

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SYED HASHMI,

Defendant.

---

06 Cr. 442 (LAP)

Filed via ECF

The Hon. Loretta A. Preska

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO  
DISMISS THE INDICTMENT**

Sean M. Maher  
Khurram B. Wahid  
Wahid, Vizcaino & Maher LLP  
122 E. 42nd Street, Suite 1616  
New York, New York  
(212) 661-5333  
(212) 661-5355 fax  
*Attorneys for Defendant Syed Hashmi*

**TABLE OF CONTENTS**

**I. THE INDICTMENT AGAINST MR. HASHMI SHOULD BE DISMISSED BECAUSE ALL OF THE COUNTS FAIL TO STATE AN OFFENSE .....4**

**A. *The Indictment* .....4**

**B. *Counts One and Two Do Not State An Offense Under 18 U.S.C. §2339B Because They Fail to Allege Essential Elements of the Offense By Not Providing Specific Facts to Describe the Alleged "Material Resources"* .....6**

**1. *The Scope of 18 U.S.C. §2339B* .....6**

**2. *The Applicable Law Regarding Challenges to An Indictment That Fails to Allege Essential Elements or Facts* .....7**

**3. *Counts One and Two Fail to Describe With Sufficient Particularity the "Material Support or Resources" Mr. Hashmi Allegedly Provided, Attempted to Provide, or Conspired to Provide* .....7**

**C. *Counts Three and Four Do Not State An Offense Under 50 U.S.C. § 1705(b) Because They Fail to Allege Essential Elements of the Offense By Not Providing Specific Facts Concerning the Phrase "Funds, Goods, and Services"* .....11**

**D. *Counts One and Two Do Not State An Offense Under 18 U.S.C. § 2339B Because They Fail to Allege An Essential Element of the Offense, Namely That Mr. Hashmi Knew That Al Qaeda Was Specially Designated as a Foreign Terrorist Organization* .....11**

**E. *Counts One and Three Do Not State An Offense Because They Provide No Detail as to the Identity of Any of the Purported Co-Conspirators* .14**

**II. COUNTS ONE AND TWO SHOULD BE DISMISSED ON CONSTITUTIONAL GROUNDS .....14**

**A. *The Court Should Find that § 2339B Incorporates the Specific Intent to Further the Illegal Activities of the Designated Terrorist Organization; If Not, the Court Should Find the Statute Unconstitutional Under the First and Fifth Amendments* .....14**

**1. *The Fifth Amendment Requires "Personal Guilt" in Prosecutions Brought Under § 2339B* .....14**

2. *Mr. Hashmi's Right to Association Under the First Amendment Bars the Instant § 2339B Charges* .....18

    a. *The First Amendment Framework* .....18

    b. *Strict Scrutiny Analysis Should Apply to the Instant Challenge* .....18

B. *Even if § 2339B Currently Is Found to Have a Constitutionally Adequate Scierter Requirement, the Statute Prior to Amendment in December 2004 Had an Impermissibly Low Scierter Requirement, Thus, Under the Due Process and Ex Post Facto Clauses, the Government is Barred from Prosecuting Mr. Hashmi for Violations of the Statute Occurring Before the December 2004 Amendment* .....22

C. *§ 2339B is Unconstitutionally Vague in Violation of the First and Fifth Amendments* .....24

    1. *The Standards Governing Vagueness Analysis* .....24

    2. *§ 2339B's Definition of "Material Support or Resources" Is Vague* .....25

    3. *§ 2339B's Definition of "Material Support or Resources" Is Vague As Applied to Mr. Hashmi* .....27

D. *The Overbreadth of § 2339B Violates the First Amendment* .....28

III. **COUNTS THREE AND FOUR SHOULD BE DISMISSED ON CONSTITUTIONAL GROUNDS** .....30

    A. *Congress Impermissibly Delegated Authority to Define Criminal Laws and Punishment to the Executive Branch by Passing the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 Et Seq.* .....30

    B. *IEEPA Fails to Provide Sufficient Notice As To What Behavior and Intent Transform a Civil Violation into a Criminal Offense in Violation of the Fifth Amendment* .....33

CONCLUSION .....35

**I. THE INDICTMENT AGAINST MR. HASHMI SHOULD BE DISMISSED BECAUSE ALL OF THE COUNTS FAIL TO STATE AN OFFENSE**

**A. *The Indictment***

On May 24, 2006, the government filed a four-count indictment against Mr. Hashmi.

Count One charges conspiracy to provide material support or resources to a foreign terrorist organization and states:

- (1) From at least in or about January 2004, up to and including in or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, and others known and unknown, at least one of whom was first brought to and arrested in the Southern District of New York, unlawfully and knowingly did combine, conspire, confederate, and agree together and with each other to provide "material resources," as that term is defined in 18 U.S.C. § 2339A(b), including currency and other physical assets, to a foreign terrorist organization, to wit, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, on or about October 2, 2003, and again on or about October 11, 2005.
- (2) It was a part and an object of the conspiracy that SYED HASHMI, a/k/a "Fahad," a United States citizen, agreed with others to assist al Qaeda by providing military gear to co-conspirators not named as defendants herein who transported the gear to al Qaeda associates in South Waziristan, Pakistan.

(Title 18, United States Code, Sections 2339B and 3238.)

Count Two charges providing and attempting to provide material support or resources to a foreign terrorist organization and states:

- (1) From at least in or about January 2004, up to and including in or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, and others known and unknown, at least one of whom was first brought to and arrested in the Southern

District of New York, unlawfully and knowingly did provide and attempt to provide “material resources,” as that term is defined in 18 U.S.C. § 2339A(b), including currency and other physical assets, to a foreign terrorist organization, to wit, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, on or about October 2, 2003, and again on or about October 11, 2005, in that SYED HASHMI, a/k/a “Fahad,” a United States citizen, provided military gear to others not named as defendants herein who transported it to al Qaeda associates in South Waziristan, Pakistan.

(Title 18, United States Code, Sections 2339B, 2 and 3238.)

Count Three charges conspiracy to make or receive a contribution of funds, goods, or services to, and for the benefit of, al Qaeda and states:

- (1) From at least in or about January 2004, up to and including in or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a “Fahad,” the defendant, a United States person, unlawfully, willfully, and knowingly violated a regulation issued under Chapter 35 of Title 50, United States Code, to wit, SYED HASHMI, a/k/a “Fahad,” the defendant, along with others known and unknown, did combine, conspire, confederate, and agree together and with each other to make and receive a contribution of funds, goods, and services to, and for the benefit of, al Qaeda, a specially designated terrorist organization, by agreeing with others to provide military gear to al Qaeda to be used by al Qaeda to fight against United States forces in Afghanistan.

(Title 50, United States Code, Section 1705(b); Title 31, Code of Federal Regulations, Sections 595.204 & 595.205.)

Count Four charges making or receiving a contribution of funds, goods, or services to, and for the benefit of, al Qaeda and states:

- (1) From at least in or about January 2004, up to and including in or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a “Fahad,” the defendant, a United States person, unlawfully, willfully, and knowingly violated a regulation issued under Chapter 35 of Title 50, United States Code, to wit, HASHMI,

along with others known and unknown, attempted to and did provide military gear to al Qaeda to be used by al Qaeda to fight against United States forces in Afghanistan.

(Title 50, United States Code, Section 1705(b); Title 31, Code of Federal Regulations, Sections 595.204 & 595.205; and Title 18, United States Code, Section 2.)

**B. *Counts One and Two Do Not State An Offense Under 18 U.S.C. §2339B Because They Fail to Allege Essential Elements of the Offense By Not Providing Specific Facts to Describe the Alleged "Material Resources"***

**1. *The Scope of 18 U.S.C. §2339B***

The “material support” statute under which Mr. Hashmi is charged, § 2339B, makes it unlawful to knowingly provide or attempt or conspire to provide “material support or resources” to a foreign terrorist organization (“FTO”).

Accordingly, § 2339B(a)(1) provides that:

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

18 U.S.C. §2339B(a)(1).

The term “material support or resources” is defined in § 2339A(b) as:

(1) any property, tangible or intangible, or services, 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, and other physical assets, except medicine or religious materials.

In December 2004, Congress amended §2339B by passing the Intelligence Reform and Terrorism Prevention Act (the “IRTPA”), Pub.L. No. 108-458, 118 Stat.

3638. "[T]he IRTPA clarified the degree of knowledge required to violate § 2339B as follows: 'To violate [§ 2339B(a)(1)], a person must have knowledge that the organization is a designated terrorist organization . . . [,] that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.' U.S. v. Shah, 474 F. Supp.2d 492, 495 (S.D.N.Y. 2007)(internal citations omitted).

**2. *The Applicable Law Regarding Challenges to An Indictment That Fails to Allege Essential Elements or Facts***

Fed. R. Crim. P. 7(c)(1) states that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." As the Second Circuit stated in United States v. Pirro, 212 F.3d 86 (2d Cir. 2000), "[a]n indictment that fails to allege the essential elements of the crime charged offends both the Fifth and Sixth Amendments." Id. at 92 (citing Russell v. United States, 369 U.S. 749, 760-61 (1962)).

The Sixth Amendment "guaranty of the defendant's right 'to be informed of the nature and cause of the accusation' against him is also offended by an indictment that does not state the essential elements of the crime." Pirro, 212 F.3d at 93 (quoting Russell, 369 U.S. at 761)(internal citations omitted). An indictment must also be detailed enough to permit the defendant to plead double jeopardy in a future prosecution based on the same set of events. U.S. v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992). Accordingly, the indictment must be scrutinized to determine whether it meets these constitutional and statutory standards, and such scrutiny reveals the indictment to be fatally deficient.

**3. *Counts One and Two Fail to Describe With Sufficient***

***Particularity the “Material Support or Resources” Mr. Hashmi Allegedly Provided, Attempted to Provide, or Conspired to Provide***

Counts One and Two fail to allege adequately the “material support or resources” element of § 2339B. An indictment must contain sufficient factual detail that “apprises the defendant of what he must be prepared to meet.” Cochran v. United States, 157 U.S. 286, 290 (1895). As the Court in Pirro explained, “[t]he Indictment Clause of the Fifth Amendment requires that an indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury.” 212 F.3d at 93 (quoting United States v. Walsh, 194 F.3d 37, 44 (2d Cir. 1999)). As a result, “the indictment must state some fact specific enough to describe a particular criminal act, rather than a type of crime,” Pirro, 212 F.3d at 93, and must be sufficiently clear so that the defendant “will not be misled while preparing his defense.” U.S. v. Brozyna, 571 F.2d 742, 746 (2d Cir. 1978). The lack of factual particularity in an indictment also raises Sixth Amendment concerns in that the defendant and his counsel are prevented from properly investigating and preparing the case for trial as well as developing an effective defense.

Here, Counts One and Two fail to provide any factual details whatsoever as to what is meant by “material support or resources” and fail to apprise Mr. Hashmi “of what he must be prepared to meet.” Instead of listing the specific items that constitute “material support or resources,” the indictment provides only the ambiguous phrase “military gear.” The statutory definition of “material support or resources” provided in § 2339A(b) does not reference “military gear” and “military gear” is not defined elsewhere in § 2339A or § 2339B.

According to The Random House College Dictionary, the term "gear," when used as a noun, is defined as follows:

*n.* **1.a.** a moving part receiving or imparting force by means of teeth engaging with teeth or the like in a corresponding part. **b.** an assembly of such parts. **c.** the state of such parts engaging with each other: *out of gear*. **d.** a possible combination of such parts: *in low gear*. **e.** any of various mechanisms: *a steering gear*. **2.** implements, tools, or apparatus; paraphernalia: *fishing gear*. **3.** harness, esp. of horses. **4. Naut.** **a.** the lines, tackles, etc. of a particular sail or spar. **b.** the tools, clothing, and other possessions of a sailor. **5.** portable items of personal property, including clothing. **6. Archaic.** Armor or arms.

The Random House College Dictionary Revised Edition, 1975, Random House, Inc., p. 548. Thus, the term even the lay term "gear" is such a wide-ranging concept that its use in the indictment is virtually meaningless.

Also, as noted above, the statutory definition of "material support or resources" in § 2339A(b) changed in December 2004. Thus, the question of *what* "material support or resources" Mr. Hashmi provided, attempted to provide, or conspired to provide *when* is critical, and is not sufficiently set forth in the indictment to meet the Fifth Amendment standard enunciated in Pirro: that an "indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury." 212 F.3d at 93. Again, the identity of such an important element of the offense – of which there are many possibilities within the statutory definition – cannot be left to surmise and speculation.

Neither Count One nor Count Two specifies *any* particular type of "material support or resources" except the amorphous phrases "military gear" and "currency and other physical assets." The phrase "military gear" is so vague that the defense can not adequately prepare to refute the charge at trial and it is not sufficiently clear so that the

defendant “will not be misled while preparing his defense.” U.S. v. Brozyna, 571 F.2d 742, 746 (2d Cir. 1978). Such ambiguous language concerning a crucial element of the offenses leaves open the distinct danger that the government will be allowed to “fill in elements of its case with facts other than those considered by the grand jury.” Pirro, 212 F.3d at 93. That danger is heightened because of the shifting definitions of “material support or resources” during the course of the alleged criminal conduct. By not identifying the material support or resources with greater precision, Counts One and Two create the potential for a conviction based on a type of “material support or resources” that was not put forward before the grand jury and that was not within the statutory definition at the time Mr. Hashmi performed the alleged conduct. Consequently, Counts One and Two suffer from fatal defects that require dismissal.

The broad language in Counts One and Two is similar to language found impermissible by Judge Sifton in U.S. v. Awan, 459 F. Supp.2d 167, 174-76 (E.D.N.Y. 2006). In Awan, the defendant was charged with providing and conspiring to provide material support or resources in violation of § 2339A. The challenged counts tracked the statutory language of § 2339A(b) in alleging that the defendant provided “currency” and conspired to provide “currency” and “personnel,” but provided no further detail as to the precise nature and amount of the “material support.” Judge Sifton dismissed the counts finding that the indictment failed to apprise the defendant of the charges and also left open the real possibility that the government would be able to fill in the elements of its case at trial with facts other than those considered by the grand jury. Id. at 175-76.

The exact same danger in Awan is present here. From the face of the indictment, there is no way for the defense to know what is meant by “military gear” and there is no

meaningful constraint on the government to put forth the same facts at trial as presented to the grand jury. In addition, there is the double jeopardy concern that by failing to plead the specific type of material support or resources considered by the grand jury, the indictment is so broad that Mr. Hashmi, if convicted, could be prosecuted again for the same set or subset of facts considered by the grand jury in violation of the Fifth Amendment or otherwise be denied the ability to litigate a future double jeopardy claim. See Brozyna, 571 F.2d at 746; U.S. v. Awan, 459 F. Supp.2d 167, 174-76 (E.D.N.Y. 2006); see also U.S. v. Santeramo, 45 F.3d 622, 624 (2d Cir. 1995).

**C. *Counts Three and Four Do Not State An Offense Under 50 U.S.C. § 1705(b) Because They Fail to Allege Essential Elements of the Offense By Not Providing Specific Facts Concerning the Phrase "Funds, Goods, and Services"***

Like Counts One and Two, Counts Three and Four fail to provide any facts detailing what is meant by the phrase "military gear " and thus fail to meet the Fifth Amendment standard enunciated in Pirro: that an "indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury." 212 F.3d at 93. Because the same underlying Fifth and Sixth Amendment notice concerns raised in I.B.3 supra apply to Counts Three and Four, the counts should be dismissed.

**D. *Counts One and Two Do Not State An Offense Under 18 U.S.C. § 2339B Because They Fail to Allege An Essential Element of the Offense, Namely That Mr. Hashmi Knew That Al Qaeda was Specially Designated as a Foreign Terrorist Organization***

As noted by this Court in Shah, § 2339B has a knowledge element in that one "must have knowledge that the organization is a designated terrorist organization . . . [,] that the organization has engaged or engages in terrorist activity . . . , or that the

organization has engaged or engages in terrorism.” Shah, 474 F. Supp.2d at 495 (quoting the IRTPA § 6603(c), 118 Stat. at 3762-63 (codified at § 2339B(a)(1))).

With the 2004 amendment to § 2339B quoted above, Congress made it clear that the government must allege and prove that the accused had the knowledge that the organization was “a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.” Indeed, prior to the 2004 amendment, the government invariably argued that the first “knowingly” in § 2339B(a)(1) referred only to the provision of material support, i.e. that the defendant knew that he or she was providing some form of material support as defined in §2339A(b), and did *not* require knowledge that the recipient of that material support was an FTO. See, e.g., Humanitarian Law Project v. Reno, 205 F.3d 1130, 1138 & n. 5 (9th Cir. 2000); U.S. v. Sattar, 14 F. Supp.2d 279, 296 (S.D.N.Y. 2004); U.S. v. Al-Arian, 308 F. Supp.2d 1322, 1336-37 (M.D. Fla. 2004). See also U.S. v. Sattar, 272 F. Supp.2d 348, 355-59 (S.D.N.Y. 2003).

Counts One and Two of the present indictment do not specifically allege that Mr. Hashmi *knew* that al Qaeda was “a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.” Contrast Count One against Mr. Hashmi with Count One leveled in Shah, which stated as follows:

From at least in or about October 2003, up to and including in or about May 2005, in the Southern District of New York and elsewhere, TARIK IBN OSMAN SHAH, a/k/a “Tarik Shah,” a/k/a “Tarik Jenkins,” a/k/a “Abu Musab,” and RAFIQ SABIR, a/k/a “the Doctor,” the defendants, and others known and unknown, unlawfully and knowingly combined, conspired, confederated and agreed together and with each other, to provide material support or resources, namely personnel, training, and expert advice and

assistance, as those terms are defined in Title 18, United States Code, Sections 2339A and 2339B, to a foreign terrorist organization, namely, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, and October 2, 2003, to wit, the defendants knowingly agreed to provide (i) one or more individuals (including themselves) to work under al Qaeda's direction and control and to organize, manage, supervise, and otherwise direct the operation of al Qaeda, (ii) instruction and teaching designed to impart a special skill to further the illegal objectives of al Qaeda, and (iii) advice and assistance derived from scientific, technical, and other specialized knowledge to further the illegal objectives of al Qaeda, to wit, TARIK IBN OSMAN SHAH, a/k/a "Tarik Shah," a/k/a "Tarik Jenkins," a/k/a "Abu Musab," agreed to provide martial arts training and instruction for jihadists, and RAFIQ SABIR, a/k/a "the Doctor," agreed to provide medical support to wounded jihadists, knowing that al Qaeda has engaged and engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), and that al Qaeda has engaged and engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(Title 18, United States Code, Section 2339B.)

Shah, 474 F. Supp.2d at 494-95 (emphasis added).

Unlike the Shah count above, Counts One and Two of the present indictment completely omit the FTO knowledge element that is required under § 2339B. This missing element from the § 2339B offense renders Counts One and Two fatally defective. U.S. v. Berlin, 472 F.2d 1002, 1008 (2d Cir. 1973)(reversing conviction for aiding and abetting submission of false documents to savings and loan association where defendant's knowledge of document's falsity was not alleged); see Russell v. U.S., 369 U.S. 749, 770 (1962)(stating that the Fifth Amendment requires that an indictment must set forth the elements of the crime to insure that a defendant is not "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which

indicted him”). Thus, Counts One and Two should be dismissed for failing to state an essential element of the offense.

***E. Counts One and Three Do Not State An Offense Because They Provide No Detail as to the Identity of Any of the Purported Co-Conspirators***

The indictment against Mr. Hashmi does not provide the identity of even *one* alleged co-conspirator. This is astounding considering the sweeping nature of the instant prosecution. Although the indictment is devoid of factual detail as argued above, the charges cover a multi-year period and the unclassified discovery has a global reach, spanning from New York City, to London, and to Pakistan. The discovery provided so far is voluminous. In this context, to not provide any details in the indictment concerning the identity of the alleged co-conspirators unfairly hamstring the defense, violates the tenets of Pirro and Awan, and runs afoul of the Fifth and Sixth Amendments.

**II. COUNTS ONE AND TWO SHOULD BE DISMISSED ON CONSTITUTIONAL GROUNDS**

***A. The Court Should Find that § 2339B Incorporates the Specific Intent to Further the Illegal Activities of the Designated Terrorist Organization; If Not, the Court Should Find the Statute Unconstitutional Under the First and Fifth Amendments***

***1. The Fifth Amendment Requires "Personal Guilt" in Prosecutions Brought Under § 2339B***

A statute offends the Fifth Amendment's Due Process Clause if it “impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete, personal involvement in criminal conduct.”

Scales v. United States, 367 U.S. 203, 220 (1961). Because § 2339B permits criminal liability in the absence of personal guilt by not requiring the prosecution to prove that Mr. Hashmi specifically intended to further any terrorist activities of al Qaeda, the statute

violates due process.

Under Scales, punishment “based on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity.” Id. at 224-25. However, such a relationship “must be sufficiently substantial to satisfy the concept of personal guilt.” Id. at 225.

“In our jurisprudence guilt is personal.” Brown v. United States, 334 F.2d 488, 495 (9th Cir.1964) (internal quotations and citation omitted). Courts are obligated to “construe [a criminal] statute in light of the fundamental principle that a person is not criminally responsible unless ‘an evil-meaning mind’ accompanies ‘an evil-doing hand.’” U.S. v. Nguyen, 73 F.3d 887, 890 (9th Cir.1995)(quoting Morissette v. United States, 342 U.S. 246, 251 (1952)). “In other words, unless Congress expressly communicates its intent to dispense with a mens rea requirement and create strict criminal liability, the notion of “personal guilt” requires some culpable intent before criminal liability attaches.” Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1130-31 (9th Cir. 2007)(denying defendant's due process scienter challenge to § 2339B).

“[D]etermining the mental state required for commission of a federal crime requires ‘construction of the statute and . . . inference of the intent of Congress.’” Staples v. United States, 511 U.S. 600, 605 (1994)(quoting U.S. v. Balint, 258 U.S. 250, 253 (1922)). In making such a determination, a court “should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.” Morissette, 342 U.S. at 263.

In U.S. v. Al-Arian, 308 F. Supp.2d 1322, 1339, reconsideration denied, 329 F. Supp.2d 1294 (M.D.Fla. 2004), the district court read § 2339B to require a showing that

the defendant specifically intended to promote the organization's terrorist activity, finding that the absence of such a requirement rendered the statute constitutionally suspect on due process and First Amendment grounds. The district court was concerned that without an additional intent requirement, § 2339B would criminalize wholly innocent conduct. Id. at 1337-38. For example, the court hypothesized that a cab driver who drives a passenger from a New York airport to the United Nations, knowing that the passenger is a member of a FTO, could be prosecuted for providing “transportation” under the statute. Id. In an attempt to salvage the statute from constitutional infirmity, the district court found that the statute encompassed the specific intent to further the terrorist activity despite the absence of such express language in the statute itself.

Before the Al-Arian decision, the Ninth Circuit in 2003 addressed a similar due process challenge to § 2339B. After examining the statutory language, Congressional intent, and relevant caselaw, the Ninth Circuit found that "when Congress included the term 'knowingly' in § 2339B, it meant that proof that a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated was required to convict a defendant under the statute." Humanitarian Law Project v. U.S. Dept. of Justice, 352 F.3d 382, 400 (9th Cir. 2003)(“HLP III”).

Subsequent to the HLP III and Al-Arian opinions, Congress amended § 2339B on December 17, 2004 under the IRTPA to include express language stating that a person “must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.” 18 U.S.C. § 2339B(a)(1).

Since the December 2004 amendment, various courts have declined to follow the reasoning of the Al-Arian court and instead have found that the amended § 2339B passes constitutional muster as articulated in HLP III. See, e.g., U.S. v. Warsame, 537 F. Supp.2d 1005, 1020 (D.MN. 2008); U.S. v. Assi, 414 F. Supp.2d 707, 724 (E.D. Mich. 2006); U.S. v. Paracha, 2006 WL 12768, at \*25 (S.D.N.Y. Jan. 3, 2006); U.S. v. Marzook, 383 F. Supp.2d 1056, 1070 (N.D. Ill. 2005); Humanitarian Law Project v. Gonzales, 380 F.Supp.2d 1134, 1147 (C.D. Cal. 2005).

The reasoning of Al-Arian was embraced by Fourth Circuit Justice Gregory:

Unlike the Ninth Circuit, however, I do not believe that [the] constitutional infirmities [of § 2339B] can be cured by reading the statutory term “knowingly” as a scienter requirement meaning only that the defendant had knowledge of the organization's designation as a foreign terrorist organization (“FTO”), or that he or she knew of the organization's unlawful activities that caused it to be so designated.

U.S. v. Hammoud, 381 F.3d 316, 371 (4th Cir. 2004)(dissenting opinion). Justice Gregory pointed out that “[e]ven Humanitarian II seemed to acknowledge that the term ‘knowingly’ did not cure any vagueness problems that existed. See 205 F.3d at 1138 n. 5 ([T]he term ‘knowingly’ modifies the verb ‘provides’ meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support.’). Id. at 379.

The reasoning of the Al-Arian Court and Justice Gregory is support by an examination of the legislative intent behind the statute. In introducing the Senate Conference Report to the Senate, Senator Hatch remarked:

This bill also includes provisions making it a crime to *knowingly provide material support to the terrorist functions* of foreign

groups designated by a Presidential finding to be engaged in terrorist activities.

142 Cong. Rec. 7550 (April 16, 1996) (statement of Sen. Hatch) (emphasis added).

As noted by Justice Gregory, "Senator Hatch seemingly made clear that the law's prohibitions on financing were connected to terrorist *acts*" by stating the following:

[N]othing in the Constitution provides the right to engage in violence against fellow citizens or foreign nations. Aiding and financing foreign *terrorist bombings* is not constitutionally protected activity . . . . I have to believe that honest donors to any organization want to know if their contributions are being used for such scurrilous *terrorist purposes*. We are going to be able to tell them after this bill . . . . I am convinced we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up.

Id. at 7557 (statement of Sen. Hatch) (emphasis added). The Ninth Circuit also surveyed the legislative history regarding the intent requirement of § 2339B and noted that there was "one statement in the Congressional Record that refers to an intent requirement in § 2339B," which was the above-cited comments made by Senator Hatch, who co-sponsored AEDPA. Humanitarian Law Project v. Ashcroft, 352 F.3d 382, 403 (9th Cir. 2003).

Mr. Hashmi urges this Court to adopt the reasoning of the Al-Arian Court and find that § 2339B, even as amended, violates due process unless the statute is construed as requiring the specific intent to further the terrorist activity of the FTO. If, however, the Court finds that the express language of § 2339B precludes the Court from construing such a specific intent element, then this Court should find the statute unconstitutional for failing to require a finding of personal guilt consistent with due process.

**2. *Mr. Hashmi's Right to Association Under the First Amendment Bars the Instant § 2339B Charge***

**a. *The First Amendment Framework***

The Supreme Court recognizes that the First Amendment right to freedom of association encompasses both a right to “maintain certain intimate human relationships,” and “a right to associate for the purpose of engaging in those activities protected by the First Amendment.” Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). The latter includes the “freedom to associate with others for the common advancement of political beliefs and ideas.” Buckley v. Valeo, 424 U.S. 1, 15 (1976)(internal quotations and citations omitted); see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982) (explaining that “the right of individuals to combine with other persons in pursuit of a common goal by lawful means” is protected by the First Amendment).

The First Amendment right to free speech includes the freedom to advocate the use of force or violation of the law, see Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969), to advocate for illegal action at some indefinite time in the future, Hess v. Indiana, 414 U.S. 105, 108-09 (1973)(per curium), to advocate the political goals of a terrorist organization, including praising such groups for using terrorism to achieve its objectives, Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000), and even to advocate for action that makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists, 244 F.3d 1007, 1015 (9th Cir. 2001), vacated on other grounds by 290 F.3d 1058 (9th Cir. 2002)(en banc).

The material support statute unconstitutionally impinges upon the First Amendment freedom to associate by making blanket prohibitions against making financial and material contributions to legal humanitarian and political activities of designated FTOs. The act of contributing money to political organizations has been

upheld as an exercise of an individual's right to freedom of association. See Buckley, 424 U.S. at 16-17 (explaining that “this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment”); see also American-Arab Anti-Discrimination Committee v. Reno, 119 F.3d 1367, 1376 (9th Cir. 1997), cert. granted in part, 524 U.S. 903 (1998)(“American-Arab II ”)(finding plaintiffs' associational activities included fundraising); In Re Asbestos School Litig., 46 F.3d 1284, 1294 (3rd Cir.1994)(cited favorably by American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1058 (9th Cir.1995)(“American-Arab I ”)(explaining that “[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.”)).

**b. *Strict Scrutiny Analysis Should Apply to the Instant Challenge***

Statutory classifications are generally “valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech . . . .” Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 509 (9th Cir. 1988).

A regulation that prohibits expression or association based on disapproval of the content of the speech is subject to the most exacting scrutiny. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (generally First Amendment prohibits government from “proscribing speech or even expressive conduct, because of disapproval of the ideas expressed”) (citations omitted); Boos v. Barry, 485 U.S. 312, 321 (1988)(indicating that “a content-based restriction on political speech in a public forum . . . must be subjected to

the most exacting scrutiny”). Thus, a regulation that infringes on an individual's right to associate with others because of the association's expression or advocacy of a particular subject or view will be upheld only if the government “demonstrates a sufficiently important interest and necessary abridgment of associational freedoms.” Buckley, 424 U.S. at 25.

When the government's regulation is unrelated to the suppression of a particular message or idea, it is content-neutral and subject to an intermediate level of scrutiny. Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 643 (1994). If a content-neutral regulation is aimed at the noncommunicative nature of expressive conduct, but incidentally infringes on First Amendment freedoms, the regulation may be upheld upon a balancing of the importance of the Government's interest and the extent to which First Amendment activity is infringed. U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

The Court should employ a strict scrutiny analysis in evaluating the constitutionality of § 2339B because the statute imposes criminal sanctions for providing material support to designated terrorist organizations without requiring specific intent to further the organizations' unlawful ends. The statute instead imposes guilt by association in violation of the First Amendment.

“[T]he First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed.” American-Arab I, 70 F.3d at 1066. Thus, the Supreme Court has “consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular

organization.” Healy v. James, 408 U.S. 169, 185- 86 (1972). “[G]uilt by association alone’ . . . is an impermissible basis upon which to deny First Amendment rights.” Id. at 186 (citation omitted); see also U.S. v. Robel, 389 U.S. 258, 264-65 (1967)(finding that “guilt by association alone,” even in the name of national defense, violates the First Amendment.). Rather, the government must “establish [the individual's] knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.” Healy, 408 U.S. at 186. Therefore, “the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not.” Id. at 192.

Because the present indictment lacks even rudimentary facts, Mr. Hashmi is unable to make a more particularized factual showing. By all appearances, however, Mr. Hashmi is being prosecuted for his association with Al Muhajiroun, a defunct Islamic organization that was never designated by the United States as a terrorist organization. There is no allegation that Mr. Hashmi personally provided anything to any member of al Qaeda. Until the government provides more facts underlying its prosecution, the Court should apply strict scrutiny and find that the statute infringes upon Mr. Hashmi's First Amendment associational rights. Otherwise, the defense requests an opportunity to supplement this motion after the government's theory of prosecution becomes clearer.

***B. Even if § 2339B Currently Is Found to Have a Constitutionally Adequate Scierter Requirement, the Statute Prior to Amendment in December 2004 Had an Impermissibly Low Scierter Requirement, Thus, Under the Due Process and Ex Post Facto Clauses, the Government is Barred from Prosecuting Mr. Hashmi for Violations of the Statute Occurring Before the December 2004 Amendment***

The Constitution forbids Congress from passing ex post facto laws. U.S. Const. art. I, § 9, cl. 3. Two factors indicate a violation of the ex post facto clause: (1) the law

"must be retrospective, that is, it must apply to events occurring before its enactment;" Weaver v. Graham, 450 U.S. 24, 29 (1981); and (2) the law must be a penal statute that disadvantages the defendant affected by it. Collins v. Youngblood, 497 U.S. 37, 41 (1990).

No retrospective application of a statute occurs simply because evidence of some conduct antedating the statute's effective date is introduced. See U.S. v. Flores, 538 F.2d 939, 943-44 (2d Cir. 1976). However, an ex post facto violation occurs if the jury may have convicted the defendant based entirely on such evidence. See U.S. v. Torres, 901 F.2d 205, 227 (2d Cir. 1990). A statute that creates a new crime or broadens the definition of an existing one is punitive for ex post facto purposes. U.S. v. Schwartz, 924 F.2d 410, 418-19 (2d Cir. 1991). In addition, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law;" thus, a court "is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. Columbia, 378 U.S. 347, 353-54 (1964).

Mr. Hashmi asserts that any § 2339B prosecution based upon conduct occurring before December 17, 2004 would violate the Ex Post Facto Clause as well as due process. Although Mr. Hashmi asserts that § 2339B has been unconstitutional for the entire period covered in the indictment, there is a heightened constitutional infirmity for acts preceding the December 17, 2004 amendment.

Before the December 2004 amendment, the statute on its face imposed strict liability for anyone who provided material support or resources to a designated terrorist organization. In an attempt to save the statute, the courts either read the statute as incorporating the requirement that (1) a person know that the organization was designated

or involved in terrorist activity (HLP III), or (2) that a person has a specific intent to further the organization's terrorist activities (Al-Arian, Hammoud dissent). Both of these judicial constructions sidestepped the statute's glaring First and Fifth Amendment deficiencies.

This Court should find that, without the express language of the 2004 amendment, § 2339B violates the First and Fifth Amendments. The Ex Post Facto Clause then precludes the government from prosecuting Mr. Hashmi retroactively for acts occurring before December 17, 2004. Because the government has not provided information to suggest that Mr. Hashmi's conduct after December 2004 violated § 2339B, prosecution under § 2339B would be barred pursuant to Flores, Torres, and Schwartz. Cf. U.S. v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991)(no ex post facto violation where "final element" of crime occurred after statute's effective date); compare U.S. v. Harris, 79 F.3d 223, 230 n.4 (2d Cir. 1996)(noting possible "tension" between Alkins and Torres but finding it unnecessary to resolve issue).

**C. § 2339B is Unconstitutionally Vague in Violation of the First and Fifth Amendments**

**1. The Standards Governing Vagueness Analysis**

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983); see Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Connally v. General Construction Co., 269 U.S. 385, 391 (1926). In other words, the Court must determine whether the criminal statute “fails to give a person of ordinary intelligence fair notice that

his contemplated conduct is forbidden by the statute,” U.S. v. Harriss, 347 U.S. 612, 617 (1954), or whether it is so indefinite that “it encourages arbitrary and erratic arrests and convictions,” Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972), before deciding it is void-for-vagueness. A statute found to be void-for-vagueness violates both the First and Fifth Amendments. See, e.g., Colautti v. Franklin, 439 U.S. 379 (1979); Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. Harriss, 347 U.S. 612 (1954).

**2. § 2339B’s Definition of “Material Support or Resources” Is Vague**

As noted above, the term “material support or resources” is defined in § 2339A(b)(1) as:

any property, tangible or intangible, or services, 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, and other physical assets, except medicine or religious materials.

This definition took its current form after the 2004 amendment, which added the parenthetical phrase after “personnel,” as well as the reference to “any property, tangible or intangible, or services” at the beginning of the definition. Thus, the definition of “material support” changed considerably during the course of the offense conduct alleged against Mr. Hashmi (January 2004 through May 2006).

In addressing the definition of “material support or resources,” courts have declared several of the components unconstitutionally vague. For example, in the Humanitarian Law Project sequence of cases, first the District Court, and then the Ninth Circuit, held that both “training” and “personnel” were unconstitutionally vague. See

HLP I, 9 F. Supp.2d at 1203; HLP II, 205 F.3d at 1137-38. Moreover, in HLP III, the Ninth Circuit again affirmed its conclusion with respect to both terms. 352 F.3d at 404. In Sattar I, the District Court held that “communications equipment” and “personnel” were vague as applied in that case. 272 F. Supp.2d at 357-59.

The 2004 amendment concerning “training,” which expanded the definition to include “instruction or teaching designed to impart a specific skill, as opposed to general knowledge[,]” see § 2339A(b)(2), only further muddled the statute. As the Ninth Circuit explained, “a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term ‘training.’” 205 F.3d at 1138. See also HLP I, 9 F. Supp.2d at 1203 (the statute “prohibits activity protected by the First Amendment – distributing literature and information and training others to engage in advocacy”).

In HLP IV, the District Court added “expert advice and assistance” to those components of “material support” that were unconstitutionally vague. 309 F. Supp.2d 1185, 1198-1201 (C.D. Cal. 2004). In Sattar I, the District Court held that “communications equipment” and “personnel” were vague as applied in that case. 272 F. Supp.2d at 357-59. As the Court in Sattar I stated, “[m]oreover, the Government’s evolving definition of what it means to provide communications equipment to an FTO in violation of §2339B reveals a lack of prosecutorial standards that would permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” 272 F. Supp.2d at 358 (citations and internal quotation marks omitted).

Thus, the Court should find that statute vague on its face. Cf. Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1136 (9th Cir. 2007); U.S. v. Taleb-Jedi, 2008 WL 2832183, at \*20-21 (E.D.N.Y. July 23, 2008); U.S. v. Warsame, 537 F. Supp.2d 1005, 1018 (D.MN. 2008); U.S. v. Assi, 414 F. Supp.2d 707, 724 (E.D. Mich. 2006); U.S. v. Shah, 474 F. Supp.2d 492, 497 (S.D.N.Y. 2007); U.S. v. Marzook, 383 F. Supp.2d 1056, 1066 (N.D. Ill. 2005); U.S. v. Lindh, 212 F. Supp.2d 541, 573-74 (E.D. Va. 2002).

**3. § 2339B's Definition of "Material Support or Resources" Is Vague As Applied to Mr. Hashmi**

As raised above, the instant indictment fails to provide any specificity as to the type of material support or resources that Mr. Hashmi is alleged to have provided. Thus, it is quite possible that the "material support or resources" the government envisions proving is among those terms that have already been declared unconstitutionally vague on their face or as applied.

Without waiving any of the arguments set forth in Mr. Hashmi's motion, the defense is aware that the government has made representations in the English judicial system concerning the prosecution case. Because these representations are not of the same force as an indictment, the defense's objections to the indictment stand. However, to give some support to Mr. Hashmi's constitutional argument, the defense raises what could be a basis of the government's § 2339B charges.

The government's allegations appear to include that Mr. Hashmi, with no criminal intent, permitted a person, who was not a member of al Qaeda, to stay at Hashmi's apartment in London for a brief period in January 2004. That person allegedly had luggage that contained waterproof socks, raincoats, and ponchos and subsequently took the items to Pakistan to be transferred to al Qaeda.

If these are in fact the allegations supporting, either in whole or in part, the § 2339B prosecution, then Mr. Hashmi's as applied challenge is multi-pronged. First, Mr. Hashmi did not *provide* anything or conspire to *provide* anything that could be construed as material support or resources. The allegation appears to be that the purported items belonged to another person who never relinquished control of the items to Mr. Hashmi. Second, the indictment does not charge Mr. Hashmi with providing storage space; thus, the prosecution theory that letting someone keep their own luggage is the same as providing military gear to an FTO seems patently absurd. Third, there is no readily apparent dangerous, nefarious, or terroristic quality to a few waterproof socks, ponchos, and raincoats so as to place a person of ordinary intelligence that such items could be construed as "material" support or resources for a terrorist organization. Fourth, permitting a short-time visitor to keep possession of their own suitcase containing ordinary clothing items would not place a person of ordinary intelligence on notice that he or she could be "providing" "material" support or resources to a terrorist organization.

Because of the dearth of information as to the exact nature of the material support and resources at issue, Mr. Hashmi respectfully requests an opportunity to further supplement his arguments as more information is formally disclosed by the government.

**D. *The Overbreadth of § 2339B Violates the First Amendment***

To succeed with an overbreadth claim, the claimant "bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003). Overbreadth challenges rest upon First Amendment grounds.

The first step in analyzing a facial challenge to the overbreadth and vagueness of

a law is to determine whether the statute “reaches a substantial amount of constitutionally protected conduct.” Vlasak v. Superior Court of California, 329 F.3d 683, 688 (9<sup>th</sup> Cir. 2003). If it does, the statute is overbroad, and may not be enforced “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). The doctrine has been invoked, among other situations, when a statute criminalizes speech protected by the First Amendment, Broadrick, 413 U.S. at 613 (quoting Gooding v. Wilson, 405 U.S. 518, 520 (1972)), innocent associations, e.g., Keyishian v. Bd. of Regents, 385 U.S. 589 (1967), as well as laws which allow for arbitrary enforcement. E.g., Papachristou, 405 U.S. at 162.

In the present case, the “material support or resources” provisions reach a substantial amount of protected conduct and criminalizes otherwise protected political, religious, and associational activity. Under the warped logic of the statute, even providing infant formula to refugees somehow affiliated with an FTO would result in potentially decades of imprisonment. Accordingly, the chill on protected activities is substantial.

§ 2339B also runs afoul of the First Amendment overbreadth doctrine. As the Supreme Court has explained, “[u]nder the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face ‘because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.’” Bd. of Airport Comm’rs of City of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574 (1987) (quoting

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

Mr. Hashmi again requests the opportunity to supplement his facial and as applied overbreadth arguments after the government's theory of prosecution becomes clearer.

**III. COUNTS THREE AND FOUR SHOULD BE DISMISSED ON CONSTITUTIONAL GROUNDS**

**A. *Congress Impermissibly Delegated Authority to Define Criminal Laws and Punishment to the Executive Branch by Passing the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 Et Seq.***

Mr. Hashmi asserts that, with the passage of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2000)("IEEPA"), Congress improperly delegated legislative authority to the Executive in violation of the separation of powers doctrine and Article I, §§ 1, 7, & 8 of the Constitution.

Congress passed IEEPA to delegate broad authority to the Executive to regulate, via civil and criminal penalties, economic interactions involving foreign persons or entities during national emergencies. Before being authorized to exercise power under IEEPA, the President must declare a national emergency in response to a defined foreign threat. Pursuant to 50 U.S.C. § 1701,

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency

which must be with respect to such threat.

Once the President declares a national emergency under 50 U.S.C. § 1701, the President is authorized under 50 U.S.C. § 1702 to "investigate, regulate, or prohibit" a range of economic activity conducted with the declared foreign country or national. In an additional delegation of authority, Congress authorizes that the "President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter." 50 U.S.C. § 1704.

There are exceptions to the grant of authority to the President. For instance, 50 U.S.C. § 1702(b)(2) precludes the President from regulating or prohibiting "donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering . . . ."

This humanitarian exception to the President's authority under IEEPA is subject to a limited "override." Pursuant to 50 U.S.C. § 1702(b)(2)(A)-(C), the President may regulate or prohibit donations "to relieve human suffering" if the President determines that such humanitarian donations:

- (A) would seriously impair his ability to deal with any national emergency declared under section 1701 . . . . ,
- (B) are in response to coercion against the proposed recipient or donor, or
- (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances[.]

Congress has codified penalties for violations of any license, order, or regulation issued under IEEPA. Pursuant to 50 U.S.C. § 1705, penalties are as follows:

- (a)** A civil penalty of not to exceed \$50,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than \$50,000, or, if a natural person, may be imprisoned for not more than twenty years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

Mr. Hashmi asserts that IEEPA is an unconstitutional delegation of legislative authority to the President. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down delegation to industry associations comprised of private individuals to create legally binding codes of “fair competition”); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down delegation to President to criminalize the interstate transport of petroleum without limiting his power at all); see also Clinton v. City of New York, 524 U.S. 417 (1998)(striking down line-item Presidential veto under Presentment Clause); Loving v. U.S., 517 U.S. 748, 771 (1996)(acknowledging that Congress “may not delegate the power to make laws”).

Mr. Hashmi acknowledges that various courts have found that the Congressional delegation of authority to the President under IEEPA is constitutional and is buttressed by the executive branch's constitutional role in foreign affairs. See, e.g., Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996); U.S. v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993); see also Zemel v. Rusk, 381 U.S. 1 (1965). Also, the judiciary historically has shown deference to Congressional delegations of authority. Mistretta v. U.S., 488 U.S. 361, 372 (1989)(reaffirming that delegations of Congressional authority are proper “[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to

conform”); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding delegation to FCC to make regulations “in the public interest”); New York Central Securities Co. v. United States, 287 U.S. 12 (1932) (upholding delegation to Interstate Commerce Commission to authorize mergers of railroad companies if it finds them “in the public interest”); Lichter v. United States, 334 U.S. 742 (1948) (upholding delegation under Renegotiation Act to determine whether private parties earned “excessive profits” during wartime); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) (upholding delegation to Federal Power Commission to determine “just and reasonable” rates for utilities).

Despite the contrary precedent cited above, the delegation of authority contemplated in IEEPA is so broad that it gives the President, upon declaring a national emergency (an act which is arguably beyond judicial review), practically unfettered discretion to promulgate criminal laws. Under IEEPA, the President has the power, and most times exercises it, to delegate the Congressional authority granted to the President straight to an executive branch agency. Thus, instead of Congress legislating what is criminal behavior, unelected functionaries buried within the executive branch in effect write and pass laws that have a tremendous effect upon individuals and nations. The almost wholesale abdication of legislative responsibility is compounded by the wide open penalty scheme found in 50 U.S.C. § 1705, which permits the imposition of punishment ranging from civil fines to 20 years of imprisonment.

**B. *IEEPA Fails to Provide Sufficient Notice As To What Behavior and Intent Transform a Civil Violation into a Criminal Offense in Violation of the Fifth Amendment***

There are significant problems with the mens rea components of Counts Three

and Four. There is a lack of notice in 50 U.S.C. § 1705, both facially and as applied to Mr. Hashmi, as to what behavior will lead to a civil penalty and what behavior will lead to a criminal penalty of up to 20 years imprisonment. According 50 U.S.C. § 1705:

**(a)** A civil penalty of not to exceed \$50,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this chapter.

**(b)** Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than \$50,000, or, if a natural person, may be imprisoned for not more than twenty years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

The difference between receiving a civil fine and years of imprisonment is whether a person "willfully violates" or "violates" any license, order, or regulation issued under IEEPA. The lack of a meaningful distinction between the vague terms "willfully violates" and "violates" precludes individuals such as Mr. Hashmi from knowing what behavior will be treated as a criminal transgression versus a civil infraction, and thus violates Mr. Hashmi's right to due process under the Fifth Amendment.

A similar challenge concerning IEEPA was brought in U.S. v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fl. 2004). Although the Court did not find a constitutional deficiency, the Court reasoned that IEEPA, to survive a constitutional challenge, must be interpreted as having a heightened scienter requirement. The Court concluded as follows:

While no court has construed the criminal prohibition contained in IEEPA, this Court concludes that a conviction under IEEPA in these circumstances requires similar proof of intent similar to that required under AEDPA [The Antiterrorism and Effective Death Penalty Act of 1996]. In other words, this Court concludes that to criminally convict a defendant for violating IEEPA the government must prove a defendant: (a) knew either that an organization was a SDT [specially designated terrorist organization] or committed

unlawful activities that caused it to be designated as a SDT; and (b) had a specific intent that the contribution be used to further the unlawful activities of the SDT.

Id. at 1340.

Another problem with the mens rea component is (1) how does one willfully violate an unknown law and (2) how does one know who is a member of "al Qaeda?"

The Second Circuit addressed the meaning of "willfully" in the context of a substantive IEEPA violation of the Iranian embargo. In U.S. v. Homa International Trading Corp., 387 F.3d 144, 146-47 (2nd Cir. 2004), the Second Circuit held that:

“[T]o establish a ‘willful’ violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.” Bryan v. United States, 524 U.S. 184, 191-92, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (internal quotation marks omitted). The district court properly instructed the jury that it could not convict Gavidel of violating the Embargo unless “the defendant knew that such transmission of funds was a violation of the Iranian embargo, and was, thus, illegal.” The instruction clearly articulated that Gavidel had to violate knowingly the Embargo.

In addition, because there are no factual allegations within the indictment that Mr. Hashmi knew about the executive orders that he is charged with willfully violating or that Mr. Hashmi knew how to discern if someone was a member of “al Qaeda,” the counts are fatally defective under the Fifth Amendment.

### CONCLUSION

All of the defects raised above warrant dismissal of the indictment. In addition, failure to dismiss all counts of the indictment will violate Mr. Hashmi's constitutional rights pursuant to the First, Fifth, and Sixth Amendments.

WHEREFORE, for the reasons stated herein, Mr. Hashmi respectfully moves the

Court to grant the instant motion and to dismiss all counts of the indictment.

Dated: January 8, 2009  
New York, New York

Respectfully Submitted,

          /S/          

SEAN M. MAHER

SM7568

KHURRUM B. WAHID

KW9149

*Counsel for the Defendant Syed Hashmi*

Wahid, Vizcaino & Maher LLP

122 E. 42nd Street, Suite 1616

New York, NY 10168

(212) 661-5333

(212) 661-5255 fax