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STEPHEN I. LANDMAN
INTRODUCTION

For over a week in late January 2002, Wall Street Journal reporter Daniel Pearl was bound, blindfolded, and tortured by Khalid Sheikh Mohammed, a self-proclaimed member of Al-Qaida.\(^1\) His traumatic experience was put to a gruesome and public end on January 31, 2002 when his beheading was broadcast via Internet for the world to see.\(^2\) The terrorist group that claimed responsibility for this act allegedly maintained bank accounts at a number of financial institutions throughout the Middle East and the United States.\(^3\) Through these bank accounts, Al-Qaida was able to finance the murder of Daniel Pearl as well as its operations in general.\(^4\)

Like many other criminal enterprises, terrorist organizations\(^5\) rely on a vast support network to undertake their violent acts, and at the apex is financial support.\(^6\) Accordingly, in the

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\(^4\) Complaint at 21, Pearl v. Sheikh, No. 07 Civ. 6639 (S.D.N.Y. July 24, 2007); see generally, *Progress Since 9/11: The Effectiveness of U.S. Anti-Terrorist Financing Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the H Comm. on Financial Services*, 108th Cong. 3 (2003) (statement of Steven Emerson, Executive Director, Investigative Project on Terrorism) (explaining that “[a] detailed look into terrorist financing and money laundering schemes reveals for instance that al Qaeda and other terrorist groups have employed, and continue to employ, U.S. financial institutions and resources to fund terrorist operations worldwide.”).

\(^5\) For the purposes of this paper, the term “terrorist organization” refers to those entities and individuals designated by the United States government as either a “Foreign Terrorist Organization” (FTO) or “Specially Designated Global Terrorist” (SDGT). See Audrey Kurth Cronin, The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations. CRS Report No. RL 32120. Oct. 21, 2003 (discussing the process of designating an individual or entity as a terrorist organization). See also *Specially Designated Nationals List*, United States Department of Treasury: Office of Foreign Assets Control, available at http://www.treas.gov/offices/enforcement/ofac/sdn/t1lsdn.pdf (last updated Oct. 10, 2007).

\(^6\) See James Kitfield and S. Levy, *Q & A: Revoking al Qaeda’s Checkbook*, NAT’L J. (June 24, 2006) (“terrorist organizations must have financing to: (1) pay for protection; (2) bribe public officials; (3) conduct recruitment, indoctrination, and training; (4) pay for general operational expenses and equipment; (5) provide logistical support;
fight against terrorism, a prime objective must be preventing the free flow of money between terrorist organizations and financial institutions.⁷

Recognizing that the war on terror will need to be fought on a number of fronts, and that cutting off terrorist financing will further the United States’ mission, on September 24, 2001, President George W. Bush launched an attack against the financial foundations of the global terror network.⁸ Building upon existing counter-terrorism legislation, the President unveiled Executive Order 13224, explaining that pursuing those who provide financial assistance to terrorist groups sends a clear message to global financial institutions: “you are with us or you are with the terrorists. And if you are with the terrorists, you will face the consequences.”⁹

The financial war currently being waged against terrorist groups has been left largely to the federal government.¹⁰ To date the U.S. Department of Justice has failed to obtain a conviction against a financial institution for terrorist financing.¹¹ If the US is going to be effective in its fight against terrorist organizations it must expand the parameters of the financial war on terrorism. Recognizing the inherent limits of criminal prosecution, American citizens injured in foreign terrorist attacks have recently brought civil lawsuits against not only the

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(6) communicate; (7) increase their organizations infrastructure; (8) pay operatives’ families; (9) provide support to families of martyrs; (10) fund humanitarian efforts; (11) and pay for various other sundry items.”).


terrorist themselves, but also against the support networks that facilitate their violent acts.\textsuperscript{12} Relying on the Anti Terrorism Act of 1990 (ATA), these plaintiffs have looked to courts to hold accountable those individuals and entities that make acts of international terrorism possible.\textsuperscript{13} Not only do these lawsuits provide a remedy to victims of terrorism, they allow for wider enforcement of the existing terrorist financing laws.

One industry that has been implicated in terrorist financing operations is financial services providers, particularly global banks. Despite strict regulatory schemes, financial institutions remain an industry vulnerable to terrorist groups seeking to finance their operations.\textsuperscript{14} Banks have invested billions of dollars a year developing new technology and implementing new security protocols in order to maintain compliance with existing statutory requirements. While the majority of banks have done a tremendous job assisting U.S. and international law enforcement in cutting off funds to terrorist groups, some financial institutions are still open for business to terrorist dollars.\textsuperscript{15} Holding these banks accountable is one area where criminal law enforcement is lacking.\textsuperscript{16}

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\textsuperscript{15} See e.g., Laura Mandaro and Matthias Rieker, \textit{Foreign Banks Quick to Aid U.S. Terror Hunt-At Least for Now}, BANK TECH. NEWS (2001) (explaining that following September 11, 2001, European Banking centers were quick to assist the United States in labeling bank accounts linked to terrorists).

\textsuperscript{16} The United States has yet to prosecute criminally a financial institution for providing material support to terrorists.
\end{flushleft}
In response to the absence of criminal prosecutions, private citizens have only brought a handful of cases.\textsuperscript{17} Banks, faced with civil liability for their actions, have defended these suits by claiming either that they were unaware of the customer’s designation as a terrorist organization, or that they were merely providing “routine banking services.”\textsuperscript{18} Although many of these cases are in the early stages of litigation, the results thus far have been mixed.\textsuperscript{19} Courts evaluating these cases must determine how broad the ATA and subsequent amendments should be read, and what specific bank services ought to be prohibited. The resolution of this issue has important public policy implications. Courts must balance the need to prevent terrorist financing with the inherent costs that a broader reading would have, both on financial institutions and their customers. Ultimately, courts must conclude that despite the costs, the lack of an available alternative makes a broad reading necessary. Moreover, courts must explain that when it comes to financing terrorist groups, there is no such thing as “routine banking services.”

This article evaluates civil liability for financial institutions that provide material support to terrorist organizations. Part I of this article analyzes the development of the ATA and related legislation proscribing material support to terrorist groups, highlighting the evolving statutory construction by looking to the body of case law surrounding lawsuits against the terrorist support network. Part II examines the issue of terrorist financing generally, taking into consideration the challenges facing financial institutions. Finally, Part III analyzes the term “financial services” in the context of material support prohibitions, referencing the ongoing litigation against financial institutions under the ATA. Using the lawsuit filed on behalf of Daniel Pearl as a case study, this


\textsuperscript{18} See \textit{In re} Terrorist Attacks, 349 F. Supp. 2d at 780; Linde, 384 F. Supp. 2d 571; and Weiss, 453 F. Supp. 2d 609

\textsuperscript{19} Compare Weiss, 453 F. Supp. 2d 609, \textit{and} Linde, 384 F. Supp. 2d 571 (denying bank motions to dismiss and currently in discovery), \textit{with In re} Terrorist Attacks, 349 F. Supp. 2d 765 (granting banks’ motions to dismiss).
article concludes that a broad interpretation of the statute is not only in line with the legislative intent of the ATA, but is also the only way in which it can be effective in halting terrorist financing.
I. DEVELOPMENT OF A PRIVATE CAUSE OF ACTION UNDER THE ATA

A. A CIVIL COUNTERPART TO THE GOVERNMENT’S WAR ON TERRORIST FINANCING

Historically, the responsibility for punishing individuals and entities that aided terrorists has fallen to the government. President Bush picked up where previous administrations had left off and implemented an “unprecedented international campaign to deter and dismantle the sources of terrorist financing.” Since that time, both the executive and legislative branches have publicly directed law enforcement officials to remain pro-active in pursuing terrorists and their private supporters. As a result of this focus, government prosecutors have announced “substantial progress not only in disrupting the activities of potential terrorists and their supporters but closing off whole avenues that terrorists have used to sustain themselves in the United States.”

Despite these achievements, impediments to destroying the terrorist’s financial infrastructure still remain. The war on terrorist finances is virtually without borders, and must be fought accordingly. The United States has devoted tremendous federal resources to shutting

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22 See Protecting Our National Security from Terrorist Attacks: A Review of the Criminal Terrorism Investigations and Prosecutions: Hearing Before S. Comm. on the Judiciary, 108th Cong. (Oct. 21, 2003) (statement of Paul J. McNulty) (citing illegal money remitters; credit-card bust-out schemes, and false identification as a few examples). See also Progress in the War on Terrorist Financing, U.S. Department of Treasury, (Sept. 11, 2003) available at www.ustreas.gov/press/releases/reports/js721.pdf (during the two years following September 11, “the U.S. and International Partners had seized or frozen nearly $200 million in terrorist-related assets and had designated 315 individuals and organizations as terrorists or as part of terrorist support networks.”).
23 See John Roth, Douglas Greenburg, Serena Wille, National Commission on Terrorist Attacks Upon the United State: Monograph on Terrorist Financing. Staff Report to the Commission, at 7 (“The inability to get records from other countries, the complexity of directly linking cash flows to terrorist operations or groups, and the difficulty of showing what domestic persons knew about illicit foreign acts or actors all combine to thwart investigations and prosecutions.”). See also Safeguarding the Financial System from the Abuse of Financial Crime, Financial Crimes Enforcement Network, Strategic Plan FY 2006-2008 (discussing the evolution of terrorist finances, the enforcement schemes available, and the continuing challenges).
down the financiers of terrorist groups and has been largely successful.\textsuperscript{24} Private citizens victimized by acts of terrorism believe that more can still be done. They have taken up arms against this support structure, focusing their attention on the one industry that is vital to terrorist organizations—financial institutions.\textsuperscript{25}

Lacking the investigative and prosecutorial ability of the federal government, citizens have taken aim at these banks armed with a seldom-used statute.\textsuperscript{26} Over a decade ago, Congress implemented the Anti-Terrorism Act of 1990 (ATA), providing a civil cause of action for victims of international terrorism.\textsuperscript{27} The law recognized the growing threat that terrorism posed to American citizens and the diminishing availability for civil redress for the victims of these


\textsuperscript{26} The Anti Terrorism Act of 1990, 18 U.S.C. § 2333 (2002) Under the statute, a federal cause of action exists for “any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism…” Id.

\textsuperscript{27} 18 U.S.C. § 2333(a) (2002) (“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.); see also Jennifer Rosenfeld, The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way, 15 Suffolk Transnat’l L. J. 726 (Spring 1992); and Civil Remedies for Victims of Terrorism, American College of Trial Lawyers (Oct. 2005), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileId=205 (both discussing the effect that the newly enacted ATA had on civil litigation for victims of international terrorism).
attacks. Finally, victims of terrorism no longer had to worry that their attempts at remuneration would be blocked by the courts based on procedural technicalities and practical impossibilities. The ATA was enacted as a complement to the already existing criminal sanctions available to the United States in preventing and punishing terrorist attacks. As such, Congress envisioned a statute that’s scope would extend beyond the terrorists themselves and attach liability at any point leading up to a terrorist attack.

B. DEFINING TERRORISM AND DETERMINING LIABILITY

1. What is An Act of “international terrorism?”

Under the ATA, a civil cause of action exists for any U.S. citizen injured by way of an act of “international terrorism.” Although “international terrorism” is broadly defined, the threshold requirement is that it “involve violent acts or acts dangerous to human life.” At first glance the provision of banking services may not appear to be an act of “international terrorism,” in that it may not “involve violent acts.” But would it be enough if the customer in question was

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28 See AntiTerrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 101st Cong. (1990) (statement of Sen. Grassley) (“With this law, the people of the United States will be able to bring terrorists to justice the American way, by using the framework of our legal system to seek justice against those who follow no framework or defy all notions of morality and justice.”). See also e.g., Walter W. Heiser, Civil Litigation As A Means of Compensating Victims of International Terrorism, 3 SAN. DIEGO INT’L L.J. 1 (2002) (discussing the procedural difficulties associated with obtaining and enforcing judgments against terrorist groups and their private and state sponsors); Jennifer Elise Plaster, Cold Comfort and a Paper Tiger: The (UN)Availability of Tort Compensation for Victims of International Terrorism, 82 WASH. U. L. Q. 533, 539 (2004) (explaining that prior to the enactment, “victims of international terrorism were precluded from bringing suit against the governments of states that sponsored terrorism, and were often left with no legal recourse and little opportunity for compensation.”).


30 Anti Terrorism Act of 1990: Hearing Before the SubComm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. (1990) (statement of S. Grassley) (“While Congress has enacted several laws extending American criminal jurisdiction to acts of international terrorism against our citizens, our civil justice system provides really little relief.”); see also, infra Part ____.


a terrorist organization? Although the legislative history of the statute envisions a broad basis of liability, as one court explained “the question is: how far removed from a violent act can an action be and still be an activity ‘involved’ in that violent act?" With courts understandably skeptical over the reach of the newly enacted statute, plaintiffs faced another obstacle in bringing to justice members of the terrorist support network—showing that the assistance was in itself an act of “international terrorism.”

Although the phrase “international terrorism” undoubtedly provided the most expansive base of liability, interpretation of that loaded phrase has proven difficult for courts. Despite the statutory language, “attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term ‘terrorism’. Recognizing that terrorist tactics are in a constant state of flux, and that attempts to enumerate acts of terrorism would be futile; the United States characterizes terrorism in broad terms. By choosing not to catalog terrorist offenses or more clearly delineate potentially culpable support activity under the ATA, the final determination had been left largely to the courts. The first court to evaluate the breadth of the ATA as applied to terrorist supporters was Boim v. Quranic Literacy Institute. In Boim the parents of seventeen year old David Boim, who had been killed by a terrorist attack in Israel, filed a lawsuit against Hamas as well as individuals

34 Boim v. Quranic Literacy Institute, 127 F.2d 1002, 1012 (N.D.II. 2001).
38 See Memorandum from Sen. Jon Kyl, Dismantling the Terror Network: the Need for a Stronger Material Support Statute (July 6, 2004) available at www.rpc.senate.gov (explaining that “the Senate should not entrust this important tool in the war against terror to appeals to the courts.”).
39 Boim, 127 F.2d at 1014.
and organizations that provided support to the group. All but one of the defendants filed motions to dismiss, arguing that even if they had provided support in the form of finances, the ATA required that the defendant directly participate in the terrorist attack. The court rejected both parties’ arguments and settled on a ‘middle of the road’ approach. The court explained that on one end of the spectrum, the plaintiff’s interpretation was so broad that it would “provide little guidance to courts concerning where to draw limits or as to what behavior Congress intended to fall under it.” Conversely, the court determined that the defendant’s reading, that only the perpetrators of the violent act itself are covered, was inconsistent with the plain language of the statute. Accordingly, the court adopted the interpretation developed by the Fourth Circuit in a domestic terrorism prosecution. The court reasoned that Congress intended the statute to “[reach] beyond the violent act itself to the individuals who knew about the violent act and participated in the preparation of the plan to commit the violent act.” In other words, the statute would be applicable not only to the bomb thrower, but to the person who built the bomb, or in the context of financial services, paid for bomb-making materials.

2. Expanding the Definition of “international terrorism” and the Development of the Material Support Offenses

Even before the Seventh Circuit upheld the district court’s decision in Boim, Congress had begun to recognize the inherent ambiguity in the ATA. Accordingly, Congress began a long march towards a clearer enumeration of terrorism related offenses. The development of new

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\text{\textsuperscript{40} Id. at 1003.}
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\text{\textsuperscript{41} Id. at 1011.}
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\text{\textsuperscript{42} Id. at 1014.}
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\text{\textsuperscript{43} Id.}
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\text{\textsuperscript{44} Id.}
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\text{\textsuperscript{45} Id. (adopting the analysis of United States v. Wells, 163 F.3d 889, 892 (4th Cir. 1998)).}
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\text{\textsuperscript{46} Id. at 1014-15.}
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\text{\textsuperscript{47} See Seventh Circuit Recognizes Implied Action for Aiding and Abetting Terrorism-Boim v. Quranic Literacy Institute, 291 F. 3d 1000 (7th Cir. 2002), 116 H ARV. L. REV. 713, 714 (2002) (discussing the Seventh Circuit’s decision to affirm the lower court’s ruling extending liability under the ATA beyond the individual terrorist).}
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criminal offenses began with the first material support statute—18 U.S.C. § 2339A, which criminalized the provision of “material support or resources” or the concealment of the same “knowing or intending that they are to be used in preparation for, or in carrying out” a terrorist act. 48 Two years later, Congress enacted a companion material support law, 18 U.S.C. § 2339B, expanding the scope of liability by criminalizing the knowing provision of material support or resources to a foreign terrorist organization, irrespective of intent. 49 The statutes collectively define “material support or resources” to include a comprehensive array of items and services. 50 Included in the definition is the provision of “financial services,” which intuitively would serve as the basis for any claim against a financial institution. 51

Recognized together as the “material support” offenses, the enactment of these laws clarified the definition of “international terrorism,” and opened new doors to disrupting and punishing terrorist organizations, both civilly and criminally. 52 As Boim explained, criminal

50 See 18 U.S.C. § 2339A(b) (2002) (defining “material support or resources.”). See also Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (May 5, 2004) (statement of Robert M. Chesney, Assistant Professor of Law, Wake Forest University School of Law) (grouping the definition into four distinct categories: (1) funding (currency, monetary instruments, financial securities, and financial services); (2) tangible equipment (weapons, lethal substances, explosives, false documentation or identification, communications equipment, and other physical assets, except medicine or religious materials); (3) logistical support (lodging, expert advice or assistance, safehouses, facilitates, training and transportation); and (4) personnel).
52 Dan Eggen and Steve Fainaru, For Prosecutors, 1996 Law is Key Part of Anti-Terror Sretagy: Some Courts Troubled by Broad Terms of Previously Seldom-Used Law, WASHINGTON POST, Oct. 15, 2002, at A02. See also Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S.
conduct as defined by the material support statutes qualifies as an act of “international terrorism,” and is therefore sufficient to establish civil liability under the ATA. This decision appeared to remove the final bar to recovery for victims of terrorism looking to hold financial supporters liable. Having more clearly defined an act of “international terrorism,” courts then took to evaluating the specific provisions of the material support provision.

C. The Evolving Interpretation of “Material Support or Resources”

In part due to the fluidity of terrorist operations, and partly in response to judicial interpretations, the material support statutes have undergone a number of amendments. Currently, “material support or resources” is defined as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” The current enactment is illustrative of Congressional intent to maintain the effectiveness of this important counterterrorism tool, while clarifying the scope of the statute in response to judicial decisions.55

53 Boim, at 1016 (“§§ 2339A and 2339B clearly indicate that Congress did view [material support] as [international terrorism],” for which the ATA provides a cause of action.”).
55 Aiding Terrorists-An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (May 5, 2004) (Statement of Sen. Orrin Hatch) (discussing possible amendments to the “material support statutes” stating, “I hope this hearing will bring to light the very real successes stemming from the PATRIOT Act’s terror-fighting tools, as well as provide an opportunity to share constructive suggestions for classifying the Act if necessary.”).
Many of the provisions of the statute have been unchallenged in courts. This is arguably due to the fact that “[w]hile few of these terms are models of clarity, most are clear enough. For example, we all know what ‘currency’ and ‘explosives’ are.” In fact, prior to the recent challenges to the term “financial services,” only a handful of the more than a dozen provisions had been challenged. Every court to evaluate the statute has upheld it against over breadth challenges, however when addressing claims that the terms of the statute are unconstitutionally vague, courts have split. Aside from the stated legislative intent favoring a broad interpretation, we can infer intent by reviewing congressional response to judicial interpretation.

1. **Chipping Away at the Material Support Statute—The Ninth Circuit Holds “training” and “personnel” Too Vague**

The first court to address a challenge to the material support statute’s terminology was *Humanitarian Law v. Reno.* (Humanitarian Law I) In *Humanitarian Law I,* the Ninth Circuit ruled on a request for preliminary injunction that, if granted, would have allowed six U.S. organizations to provide support to two designated terrorist groups. The organizations specifically challenged the statute’s prohibitions against providing “personnel” and “training.” The Ninth Circuit, rejecting the government’s attempt to more clearly define the statute, upheld the lower court’s determination that the terms were impermissibly vague.

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57 * (Including “training,” “personnel,” “expert advice or assistance,” “communications equipment,” “medicine,” and “services.”).
59 Humanitarian Law v. Reno, 205 F.3d 1130 (9th Cir. 2000)
60 The “designated terrorist organizations” were the Kurdistan Workers’ Party and the Liberation Tigers of Tamil Eelam, both designated by the United States government as Foreign Terrorist Organizations. Available at http://www.state.gov/s/ct/rls/fs/37191.htm
61 Humanitarian Law, 205 F.3d at 1137.
62 Id.
The primary concern of the Ninth Circuit in striking down this portion of the statute was that it was not clear from the plain language who it could be applied to. With regards to “personnel” the court explained that, “it is easy to see how someone could be unsure about what [the material support statute] prohibits…as it blurs the line between protected expression and unprotected conduct.” Ignoring the government’s explanation that the term personnel should be limited to activity “performed under the direction or control of the foreign terrorist organization,” the court imagined a scenario where the term personnel could be applied “to somebody who engaged in the purely constitutional act of advocacy on behalf of the terrorist group.” Likewise, the court explained that the term “training was unconstitutionally vague because “it is easy to imagine protected expression that falls within the bound of this term.”

2. Legislative Response to the Ninth Circuit—The American Taliban, The Lackawanna Six, and Lynne Stewart

Less than two years after the Ninth Circuit ruling, federal courts in Virginia and New York rejected the holding in *Humanitarian Law* as it applied to the term “personnel” in the material support statute. In both cases, the defendants, United States citizens charged with providing material support to *Al-Qaida* in the form of personnel, challenged the constitutionality of the law.

The first significant development came in 2002, when John Walker Lindh, the so-called “American Taliban” was indicted for among other offenses, providing material support to *Al-
In United States v. Lindh, the federal court in the Eastern District of Virginia, rejected the defendant’s argument that the term was so vague that “a mere bystander, sympathizer, or passive member will be convicted on the basis of association alone.” In addition to denying the defendant’s motion to dismiss the material support count of the indictment, the court rejected the reasoning of the Ninth Circuit Court of Appeals. The Lindh court explained that contrary to the holding in Humanitarian Law I, the plain meaning of the term “personnel” was appropriately broad. Lindh, looking to the legislative intent of the statute, reasoned that the “term is aimed at denying the provision of human resources to proscribed terrorist organizations, and not the mere independent advocacy of an organization’s interests or agenda.” The court accepted the government’s interpretation of the statute and found that an ordinary person reading the term in the context of the statute would understand that it was applicable “only to those who work under the direction and control of [a terrorist] organization.”

Six American citizens were arrested in September 2002 in Lackawanna, NY for having attended an Al-Qaeda training camp in Afghanistan, and charged with violations of the material support statute. In United States v. Goba, a federal judge in the Western District of New York followed the reasoning of Lindh rather than Humanitarian Law I. The judge explained that “one can be found to have provided material support or resources to a foreign terrorist organization by offering one’s services to said organization and allowing one’s self to be indoctrinated and trained as a “resource” in that organization’s beliefs and activities.”

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70 Lindh, 212 F. Supp.3d at 572.
71 Id.
72 Id.
73 Id. at 574.
74 Id. at 572.
76 Goba, 220 F. Supp. 2d at 194.
77 Id.
Along with a number of co-defendants, Lynne Stewart, the attorney to imprisoned Sheikh Omar Abdel-Rahman, was indicted for providing material support for allegedly passing messages to Abdel-Rahman’s terrorist organization. The Southern District of New York, in *United States v. Sattar*, reviewed the indictment charging that “communications equipment, personnel, currency, financial security and financial services, and transportation” were provided to a foreign terrorist organization. The defendants challenged the material support provisions of “communications equipment,” “personnel,” “transportation,” “currency,” and “financial services.” In siding with the Ninth Circuit, the court explained that, “whatever the merits of *Lindh* as applied to a person who provides himself or herself as a soldier in the army of an FTO, the standards set out there are not found in the statute, do not respond to the Court of Appeals in *Humanitarian Law Project,* and do not provide standards to save the provision of personnel from being unconstitutionally vague.”

*Sattar* also provided the first challenge to the provision of “communications equipment.” The defendants allegedly provided telephones, computers, and fax machines in order to transmit, pass, and disseminate messages, communications and information between and amongst members of a terrorist organization. Having failed to show that the defendants had actually provided the communications equipment rather than just using it, the government argued “use equals provision.” In rejecting this argument and holding the provision unconstitutionally

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80 *Id.* at 362 (having rejected the first two provisions on vagueness grounds the court never addressed the other three challenges. The court stated that although there has not been a challenge to these terms, “prohibiting the supply of such tangible forms of material support is clearly a legitimate exercise of Congress’ power.”).
81 *Id.* at 359 (as in *Humanitarian Law I*, the court rejected the government’s narrower interpretation).
82 *Id.* at 348
83 *Id.*
84 *Id.*
vague, the court explained that, “the government’s evolving definition of what it means to
provide communications equipment to an FTO…reveals a lack of prosecutorial standards.”

3. The Patriot Act—The More Things Change the More They Stay the Same

In response to the attacks of September 11, 2001, Congress enacted Title III of the USA
PATRIOT ACT on October 26, 2001. The act, which broadened the definition of material
support or resources, added the proscribed act of “expert advice or assistance.”

Almost immediately after the passage of the Patriot Act, the California courts faced the
second round of challenges to the material support statute in Humanitarian Law Project v.
Ashcroft. (Humanitarian Law II) In Humanitarian Law II, the challenge focused on the newly
enacted proscription against “expert advice or assistance.” The court, in following the tradition
set in Humanitarian I, agreed with the plaintiffs that the term “expert advice or assistance” is at
least as vague as the terms “training” and “personnel.” The court concluded that, “like the
terms ‘personnel’ and ‘training,’ ‘expert advice or assistance’ could be construed to include
unequivocally pure speech and advocacy protected by the First Amendment.

4. Congressional Response Held Insufficient

In response to continuing constitutional challenges, and the infirmities recognized by the
Ninth Circuit, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA)

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85 Id. at 358
86 USA Patriot Act, Title III
87 See Ross Panko, Banking on the USA PATRIOT Act: Endorsement of the Act’s Use of Banks to Combat Terrorist
Financing and a response to its Critics, University of Maryland School of Law (June 29, 2004) available at
http://ssrn.com/abstract=560501 (discussing the effect that the Patriot Act had on the material support statute and its
usefulness in fighting terrorist financing).
89 Id.
90 Id. at 1199 (arguing that (1) “expert” fails to identify the types of activities which may or may not be undertaken,
(2) “advice” is virtually synonymous with “training,” (3) “assistance,” which is potentially broader than “advice,”
could encompass nearly any human resources support, and (4) although the modifier “expert” makes the ban on
advice and assistance less broad than the ban on the provision of “personnel,” it is still similar to, and potentially
broader than, the ban on “training.”
91 Id. at 1185.
in December 2004.\textsuperscript{92} The IRTPA should have cured the deficiencies identified within this key counterterrorism tool.\textsuperscript{93} It defined “expert advice or assistance” as “advice or assistance derived from scientific, technical, or other specified knowledge.”\textsuperscript{94} To address the concerns about avoiding prosecution of those who provide material support by accident or mistake, the amendments instructed that only those who knowingly or intentionally contribute to terror groups are liable.\textsuperscript{95} Furthermore, to ease the fears of courts interpreting the statute, the 2004 IRTPA states that, “nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment.”\textsuperscript{96}

Shortly after the enactment of the IRTPA came a renewed challenge to the material support statute. In \textit{Humanitarian Law v. Gonzalez (Humanitarian Law III)}, a California District Court was asked to reevaluate the statute in light of the recent amendments.\textsuperscript{97} Here the court evaluated the changes related to the terms “training,” “expert advice or assistance,” and “personnel.”\textsuperscript{98} The government went one for four, with the court concluding that the terms “training,” “expert advice or assistance,” and “service” were impermissibly vague; however the amendments to the term “personnel” cured the vagueness concerns.\textsuperscript{99} The court addressed each provision in turn.

\begin{itemize}
\item \textsuperscript{92} Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.
\item \textsuperscript{93} \textit{See A Review of the Material Support to Terrorism Prohibition: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (April 20, 2005) (statement of Barry Sabin, Chief, Counterterrorism Section of the Criminal Division, Department of Justice) (explaining that the definition formerly was limited to specified types of material support and “other physical assets,” and that Congress’s action to clarify this definition “assures that no form of terrorist assistance or activity will escape the reach of the statute.”).}
\item \textsuperscript{94} Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, at §6603(b), 118 Stat. at 3762 (codified at §2339A(b)(3)).
\item \textsuperscript{95} Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, at §6603(f) (codified at §2339B(h)).
\item \textsuperscript{96} Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, at §6603(f) (codified at §2339B(h)).
\item \textsuperscript{97} Humanitarian Law Project v. Gonzalez, 380 F. Supp. 2d 1134 (C.D. Cal. 2005)
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id. at 1149
\end{itemize}
The court held that the IRTPA amendment to “training” fails to cure the concerns that the court previously identified, because ordinary persons “must now guess whether teaching international law, peacemaking, or lobbying constitutes a ‘specific skill’ or ‘general knowledge.’”100 Likewise, “expert advice or assistance” is vague for fear that it could be construed to include activities protected by the First Amendment.101 Specifically, the court believed that the IRTPA amendment defining “expert advice or assistance” as among other things “other specialized knowledge,” is impermissibly vague in that it “includes the same protected activities that ‘training’ covers.”102 The district court granted partial summary judgment for the government, and both parties appealed.

In Humanitarian Law Project v. Mukasey, (Humanitarian Law IV), both parties repeated their earlier arguments, with the court upholding the lower court’s ruling on as to the terms “training,” “expert advice or assistance,” “service,” and “personnel.”103 Considering the proscription against “training” the court found it “highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami-related aid, one is imparting a “specific skill” or “general knowledge.”104 As to “expert advice or assistance,” the court declared that although “the inclusion of the phrase ‘scientific, technical, or other specialized knowledge’ does not clarify the term ‘expert advice or assistance’ for the average person with no background in law… the portion of the “expert advice or assistance” definition that refers to “scientific” and “technical” knowledge is not vague.”105 Likewise the Court held the term “service” to be impermissibly vague because “the statute

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100 Id. at 1150.
101 Id. at 1151.
102 Id.
103 Humanitarian Law Project v. Mukasey, No. 05-56846, slip op. 16135, 16155 (9th Cir. Dec. 10, 2007).
104 Id. at 16157.
105 Id. at 16158-9.
defines ‘service’ to include ‘training’ or ‘expert advice or assistance’ and because ‘it is easy to imagine protected expression that falls within the bounds of the term ‘service.’ In addition to upholding the lower court’s rulings that were favorable to the plaintiff, the court also reiterated that the AEDPA’s prohibition on providing “personnel” is not vague because “unlike the version of the statute before it was amended, the prohibition on “personnel” no longer blurs the line between protected expression and unprotected conduct.”

5. Where Does that Leave Courts?

In recapping the Humanitarian Law line of cases, one commentator explained: “[t]hese rulings…challenged the straightforward, un-nuanced theory of material support: terrorism is a patent evil; an organization which engages in it as any part of its operations forfeits the right to any type of assistance.” Despite this, the back and forth between Congress and the judiciary has produced some consistency in interpreting the material support law.

First, every court to analyze the material support statutes has rejected argument that the law violates the First Amendment. Courts have instead, drawn a distinction between advocacy and aid. In Humanitarian Law I, the court explained that while the plaintiffs were free to advocate the goals of the terrorist organizations, the ban on material support was aimed at stopping aid to the terrorist groups. In Lindh the court explained that “[the defendant] is accused of joining groups that do not merely advocate terror, violence, and murder of innocents;
these groups actually carry out what they advocate and those who join them, at whatever level, participate in the groups’ acts of terror, violence and murder.”111 The court went further in stating that, “those who choose to furnish such material support to terrorists cannot hide or shield their conduct behind the First Amendment.”112

In the challenges brought against the material support statute, courts have consistently upheld a broad reading of the statute and its provisions. As one commentator explains it, “the broad sweep of the law is not accidental.”113 Even in Humanitarian Law I, the court rejected an over-breadth argument explaining that, “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”114 This simple fact recognizes that in order to successfully prosecute the terrorist support network currently in place, the laws must be construed as broadly as possible.115

111 Lindh, 212 F. Supp.3d at 569.
112 Id. at 570
113 Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (May 5, 2004) (statement of Robert M. Chesney, Assistant Professor of Law, Wake Forest University School of Law)
114 Humanitarian Law v. Reno, 205 F.3d at 1136 (“there is no way to control the manner in which the donations are used. Even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts.”). See also Humanitarian Law Project v. Mukasey at 16163. (“because the AEDPA section 2339B is not aimed at expressive conduct and because it does not cover a substantial amount of protected speech, we hold that the prohibition against providing ‘material support or resources’ to a foreign terrorist organization is not facially overbroad.”). See also Michael Kraft, Letter to the Editor, What an AntiTerrorism Law Bans, WASHINGTON POST, Oct. 30, 2007, at A14 (“terrorist groups that run clinics or schools use these operations to recruit supporters and potential operatives. Funds for this purpose are more important than the relatively small amount of money needed to assemble suicide bombs.”).
115 A Review of the Material Support to Terrorism Prohibition: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (April 20, 2005) (statement of Barry Sabin, Chief, Counterterrorism Section of the Criminal Division, Department of Justice)
II. DETECTING AND DETERRING TERRORIST FINANCING

A. WHAT IS TERRORIST FINANCING?

As former U.S. Secretary of State, Colin Powell, explained “money is the oxygen of terrorism. Without the means to raise and move money around the world, terrorists cannot function.”\textsuperscript{116} In order to ensure continued survival, “terrorists need to raise funds, open and use bank accounts, and transfer money.”\textsuperscript{117} The process of terrorist financing—the act of knowingly providing something of value to persons and groups who encourage, plan, or engaged in terrorist activity—is executed using both official and unofficial financial systems.\textsuperscript{118} Admittedly, the United States will need to develop new strategies for combating the use of alternative “underground” systems such as \textit{hawala}, however, the focus here is on the applicability of the material support statutes as they apply to the typical banking system.

Although intuitively we know that terrorist operations cost money, there is some disagreement over the estimated cost of the “average” terrorist attack.\textsuperscript{119} Even more difficult to determine are the operating costs for terrorist organizations.\textsuperscript{120} Despite law enforcement’s best


\textsuperscript{117} \textit{A Review of the Material Support to Terrorism Prohibition: Hearing Before the S. Comm. on the Judiciary, 109th Cong.} (April 20, 2005) (statement of Barry Sabin, Chief, Counterterrorism Section of the Criminal Division, Department of Justice).


\textsuperscript{119} \textit{See The Financing of Terror Organizations: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs,} 108\textsuperscript{th} Cong. (2003) (statement of Dr. Louise Richardson) (arguing that while 9/11 cost an estimated half million dollars, the average terrorist attack costs much less). \textit{But see Joshua Prober, Accounting for Terror: Debunking the Paradigm of Inexpensive Terrorism.} GAO Report No. 06-19, at 5 (Nov. 1, 2005 (“while actual terrorist operations require only comparatively modest funding, international terrorist groups need significant amounts of money to organize train, and equip new adherents and to otherwise support their infrastructure.”)).

\textsuperscript{120} One source of these estimates is the annual report of seized terrorist assets issued by the U.S. Treasury Department’s Office of Foreign Asset Control. \textit{See generally Terrorist Assets Report: Calendar Year 2005 Fourteenth Annual Report to Congress on Assets in the United States of Terrorist Countries and International
efforts, terrorists have continued to adapt and develop new methods of financing their organizations in order to avoid detection and maintain a viable financial infrastructure. Adding to the versatility of terrorist organizations is that unlike traditional financial crimes such as money laundering, terrorism financing is more difficult to trace. Whereas the focus in a money laundering investigation is the source of the money, terrorist financing investigations are more forward looking in that the focus is on the recipient and application of the funds.

**B. HOW ARE BANKS INVOLVED?**

Recognizing the importance of the war on terrorist finances and the difficulty associated with monitoring individual transactions to determine the final destination of otherwise innocuous funds, the United States has taken a different approach to terrorism financing investigations. The result is a list of foreign terrorist organizations for whom the provision of financial services constitutes a crime. These lists as well as updated information are then forwarded to banks who are tasked with instituting policies to prevent the flow of terrorist finances through their vaults.

With the help of foreign and domestic officials, financial institutions have begun to implement stricter oversight systems to better detect the financial activity of terrorist
organizations. The underlying justification for this cooperation is largely driven by a calculation of the potential risks and profits. On the one hand, implementation of the required procedures is costly. One estimate is that compliance with the laws costs financial institutions approximately seven billion dollars a year. In addition to the cost to the financial institutions, it is estimated that bank customers bear an additional billion dollars a year as a result of the regulations. On the other hand, banks stand to lose a great deal for failing to establish proper protocols.

Primarily there is issue of liability. The threat of fines, criminal indictments, and now civil liability has led to an increase in cooperation. Some companies and industry officials, however, believe that these requirements have led to a “flood of ‘defensive filings’ aimed at avoiding future liability.” These officials argue that instead of assisting, these additional reports hamper the government’s efforts to crack down on terrorist financing. This concern is substantial, and it is one that government officials must take under consideration; but it cannot be the justification for avoiding regulatory schemes. In addition to civil and criminal liability, there is the public perception factor. It is assumed that banks do not want to be associated with terrorist finances, and that as a result they will implement the necessary procedures. As David Aufhauser explained, “[banks] enjoyed their plausible deniability of connection, and that if you could unmask them and shame them and perhaps threaten their assets, you could have a profound

126 See Adam Rombel, Banks Battle Terror Financing with Software, Global Finance. September 2002 (discussing the cottage industry that has developed out of the new compliance measures); but see Scott J. Paltrow, U.S. Says Banks Overreport Data for Patriot Act. WALL ST. J. July 7, 2005, at C1.
128 See Id.
130 Id.
impact on deterring the planning and execution of acts of terrorism."\textsuperscript{131} Despite the costs, most financial institutions have contributed tremendously to the global financial war on terrorism.\textsuperscript{132} The question remains, what avenues of relief are available, both criminal and civil, not only to prevent but also to punish the complicity of financial institutions in terrorist financing.

\textsuperscript{131} The War on Terrorism: The Financial Front, Council on Foreign Relations, Jan. 10, 2007 (Transcript), available at\url{http://www.cfr.org/publications/12432}

\textsuperscript{132} See e.g., Joseph M. Myers, The Silent Struggle Against Terrorist Financing, 6 GEO. J. INT’L AFF. 33, 35 (2005) ("The financial services sector, which had previously opposed to many of the PATRIOT Act provisions, was extraordinary cooperative and patient with the United States and other countries trying to unravel the financial trail left by the 9/11 hijackers."). See also, Leo Wolosky and Stephen Heifetz, Regulating Terrorism, 34 L. & POL’Y IN INTERNAT’L BUS. 1, 1 (2002) (explaining that a significant number of reports on suspicious transactions has already being made by financial institutions pursuant to existing statutory obligations).
III. MATERIAL SUPPORT IN THE WAR ON TERRORIST FINANCING

A. DEFINING “FINANCIAL SERVICES”

The material support offenses have been an important tool against the underground support network of terrorist groups. Despite the broad application of the statute, they have been an undervalued resource against the financial institutions that store and move terrorist finances. The plain language of the statute prohibits the provision of “financial services.” Intuitively this may be a clear and unambiguous term, however, it has recently been the subject of debate. In a recent string of civil suits filed by victims of international terrorism, courts in New York and the District of Columbia were tasked with interpreting the scope of “financial services” as applied to financial institutions.

In bringing their claims under the ATA, these plaintiffs have alleged that a number of financial institutions should be held liable for providing “financial services” to foreign terrorist organizations in violation of the material support statutes. The banks contend that they were simply providing “routine banking services,” conduct that they argue is not covered by the statute. Most courts have properly rejected this argument as purely semantics; explaining that even the provision of “routine banking services,” when knowingly provided to a terrorist, subjects a bank to liability under the material support statutes.

As is illustrated from the legislative intent, the statute was enacted to have a broad scope. Its usefulness would be undermined if courts could not cast a wide net over the types of support and services that keep a terrorist organization functioning. Courts must adhere to this legislative

intent, and continue to reject any attempts by financial institutions to implement a narrower interpretation of the term “financial services.” Congress did not intend to incorporate an exception for the provision of “routine” services, and any argument to the contrary would have the effect of putting banks on notice that as long as the services they provide are “routine” it’s acceptable to provide them to a terrorist group. To paraphrase one court interpreting the statute, there is nothing routine about the provision of financial services to a terrorist group.139

B. THE SLIDING SCALE OF LIABILITY—APPLYING MATERIAL SUPPORT TO FINANCIAL INSTITUTIONS

It is clear from the ongoing litigation that the involvement of financial institutions in terrorist financing has ranged from the near benign all the way to direct and intentional provision of assistance in conducting terrorist operations. In response to this, courts have implemented a sliding scale analysis, apportioning liability based on the type of conduct that the banks have allegedly engaged in. At one end of the spectrum, you have financial institutions that have and in a few cases continue, to act as the bank for foreign terrorist groups. These institutions that are essentially acting in concert with terrorist groups are precisely the target of the material support statutes, and accordingly liability must attach. At the other end of the spectrum are banks that acted as unknowing conduits for terrorist funds either because the group was not designated or the connection to the actual account holder was too far removed to effectively have put the bank on notice that it was dealing with a terrorist group. While the determination at either end of the spectrum may appear clear-cut, the question courts must answer is where along the scale does the conduct become “material” and as a result open the bank to criminal and civil liability? This sliding scale has produced an unacceptable level of ambiguity surrounding the enforcement of this statute.

139 Linde, 384 F. Supp. 2d 571.
1. **Knowledge as a Basis of Liability**

In order to remove this ambiguity, courts must look not just at the level of conduct, but at the scienter of the bank. Under 2339A, the first material support statute, Congress proscribed “material support or resources...knowing or intending” they be involved in an act of international terrorism.\(^{140}\) Among the reasons for the enactment of the supplemental 2339B, was Congressional concern that “terrorist organizations could raise funds “under the cloak of a humanitarian or charitable exercise.”\(^{141}\) To violate Section 2339B, it is required only that one “knowingly provide...material support or resources” to a designated foreign terrorist organization\(^{142}\) Congress’ choice to omit the word “intending” from 2339B while using it in 2339A suggests that Congress did not wish for 2339B to include an intent requirement.\(^{143}\) By enacting this broader law, courts could now hold individuals or entities liable for the provision of material support regardless of intent.\(^{144}\)

The clearest enunciation of the standard for “financial services” claims comes out of the Eastern District of New York. In *Linde v. Arab Bank PLC*, the court explained that “[s]ection 2339B is violated if the Bank provides material support in the form of financial services to a designated foreign terrorist organization and the Bank either knows of the designation or knows that the designated organization has engaged or engages in terrorist activities.”\(^{145}\) The same year, a court evaluating a claim under the ATA brought by victims of the September 11, 2001 attacks dismissed all claims against a number of banks alleged to have provided material support to *Al-

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\(^{140}\) 18 U.S.C. § 2339A(a).

\(^{141}\) Weiss, 453 F. Supp.2d at 626 (citing H.R. Rep. 104-393 at 43 (1995)).

\(^{142}\) See Humanitarian Law Project v. Gonzalez, 380 F. Supp. 2d at 1144-1148 (explaining that the material support statute does not require specific intent to commit specific acts of terrorism).

\(^{143}\) Weiss, 453 F. Supp.2d at 625.

\(^{144}\) See also Intelligence Reform and Terrorism Prevention Act of 2004 (amending §2339B to include the phrase “to violate this paragraph a person must have knowledge that the organization is a designated terrorist organization...or that the organization has engaged in or engages in terrorist activity...or terrorism.”).

\(^{145}\) Linde, 384 F. Supp.2d at 587.
The court explained that according to Boim, “to adequately plead the provision of material support… a plaintiff would have to allege that the defendant knew about the terrorists’ illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities.”\textsuperscript{147} This interpretation is an improper reading of the statute as well as the prior case law. As already discussed, 2339B does not include a requirement of intent, only knowledge. In Boim, the court referenced “intent” in responding to a First Amendment challenge, explaining that a showing of intent was the only way to impose liability on mere association, a purely protected activity.\textsuperscript{148} Conversely, the material support statute, is not prohibiting mere association, it prohibits active support of a terrorist organization.

\textit{Weiss v. National Westminster Bank PLC} provides a clearer understanding of specifically what sources financial institutions are expected to review.\textsuperscript{149} In Weiss, the bank was accused of providing financial services to The Jennin Committee, The Tulkarem Committee, and The Holy Land Foundation.\textsuperscript{150} In support of its motion to dismiss, the bank argued that the groups had not been formally designated as terrorists by the U.S., and there was no obligation on the part of the institution to consult the Israeli list identifying the organizations as such.\textsuperscript{151} The court struck down this argument explaining that, “NatWest had reason to know of the activities of its clients because of its legal and self-imposed obligations to know its customers.”\textsuperscript{152} Although at first glance this may appear too far reaching, the court explained that, “there are several sources of information that may help financial institutions in determining whether a potentially suspicious or unusual transaction could indicate funds involved in the financing of

\textsuperscript{146} In re Terrorist Attacks, 349 F. Supp. 2d at 828.
\textsuperscript{147} Id. (Citing Boim, 291 F. 3d at 1023).
\textsuperscript{148} Boim, 291 F. 3d 1000.
\textsuperscript{149} Weiss, 453 F. Supp.2d at 626.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 627
\textsuperscript{152} Id. at 627 n.15
terrorism.”153 The message was clear: banks can no longer act as “unknowing conduits,” for terrorist monies. In a time where banks are obligated to institute “know your customer” and anti-money laundering procedures, it is unacceptable to claim to have not known of a group’s clear terrorist affiliation.

It is now clear that courts will infer knowledge based on a broad range of sources, both official and unofficial. Furthermore, the plain language of the statute explains that knowledge without intent is enough to trigger liability under the material support statute. The next step is deciding whether or not knowledge alone would establish liability. Congress has recognized that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”154 Moreover, as the court in Humanitarian Law II explained, “[m]aterial support given to a terrorist organization can be used to promote the organization’s unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used.”155 Considering that any support given to a terrorist group supports that group’s unlawful goals, it is reasonable to conclude that based on the case law and legislative intent, any support given to a terrorist group is material, regardless of its “materiality.” 156

2. Martyr’s “Death Insurance Plan”

153 *See Financial Action Task Force. (including lists maintained by the UN, the FATF, the United States, and the European Union. Furthermore, there is no statement that the list is exclusive). See also e.g., under the Wolfsberg principles, banks must implement procedures for consulting applicable lists and taking reasonable and practicable steps to determine whether a person involved in a prospective or existing business relationship appears on such a list.

154 Pub. L. 104-132 §301.

155 Humanitarian Law v. Reno, 205 F.3d at 1134.

156 Boim v. Holy Land Foundation for Relief and Dev., Nos. 05-1815, 05-1816, 05-1821, and 05-1822, slip op. at 64 (7th Cir. Dec. 28, 2007) (“If an individual or organization established a funding network in the United States designed to provide ongoing financial support for Hamas’s terrorist activities, a factfinder might reasonably infer that the act of establishing that network was a cause of ensuring acts of Hamas terrorism, even if no line could be drawn linking a particular dollar raised to a particular terrorist act.”).
Of all of the allegations put forth by the plaintiffs in these cases, the most distressing is the allegation that Arab Bank conspired to finance terrorist groups by knowingly administering what amounts to a “death insurance plan” for the families of suicide bombers in Israel. 157 On approximately October 16, 2000, the Saudi Committee in Support of the Intifada al Quds (Saudi Committee) was established as a private charity registered with the Kingdom of Saudi Arabia, whose purpose was to support the Intifada. 158 According to the complaint, in furtherance of this goal, Arab Bank in consultation with the Saudi Committee publicly announced plans to pay out 20,000 Saudi Riyals (the equivalent of about USD $5,316.06) to the families of terrorists killed or captured by the Israeli Defense Forces during the intifada. 159

The maintenance of the “death insurance plan” is relatively straightforward. Following a terrorist attack, the Arab Bank and or the Saudi Committee would be provided the names and personal information of the individuals that were responsible. 160 The financial institution, in consultation with the Saudi Committee and local representatives of Hamas and other terrorist groups, would then compile a finalized database of persons eligible for payments. 161 The families of the terrorist could then present the bank with a death certificate and a transfer would be made to the family’s account. 162 According to plaintiffs the Saudi Committee paid death benefits to at least 200 “martyrs” in the first year of its existence along, and as of November 2001, the Saudi Committee paid more than forty-two million dollars to terrorists and/or their beneficiaries. 163

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158 Id.
159 Id.
160 Id.
161 Id.
162 See e.g., Pearl Complaint (“Da A-Tawil perpetrated a suicide bombing attack on March 27, 2001 on behalf of HAMAS. He was designated Palestinian Authority Martyr No. 449. His father, Hussein Mohamed Favah Tawil, presented the ‘official’ certification to Arab Bank, and received a confirmatory receipt stating that the benefit was paid to his Arab Bank account in Ramallah.”).
163 Lindh, 212 F. Supp.3d at 588.
As the plaintiffs in *Linde* point out, this type of financial support provides an incentive to terrorism by providing the “type of support [that] is critical to the terror organizations’ efforts to win the hearts and minds of the Palestinian people and to create an infrastructure capable of solidifying their position within Palestinian society.”\(^{164}\) Taken as true, this conduct is exactly the activity that Congress intended to criminalize with the enactment of the material support statutes.

3. **There is No Such Thing as “routine banking services.”**

While it may be clear that running a “death insurance plan” is the type of activity that would inculpate a financial institution, what about more benign practices? *Weiss v. National Westminster Bank, PLC*\(^{165}\) and *In re Terrorist Attacks on September 11, 2001*\(^{166}\) provided an opportunity to evaluate claims where the banks were not engaged in such clear cut support for terrorist operations. Evaluating similar claims, two federal courts in New York came to divergent conclusions on the scope of liability under the ATA for providing financial services to a terrorist organization. Specifically, the courts differed in their evaluation of defendant arguments that they were merely providing “routine banking services.”\(^{167}\)

In *In re Terrorist Attacks on September 11, 2001*, family members of victims of the September 11 attacks filed a class action lawsuit under the ATA claiming that over two hundred defendants directly or indirectly provided material support to Osama bin Laden and the *Al-Qaida* terrorists.\(^{168}\) Among the financial institutions sued were al Rajhi Bank\(^{169}\), Saudi American

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\(^{164}\) Lindh, Complaint at ¶ 449.

\(^{165}\) Weiss, 453 F. Supp. 2d 609.

\(^{166}\) *In re Terrorist Attacks*, 349 F. Supp. 2d 765.

\(^{167}\) *In re Terrorist Attacks*, 349 F. Supp. 2d at 824 (defining “routine banking services” as “opening and maintaining bank accounts, collecting funds, transmitting funds, and providing merchant account credit card services.”).

\(^{168}\) *In re Terrorist Attacks*, 349 F. Supp. 2d at 780.

\(^{169}\) *See id.* at 831 (Al Rajhi Bank was founded in 1987 and now has a network of nearly 400 branch offices throughout Saudi Arabia and seventeen worldwide subsidiaries).
Bank\textsuperscript{170}, Arab Bank\textsuperscript{171}, and Al Baraka Investment & Development Corporation\textsuperscript{172}. Although each bank is alleged to have provided specific services, the general claim is that all of the banking defendants have “provided essential support to the \textit{Al-Qaida} organization and operations.”\textsuperscript{173} The court granted the defendant bank’s motions to dismiss, explaining that there is “no basis for a bank’s liability for injuries funded by money passing through it on routine banking business.”\textsuperscript{174}

Despite the low standard associated with a motion to dismiss, the court rejected the plaintiff’s factual allegations. Al Rajhi was alleged to be the “primary bank for a number of charities that serve as \textit{Al-Qaida} front groups.”\textsuperscript{175} The plaintiffs claimed that, “Arab Bank has long known that accounts it maintained were being used to solicit and transfer funds to terrorist organizations [and despite this knowledge] Arab Bank has continued to maintain those accounts.”\textsuperscript{176} Saudi American Bank and al Baraka were accused of providing bank account and facilities to receive donations for a committee of charity organizations that were known terrorist front groups.\textsuperscript{177}

The court in this case relied in large part on the level of knowledge of the defendants, however, it appears that the banks were given the benefit of the doubt in their claims that they

\begin{footnotes}
\textsuperscript{170} See \textit{Id.} at 833 (Saudi American Bank is based in Riyadh, Saudi Arabia, and was formed in 1980 pursuant to a royal decree to take over the then-existing branches of Citibank in Riyadh and Jeddah).
\textsuperscript{171} \textit{Id.} at 834 (Arab Bank is a Jordanian Bank with offices in New York).
\textsuperscript{172} \textit{Id.} at 835-6 (the financial arm of Dallah AlBaraka, a diversified conglomerate based in Jeddah which includes 23 banks in Arab and Islamic countries. Al Baraka is a holding company with 43 subsidiaries, including banks in Chicago and Houston).
\textsuperscript{173} \textit{Id.} at 831.
\textsuperscript{174} \textit{Id.} at 833; \textit{But See} Boim v. Holy Land Foundation for Relief and Dev., Nos. 05-1815, 05-1816, 05-1821, and 05-1822, slip op. at 64 (7th Cir. Dec. 28, 2007) (“A factfinder reasonably could conclude those who provide money and other general support to a terrorist organization are as essential in bringing about the organization’s terrorist acts as those who plan and carry out those acts.”).
\textsuperscript{175} See e.g., \textit{In re} Terrorist Attacks, 349 F. Supp. 2d at 832 (explaining that through al Rajhi, transfers were made to and from Mousa Marzook, a designated terrorist.)
\textsuperscript{176} \textit{Id.} at 834 (The plaintiffs alleged that (1) Arab Bank maintains accounts for front groups of terrorist orgs posing as charities; and (2) Arab Bank is used regularly by al Qaeda’s Spanish cell for cash transfers).
\textsuperscript{177} \textit{Id.}
\end{footnotes}
were ignorant to the fact that the “customers” were terrorist groups. To counter the defendant’s
claim that they were unknowing conduits for terrorist funds plaintiffs explained that the U.S.
government had put the bank on notice that it was being manipulated to fund Al-Qaida and other
terrorist groups almost a decade ago.\textsuperscript{178} The defendant countered that the Saudi Arabian
Monetary Agency had not adopted any requirements that would have imposed a duty on al Rajhi
to inspect financial transactions and ascertain the ultimate destination of its donations.\textsuperscript{179} The
court held that absent a duty on the part of the bank, “plaintiffs do not offer facts to support their
conclusions that al Rajhi Bank had to know that the charity groups were supporting terrorism.
\textsuperscript{180} The problem with this reasoning is that regardless of the lack of oversight in Saudi Arabia, the
United States and the international community have instituted specific requirements for
identifying, reporting, and preventing terrorist financing. These banks maintained offices in the
United States, and accordingly should have been held to answer for the failure to act in
preventing the transfer of terrorist funds.

In \textit{National Westminster} the bank defendant, NatWest, was a financial institution that was
based out of London.\textsuperscript{181} The lawsuit alleges that the bank maintained numerous accounts for
front groups of \textit{Hamas} operating as charitable organizations under the umbrella organization
ironically titled the Union of Good.\textsuperscript{182} Through this global network of charities, it is alleged that
money was knowingly transferred back and forth to \textit{Hamas} for a period of over nine years.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{178} See \textit{Id.} at 831 (explaining that in 1999, William Weschler of the National Security Council and Richard
Newcomb of the Office of Foreign Assets Control traveled to Saudi Arabia to warn al Rajhi Bank and its regulator,
the Saudi Arabian Monetary Agency, “that their financial systems were being manipulated or utilized to fund
terrorist organizations such as al Qaeda. Despite these warnings, al Rajhi failed to adopt even the most minimal
standards, which resulted in the use of the bank as an instrument of terror.”).
\item \textsuperscript{179} \textit{Id.} at 832.
\item \textsuperscript{180} \textit{Id.} at 833.
\item \textsuperscript{181} Weiss, 453 F. Supp.2d at 615.
\item \textsuperscript{182} \textit{Id.} (naming among the charities, the Orphan Care Society of Bethlehem, Al Islah Charitable Society in Ramallah-
Al-Bireh, The Ramallah Al Bireh Charitable Society, The Jenin charitable Committee, the Hebron Islamic
Association, Tulkarem Charity Committee, Al Mujama al Islami, the Islamic Charitable Society in the Gaza Strip,

To support their claim, the plaintiffs detailed three occasions in which NatWest accepted deposits on behalf of the charity groups from terrorist organizations, and three separate transactions where NatWest transferred funds to the *Hamas* front groups.\(^{184}\) The defendant, seeking dismissal of the complaint, argued that (1) the support was not direct; (2) the support was not material; and (3) that NatWest did not know that it was providing the services to terrorist groups.\(^{185}\)

In support of its first argument, the defendant claimed that the services were not provided directly to *Hamas* but to organizations with ties to *Hamas*.\(^{186}\) Recognizing that terrorist groups constantly change their identities in order to maintain secrecy, the court rejected this argument; holding that an organization cannot escape FTO status merely by adopting an alias.\(^{187}\) As the court explained, it is silly to suppose “that Congress empowered the Secretary to designate a terrorist organization...only for such periods of time as it took such organization to give itself a new name, and then let it happily resume the same status it would have enjoyed had it never been designated.”\(^{188}\) The court’s rejection of this indirect versus direct distinction was proper not only for practical reasons, but because of common sense.

\(^{183}\) The three primary charities were Interpal, designated by the United States as a Specially Designated Terrorist Organization in August 2003; Holy Land Foundation, designated as a Specially Designated Terrorist Organization by the U.S. on December 4, 2001; the Union of Good, whose board of directors was designated as a SDGT on November 7, 2001; and the Jenin Committee, Tulkarem Committee, and the Orphan Care Society, all designated by the Israeli government as terrorist organizations.

\(^{184}\) Weiss, 453 F. Supp.2d at 615-616.

\(^{185}\) Id. at 622.

\(^{186}\) Id.

\(^{187}\) Id.

\(^{188}\) See Id. (citing Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192, 200 (D.C. Cir. 2000)).
There are approximately 42 groups that have been listed by the United States government as Foreign Terrorist Organizations. Although it is easy to identify these groups on their face, realistically, a leader of Hamas does not walk into a bank in London and request to open an account in order to support the Intifada. What is more likely is that Hamas would use a front organization to set up their financial accounts. Although the U.S. and the international community must continue to unmask these front groups, financial institutions must deny services to the hundreds that have already been labeled. “We cannot allow charitable organizations to paint themselves as tools of goodwill when they are nothing more than facilitators of evil.”

The bank in Weiss grounded its second argument on two theories. The defendant argued that to impose liability for providing banking services would be redundant since the bank already had a duty to report suspicious activities under the BSA and other anti-money laundering statutes. The court rejected this theory, explaining that “Congress might have intended to create criminal and civil liability for banks that are providing banking services to FTO’s and to impose additional duties on banks to report and freeze any assets of FTO’s in their possession.” The defendant argued in the alternative in reliance on Terrorist Attacks, that a bank is not liable for injuries that merely pass through the bank.” In rejecting this argument, the court explained what its view of the Terrorist Attack decision. “The court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the court

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191 Weiss, 453 F. Supp.2d at 624.

192 Id.

193 Id.

194 Id. at 625.
relied on the routine nature of the banking services to conclude that the defendant bank had no
knowledge of the client’s terrorist activities.” The court went on to echo the decision in Linde
that when the bank knows that the group to which it provides services are engaged in terrorist
activities, “even the provision of basic banking services may qualify as material support.”

C. Case Study—Pearl Complaint

Until recently, the Southern District of New York had been presented with another
chance at evaluating the scope of liability under the material support statute. Daniel Pearl’s
wife filed the complaint under the ATA, alleging among other things that Habib Bank Limited
and al Rashid Trust International provided financial services to Islamic Jihad, and other terrorist
groups responsible for the death of her husband. Despite the merits of the case, the plaintiff
voluntarily dismissed the suit for unknown reasons on July 24, 2007. Accordingly, for the
purposes of the “financial services” analysis, this article will only analyze the claims against
Habib Bank Limited as they existed prior to the voluntary dismissal.

Habib Bank Limited was alleged to have maintained accounts for al Rashid Trust, knowing that they supported terrorist groups. In support of her claim, the plaintiff pointed to a
July 2006 report by the UN indicating that al Rashid Trust held at least two accounts at Habib
Bank Limited. Additionally, “Al Rashid and other fronts and groups have used a British
internet site called the Global Jihad Fund…to publish bank account information and solicit support” to terrorist groups.203

In evaluating this hypothetical claim under the ATA the court would likely hold the bank liable for providing “financial services” to a foreign terrorist organization.” The facts presented in this case, while not as strong as those of Linde certainly rise to meet those of Weiss and Terrorist Attacks. Pearl presents an analogous factual scenario to that of Terrorist Attacks: a bank providing financial services to a front group for a terrorist organization posing as a charity. Had the Southern District of New York had an opportunity to issue a ruling on this fact pattern, it would have been advantageous to clarify the holding from Terrorist Attacks. In that case, the court explained that there could be “no liability for injuries funded by money passing through it on routine banking business.”204 That holding was based in part on the courts conclusion that the banks did not have a duty to inspect the financial records of its clients. There is however an internationally recognized duty not to provide support to terrorist organizations; and banks, especially those operating in the United States, must consult the lists of designated terrorist groups compiled by the United States. In Pearl, Habib Bank continued to provide financial services to the Al Rashid Trust, despite its designation as an FTO.

The court must reject any argument that the maintenance of accounts and monetary transactions were “routine banking services.” Although the court in Terrorist Attacks used the routine nature of the services to determine knowledge, knowledge is readily identifiable here. Accordingly, the court must conclude that since the bank clearly knew it was providing the services to a terrorist organization, “even the provision of basic banking services may qualify as

203 Pearl v. Shiekh, 07 Civ 6639, ¶94
204 In re Terrorist Attacks, 349 F. Supp. 2d at 833.
material support.” The court has the ability to build upon its prior decision, and establish case
law in the Southern District that would be consistent with the legislative intent and practical
purpose of the statute. The court should explain that when it comes to the knowing provision of
financial services to a terrorist group, there is no such thing as “routine banking services.”

205 Weiss, 453 F. Supp.2d at 624 (citing Lindh, 212 F. Supp.3d at 588).
IV. CONCLUSION

The United States has declared war on terrorist organizations and their support network. The prime target of this financial war must be the financial institutions that are used to maintain and transfer funds for terrorist groups. Although the federal government has the ability to prosecute and punish any bank that provides support to terrorist groups; thanks in part to the ATA, individual victims of terrorist attacks now also have the ability to hold these banks accountable. As President Bush explained in announcing the global war on terrorist financing, “if you are with the terrorists, you will face the consequences.” Banks must understand that this applies to them as well.

The material support statutes were intended to cast a wide net and have a substantial impact on reducing the availability of items necessary to sustaining a terrorist organization. As with other terms found in the statute, the proscription of “financial services” must be read broadly. No court has sustained a challenge to the provisions as overbroad, and there is no justification to stray from this course in interpreting “financial services.” As an initial matter “financial services” is not overbroad in the context of the statute. Although the proscription of financial services in another context may be overbroad in another context if it was to impede a constitutional right, there is no constitutional right to finance terrorist organizations. The purpose of the law as explained during recent congressional hearings is to make an organization radioactive—“an entity that merits only our contempt, nor our contributions.” Because the law as a whole is intended to be broad, any possible chilling effect must be given limited discretion.


Furthermore, to the extent that the statute or specific provisions have been held to be broad, courts have held them to be reasonably broad. In other words, the prevention of terrorism allows for laws that are overbroad, so long as they are not substantially overbroad.

The question of vagueness presents a different analysis in that courts must find the term “financial services” to pass any vagueness challenge. Although courts have differed in their analysis of the term, they have not struck it down as vague. Like currency and explosives, “financial services” is clear. The statute does not ban “helping all bad terrorists,” but casts a wide net over the support structure in order to reduce the availability of funds and other items to terrorist groups.

With mixed results, banks have so far cloaked themselves in the “routine banking services” defense. This defense is in direct contravention to the purpose of the material support statute—namely to cast a wide net over the range of conduct necessary to maintain a terrorist operation. Courts must take this shield away from banks, and explain that if the bank is knowingly dealing with a terrorist or terrorist organization, they will be held liable, regardless of the types of services they provide.

Because of the unique position that money plays in terrorism, and due in part to its fungible nature, the statute must continue to be read as broadly as possible. Terrorists will continue to search out new ways to earn, store, and move money to fund their operations. The United States and the international community must continue to adapt to stay one step ahead of them. Terrorist groups will always be able to find new recruits, and people willing to die for their cause. But without the means to sustain their organizations and finance their operations, they will go bankrupt and disappear.