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MATERIAL SUPPORT PROSECUTIONS AND THEIR INHERENT SELECTIVITY

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The government's maintenance of a list of designated foreign terrorist groups and criminalization of any meaningful interaction or transactions – whether peaceful or violent – with such groups are no longer novel concepts. Inherent in both listing these groups and prosecuting individuals for assisting them, even in trivial ways, is the government's essentially unreviewable discretion to classify groups and proceed with any subsequent prosecutions. A summary review of the past quarter-century reveals the government's predilection for pushing the boundaries of what it deems "material support" to terrorist groups, all the while making greater and greater use of a criminal statutory scheme for foreign policy purposes. This Article explores the dynamics of the designation process and material support prosecutions, highlighting the selectivity inherent at every turn, which tells who and from what major monotheistic faith the terrorist threat emanates.

In 1996, the Supreme Court decided *United States v. Armstrong*, a case involving a selective enforcement challenge to the use of the criminal laws targeting the sale of crack cocaine.¹ *Armstrong*, an African-American defendant, made the argument that charges regarding crack, which at the time produced criminal sentences literally 100 times more harsh than the laws surrounding powder cocaine, were exclusively brought against Black defendants in the Central District of California, the area that contains the city of Los Angeles.² In raising the implication that the government was discriminating on the basis of race, *Armstrong* asked for discovery regarding the prosecutor's charging decisions in such cases.³ The Supreme Court rejected *Armstrong's* efforts, reasoning that the evidence he produced to bolster his discovery request was insufficient (an affidavit from an employee of the federal public defender attesting that all 24 of the office's crack prosecutions in the year 1991 were brought against African-American defendants).⁴ The Court's ruling was clear: actual evidence of direct prosecutorial bias must exist when a defendant al-

1. 517 U.S. 456 (1996).

2. *Id.*, at 458-62.

3. *Id.*

4. *Id.*, at 470.

leges a violation of their rights to equal protection under the law. Armstrong could not meet this standard, since none of the evidence tending to show prosecutorial bias originated from the prosecution. Of course, this ruling was quixotic in its circular formalism. In order for Armstrong to obtain access to the prosecutor's files, he had to show proof of prosecutorial bias—evidence which was only available if he had access to the prosecutorial files in the first place (or in the highly unlikely event that a prosecutor admitted to racially biased charging decisions). For all practical purposes, the U.S. Supreme Court effectively eliminated the possibility of proving an Equal Protection claim – one rooted in selective enforcement – in the context of a criminal prosecution.⁵

In 1996, Congress also passed its criminal ban on providing material support to designated Foreign Terrorist Organizations (FTOs), 18 U.S.C. §2339B (“Section 2339B”). Geared to stop the purportedly pressing problem of terrorist groups raising funds under the cover of humanitarian activity, the law relied on two critical congressional findings: 1) 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”; and 2) because money is fungible, any donation to an FTO – even that sent for credible charitable purposes – frees up money for weapons and violence.⁶ Material support itself is not limited to funds or weapons, but can encompass more abstract or attenuated concepts like speech, training, expertise, and personnel.⁷ There is no requirement that there be a link to an act of violence, as the support itself is what is criminalized by Section 2339B. This represents a novel type of criminal liability, under which convictions can bring a twenty-year prison sentence.⁸ In 2010, the U.S. Supreme Court ruled that it is constitutional to prosecute someone for providing material support, even if that support attempts to make an FTO choose peaceful means over violence.⁹ Since the September 11, 2001 attacks, Section 2339B has been the most utilized statute in terrorism prosecutions, with more than half of criminal defendants in such prosecutions facing material support charges.¹⁰

5. In the same term it decided *Armstrong*, the Court ruled in *Whren v. U.S.* that pretextual traffic stops by the police do not offend the Constitution, even if motivated by racial bias, as an officer's subjective intent is irrelevant as long as there is probable cause for the traffic stop itself. 517 U.S. 806, 813 (1996).

6. Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 577 n.200 (2011); Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 B.Y.U. L. REV. 1455, 1491 n.163 (2011).

7. 18 U.S.C. §2339A (defining “material support or resources”).

8. 18 U.S.C. §2339B.

9. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010).

10. *Trial and Terror*, THE INTERCEPT, <https://trial-and-terror.theintercept.com/>.

The U.S. Secretary of State is responsible for designating FTOs, a determination that relies on three findings; 1) that the group is foreign; 2) that it engages in terrorism or terrorist activity (defined in the broadest terms to encompass any nonstate violence for a political purpose); and 3) that terrorist activity “threatens the security of American citizens or U.S. national security,” which itself is an expansive and ambiguous term.¹¹ Critically, this third finding is essentially beyond the ambit of any federal court, so no FTO designated by the Secretary of State can petition a court to overturn a designation based on the fact that it has no quarrel with the United States.¹²

This legal structure lends itself inherently to selectivity, as terrorist groups that do not threaten American notions of national security presumably will not be designated. The decision to designate is solely within the executive branch’s purview, and is not subject to any outside scrutiny or input from non-government actors. The status of a terrorist group, as an organization engaged in violence of an inherently political nature, can change if and when the United States decides it is in the country’s interests to do so. After all, the list of FTOs comprises those groups of concern to the United States, not all those nonstate actors who engage in what domestic law calls terrorism.¹³ This is quite unlike the war on drugs – the other abstract concept that is also subject to a government-sponsored “war.” For example, heroin from Afghanistan and heroin produced in Thailand are both equally unlawful. Presumably, the federal government would never consider making just one of these types of heroin unlawful, while keeping the other legal.¹⁴

To know who the U.S. government considers a terrorist enemy, consider the following. At the time of writing, there are currently 73 groups designated as FTOs. All but 12 are Arab or Muslim in composition, and the vast majority of those are Islamist.¹⁵ All but 5 of the 51 groups designated post-9/11 have been Islamist,¹⁶ which serves as a fair

11. 8 U.S.C. §1189(a)(1), (d)(4).

12. See *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999); see Said, *The Material Support Prosecution and Foreign Policy*, supra note 6 at 569–70 (discussing the fate of legal challenges to FTO designations on such a basis).

13. 18 U.S.C. §2332b (g)(5)(a) (defining a “Federal crime of terrorism” as actions “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”).

14. See Wadie E. Said, *Limitless Discretion in the Wars on Drugs and Terror*, 89 U. COLO. L. REV. 93, 119–20 (2018).

15. *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM, <https://www.state.gov/foreign-terrorist-organizations/>.

16. *Id.* (The non-Islamist groups are the Communist Party of the Philippines/New People’s Army, Continuity Irish Republican Army, Revolutionary Struggle, Segunda Marquetalia, and Revolutionary Armed Forces of Columbia – People’s Army).

basis for concluding that the government believes that terrorism – or at least the terrorism worth acting against – derives largely from a particular religion and primarily originates in Africa, the Middle East, and South Asia. While the government is free under the law to decide what groups threaten national security, those decisions also send a clear message about the nature of the terrorist threat that gets uncomfortably close to criminalizing an entire faith. As the great majority of material support prosecutions feature charges of supporting Islamist groups, one type of material support – that of “personnel” – illustrates how the statute transforms individual defendants into an instrumentality of terrorism itself.¹⁷ In the more recent iteration of Section 2339B prosecutions, individuals are charged with providing themselves as “personnel” when they attempt to go the Middle East to volunteer on behalf of an FTO, usually the Islamic State (“IS”).¹⁸ These individuals, often young men of color, personify terrorism through their actions, even though the statute does not require any link to an act of violence. This is so even if it takes the form of an attempt bound to fail in a controlled sting set up by an informant.¹⁹

There is further selectivity involved in pursuing actual Section 2339B prosecutions. Just because a group has been designated does not mean that anyone will actually be prosecuted for providing it with material support. When I was an assistant federal public defender, I made several motions for relief and discovery based on the selective prosecution of my client, a Muslim-American citizen of Palestinian origin. Those motions were denied in relatively summary fashion by the court, without much legal reasoning deemed necessary, other than that I had not met *Armstrong’s* difficult standards. My argument was rooted in the fact that certain other, non-Muslim FTOs had been investigated by the FBI and were known to operate in the United States, but no one had ever been charged with materially supporting them. This is in stark contrast to the fact that the vast majority of defendants charged with violations of Section 2339B were alleged to have supported Islamist FTOs. That was, and

17. See 18 U.S.C. §2339B.

18. See, e.g., *U.S. v. Nagi*, 254 F. Supp. 3d 548, 557 (W.D.N.Y. 2017) (“When a defendant is charged with violating §2339B by providing himself as ‘personnel’ to a foreign terrorist organization [in this case, IS], the Government is not required to charge (or, ultimately, to prove) that a defendant planned, aided, or committed an act of terror at the direction of, in coordination with the foreign terrorist organization; such a requirement would be inconsistent with both the text and purpose of §2339B, which...was intended to prohibit the ‘aid that makes [terror] attacks more likely to occur’ – not terror acts themselves”).

19. See Trevor Aaronson, *FBI Counterterrorism Informant Spent a Decade Committing Fraud*, THE INTERCEPT (Dec. 29, 2020), <https://theintercept.com/2020/12/29/fbi-counterterrorism-informant-wire-fraud-scam/>; Nicole Hong, *In U.S. ISIS Cases, Informants Play a Big Role*, WALL ST. J. (Apr. 21, 2015), <https://www.wsj.com/articles/in-u-s-isis-cases-informants-play-a-big-role-1429636206>.

probably still is, of no moment to a selective enforcement argument. *Armstrong*'s terms are strict, and render the likelihood of success on such a claim virtually impossible.²⁰ My research, based on newspaper articles and the pointed lack of prosecutions of other similarly situated defendants of a different ethnoreligious background, was apparently insufficient.

The extremely broad deference afforded the government to designate FTOs, as well as decide on when to prosecute, also produces outcomes that speak to a country selectively protecting its interests, as opposed to treating all groups equally. Consider that in 2011, during a famine in Somalia, the State Department decreed that members of charitable groups that wished to provide aid to parts of the country controlled by FTOs would not be subject to a Section 2339B prosecution, provided they operated in good faith.²¹ But the purpose of the material support ban is to deny terrorist organizations assistance gathered under the cover of humanitarian activity, even in instances where the government admits that such charitable aid is undisputedly legitimate. While the outcome was correct in the Somalia example, there is no basis for denying legitimate humanitarian assistance in other, equally compelling humanitarian situations involving territory controlled by FTOs. Generally speaking, FTOs operate in parts of the world that are hard-hit by war, poverty, and famine, and denying charitable aid to whole populations based on the presence of certain undesirable actors reveals an American attitude that is concerned with its security only, no matter the humanitarian cost.

More contemporary developments have only served to highlight American attitudes that shift with political developments on the ground. The Kurdistan Workers Party ("PKK"), which is engaged in a struggle with Turkey over its desire for an independent Kurdistan, has been designated as an FTO since the first iteration of the terrorist list in 1997, and remains so listed today.²² During the upheaval in the Middle East that flowed from the emergence of the IS phenomenon, the United States openly allied with a group called the Syrian Democratic Forces ("SDF") to fight against IS.²³ The SDF is made up largely of Kurdish fighters from the People's Protection Units, which Turkey considers a front

20. See Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of *Whren v. United States**, 83 GEO. WASH. L. REV. 882, 885-86 (2015) ("[T]he Court has made proving freestanding Equal Protection claims in the criminal context virtually impossible") (citing *United States v. Armstrong*, 517 U.S. 456 (1996)).

21. See Wadie E. Said, CRIMES OF TERROR 61 (2015).

22. *Foreign Terrorist Organizations*, *supra* note 15.

23. Hwaida Saad & Rod Nordland, *Kurdish Fighters Discuss Releasing Almost 3,200 ISIS Prisoners*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2018/12/20/world/middleeast/isis-syria-prisoner-release-trump.html>.

group for the PKK, its age-old bugbear.²⁴ The main local force allied with the United States in the ultimately successful fight to remove IS from its strongholds in Northeastern Syria was effectively a poorly-disguised outcropping of a well-established FTO. What would have otherwise been clear evidence of criminal material support was provided by the US military in service of a greater policy goal. The government alone is able to make these types of exceptions, and later on decided to cut off its cooperation and support of the SDF when such an arrangement no longer suited it. Contrast this with the American plaintiffs, who were proposing to provide material support in the form of speech and expertise to, *inter alia*, the PKK, and sued to enjoin enforcement of Section 2339B.²⁵ In the 2010 opinion, the U.S. Supreme Court ruled against them, holding constitutional the criminalization of the provision of material support in the form of speech, even if the support is geared to helping an FTO use peaceful means instead of violence.²⁶ The structure of Section 2339B does not yield—unless the government allows it— even if the individual actor identifies with an FTO’s cause, and wishes to help advocate for it peacefully. Again, changes in a group’s status and decisions about when to prosecute are purely within the purview of the federal government.

Until recently, the implication of the FTO list and designation process was that terrorist groups seem to be exclusively nonstate in nature as evidenced by the fact that all the organizations on the list were in fact nonstate actors. However, in 2019 the State Department designated the Islamic Revolutionary Guard Corps (“IRGC”), a critical component of the Iranian state military and security apparatus, as an FTO.²⁷ While the designation was viewed as a kind of gift from the Trump administration to then-Israeli Prime Minister Benjamin Netanyahu to bolster his bid for reelection, many former and current American officials opposed it, not least for the fact that it could invite Iranian retaliation against American troops stationed in Iraq.²⁸ This was also the first instance where a Secretary of State designated an actual organ of a sovereign state as an FTO, a move that could spur other governments to adopt similar measures

24. *Id.*

25. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 14-15 (2010).

26. *Id.* at 39.

27. *Foreign Terrorist Organizations*, *supra* note 15; see also Alissa J. Rubin, *The Revolutionary Guard, Iran’s Enforcer of Ideology*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/09/world/middleeast/iran-revolutionary-guards-.html> (discussing role of IRGC in Iran).

28. Edward Wong & Eric Schmitt, *Trump Designates Iran’s Revolutionary Guards a Foreign Terrorist Group*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/world/middleeast/trump-iran-revolutionary-guard-corps.html>.

against national bodies of foreign states.²⁹ Again, the government has pushed Section 2339B's contours and limitless executive discretion into new areas, signaling the greater use of the material support ban for expressive foreign policy purposes, as opposed to solely a vehicle for criminal prosecutions. The likelihood of the IRGC actively raising funds in the United States, and thus being the subject FTO of a Section 2339B prosecution, is remote indeed, but designating an arm of a foreign government as a terrorist organization is a strong rhetorical tool, to be sure. Even with the shift from the Trump to the Biden administration, the IRGC has remained designated.

It should come as no surprise that removing a group from the FTO list is strictly the prerogative of the Secretary of State. But simply because a group has had its designation revoked does not mean that the government has a series of standards or benchmarks that any FTO can meet to be de-listed. For example, on his last day in office, Secretary of State Mike Pompeo designated the Houthi movement, which is engaged in a long-running civil conflict in Yemen with forces militarily supported by the United Arab Emirates and Saudi Arabia, largely as a move to support the Saudi-led coalition in the war.³⁰ In February 2021, the Biden administration revoked the designation less than one month after taking office, remarking that Yemen was suffering through "the world's worst humanitarian crisis," and that de-listing the Houthi movement would assist aid agencies in alleviating the crisis, while also maintaining the possibility of a negotiated settlement to the war in Yemen.³¹ But not all designated FTOs in areas of humanitarian crisis, where the possibility of a negotiated end to a civil conflict, expect to see their status lifted. Only those designated FTOs that comport with shifting American interests can expect to be de-listed. In another prominent example from 2012, the Iranian dissident group, Mujahedin-e Khalq ("MEK"), which was designated in 1997, was removed as an FTO by Secretary of State Hillary Clinton.³² The terse statement explaining the decision noted the factors Secretary

29. In early 2020, the Trump administration then took a further step against the IRGC when it authorized the killing of Qassim Suleimani, the IRGC's leader, via a drone strike as he was leaving Baghdad airport. See Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike Kills Qassim Suleiman, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html>.

30. Joseph Stepansky, *Biden Admin Ends Trump-era Houthi "Terrorist" Designation*, AL-JAZEERA (Feb. 16, 2021), <https://www.aljazeera.com/news/2021/2/16/biden-admin-ends-trump-era-houthi-terrorist-designation>.

31. Anthony J. Blinken, *Revocation of the Terrorist Designations of Ansarallah*, U.S. DEP'T OF STATE (Feb. 12, 2021), <https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/>.

32. *Foreign Terrorist Organizations*, *supra* note 15.

Clinton considered in arriving at her decision: “MEK’s public renunciation of violence, the absence of confirmed acts of terrorism by the MEK for more than a decade, and their cooperation in the peaceful closure of Camp Ashraf, their historic paramilitary base.”³³ While the decision to de-list the group came in the context of a lobbying campaign by conservative Republicans on its behalf, the group continues to be suspected of terrorist violence in Iran, belying the reasons behind the revocation of its FTO status, and further casting doubt on the neutrality of the designation process itself.³⁴

In conclusion, while Section 2339B has proved a successful vehicle for achieving convictions, its inherently selective framework regarding what groups get designated and what individuals get charged represents a deeply unprincipled state of affairs. There is now a greater understanding of the role explicit bias plays in this whole process. Terry Albury, a former FBI agent and convicted whistleblower, noted that it was “very clear from Day 1 that the enemy was not just a tiny group of disaffected Muslims. Islam itself was the enemy.”³⁵ In the context of the post-9/11 war on terror and its disproportionate focus of Islam, the overwhelming discretion of the government to label groups and charge individuals with supporting terrorism has been corrosive indeed—not simply to an individual’s constitutional rights, but to the fundamental fairness of the criminal process itself.

33. Press Release, Office of the Spokesperson, U.S. Dep’t of State, Delisting of the Mujahedin-e-Khalq (Sept. 28, 2012) (<https://2009-2017.state.gov/r/pa/prs/ps/2012/09/198443.htm>).

34. See Thomas Erdbrink & Mujib Mashal, *At Least 12 Killed in Pair of Terrorist Attacks in Iran*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/world/middleeast/iran-parliament-attack-khomeini-mausoleum.html>.

35. Janet Reitman, *I Helped Destroy People*, N.Y. TIMES MAG. (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html>.