



**REFORMING THE MATERIAL SUPPORT LAWS:  
CONSTITUTIONAL CONCERNS PRESENTED BY  
PROHIBITIONS ON MATERIAL SUPPORT TO  
"TERRORIST ORGANIZATIONS"**

**A REPORT BY THE CONSTITUTION PROJECT'S  
LIBERTY AND SECURITY COMMITTEE**

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## REFORMING THE MATERIAL SUPPORT LAWS: CONSTITUTIONAL CONCERNS PRESENTED BY PROHIBITIONS ON MATERIAL SUPPORT TO “TERRORIST ORGANIZATIONS”

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Cutting off support of terrorist activity is an important and legitimate part of the United States’ counter-terrorism strategy. Our government should have the tools needed to apprehend and punish not just terrorist leaders, but also those who work to facilitate and enable acts of terrorism. But in providing the legal authority to prohibit and punish such conduct, it is essential that the law respect constitutional freedoms.

Existing federal laws make it illegal to provide “material support” to groups that the government has designated as “terrorist.” In their current form, these laws raise serious concerns under the First and Fifth Amendments, because they define “material support” so expansively and vaguely as to criminalize pure speech furthering only lawful, nonviolent ends. The legal prohibitions are not limited to those who engage in such speech to support the illegal or terrorist acts of so-called terrorist organizations. They criminalize even speech that is intended to further, and in fact only furthers, lawful, peaceful, and nonviolent activities. Indeed, the criminal bar is so sweeping that it applies even to aid that is designed to *reduce* a group’s resort to violence by encouraging the peaceful resolution of disputes, and even where the aid can be shown to have had precisely that beneficial effect. In addition, because the law likely criminalizes any conduct undertaken under a designated group’s direction or control, it appears to penalize pure association. These aspects of the “material support” definition go far beyond the criminalization of financial support, and trench on important First and Fifth Amendment rights.

These concerns are not hypothetical. Federal prosecutors have invoked these laws to prosecute a student for running a web site that included links to other web sites featuring jihadist rhetoric by individuals associated with designated groups;<sup>1</sup> a satellite television provider for including a television channel run by another designated group;<sup>2</sup> and a lawyer for communicating to a reporter a statement from the leader of another designated group.<sup>3</sup> Moreover, in a long-running case now pending before the Supreme Court, the government has defended the application of these laws to prohibit a U.S. human rights group’s efforts to provide training in human rights advocacy and assistance in peacemaking to a designated group.<sup>4</sup>

The material support laws also raise constitutional concerns regarding the process by which groups and individuals are designated as “terrorist.” They give the executive branch extraordinarily broad discretion to designate individuals and groups, and provide little process to those who have been designated. As a result, they intrude upon important due process rights, at least when applied to individuals and entities with a presence in the United States.

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<sup>1</sup> Susan Schmidt, “Saudi Acquitted of Internet Terror,” Wash. Post, June 11, 2004, at A3. A jury acquitted the student of all “material support” charges.

<sup>2</sup> Benjamin Weiser, “A Guilty Plea in Providing Satellite TV for Hezbollah,” N.Y. Times, Dec. 23, 2008, at A21, available at <http://www.nytimes.com/2008/12/24/nyregion/24plea.html>.

<sup>3</sup> *United States v. Sattar*, 272 F. Supp.2d 348, 385 (S.D.N.Y. 2003) (declaring prohibition on providing “personnel” and “communications” to a designated group unconstitutionally vague). The government subsequently dropped those charges and issued a superseding indictment charging the lawyer with providing support to terrorist activities.

<sup>4</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 920-922 (9<sup>th</sup> Cir. 2008), cert granted sub nom. *Humanitarian Law Project v. Holder*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08-1498).

For these reasons and as outlined further below, we, the undersigned members of the Constitution Project's bipartisan Liberty and Security Committee, believe that the material support laws are in need of significant reform. This report addresses only the constitutional concerns raised by the application of these laws to pure speech, and those raised by the failure to provide appropriate due process protections in the designation process for organizations or individuals with a presence in the United States. We take no position on whether application of these laws to prohibit financial support of designated organizations raises separate constitutional concerns, nor on whether the procedural protections owed to entities and individuals with a presence in the United States should also extend – as a constitutional or policy matter – to entities or individuals without such a presence.

At the conclusion of this report, we propose several specific reforms.

## I. THE LEGAL REGIME

### A. The Criminal “Material Support” Statute - 18 U.S.C. § 2339B and 8 U.S.C. § 1189

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA Patriot Act in 2001 and again in 2004, authorizes the Secretary of State to designate “foreign terrorist organizations”<sup>5</sup> and makes it a crime for anyone to support even the wholly lawful, nonviolent activities of those designated organizations.<sup>6</sup>

The law authorizes the Secretary of State “to designate an organization as a foreign terrorist organization . . . if the Secretary finds that -- (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined at [8 U.S.C. § 1182(a)(3)(B)]); and (c) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.”<sup>7</sup> The term “terrorist activity” is broadly defined to include virtually any unlawful use of, or threat to use, a weapon against person or property.<sup>8</sup> The only exception from this terrorism definition is unlawful use of or threats to use a weapon that is engaged in for mere personal monetary gain.<sup>9</sup> “National security” is also broadly defined to mean “national defense, foreign relations, or economic interests of the United States.”<sup>10</sup> The Secretary's determination that a group's activities threaten our “national security” under the statute is judicially unreviewable.<sup>11</sup> Thus, while the law requires that a designated group have engaged in or threatened to use force in some way, it also permits the executive to choose among the many groups that fit that broad criterion on the basis of unreviewable political judgments about what jeopardizes our economic interests or foreign relations.

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<sup>5</sup> 8 U.S.C. § 1189(a).

<sup>6</sup> *See* 18 U.S.C. § 2339B.

<sup>7</sup> 8 U.S.C. § 1189(a)(1).

<sup>8</sup> *See id.* § 1182(a)(3)(B).

<sup>9</sup> *See id.* § 1182(a)(3)(B)(iii)(V).

<sup>10</sup> 8 U.S.C. § 1189(d)(2).

<sup>11</sup> *People's Mojahedin Org. of Iran v. U.S. Sec. of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).

Once the Secretary designates an organization and publishes the designation in the Federal Register, it becomes a crime, punishable by up to fifteen years of imprisonment (or life imprisonment if death results) and a substantial fine, to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so."<sup>12</sup> "Material support or resources" is defined as:

any property, tangible or intangible, or service, including 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 (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>13</sup>

In applying this statute, the Executive Branch has maintained that Congress in effect adopted an irrebuttable presumption that *all* support to such organizations furthers their terrorist ends.<sup>14</sup> The only exception from this broad prohibition is that the statute explicitly permits the donation of unlimited amounts of medicine and religious materials to designated organizations. Thus, in addition to being overbroad, the statute expressly discriminates between religious and political aid, permitting unlimited amounts of religious aid (even if it is intended to further terrorist activity),<sup>15</sup> while barring all political aid, even if it is designed to counter terrorism and promote peace.

Once the Secretary of State designates a group and publishes that fact in the Federal Register, the designated group may file a legal challenge in the United States Court of Appeals for the District of Columbia Circuit.<sup>16</sup> The court of appeals, however, does not consider any new evidence, but reviews only the evidence the State Department developed unilaterally in its designation process.<sup>17</sup> The government may, and generally does, present the bulk of its evidence in secret, so the designated group is not able to see the evidence used against it. The court of appeals may only set aside a designation if the Secretary's actions are arbitrary and capricious, and lack substantial support in the administrative record or in classified information submitted to the court.<sup>18</sup> To date, no group has succeeded in overturning its designation under this law.<sup>19</sup>

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<sup>12</sup> 18 U.S.C. § 2339B(a).

<sup>13</sup> *Id.* § 2339A(b).

<sup>14</sup> *See* AEDPA, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996).

<sup>15</sup> 18 U.S.C. § 2339A prohibits the provision of "material support or resources" for the purpose of furthering specified terrorist activities, but then exempts the provision of "medicine or religious materials" from the definition of "material support." Accordingly, even if an individual donated medicine *for the purpose of furthering terrorist activity*, his action would not be prohibited by the "material support" provisions, 18 U.S.C. §§ 2339A and 2339B.

<sup>16</sup> 8 U.S.C. § 1189(c)(1).

<sup>17</sup> *Id.* § 1189(c)(2).

<sup>18</sup> *Id.* § 1189(c)(3)(A)-(E).

<sup>19</sup> Immigration law also penalizes "material support." Foreign nationals can be denied entry or ordered deported for having provided material support not only to organizations designated as "terrorist," but even to organizations that have never been designated terrorist, but merely have at some point threatened to use a weapon against person or property. In one case, for example, a national of India was ordered deported for having set up a tent for religious services that were then attended by, among others, some members of an Indian guerrilla organization. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301 (3d Cir. 2004). The Constitution Project's Liberty and Security Committee previously addressed that issue in *The Use and Abuse of Immigration Law as a Counterterrorism Tool*, available at

## **B. Embargoing Individuals and Groups - the International Emergency Economic Powers Act**

The International Emergency Economic Powers Act (IEEPA) has also been employed to penalize support of disfavored groups and individuals.<sup>20</sup> This statute, designed to empower the President during emergencies to impose economic embargoes on foreign nations, has been used by several administrations to place embargos not on nations, but on individuals and groups. After the terrorist attacks of September 11, President Bush invoked the law to name 27 “specially designated global terrorists.”<sup>21</sup> He offered no explanation for why any of them were designated as such, or any criteria used for the determination. IEEPA establishes no criteria for such designations, and accordingly gives the President a proverbial “blank check.” President Bush also authorized the Secretary of the Treasury to designate still others using extremely broad criteria.<sup>22</sup> Under that authority, the Treasury Secretary has added hundreds of individuals and groups to the designated list. Once a group or individual is designated, all of its assets are frozen, and it becomes a crime for anyone to engage in any transaction with the group or individual, regardless of the purpose of the transaction.

As amended by the USA Patriot Act, the law also permits the Treasury Secretary to freeze an organization’s assets without even finding that it should be designated, based solely on a letter stating that the group is under investigation. The law does not require any degree of suspicion, does not require the Treasury Secretary to obtain advance judicial approval, and sets no time limit on the length that such a “block pending investigation” can last. In one case, the government has maintained a “block pending investigation” for more than three years – without any finding of wrongdoing by the affected organization.<sup>23</sup>

Groups or individuals may challenge IEEPA designations in federal court, but the government may defend its designations using secret evidence submitted to the court *ex parte* and *in camera* – in other words in secret and without participation by a lawyer representing the designated group or person. Moreover, the Treasury Department sharply restricts the ability of a group whose assets have been frozen to use those assets in its defense.

## **II. CONSTITUTIONAL CONCERNS**

The statutes described above prohibit association and speech in support of organizations designated on explicitly political grounds, even where the support takes the form of pure speech that aims to promote peace and discourage terrorist acts. Further, these laws grant executive branch officials effectively unreviewable discretion to target disfavored groups. The laws are so overbroad that they likely make it a crime to write an op-ed, provide legal advice, volunteer one’s time, or distribute a magazine for any “designated” group, even if there is no connection whatsoever between the individual’s speech and any illegal activity of the proscribed group.

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<http://www.constitutionproject.org/manage/file/48.pdf>. In that report, we recommended that Congress amend the immigration laws to eliminate deportation and exclusion based on speech and association.

<sup>20</sup> IEEPA, 50 U.S.C. §§1701-1706 (2000).

<sup>21</sup> Exec. Order No. 13,224, 66 Fed Reg. 49079 (Sept. 18, 2001).

<sup>22</sup> *See id.*

<sup>23</sup> *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, No. 3:08CV2400, 2009 U.S. Dist. LEXIS 80475 (N.D. Ohio Aug. 18, 2009).

## A. First Amendment Concerns

The material support laws' application to speech and association impinge on First Amendment freedoms in two ways. First, they penalize speech solely when it is undertaken in association with a disfavored group, thereby selectively penalizing association. Second, the laws' definition of "material support" encompasses protected speech that furthers only lawful, nonviolent ends.

Guilt by association is "alien to the traditions of a free society and the First Amendment itself."<sup>24</sup> The Supreme Court first recognized these principles when addressing a series of McCarthy era laws. In those cases, the Court either narrowly construed or invalidated a host of these laws for imposing guilt by association, where the statutes penalized association with the Communist Party without requiring proof of intent to further the Communist Party's illegal ends. Congress had specifically found that the Communist Party was a foreign-dominated group engaged in terrorism for the purpose of overthrowing the United States.<sup>25</sup> The Supreme Court accepted that finding, but nonetheless ruled that even with respect to such a group, individuals could not be penalized for their associations absent proof of "specific intent" to further the group's illegal ends.<sup>26</sup>

The material support statutes penalize association in two ways. They prohibit the provision of "personnel," defined as any work done under a designated group's direction or control. Since virtually anything one would do in association with a group could be said to be under its "direction or control," including, for example, sending a petition to Congress to protest the group's designation in response to a "Take Action" link on a website, this provision trenches on pure association. In addition, the statutes make the very same conduct – teaching human rights, for example – a crime if provided to a proscribed group, but permissible if provided to a non-proscribed group. Yet, contrary to the precedent established in the Communist Party cases, the material support laws require no proof that an individual's speech or association is intended to promote terrorism or other illegal ends.<sup>27</sup>

The courts have largely upheld the material support laws as applied to financial support, an issue this report does not address. But they have invalidated aspects of the definition of material support that reach pure speech. Several of the terms in the definition of "material support" are expressly targeted at speech, and some discriminate on the basis of content. Thus, the law prohibits the provision of "expert advice," defined as any advice "derived from scientific, technical, or other specialized knowledge." Such a definition targets speech on the basis of its

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<sup>24</sup> *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982).

<sup>25</sup> Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987 (codified as 50 U.S. § 781), *repealed by* Act of Dec. 17, 1993, Pub. L. No. 103-199, § 803(1), 107 Stat. 2329.

<sup>26</sup> *See, e.g., United States v. Robel*, 389 U.S. 258, 262 (1967) (finding that the government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

<sup>27</sup> The Supreme Court has held that even advocacy of illegal conduct is protected unless it is intended and likely to cause imminent unlawful action. *Brandenburg v. Ohio*, 395 U.S. 444, 447- 49 (1969).

content, permitting advice derived from “general” knowledge but prohibiting speech derived from “specialized knowledge.” Moreover, the impossibility of discerning whether advice is derived from general or specialized knowledge raises substantial vagueness concerns. The same problems are raised by the prohibition on “training,” which permits training in “general knowledge,” but not “specific skills.”

In addition to discriminating on the basis of content, several of the prohibitions are unconstitutionally vague as applied to speech. How is a teacher to determine, for example, whether her training promotes “general knowledge” or a “specific skill”? How is a lawyer to determine whether his advice is “derived from scientific, technical, or other specialized knowledge”? Another provision prohibits the provision of any “service,” a term left undefined, but which the government has said reaches any activity undertaken “for the benefit of” a designated group. And the “personnel” prohibition permits speech that is “entirely independent,” but criminalizes speech under the “direction or control” of a group. Would an op-ed writer who accepted two edits from a designated group’s leader be guilty? Citing some of these concerns, courts have struck down the prohibitions on providing “training,” “expert advice or assistance,” “personnel,” and “service” to designated groups as unconstitutionally vague as applied to speech.<sup>28</sup>

Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>29</sup> On this basis, the Executive Branch has argued that broadly criminalizing support even of groups’ otherwise lawful activities is necessary because support is fungible, and therefore any support, even to legitimate activities, frees up resources that can then be used to finance a group’s illegal activities. While we take no position in this report on the accuracy of this finding as applied to contributions of money, financial services, or non-humanitarian physical resources to designated organizations, we agree that this finding is unsupportable as applied to contributions through speech. Congress in fact heard no testimony concerning any specific terrorist group, much less all groups that might be designated terrorist, that would support such a “finding.” Moreover, the material support statutes prohibit as “material support” even pure speech designed to *discourage* resort to violence. There is no basis for concluding that, for example, training an organization in human rights advocacy would “free up” resources that the group could then use to engage in terrorism. Moreover, without any requirement to show intent to promote terrorist activity, this broad application of the material support statutes can be counter-productive, by chilling speech that might encourage lawful and nonviolent alternatives for resolving disputes.

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<sup>28</sup> See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9<sup>th</sup> Cir. 2000) (declaring prohibitions on providing “training” and “personnel” unconstitutionally vague); *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928-31 (9<sup>th</sup> Cir. 2008) (declaring prohibitions on providing “training,” “expert advice or assistance,” and “services” unconstitutionally vague), *cert. granted sub nom.*, *Humanitarian Law Project v. Holder*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08-1498); *United States v. Sattar*, 272 F.Supp.2d 348, 356-61 (S.D.N.Y. 2003) (declaring prohibitions on providing “personnel” and “communications” unconstitutionally vague).

<sup>29</sup> AEDPA, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996).

## B. Fourth Amendment and Due Process Concerns

The process the Executive Branch employs for designating entities and individuals also raises constitutional concerns, especially when applied to an entity or individual in the United States entitled to due process protections. The IEEPA authority permits the government to freeze an entity's assets indefinitely without a finding of wrongdoing, without even a finding of probable cause, and without any prior judicial approval. Two courts have held that such action constitutes a "seizure" under the Fourth Amendment.<sup>30</sup> The same courts have held that the Treasury Department failed to provide adequate notice of the charges to the designated entities, because, among other problems, it failed to provide notice of the factual and legal basis for the charges against the groups sufficient to allow them a meaningful opportunity to respond.<sup>31</sup> Other courts have rejected constitutional challenges, and permitted the government to defend its designations using secret evidence not disclosed to the challenger.<sup>32</sup>

In general, the courts have required that where a designated entity has a presence within the United States, due process requires that it be afforded an opportunity to make a presentation to the Treasury Department as designating authority, to be included as part of the administrative record.<sup>33</sup> But that is the extent of the group's opportunity to defend itself – it may submit evidence in writing. No hearing is required, and accordingly there is no opportunity to present witnesses or confront the government's witnesses.

There are many more precisely calibrated ways to stem the flow of funds for terrorist activity.<sup>34</sup> Congress has made it a crime to provide material support to enable commission of a wide range of terrorist acts; those statutes focus on an individual's aid to terrorist activity, not his or her association with a proscribed group.<sup>35</sup> Conspiracy and "aiding and abetting" statutes penalize persons who engage in overt acts in furtherance of terrorist conduct, even if the ultimate wrongdoing never comes to fruition.<sup>36</sup> Money laundering statutes expressly prohibit the transmission of money or funds with the intent of promoting terrorist activity.<sup>37</sup> And the

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<sup>30</sup> *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, No. 3:08CV2400, 2009 U.S. Dist. LEXIS 80475, at \*22-27 (N.D. Ohio Aug. 18, 2009); *Al Haramain Islamic Fdn, Inc. v. Dept of Treasury*, 585 F. Supp. 2d 1233, 1262-64 (D. Or. 2008).

<sup>31</sup> *KindHearts*, 2009 U.S. Dist. LEXIS 80475, at \*120-125; *Al Haramain*, 585 F. Supp. 2d at 1254-57.

<sup>32</sup> *See, e.g., Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

<sup>33</sup> *National Council of Resistance to Iran v. Dept of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). This report does not take a position on whether similar protections should extend to foreign organizations without a presence in the United States – either as a matter of due process, or as a matter of policy. Thus, based on current constitutional doctrine, our recommendations are limited to organizations or persons with a presence in the United States.

<sup>34</sup> We have no doubt that even under a narrowly tailored statute, Congress could designate Al Qaeda as a terrorist organization, in light of the fact that it is dedicated to violence against Americans and American interests.

<sup>35</sup> 18 U.S.C. § 2339A(a) (criminalizing aid to a long list of specific terrorist acts).

<sup>36</sup> Sheikh Omar Abdel Rahman, for example, was convicted of seditious conspiracy for his part in encouraging a plan to bomb various tunnels and bridges in New York City, even though he did not undertake any violent act himself. *United States v. Rahman*, 189 F.3d 88, 103-111 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).

<sup>37</sup> The Money Laundering Control Act makes it a crime, among other things, to transmit funds "with the intent to promote the carrying on of specified unlawful activity," including terrorism. 18 U.S.C. §1956(a)(2)(A). The USA PATRIOT Act added extensive new money laundering provisions designed to facilitate the investigation, prevention, and prosecution of money laundering related to terrorism. USA PATRIOT Act, Pub. L. No. 107-56, §§ 301-376, 115 Stat. 272 (codified as amended in scattered sections of 12, 15, 18, and 31 U.S.C.) (2001).

Racketeering Influenced and Corrupt Organizations Act, or RICO, permits the government to target ostensibly legitimate activities when they are a front for illegal conduct.<sup>38</sup> Thus, the constitutional protections of speech, association, and due process do not leave the government without tools for targeting the financing of terrorism. They simply require the government to target terrorist activity rather than political association.

## RECOMMENDATIONS FOR REFORM

For these reasons, we, the undersigned members of the Constitution Project's Liberty and Security Committee recommend the following reforms:

1. Congress should amend the definition of "material support" to provide that pure speech may be punished only if it is intended to further illegal conduct.
2. Congress should amend 8 U.S.C. § 1189 to require the responsible federal agency to provide designated organizations that have a presence in the United States with notice of the charges and evidence against them in sufficient detail to ensure that they have a meaningful opportunity to respond to the charges against them. The procedures should provide appropriate protections for classified information.
3. Congress should amend IEEPA to require that entities subject to designation that have a presence in the United States be afforded notice of the charges and evidence against them in sufficient detail to have a meaningful opportunity to respond to the charges against them. The procedures should provide appropriate protections for classified information.
4. Congress should amend IEEPA to require, consistent with the Fourth Amendment, that the Treasury Department must obtain judicial authorization based on probable cause that an organization with a presence in the United States has violated IEEPA before freezing such an entity's assets. The statute should include an exception for cases where the government reasonably fears that the assets will be removed from the country unless the assets are immediately frozen, so that there is not sufficient time to obtain a warrant. Any such action should, however, be subject to a probable cause hearing shortly after the action is completed.
5. Congress should carefully craft an amendment to expand the category of support or resources exempt from the definition of material support beyond "medicine or religious materials" to also include such humanitarian aid items as medical services, civilian public health services, and, if provided to noncombatants, food, water, clothing, and shelter.
6. Amend IEEPA or the governing regulations to require that consistent with the Fourth Amendment, the Treasury Department must obtain advance judicial authorization based on probable cause, consistent with the Fourth Amendment, and must also provide timely judicial review, consistent with the Fifth Amendment, of any decision to freeze assets of an organization with a presence in the United States pending investigation. The amendment should also limit the time that such a freeze pending investigation may last.

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<sup>38</sup> 18 U.S.C. §§ 1961-68. RICO prohibits the acquisition or maintenance of any enterprise through a pattern of racketeering, or with income derived from a pattern of racketeering. *Id.* § 1962. A wide range of terrorist activity and fundraising for terrorist activity is included within the definition of racketeering activity. *See id.* § 1961(1); *id.* § 2332b(g)(5).

These regulations should set out procedures for emergency orders similar to those under recommendation 4 above.

7. Amend IEEPA or the governing regulations to require the Treasury Department to provide a statement of reasons to an affected entity with a presence in the United States upon subjecting it to a freeze pending investigation or a designation.
8. Amend IEEPA or the governing regulations to authorize a court to permit an entity with a presence in the United States to expend its own funds for reasonable legal expenses in defense of any action taken to freeze its assets pending investigation or to designate it, including at the administrative level and in judicial review thereof.

**Members of the Constitution Project's  
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*Reforming the Material Support Laws*\***

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**Lawrence Wilkerson**, Colonel (Ret.) U.S. Army; Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; Chief of Staff to Secretary of State Colin Powell, 2002-2005

**Roger Wilkins**, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of United States Community Relations Service, Johnson administration

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