purification is not here.

The second thing I would say is that this process was in place prior to the tsunami hitting. You know, this statute was already the law, you know, at the time that this had happened. And in fact, its constitutionality had already been considered in a preliminary way in the Ninth Circuit. Obviously, it's not necessarily going to be fast enough to deal with humanitarian crises.



When I was on the ground about 48 hours after the tsunami hit, doctors are having to make decisions about things to do right then; people are dying right then. And a process whereby the Secretary of State has to concur with the Attorney General and make a political decision—you know, I think it was President Reagan who said, “A hungry child knows no politics.” And I continue to be somewhat disturbed by the idea that this humanitarian activity would be subordinated to political objectives; whether it be political objectives to undermine the legitimacy of one of these groups, or the political objectives of, you know, the Government in making foreign policy decisions. I mean, there ought to be——

Mr. CHABOT. Okay, let me stop you there, because my time is about out. Would one of the other gentlemen on the panel like to respond to any of the points made by the gentleman whose name has been mispronounced only more often than my name, I think?

Mr. KATSAS. With respect to food, let’s say, we think there is a crucial distinction between what is permissible, which is providing food to starving individuals, and what is not permissible, which is providing something like food to, say, the terrorist group directly. One can imagine something like an al Qaeda training operation which would be aided were someone to donate to it the food services necessary to run that organization.

Mr. CHABOT. Would one of the other gentlemen like to respond? Mr. Sabin?

Mr. SABIN. On a variety of fronts. First, if the issue is timeliness and, following up on Mr. Delahunt’s point, to the extent that there is a concern that somehow 2339B(J) won’t be efficient enough in a crisis or disaster mechanism, we can work with the Congress to provide appropriate clarification. We’re open to that kind of dialogue.

But if I have heard correctly, in that specific instance, there was not a type of food or other humanitarian assistance that was prevented from being provided that has been documented here today.

And let’s not lose sight of the larger picture; that this structure is what Congress desired so that groups like Hamas would not have the ability to free up, through the humanitarian assistance, and have individuals have that escape hatch so that they could not be in violation of the law. And in case after case, it has proved to be of tremendous assistance.

And we have used the article III courts, the Justice Department has, including six trials in the last 90 days where terrorist-related prosecutions resulted in convictions of all defendants including——

Mr. COBLE. Mr. Sabin, the gentleman’s time has expired. If you could, wrap it up.

Mr. SABIN. The bottom line is that I don’t believe it’s a constitutional argument that I’m hearing today. It is one in terms of the efficiency and timeliness. And we’ll be able to work with you in order to provide a mechanism and procedure by which that can occur.

Mr. COBLE. The gentleman’s time has expired.

The distinguished lady from California, Ms. Waters, is recognized.

Ms. WATERS. Thank you very much, Mr. Chairman. Let me, before I ask my question, thank you for all the work that you’ve done

on the PATRIOT Act. I've never seen these many hearings, this in-depth kind of work done. And I think this is so important, and I'm really appreciative for it.

Mr. COBLE. If the lady would suspend?

Ms. WATERS. Yes.

Mr. COBLE. I thank you for that, but we've all pulled the plow together. Bobby and I—Mr. Scott and I are not the only ones to do it. But thank you, Ms. Waters.

Ms. WATERS. Both of you. Both of you. Both of you have done an excellent job.

Let me say to our panel today that we understand the need to have a PATRIOT Act, and we understand very well that we have embarked upon trying to secure the homeland. And it was necessary for us to take a look at ways by which we deal with terrorism. But at the same time, let me also say that those of us who have fought for civil rights and civil liberties all of our lives must also fight for balance and make sure that we are in no way undermining the civil rights and civil liberties of our citizens in this democracy.

I'd like to thank the ACLU for doing just an excellent job. People don't know the kind of work that goes into trying to protect the democracy. And I have a real appreciation for all of the problems that you have in trying to do this work.

Having said that, I am pleased that we have written into law that we should have this report on this section—I guess, 101—on whether there have been any civil rights violations; but I don't want to concentrate on that right now.

What I want to talk about is equal application of the law, and I want to try and understand how these decisions are made. I know that the PATRIOT Act came into being after 9/11, but I'm still bothered by the fact that following the attack somebody in government rounded up the royal family and others. We don't even know who all they rounded up and put on airplanes and shipped out of here, and let them get back to Saudi Arabia. And we do know that some members of the royal family are from the Osama Bin Laden-thinking side; that they don't all think alike.

And we know that some members of the royal family have been supportive of terrorist organizations. We believe that. We even know about an ambassador's wife, I think it was, that gave money to an organization that was identified as a terrorist organization.

I want to know, have they ever been investigated? Who are those people that we let out of here? Were they tied to terrorist organizations? Were they supplying funds to terrorist organizations? Let me start with Mr. Sabin. Do you know anything about that?

Mr. SABIN. If I recall, when I testified before a different Committee that you were on back in September, you had raised a related question in that regard.

Ms. WATERS. Refresh me.

Mr. SABIN. And the specifics of that are beyond the scope of this particular hearing today. But to the extent that you're asking whether there is an ongoing investigation in that matter, I am not at liberty to say now, but I can check with the FBI and we, through our appropriate channels in the Justice Department, will get back to you with an answer one way or another.

Ms. WATERS. I doubt if I'll get an answer, but that's okay. I just—it's just on my mind, and it won't leave until I understand what took place. Are you familiar with the madrasas in Saudi Arabia?

Mr. SABIN. In a general proposition.

Ms. WATERS. Do you know what they do?

Mr. SABIN. In terms of providing teachings—

Ms. WATERS. Yes.

Mr. SABIN.—to inspire or recruit or develop a particular kind of teaching? Yes, generally.

Ms. WATERS. Let me just ask this. Are there groups or organizations in the United States that are supplying funds or resources to the madrasas in Saudi Arabia?

Mr. SABIN. To the extent that you are suggesting that there is a violation of a United States law, either 2339A or B, in relationship to that, if you have specific facts, we would welcome the opportunity to review—

Ms. WATERS. No, I want to know, do you know about any?

Mr. SABIN. There are matters under investigation at the FBI. I am not going to comment on the specifics of a madrasa, or Saudi Arabia in particular. We welcome all specific facts, whether it's from Congress or the public. If there is a predication for a violation of United States law, we will review it.

Ms. WATERS. Well, I'm talking about equal application of the law. And I raise this question because I don't want to sit here and talk about getting tough on terrorism and, because we are friends with Saudi Arabia—whether it is because of the oil connection, or the President just knows them so well and loves them and kisses and hugs them when they come over; I don't know what it is—but I don't want to talk about how we are fighting terrorism and how we are targeting groups, when in fact we have right before our very eyes—and, I think, knowingly—that we have support for madrasas and other organizations in Saudi Arabia.

And I would kindly ask my Chairman for just 30 more seconds.

Mr. SABIN. And I can answer—

Mr. COBLE. Without objection.

Ms. WATERS. I think I get your drift. Is the Taliban a terrorist organization?

Mr. SABIN. It is not designated as a foreign terrorist organization. It is listed under the International Emergency Economic Powers Act as a specially designated global terrorist, I believe is the proper term.

Ms. WATERS. Please just tell us, is the Taliban—

Mr. SABIN. It is not a foreign terrorist organization that would prove a predicate for a 2339B violation. But yes, it is listed so that you could have a violation of the IEEPA statutes under title—

Ms. WATERS. Do you have conservative religious organizations in the United States who supply resources to the Taliban?

Mr. SABIN. I don't know what you're specifically referring to.

Ms. WATERS. Well, I'm talking about Pat Robertson and some of the organizations that were involved with support of the Taliban before 9/11. And I'm told that still there may be some connections to them. Do you know anything about this at all?

Mr. SABIN. I don't know what you're referring to.

Ms. WATERS. Well——

Mr. SABIN. I would welcome the specific facts. But in terms of your larger question, as a considered prosecutor——

Ms. WATERS. Do you know of any conservative organizations in the United States, religious organizations, that are supportive of the Taliban, either before 9/11 or after 9/11?

Mr. SABIN. Again, I am not going to comment in a public forum about a particular investigation. If there are specific facts that you believe suggest a violation——

Ms. WATERS. Well, let me just say—let me just say this——

Mr. SABIN.—of a United States law, we equally apply them.

Ms. WATERS. The point that is made—Mr. Chairman, this is the point. This is the point. You may not be able to comment. You will probably never comment. But my point is this: What's good for the goose is good for the gander. And if we're fighting terrorism, we don't have any, and shouldn't have any, special friends who we let off the hook because somehow they are doing something that we consider is all right.

And until you can clear up these kinds of questions in my mind, then I'm going to do everything that I can not to allow this country to have a PATRIOT Act or anything else that selectively identifies and prosecutes any organization.

You have got to come down with the truth at some point. And you may not be able to do it today, and I probably will never, ever know; but I'll keep asking these questions over and over and over again.

Thank you, Mr. Chairman.

Mr. COBLE. Will the—Mr. Sabin, very briefly.

Mr. SABIN. And we appreciate that oversight of Congress, and the Inspector General, and the press, and the ACLU. We are better for that dialogue. And I would clearly and unequivocally say that the prosecutors around the country in the Justice Department and the investigators on the joint terrorism taskforces look at the facts, apply it to the law, and seek justice.

And we do so not because of special favorites, or any kind of other objectives; but in order to fulfill our responsibilities under the Constitution even-handedly, to bring cases where appropriate, and also not to bring cases when it's inappropriate.

Mr. COBLE. Well, the gentlelady's time has expired.

Ms. WATERS. Thank you very much, Mr. Chairman.

Mr. COBLE. You betcha. We'll try a second round now. Mr. Katsas, I cut you off, or the red light cut you off, in the first round. I'll be glad for you to respond.

Mr. KATSAS. Mr. Chairman, you——

Mr. COBLE. I think it was in response to something Mr. Sabin had said.

Mr. KATSAS. You had a colloquy with Mr. Sabin on the very sound reasons for not imposing a specific intent requirement, the intent of the donor. So that writing a check to al Qaeda is illegal, and we don't get into issues of whether that is intended for terrorist operations or humanitarian operations.

The only point that I wanted to add was with respect to the constitutional question, whether you have to have a specific intent requirement. We have litigated that issue in four United States

Courts of Appeals. Every one of them has held this kind of scheme to be permissible: the Ninth Circuit; the D.C. Circuit; the Seventh Circuit; and the Fourth Circuit, which was sitting en banc, at least eleven-to-one, on this point. So we think the authority for Congress proceeding as it has is now very well established.

Mr. COBLE. I thank you, sir. Mr. Fine, you indicated in your written testimony that section 1001 of the PATRIOT Act explicitly requires the Inspector General of the Department of Justice to designate an official who shall submit to this Committee, and also the Committee on the Judiciary of the other body, the Senate, on a semi-annual basis. As to responses to this section, how would changing the requirement for submitting such a report from a semi-annual basis to an annual basis affect the ability of the IG's office to successfully implement its oversight responsibilities?

Mr. FINE. I don't believe it would affect our ability to do that. We provide the reports that Congress asks for, and we try and do a thorough and expeditious job in it. If it was moved to an annual basis, we could do that as well, and we could also provide briefings to the Committee, to the extent they needed it, as well.

Mr. COBLE. But is it not being considered to transfer to an annual?

Mr. FINE. I have heard of no—this is the first I've heard of that.

Mr. COBLE. Okay, I'm—

Mr. FINE. But I wouldn't be opposed to it.

Mr. COBLE. All right. Very well.

Mr. ARULANANTHAM. Mr. Chairman, can I comment very briefly on that?

Mr. COBLE. Yes, sir.

Mr. ARULANANTHAM. Just to clarify that. Mr. Fine is relying on reports that other people send to him. So for example, in situations where there's a gag order, as in the National Security Letter context, and, you know, people are prevented from disclosing what may be abuses under the act, then obviously that's going to limit his investigation.

Mr. COBLE. Mr. Fine, do you want to respond to that?

Mr. FINE. We widely publicize who we are, what our duties are. We do rely upon complaints coming in. We've received 7,000 of them. To the extent that people do not know of anything happening to them, there is an issue about whether they can complain; so I think that's a legitimate question. But I will say we have very widely publicized what we do, and we received a very significant number of complaints.

Mr. COBLE. I thank you, sir.

The distinguished gentleman from Virginia.

Mr. SCOTT. Thank you. Mr. Fine, you indicated that you are investigating the Mayfield situation?

Mr. FINE. Yes.

Mr. SCOTT. You won't be offended if some of us are really skeptical about how he could have been misidentified by fingerprints? Of all the people in the world to get inadvertently misidentified, it happened to be a Muslim lawyer suing the United States. That's—that's unusual; don't you think?

Mr. FINE. I think it is unusual, and I think healthy—skepticism is a healthy thing. And that's what we try and bring to bear on our investigations. And we're going to investigate this very thoroughly.

Mr. SCOTT. So you have to do a little bit more investigation than average to convince a lot of people that there wasn't something going on other than just a random misidentification of fingerprints.

Now, on your civil rights investigations, you've kind of alluded to this a little bit. One of the problems, if you're just waiting for complaints, is that, one, you've got the gag orders to deal with. You've got another problem. A lot of these things are secret. You didn't know you were—there was a sneak-and-peek investigation or search of your house. Are you being pro-active in your investigation, or are you just waiting for the complaints?

Mr. FINE. We're not simply waiting for complaints. We look to see where there's serious problems. In fact, in our investigation of the treatment of detainees after September 11th, we received a few complaints and we were very pro-active in going forth with a systemic review of what was happening to those detainees.

With regard to the delayed notification, or the so-called "sneak-and-peek," eventually people do get notified of the search. And if they had complaints, I would presume they'd know where to come, or should come to us with it.

Mr. SCOTT. Did you look into the fact that Muslims were rounded up in the Detroit area, as a civil rights violation?

Mr. FINE. We have not investigated that matter, no.

Mr. SCOTT. What about, did you take a position on the idea of enemy combatants, where people could get arrested in the United States and held without charges?

Mr. FINE. That's a matter that's before the courts, and we have not opened an independent review of the enemy combatant situation.

Mr. SCOTT. What about the status of military tribunals?

Mr. FINE. The status of military tribunals?

Mr. SCOTT. Yes. I mean, there was a lot of civil rights implications on whether or not people would get a fair trial under that situation. I mean, the first announcement said that, you know, you're not entitled to guilt beyond a reasonable doubt, you're not entitled to a presumption of innocence. Mr. Katsas, do you want to—

Mr. KATSAS. Mr. Scott, if I may, that issue is the subject of litigation which is currently pending in the Court of Appeals for the D.C. Circuit.

Mr. SCOTT. And therefore, you can't look at it as a civil rights violation?

Mr. KATSAS. Not to comment—

Mr. SCOTT. I mean, even if it's legal, it seems to me that there's some problems with hauling people off the street and locking them up. And I asked Attorney General Ashcroft, "If you happened to round up the wrong person, and they're innocent, when do they get out?" And the answer was, "The end of the conflict." At the end of the war on terrorism, they can get out. No hearing, no habeas corpus, no nothing. Isn't that something that we need to look at, whether it's legal or not, as a civil rights violation?

Mr. FINE. I think that is a very serious issue that should be looked at by Congress, by others, by the courts. I'm not sure how we would investigate it.

Mr. SCOTT. Well, Congress hadn't authorized this, pick people off the street. How do we look into it?

Mr. FINE. I think Congress, in its oversight role, could look into it. And there's many facets of oversight.

Mr. SCOTT. Well, suppose Congress passed that you can pick somebody off the street and lock them up. I mean, so what? I mean, it's still illegal; isn't it?

Mr. FINE. Presumably. I would hope that if there was an illegal action by Congress that the courts would review it.

Mr. SCOTT. Well, I mean, if we passed a law that you could pick somebody off the street who'd been designated by the Executive Branch as an enemy combatant and held without charges, if we passed a law to authorize that, don't you think the courts ought to throw it out, or somebody in the civil rights division ought to find a little civil rights problem?

Mr. FINE. Absolutely.

Mr. SCOTT. Okay. I don't know who this—maybe Mr. Katsas or Mr. Sabin. Is there anything comparable in domestic law that has this aid to terrorist organizations? We have a lot of little terrorist organizations around. Some of the groups have websites listing abortion physicians that end up getting shot. Do you have any—is there any domestic equivalent to this? You've got militias running around in the woods, teaching people how to use firearms.

Mr. SABIN. There is not a comparable provision. There is title 18, United States Code, Section 842(P), which provides for the teaching of bomb-making type of activities; which arguably could have first amendment concerns that civil libertarians would seek to address. But in terms of a listing approach, no. The answer is, no.

Mr. SCOTT. But I mean, if we had caught the Oklahoma bombing group before—and I understand you're trying to open an investigation to determine whether we got everybody or not—if we had gotten a group before, and they'd just been training, with nothing specific, without getting into any specifics, just training for this kind of thing, and you concluded that they were a terrorist organization, would we have any domestic law to deal with that?

Mr. SABIN. We can work with the Congress in terms of specifics. But there is, for example, under eco-terrorism, section 43 of title 18 of the United States Code, which has—addresses that. There's the explosive statutes under section 844, that you could have certain kinds of conspiracies. And that's how we reached, for example, the Oklahoma City bombers, in use of weapons of mass destruction and the like.

Mr. SCOTT. Yes, but in all of those, you have to have—actually be involved in the crime. It's just not giving feeding and other expertise, medical advice, to the group, with nothing to do with the crime. Your activities have to be crime-related. There's apparently no comparison to where you're giving that kind of advice to a group, and then all of a sudden, because they're a terrorist organization, you're roped into a Federal crime.

Mr. SABIN. I think we have to look carefully at the language of section 43 relating to eco-terrorism; but I think that is generally a

correct proposition, sir. There is attempt and conspiracy statutes that could encompass certain kinds of criminal activity.

Mr. ARULANANTHAM. Just briefly—

Mr. SABIN. Also, a concept under the guidelines for terrorism enterprise investigations where there are a number of organizations that are under review and scrutiny, such as some of the militia groups that you've referred, that the FBI has under investigative scrutiny.

So there's an investigative mechanism in that regard, but not a statute, if I understand your question correctly.

Mr. ARULANANTHAM. Representative Scott, just briefly, if I may, I think the question is a good one, and it goes to the constitutional point. I'm making here primarily a humanitarian argument because of the horrible things that I saw, but I think the analogy is very, very important to understand.

A lawyer who wanted to advise Operation Rescue about how they can comply with, you know, the laws governing clinic protection, for example, and still legitimately protect—or protest abortion provision going on in this country, is clearly expert advice. It just clearly is. And it involves specialized knowledge.

It's very hard to understand—in fact, in the Humanitarian Law Project case, where the Government has won an—has defeated an injunction, most recently in the Ninth Circuit, one of the prospective defendants wants to give human rights training to a group so they can comply with, you know, international humanitarian law. And the Government argues that, you know, that can be proscribed under the statute.

So I think there's no even remote analogue in the domestic context, because in all vicarious liability contexts, whether it be conspiracy law, or aiding and abetting, or RICO, or any of these contexts, you require something. It's not a specific intent; it's just that the person have some interest in the actual criminal activity going on.

And in this other context, we don't—you know, the way the law is currently written, it doesn't require the doctor to actually want to further the LTTE's military purposes. Quite on the contrary. The doctor might just want to help starving people or people in need of medical assistance; but the law still bans it.

Mr. COBLE. The gentleman's time has expired.

Mr. Katsas, you looked like you wanted to jump in. Did you not? Okay, I misread you.

The gentleman from Texas is recognized for 5 minutes.

Mr. GOHMERT. I thank you, Mr. Chairman. Mr. Sabin, let me follow up on a matter of previous questioning, and ask you, is there any group that is operating, or allegedly operating, out of Saudi Arabia, that has been designated as a terrorist organization?

Mr. SABIN. Specific foreign terrorist organization? I mean, there are groups—there are individuals of groups in that country that—al Qaeda representatives, and the like. Off the top of my head, of the 40 groups that have been designated, I think the answer is, no. But I can check, and get back to you on that.

Mr. GOHMERT. Do they get—if there are individuals in Saudi Arabia, are they getting any special treatment because of the relationship of the U.S. and Saudi Arabia?



Mr. SABIN. No. No. Specifically, I can refer you to the case that is pending in the Eastern District of Virginia, involving Abu Ali, where he was in Saudi Arabia, a U.S. citizen, allegedly involved in providing assistance to al Qaeda.

Mr. GOHMERT. Just a comment, lest others are tempted to discuss whom a President hugs and kisses. I don't think we want to go down that road in comparing this President to past Presidents and who they hug and kiss, nationally or internationally. But anyway, I'm still concerned—we talk about concerns—about the Justice Department of the prior Administration still not prosecuting anybody for having a thousand FBI files or so, when Chuck Colson went to prison over one in that kind of abuse.

But this is such a difficult issue. And I'd like to thank the Chairman again for having the hearings. You know, on the one hand, the concern expressed has quoted from Senator Feinstein about masking humanitarian aid with terrorism. I mean, we've seen some of that in the oil-for-food scandal. And now we've got the U.N. trying to cover its tracks. It is a difficult issue.

And on the other hand, then we have the benefit of looking backwards and seeing how unfairly Dr. Mudd was treated when he was presented with, you know, John Wilkes Booth, who he had no idea had just killed our great President.

So we want to prescribe fairness. We want to make sure that there is fairness and justice. And we appreciate you all's efforts in testifying. You provided a great deal of information in your written testimony.

I would like to ask Mr. Fine, though, having read the quote from a New York Times article I'm sure you're quite familiar with, by the author Mr. Shiman, he says that, "Mr. Fine, whose job is to act as the Department's internal watchdog, found that hundreds of illegal immigrants had been mistreated after they were detained following attacks." Can you explain the discrepancy? It sounds to me there's a discrepancy in what he says and what you say.

Mr. FINE. The quote that you just read I think is accurate. We did find in our report dealing with the treatment of aliens held after the September 11th attacks that there was abuses; that they were mistreated; that they were held in unduly harsh conditions; that they were not given their notice of charges; that they were not allowed access to counsel in a timely way; that some of their conversations with their attorneys, when they got them, were taped. We found a series of problems and abuses of them. That was not of the PATRIOT Act, though. I think that's where the issue is.

Mr. GOHMERT. That's the distinction.

Mr. FINE. That's the distinction. But there were serious problems that we found in the way the FBI and the Department treated those detainees. And we pointed them out and as Congressman Delahunt pointed out again. And we recommended discipline be taken. And we're still waiting.

Mr. GOHMERT. All right. Thank you. I would encourage you to follow up on any allegations or potential information about interrogation being staged for the benefit of Congress; because, you know, how can Congress function adequately, if we're not given, you know, real information from which to act?

So we appreciate all of your testimony. And I haven't asked you any questions at this point, but I'll try to follow up on some of the things I heard as concerns. So, thank you.

Mr. COBLE. I thank the gentleman from Texas.

The distinguished gentleman from Massachusetts is recognized for 5 minutes.

Mr. DELAHUNT. I thank the Chair. Who's the senior member of the Department here? Is that you—Mr. Katsas.

Mr. KATSAS. We're from different areas in the Department.

Mr. DELAHUNT. I understand. Different areas. What I would like to do is have—I guess I would make the request of you, Mr. Katsas, to inquire of—you can go up the chain and then down the chain, if necessary—to inquire on behalf of myself in a request for a written response as to why the delay from the Bureau of Prisons, in terms of considering the recommendation made by the Department of the Inspector General.

Mr. KATSAS. With respect, that's far outside the purview of the civil division. I imagine we have processes for transmitting that—

Mr. DELAHUNT. I see some gentlemen in the back that are making notes. I see Mr. Moschella leaning over. Since he is the congressional liaison, I would—through you to Mr. Moschella, please follow up on that request, so that we can, you know, understand the rationale.

Mr. KATSAS. And I've just been told we will do so.

Mr. DELAHUNT. Thank you. I want to be clear to Mr. Sabin, you know, I'm not speaking about the constitutionality of the particular provision that we're here reviewing, as far as the PATRIOT Act is concerned. I'll leave that to the courts. There are plenty of decisions. Presumably, at some point in time, the Supreme Court might take jurisdiction. I don't know. And I want to be clear that I understand your concerns, and I respect your concerns.

But I do think, again, to go back to what I was talking about, that some sort of humanitarian waiver on the part of the appropriate secretary, or the President himself, that would implicate the necessary conditions for accountability would, I think, address the concerns that we've heard here today. And I just think that is common sense.

Now, we can get into what section and subsection, and whether it's "P" or "B." But I think we, as Americans, want—I know we all want to do the right thing. And there are occasions when that—let's call it waiver authority—could be implicated.

Mr. SABIN. Fair point. We'll work with you and we'll work with the Congress, in order to see if we can reach a meeting of the minds in that regard that can preserve what we're trying to preserve in terms of our enforcement abilities, but also address the concerns that you articulate. To follow up, though, on a—

Mr. DELAHUNT. I'm going to interrupt you—

Mr. SABIN. Okay.

Mr. DELAHUNT.—because I'll run out of time.

Mr. SABIN. Okay.

Mr. DELAHUNT. But I want to follow up on, I think, what the concerns were expressed by my friend from California, Congresswoman Waters, in terms of, how do you get on these various lists?

I sent a letter recently to the Attorney General, Mr. Gonzales. I guess this would be under the IEEPA. Am I pronouncing the acronym correctly?

Mr. SABIN. Yes.

Mr. DELAHUNT. That was—

Mr. SABIN. When I came to Washington, I learned there's a lot of acronyms you have to learn.

Mr. DELAHUNT. Right. I'm starting to. I've only been here a short time.

Mr. SABIN. Miss your days as a prosecutor, sir.

Mr. DELAHUNT. Right, I do. There are two individuals, and I'd like to have some sort of a written response. If you can do it, you are our counterterrorism expert. I've spent considerable time in Latin America and in the Caribbean. I've asked Attorney General after Attorney General, what is the status of an individual that I believe to still be in the United States, by the name of "Emanuel Todo Constant," who is the leader of the FRAP, a foreign terrorist organization if there ever should be one. Is he on—if you know, is he on the—you know, the terrorist—the identified terrorist list?

Mr. SABIN. I'll look into it and get back to you, sir.

Mr. DELAHUNT. You don't know whether he's on—

Mr. SABIN. Not as I sit here today, I do not know.

Mr. DELAHUNT. You don't. And then, there's an individual who recently, yesterday, was on the front page of the New York Times, who allegedly was responsible in the late 1970's for the killing of some 73 innocent civilians aboard a Cuban airline, by the name of "Luis Posada Carriles"; who purportedly, according to his lawyer and others in Florida, is currently in the United States. Is he on the—is he an identified terrorist on the list?

Mr. SABIN. I'm familiar with that individual. And I do not know, as I sit here, whether he is on the list, but the Justice Department is familiar with that individual; as well as other Government components, including the Department of Homeland Security.

Mr. DELAHUNT. I take it, this is not a secret list; is it?

Mr. SABIN. No, it's not. What I'm saying is, I can go back; we can check; and we can provide you that, transparently. That's the purpose of the list, is to have these individuals.

Mr. DELAHUNT. Right.

Mr. SABIN. So I am familiar with the individual; I just don't know whether that individual is on a list.

Mr. DELAHUNT. If you could, let me know. Because I guess, once I find out, I'm going to—you've solicited our assistance and input. And once I find out, if he's not on the list, I intend to try to develop some information so that both of these individuals will be placed on the terrorist list.

Mr. SABIN. We appreciate your interest, and we'll work with you to make sure that the matter is addressed.

Mr. DELAHUNT. Thank you.

Mr. COBLE. The gentleman's time is expired.

The Chair recognizes the distinguished lady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. I don't believe that Todo Constant is on any list, but I can tell you where he is up in New Jersey. If you call my of-

fice, I will give you his address. And probably, because he worked for the CIA, he will not make the list; as Mr. Posada will not.

Now, let me get back to the Taliban. And I'm going to go to Mr. Katsas now. Is the Taliban listed as a terrorist organization? And what's the distinction that Mr. Sabin was trying to make between being on—listed as a terrorist organization in some other way? Would you help me with that?

Mr. KATSAS. I don't know if it's listed or not. I can tell you the distinction Mr. Sabin was trying to make—

Ms. WATERS. Okay.

Mr. KATSAS.—is that there are different—there are different statutes which target terrorist organizations. The principle one that we're discussing here is the foreign terrorist organization provisions, primarily in section 2339B. There is a separate statutory scheme, called IEEPA, which has a different kind of designation.

I can't tell you who is designated under which provisions. My job is to defend the constitutionality of each statute as it is challenged, and we have done that fairly well.

Ms. WATERS. Well, let me just say, listed under "Indictments" I see that, on page 5 of your testimony, that, "Ahmad, a resident of the United Kingdom, alleged operated and directed Azzam Publications and its family of Internet websites, located in the United States and around the world, to recruit and assist the Chechen mujahideen and the Taliban and to raise funds for violent jihad overseas."

So the Taliban is considered a terrorist organization under this indictment?

Mr. SABIN. No, the Taliban is considered a terrorist organization under the IEEPA statutes; not under the foreign terrorist organizations definition under 2339B of title 18.

Ms. WATERS. What's the difference?

Mr. SABIN. Under 2339B, you have to be foreign, you have to be terrorist, and you have to be an organization. So you could not have a domestic entity in the—in the FTO, 2339B scheme. It has to be a terrorist; namely, involved in activities that harm United States' interests, threats to the United States national security. And an organization is the—as opposed to an individual; an actual group or collection of individuals seeking to accomplish terrorist goals.

Ms. WATERS. Why is it the Taliban does not fit the definition?

Mr. SABIN. Under an FTO?

Ms. WATERS. Yes.

Mr. SABIN. Actually, we had charged in certain indictments—and I would refer you to the Khan case out of the Eastern District of Virginia, where we had alleged certain activities, under FTO designation for 2339B regarding individuals, were both in violation of al Qaeda and the Taliban. And the court ruled that it is not the same and it is not designated.

To the extent that your recommendation is that the Taliban should be designated as a foreign terrorist organization, we'll go back and scrutinize that. Previously, it had been an actual government, and so it could be listed as one of the seven state sponsors of terrorism; an actual state, as opposed to an organization. If I understand the thrust of your question—and I think it's a fair one—

should the Taliban be designated as an FTO so that it can be under the—not only under the IEEPA statutes, but under the material support statutes.

Ms. WATERS. Well, you know, I appreciate your willingness to go back and take a look at this. But I would hope that this isn't the first time you heard this. And I would hope that you know way more about it than I do; and that you should be on top of it. And that just coming here—well, we only have 5 minutes to talk with you—all of a sudden raises a concern that you never had.

Mr. SABIN. No, I don't mean to suggest that.

Ms. WATERS. Yes?

Mr. SABIN. What I'm saying is that, in regards to bringing cases against individuals that are involved with the Taliban, we have brought those cases, as you refer to Mr. Ahmad. He is now in custody in the United Kingdom, awaiting extradition determination to the United States for those—

Ms. WATERS. Was the Taliban involved in killing any of our soldiers in Afghanistan?

Mr. SABIN. Yes.

Ms. WATERS. Were they involved with killing people in the public square, and assisting any organizations involved, as you said here, with jihad overseas?

Mr. SABIN. Yes.

Ms. WATERS. I don't understand why, then, they are not considered a terrorist organization under the statute we're dealing with.

Mr. SABIN. And my point is that we have not been precluded from bringing prosecutions against individuals under the statute.

Ms. WATERS. I'm talking about individuals and the organization. And I'm really trying to get to the fact that there are conservative religious organizations attached to the Taliban right here in the United States. Do you not know about that?

Mr. SABIN. And to the extent you have a specific individual—

Ms. WATERS. No, no, no, no.

Mr. SABIN.—or groups that you're referring to—

Ms. WATERS. No, my question—

Mr. SABIN.—I'd welcome that information.

Ms. WATERS. My question is, do either you or Mr. Katsas know anything about religious organizations connected to the Taliban here in the United States, who may be providing material support, now or in the past?

Mr. KATSAS. I don't. But I would like to just elaborate for a minute on the different ways we try to protect the country from terrorist-like entities. I said there were two principle ones: this scheme, and the IEEPA scheme. Those are typically schemes enforced against non-government terrorist entities.

There is a third scheme involving provisions in the Foreign Sovereign Immunities Act, which imposes certain different liabilities on governments, foreign governments that support terrorism. So that's a third way in which we go after governments.

And finally, with respect to the Taliban itself, you are absolutely correct that there was obviously an armed conflict. And we have taken various measures, including the enemy combatant designations, to hold members of the Taliban who have been fighting

against our troops and are dangerous. And we are actively defending the constitutionality of that program, as well.

So there are a whole range of ways in which we try to protect Americans from terrorist private organizations, and terrorist governments.

Ms. WATERS. Mr. Chairman, if I may, 30 seconds.

You recognize that the Taliban is not a legitimately organized government entity; do you not?

Mr. KATSAS. I'm not sure—I'm reluctant to speak on the foreign policy—the precise status of the Taliban. I might—I think that's right.

Ms. WATERS. Do you know how Afghanistan is organized? Do you know what Mr. Karzai's role is there, and what he's supposed to be doing?

Mr. KATSAS. He is current—the head of—currently the head of state.

Ms. WATERS. That's right. That's right. The Taliban——

Mr. KATSAS. The Taliban is no longer the ruling government.

Ms. WATERS. Absolutely. It is not a government organization. But it's still in existence; is it not? Is it not the organization that's up on the border between Afghanistan and Pakistan, still giving us a lot of trouble?

Mr. KATSAS. I assume so. You're well beyond my expertise.

Mr. COBLE. Well, the gentlelady's time has expired.

Ms. WATERS. Thank you.

Mr. COBLE. As the gentlelady from California pointed out at the outset, folks, we have covered a lot of ground, we Members of this Subcommittee. And we've gleaned valuable information, in my opinion; thanks in no small part to the outstanding witnesses—and today being no exception to that—who have contributed very ably and very significantly to this problem.

As we—I'm going to make this clear later, but the record will remain open for 7 days. But as we go about trying to resolve some of these problems, I don't want any of us to become oblivious to the fact as to why we had a PATRIOT Act to begin with. I mean, we were attacked on 9/11. And I'm afraid that many Americans have maybe—you know, we Americans have short memory spans, and we forget. But I don't want us to forget that, because that's very significant.

I appreciate the witnesses for your testimony. The Subcommittee appreciates your contribution. In order to ensure a full record and adequate consideration of this important issue, the record will remain open for additional submissions for 7 days. Also, any written question that a Member wants to submit should be submitted within that same 7-day time frame.

The gentleman from Massachusetts?

Mr. DELAHUNT. Yes, if the Chair would indulge me for a moment?

Mr. COBLE. Yes, sir. The gentleman from Massachusetts.

Mr. DELAHUNT. I don't know if the Chair could inform us, but can we anticipate further hearings?

Mr. COBLE. If I may be brutally frank, I hope not, but——

Mr. DELAHUNT. Okay. [Laughter.]

Mr. COBLE. But I'll say to the gentleman from Massachusetts, I don't know that with certainty. This is our eighth one, as you know. And I think there may be two others that may involve the full House Judiciary Committee. That's a fair question, Mr. Delahunt, but I don't have an answer right now.

Mr. DELAHUNT. Okay. Mr. Chairman, if you know, or at least I would hope that, if there will be additional Subcommittee hearings—or if you could convey this to the appropriate personnel on the full Committee staff—I would suggest that, in terms of the timing, you know, a Tuesday at 2, as opposed to a Tuesday at 10, time would probably be more conducive to Members, in terms of attendance.

Mr. COBLE. Very well.

Mr. SCOTT. Mr. Chairman?

Mr. COBLE. Yes, sir.

Mr. SCOTT. And I would hope that we would, if and when legislation is actually drafted, we could have hearings on that legislation. I think it would be extremely helpful.

Mr. COBLE. And by the way, I don't want anyone to think that I am being too casual when I said I hope not. My point is that we have other matters that fall under the jurisdiction of this Subcommittee, other than the PATRIOT Act. And that's what I meant, that that will afford us additional time to direct attention to those other features.

This concludes the oversight hearing on the "Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004."

Thank you for your cooperation, and the Subcommittee stands adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]





## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. I appreciate your holding this hearing on the issues surrounding the material support provision of the USA PATRIOT Act. This provision has proved troublesome in its application. It has proved to be particularly troublesome in the context of humanitarian and disaster relief efforts where aid workers are severely hampered by bizarre implications of a provisions that attempts to make an exception for medical and humanitarian relief, but not for food and water, or medical supplies to provide for the medical procedures to provide the relief.

Various aspects of the provision have been found unconstitutional by several courts. We have not had a definitive ruling on it from the U.S. Supreme Court, so the issues are still being litigated.

We made some fixes to the provision in the 9/11 bill we passed last year, but there still appear to be problems. Moreover, that fix is sunsetted to expire in 2006, so it is timely that we are revisiting it at this time.

So, Mr. Chairman. I look forward to the testimony of our witnesses on what problems have arisen with the provision and what it takes to fix it, assuming it can be fixed. And I look forward to working with you to implement their recommendations. Thank you.

