Muna Osman Jama

INDEX TO APPENDICES

APPENDIX SECTION

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Exhibit A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4205

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HINDA OSMAN DHIRANE, a/k/a Nicmatu Rabbi,

Defendant - Appellant.

No. 17-4226

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MUNA OSMAN JAMA, a/k/a Asha Ali Amin, a/k/a Umu Luqmaan, a/k/a Taaibah,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:14-cr-00230-AJT-1; 1:14-cr-00230-AJT-2)

Argued: May 10, 2018 Decided: July 16, 2018

Before NIEMEYER, KEENAN, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Keenan and Judge Harris joined.

ARGUED: Geremy C. Kamens, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellants. Jonathan Y. Ellis, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Whitney E.C. Minter, First Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia; Alan H. Yamamoto, LAW OFFICE OF ALAN YAMAMOTO, Alexandria, Virginia, for Appellants. Dana J. Boente, United States Attorney, James P. Gillis, Assistant United States Attorney, Danya E. Atiyeh, Assistant United States Attorney, Joseph S. Attias, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

NIEMEYER, Circuit Judge:

Following a bench trial, the district court found Muna Osman Jama and Hinda Osman Dhirane guilty of conspiracy to provide and of providing on numerous occasions material support to al-Shabaab, a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B. The defendants, naturalized American citizens who were born in Somalia, collected money from members of online chat rooms and transmitted the funds to coconspirators in Somalia and Kenya to assist al-Shabaab's terrorist activities in the Horn of Africa. The district court sentenced Jama to 144 months' imprisonment and Dhirane to 132 months' imprisonment.

On appeal, the defendants contend (1) that the district court erred in denying their motion to suppress evidence obtained pursuant to warrants issued under the Foreign Intelligence Surveillance Act ("FISA"), arguing that the evidence was obtained unconstitutionally in light of FISA's *ex parte* and *in camera* judicial review process; (2) that the district court applied an incorrect legal standard to conclude that two coconspirators in Somalia and Kenya, to whom the defendants transmitted monies, were "part of" al-Shabaab; and (3) that the district court erred in applying sentencing enhancements under U.S.S.G. § 2M5.3(b)(1)(E) (providing for a two-level enhancement when the support to a foreign terrorist organization was provided with the intent, knowledge, or reason to believe it would be used to assist in the commission of a violent act).

For the reasons that follow, we affirm.

I

In 2008, the U.S. Department of State designated al-Shabaab a foreign terrorist organization under § 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. At that time and continuing through the events of this case, al-Shabaab was engaged in terrorist activities in the Horn of Africa region, principally in Somalia.

In the period from 2011 to 2013, the defendants participated in an online chat room composed of members of the Somali diaspora in the United States and around the world. Participants generally discussed current events concerning Somalia, including al-Shabaab's activities there, and, on various occasions, al-Shabaab leaders and representatives would speak to the group and solicit support, including financial support, for their terrorist activities. During that time, the defendants also participated in a smaller, private chat room known as the "Group of Fifteen." Only those participants from the larger chat room who had been or who could be persuaded to become committed supporters of al-Shabaab were invited to join. The Group of Fifteen conversed confidentially approximately once or twice a month, where members pledged to make periodic payments ranging from $50 to $200 in support of al-Shabaab's operations. The defendants kept track of those commitments and contributed money themselves. They also arranged for representatives or persons associated with al-Shabaab to speak to the Group of Fifteen and solicit support, including financial resources, for al-Shabaab's activities.

As the money was collected, the defendants transmitted it to persons involved with al-Shabaab either on "the Nairobi side," referring to the geographical area around

Nairobi, Kenya, or "the Hargeisa side," referring to the geographical area around Hargeisa, Somalia. Defendant Jama "personally solicited contributions" from the Group of Fifteen, "monitored whether the individual members had satisfied their monthly commitments," and saw to it that the sums were "successfully transmitted to and received by [al-Shabaab] contacts," both on the Nairobi side and the Hargeisa side. And defendant Dhirane played a similar role, mostly for the Hargeisa side. The monies sent to the Nairobi side were transmitted principally to a woman named Fardowsa Jama Mohamed, who used the funds to operate two safehouses in Nairobi for al-Shabaab fighters. The monies sent to the Hargeisa side were transmitted principally to a woman named Barira Hassan Abdullahi, described as a financial organizer on behalf of al-Shabaab, who used the funds to purchase vehicles and other supplies for al-Shabaab fighters in the Golis Mountains just north of Hargeisa.

The government gathered evidence of the defendants' activities through electronic surveillance authorized under FISA. Transcripts of conversations collected during this surveillance showed the defendants and their coconspirators using coded language and sharing advice about how to avoid being caught and what to say if questioned. They also showed the defendants discussing instances where their financial help had assisted fighters in the field. On one occasion, Dhirane described a news report of an attack by al-Shabaab on Somali government troops as an ambush "by our forces," stating, "Thanks to God; let him die. . . . Yes, wonderful; that one will benefit us."

In June 2014, the defendants, along with others — including Mohamed and Abdullahi — were indicted and charged with one count of conspiracy to provide material

support to al-Shabaab, a designated foreign terrorist organization, and both defendants were charged with 20 substantive counts of providing material support in the form of money to al-Shabaab — one count for each transmission of money — all in violation of 18 U.S.C. § 2339B(a)(1).

Prior to trial, the government filed a notice of its intent to present evidence gathered during the surveillance that was conducted pursuant to warrants issued under FISA. The defendants filed a joint motion to suppress the evidence, even though they had not reviewed the warrant application and supporting materials due to the fact that they were classified, contending that the information was unlawfully acquired or the surveillance was not made in conformity with an order of authorization or approval, citing 50 U.S.C. §§ 1806(e) and 1825(f). They also requested that their counsel, who possessed a security clearance, be given access to the classified FISA materials. While the district court denied their counsel access to the FISA materials, it nonetheless conducted an *in camera* and *ex parte* review of the materials and thereafter denied the defendants' motion to suppress. The court concluded that there was probable cause to issue the warrants; that the surveillance complied with all applicable procedures; and that nothing in the materials suggested that a false statement or misleading omission had been made to the Foreign Intelligence Surveillance Court that issued the warrants authorizing the surveillance.

The defendants waived their right to a jury trial, and the district court conducted a bench trial beginning in July 2016. During trial, the defendants argued that they provided monies exclusively for the purpose of procuring medicine and medical services for

al-Shabaab members, which they claimed fell within the "medicine" exception to "material support" as used in 18 U.S.C. § 2339B. *See id.* § 2339A(b)(1). At the conclusion of trial, the court found both defendants guilty of conspiracy, Jama guilty of all substantive counts, and Dhirane guilty of those substantive counts covering conduct that occurred after she joined the conspiracy, acquitting her on the remaining counts. The court issued a written opinion dated November 4, 2016, providing its findings of fact and addressing the various legal issues that had been presented at trial.

The court found as facts that the defendants were "ardent, committed, and active supporters of [al-Shabaab]"; that they knew that al-Shabaab was a designated foreign terrorist organization and was engaging in terrorist activities; and that they knew that it was unlawful to provide support to that organization. The court found further that the defendants played a prominent role in the Group of Fifteen chat room, arranging for representatives of or persons associated with al-Shabaab to solicit funds from members of the chat room and then organizing the collection of those funds and their transmission to Kenya and Somalia. It found that the defendants transmitted the funds mostly to coconspirator Mohamed on the Nairobi side and coconspirator Abdullahi on the Hargeisa side for the specific purpose of supporting al-Shabaab's activities in those areas. Mohamed, it found, operated two safehouses in Nairobi, one for providing medical care and treatment to injured al-Shabaab soldiers and the other as a staging ground for al-Shabaab's military operations. Abdullahi, it found, received the monies in Hargeisa and used them to provide transportation, trucks, and other support services to al-Shabaab soldiers. The court found generally that the defendants, as part of their fundraising

activities, had access to al-Shabaab leaders and to nonpublic information pertaining to al-Shabaab's financial needs, including for its military activities. In this regard, the court found specifically that these defendants coordinated "to some degree their fundraising" with respect to the specific military activities of al-Shabaab. In sum, the court found that the defendants "understood, intended, and planned that, when they provided money to [Mohamed, Abdullahi, and others], they provided money to [al-Shabaab]."

The district court sentenced Jama to 144 months' imprisonment and Dhirane to 132 months' imprisonment, applying sentencing enhancements to their Guidelines ranges under U.S.S.G. § 2M5.3(b)(1)(E) (providing for a two-level enhancement when the support to a foreign terrorist organization was provided with the intent, knowledge, or reason to believe it would be used to assist in the commission of a violent act).

From the district court's judgments, the defendants filed these appeals.

II

The defendants contend first that the statutory framework that allowed the district court to determine *ex parte* and *in camera* the legality of the government's surveillance of them pursuant to the FISA warrants was "fundamentally at odds with our adversary system." They argue that it was contrary to our constitutionally established adversary system to deny their counsel, who possessed the requisite security clearance, access to the warrant applications and supporting materials to assess whether they met statutory requirements and were consistent with the Fourth Amendment. Such a review on behalf of any defendant, they assert, should only be made by the defendant's counsel as an

advocate, not by the court. *See Dennis v. United States*, 384 U.S. 855, 875 (1966) (recognizing, in the context of a trial witness's grand jury testimony, that "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate"). Moreover, they contend that by refusing to allow defense counsel to review the materials, the district court effectively precluded counsel from obtaining a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 171–72 (1978) (authorizing an adversarial hearing on the validity of a warrant upon a showing of an intentional or reckless falsehood in a warrant affidavit). The defendants make clear, however, that they do not challenge on appeal the conclusions reached by the district court, only the statutory framework that allowed the court to reach those conclusions without the participation of counsel.

The defendants filed a motion to suppress the surveillance evidence before trial, and because the Attorney General filed an affidavit stating that disclosure of the classified materials involved in obtaining the warrants would harm national security, the district court conducted an *ex parte* and *in camera* review of the warrant applications and underlying materials, as provided by FISA. The court found that it was able to adjudicate the legality of the FISA surveillance without the assistance of defense counsel, although the statute provided it with discretion to seek that assistance, and it concluded that the surveillance was properly authorized and lawfully conducted.

In enacting FISA, Congress intended that the procedures provided strike a reasonable balance between the competing interests in protecting individuals' constitutional guarantees and in protecting matters involving national security. The Act

provides that when a defendant files a motion to suppress and the Attorney General files "an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," the court must review the materials *ex parte* and *in camera* "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f); *see also id.* § 1825(g). The Act gives the court authority to disclose the materials to the party moving to suppress, but "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* § 1806(f); *see also id.* § 1825(g)

The government notes that every federal court to have considered the constitutionality of these procedures has concluded that FISA reached a reasonable and therefore constitutional balance of competing interests. *See, e.g.*, *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *see also United States v. El-Mezain*, 664 F.3d 467, 567–68 (5th Cir. 2011); *United States v. Damrah*, 412 F.3d 618, 624–25 (6th Cir. 2005); *United States v. Belfield*, 692 F.2d 141, 148–49 (D.C. Cir. 1982). And we share that view. It is consistent with the general notion, even in the criminal context, that the right to an adversarial proceeding to determine disputes of fact is not absolute. *See Kaley v. United States*, 571 U.S. 320, 338 (2014) ("This Court has repeatedly declined to require the use of adversarial procedures to make probable cause determinations"); *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (noting that "an adversary proceeding and full disclosure" is not required for "resolution of every issue raised by an electronic surveillance"); *United States v. Daoud*, 755 F.3d 479, 482 (7th Cir. 2014) (similar).

Nonetheless, the defendants contend that the FISA structure denied them their constitutionally established right to a *Franks* hearing. In *Franks*, the Supreme Court recognized that a defendant has the right to challenge the veracity of an affidavit made in support of a warrant, but in order to procure an evidentiary hearing on the matter, the defendant must first specifically identify what aspect of the affidavit used by the judicial officer to issue the warrant was allegedly false and must accompany that allegation with an offer of proof. 438 U.S. at 167, 171. FISA similarly provides for court review of a warrant application's veracity and legality and, if the court finds it necessary, a hearing. In conducting its review, however, the court relies on the input of various executive officers and its own review of the relevant materials to decide whether a hearing is necessary. *See* 50 U.S.C. § 1806(e)–(g); *see also Daoud*, 755 F.3d at 484 ("[T]he judge makes the additional determination, based on full access to all classified materials and the defense's proffer of its version of the events, of whether it's possible to determine the validity of the *Franks* challenge without disclosure of any of the classified materials to the defense").

We recognize the benefit that an open, adversarial proceeding could provide, particularly in cases where a falsehood in the affidavit could be more readily identified by the defendant or his counsel than by a court perhaps less familiar with the subject matter. But Congress did not run afoul of the Constitution when it reasoned that the additional benefit of an unconditional adversarial process was outweighed by the Nation's interest in protecting itself from foreign threats. And even then, it took care to mitigate the loss of any such benefit by requiring the involvement of a number of high-ranking executive

officials who, subject to additional oversight by the Attorney General, must participate in the FISA-warrant application process. *See* 50 U.S.C. § 1804 (requiring, *inter alia*, (1) that the application be made by a federal officer upon oath or affirmation, (2) that the Attorney General personally approve the application, (3) that a high-ranking executive official certify the application, and (4) that other affidavits or certifications be provided as the judge or Attorney General may demand).

At bottom, we reject the defendants' challenge to the FISA framework and thus to the district court's decision not to disclose the classified FISA materials to the defendants' counsel under that framework, even though, as the defendants repeatedly noted, their counsel had the requisite security clearance.

III

For their main argument on appeal, the defendants contend that the district court, in the course of its opinion after trial, erred by "redefin[ing] an element of § 2339B," without any legal support, when it defined "a foreign terrorist organization" as used in the statute to include any person "engaged in significant activity on behalf of [a foreign terrorist organization] relative to [its] goals and objectives" and developed a list of non-exclusive factors to determine if someone met that definition. They argue that with this broadened definition of "organization," the court concluded that coconspirators Mohamed and Abdullahi, to whom the defendants sent money, were part of al-Shabaab. This was, the defendants maintain, critical to the finding of guilt, because they claimed at trial that Mohamed and Abdullahi were independent of any foreign terrorist organization

and that therefore the defendants' transmission of funds to them was not "to a foreign terrorist organization." They then elaborate on the consequences of the court's error:

> Federal courts have no power to invent their own definitions of the elements of federal criminal offenses. Doing so violates the fundamental principle that Congress, not courts, defines the elements of a federal crime. Devising a novel and unforeseeable construction of an element of a federal crime at the end of a criminal case, and then applying that construction retroactively, violates the Due Process Clause. And devising a novel non-exclusive seven-factor test to define an element of a federal offense violates the void-for-vagueness doctrine. At bottom, the district court's common law construction of the "foreign terrorist organization" element of § 2339B reconfigured an element of a federal crime into something that was previously unknown to the law.

In its written opinion finding the defendants guilty, the district court began with its factual findings. It then applied § 2339B to the facts. In applying the statute, however, the court seemed to assume, as the defendants had argued, that the transmission of monies by the defendants for use by al-Shabaab could only satisfy the elements of the statute if the monies were transmitted to persons — here, Mohamed and Abdullahi — who were "*part of* al-Shabaab." (Emphasis added). The court's discussion was in response to the defendants' particular argument for acquittal — that Mohamed and Abdullahi, to whom the defendants transmitted the monies, were "independent of" al-Shabaab and that the monies paid to them were "for purposes the Defendants believed were lawful," thus insulating them from criminal liability as they "did not intend to deliver these funds to [al-Shabaab] or anyone who could be considered part of [al-Shabaab]." As the court thus understood its task, it was looking for a standard "to determine whether someone [was] sufficiently *acting for or on behalf of* [a foreign terrorist organization] *to be deemed a part of* the [foreign terrorist organization]."

(Emphasis added). When looking for the substance of that standard, however, the court observed:

> There is surprisingly little case law concerning by what standard to determine whether a particular individual is sufficiently associated with [a foreign terrorist organization] to constitute the organization itself.

Therefore, the court, on its own, developed a seven-part balancing test from analogous sources to determine whether Mohamed and Abdullahi, "to whom the defendants delivered their funds[,] were *part of* [al-Shabaab]." (Emphasis added). The court then applied the test to the facts and concluded that both Mohamed and Abdullahi, as well as the defendants, were indeed *part of* al-Shabaab.

The defendants on appeal now seize on this portion of the court's analysis, arguing that the district court had no legal justification to create and apply a new standard under the statute during the course of a criminal prosecution and that, in doing so, the court not only erred but also acted unconstitutionally by introducing a new element into the crime.

The district court's adoption of a test to determine whether someone was *part of* a foreign terrorist organization for purposes of § 2339B was, we conclude, unnecessary and resulted from a misunderstanding of what § 2339B required in the context of this case. Section 2339B does not require that persons such as Mohamed and Abdullahi be *part of* a foreign terrorist organization, nor does it require that the defendants themselves be *part of* the organization. The statute prohibits *anyone* from knowingly providing or attempting to provide material support or resources to a foreign terrorist organization. As § 2339B provides:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be [punished]. . . . To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.

The statute defines "material support or resources" to include, among other things, "any property," "currency," "safehouses," "facilities," or "transportation," but it excludes "medicine or religious materials." 18 U.S.C. §§ 2339B(a)(1), 2339B(g)(4), 2339A(b)(1). Accordingly, to prove a violation, the government must establish that a defendant (1) knowingly provided or attempted or conspired to provide material support (2) to a foreign terrorist organization (3) that the defendant knew had been designated a foreign terrorist organization or had engaged in terrorism. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16–17 (2010) (clarifying that the requisite "mental state" required to violate § 2339B is "knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities").

Thus, determining that Mohamed and Abdullahi, to whom monies were transmitted, were part of al-Shabaab was not necessary to finding that the defendants had provided or attempted to provide material support to al-Shabaab. Soliciting money to satisfy al-Shabaab's expressed needs, collecting that money, and then transmitting it to individuals in Africa who were associated with al-Shabaab for the sole purpose of funding al-Shabaab's activities violated § 2339B. And while such an attempt alone is all that is necessary — *see Humanitarian Law Project*, 561 U.S. at 30 (noting that even "working in coordination with" a designated terrorist organization "serves to legitimize

and further their terrorist means") — in this case the monies actually went to maintain safehouses for al-Shabaab militants and to acquire trucks, transportation, and other support services for the militants. As the court found, the monies reached the defendants' intended objects and accomplished the intended purpose of assisting al-Shabaab. That undoubtedly fulfills the elements of the prohibited conduct.

The defendants' argument that support given to assist a terrorist organization might thereafter have been used to purchase medical equipment or supplies was therefore irrelevant. The defendants were charged with providing *money*, not medical supplies, and in particular money that they had solicited and collected with the stated purpose that it would be sent to support al-Shabaab and its various activities. As the Supreme Court has observed in this context, even material support given to a terrorist organization to promote "peaceable" or "lawful" conduct furthers terrorism as it "frees up other resources within the organization that may be put to violent ends." *Humanitarian Law Project*, 561 U.S. at 30; *see also id.* at 32 (noting that providing material support to terrorist groups in any form "also furthers terrorism by straining the United States' relationship with its allies and undermining cooperative efforts between nations to prevent terrorist attacks"). "Money," the Court observed, "is fungible." *Id.* at 31. There was thus no need for the district court to respond to the defendants' assertion that at least some of the money they sent was used for medical supplies.

Yet, while the district court's development and application of its multi-factor test was unnecessary, its factual findings nonetheless amply satisfied each element of the offense. The court began by finding that al-Shabaab was designated as a foreign terrorist

organization, that it "had engaged and was engaging in terrorist activities at the time of the events involved in this case," and that the defendants knew of these facts. It also found that the defendants were "ardent, committed, and active supporters of [al-Shabaab]." Indeed, it found that the defendants were "involved in arranging for representatives or persons associated with [al-Shabaab] to speak to [their] chat room . . . during which time these [al-Shabaab] members solicited support, including financial resources." The court found further that the defendants, as members of the chat room, were "committed to providing financial contributions approximately monthly for the benefit of [al-Shabaab]" and that "[t]his money was delivered to persons involved in [al-Shabaab's] operations." In particular, it found that Jama "personally solicited contributions," "monitored whether the individual members had satisfied their monthly commitments and whether those sums had been successfully transmitted to and received by [al-Shabaab] contacts," and served "in the nature of an enforcer by following up with those . . . who had not paid their monthly commitments." Dhirane, the court found, came to play a similar role. The court found that the defendants "associated and coordinated with other supporters of [al-Shabaab], including Codefendant Mohamed . . . and Codefendant Abdullahi." "All of these other individuals," it found, "were actively involved in arranging for and facilitating support for [al-Shabaab]." Finally, the court found that neither Mohamed nor Abdullahi was involved with or was using the money for any entity other than al-Shabaab and that the defendants knew this.

In short, the defendants engaged, over a lengthy period of time, in collecting monies for the purpose of providing material support to al-Shabaab, which they knew

was a terrorist group engaged in military activities, and then in sending those monies to individuals they knew were associated with al-Shabaab and involved in providing it with various resources and support. That conduct constitutes the provision of or at least the attempt to provide material support to al-Shabaab in the form of money. And these facts, which the defendants do not challenge on appeal, amply satisfy each of the elements for a conviction under § 2339B. Thus, while we do not subscribe to the analysis conducted by the district court in response to the defendants' position that the court had to find the coconspirators to be *part of* the subject terrorist organization, we conclude that the court appropriately found both defendants guilty of violating § 2339B. We therefore affirm.

IV

Finally, the defendants contend that the district court erred in calculating their sentencing ranges under the Sentencing Guidelines by applying a two-level enhancement for providing material support or resources to a terrorist organization "with the intent, knowledge, or reason to believe they are to be used *to commit or assist in the commission of a violent act*." U.S.S.G. § 2M5.3(b)(1)(E) (emphasis added). They argue that the enhancement requires a showing of the defendants' intent or knowledge that "the specific support [they] provide[] is to be used in the commission of a violent act." (Quotation marks omitted). According to the defendants, the district court's findings do not sufficiently specify the linkage between their support and a violent act.

Section 2M5.3(b)(1)(E), however, does not require, as the defendants seem to be suggesting, that support be traced to or be designed to lead to a *specific* act of violence.

What it does require is that the defendants be shown to have intended, known, or had reason to believe that their support would be used to assist in acts of violence by the terrorist organization.

In this case, the district court expressly found that al-Shabaab was engaged in terrorist activities in fighting wars in Somalia and in Kenya and that the defendants engaged the leaders of al-Shabaab to learn of and respond to specific needs arising "as a result of [al-Shabaab] military operations." And the court found that the defendants "coordinated to some degree their fundraising" with those specific needs. Because the defendants' financial support was directed at and designed to support al-Shabaab's military operations in fighting a war of terrorism in Somalia and Kenya, we conclude that the district court had sufficient evidence with which to apply the enhancement under § 2M5.3(b)(1)(E).

* * *

The judgments of the district court in convicting and sentencing the defendants are accordingly affirmed.

AFFIRMED

Exhibit B

UNITED STATES OF AMERICA v. MUNA OSMAN JAMA and HINDA OSMAN DHIRANE, Defendants.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION
217 F. Supp. 3d 882; 2016 U.S. Dist. LEXIS 153709
Case No. 1:14-cr-230-AJT
November 4, 2016, Decided
November 4, 2016, Filed

Counsel For Muna Osman Jama, also known as Asha Ali Amin, also known as Umu Luqmaan, also known as Taaibah, Defendant: Whitney E.C. Minter, LEAD ATTORNEY, Office of the Federal Public Defender (Alexandria), Alexandria, VA; Geremy C. Kamens, Office of Federal Public Defender, Alexandria, VA; Joshua Michael Siegel, Cooley LLP (DC), Washington, DC.

For Hinda Osman Dhirane, also known as Nicmatu Rabbi, Defendant: Alan H. Yamamoto, LEAD ATTORNEY, Law Office of Alan Yamamoto, Alexandria, VA.

For USA, Plaintiff: Danya E. Atiyeh, LEAD ATTORNEY, US Attorney's Office (Alexandria-NA), Alexandria, VA; James Philip Gillis, LEAD ATTORNEY, United States Attorney's Office, Alexandria, VA.

Judges: Anthony J. Trenga, United States District Judge.

CASE SUMMARY Defendants were convicted of conspiracy to provide material support to foreign terrorist organization (FTO), in violation of 18 U.S.C.S. § 2339B, because U.S. proved beyond reasonable doubt that they knowingly and intentionally entered into agreement between themselves and others to provide material support or resources to group they knew was FTO.

OVERVIEW: HOLDINGS: [1]-With respect to conspiracy to provide material support to a foreign terrorist organization (FTO), the U.S. proved beyond a reasonable doubt that defendants each knowingly and intentionally entered into an agreement between themselves and others to provide material support or resources to a group that they knew was a FTO, in violation of 18 U.S.C.S. § 2339B; [2]-Defendants engaged in a substantial amount of significant activities on behalf of and in coordination with the group over an extended period of time; defendants played such central coordinating, facilitating, and supervisory roles that they were also operationally integrated into the group as part of its fundraising network; [3]-Defendant two was guilty of providing material support, as charged in six counts, under Pinkerton liability, based on defendant one's convictions on those same counts.

OUTCOME: Defendant one found guilty. Defendant two found guilty in part and not guilty in part. Defendant one's motion for acquittal denied. Defendant two's motion for acquittal granted in part and denied in part.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism > Support of Terrorist Organizations > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

In order to convict a defendant of conspiracy to provide material support to a foreign terrorist organization, the United States must prove beyond a reasonable doubt the following elements: (1) two or more persons entered into an agreement that had as its objective providing material support or resources to a foreign terrorist organization in violation of 18 U.S.C.S. § 2339B; (2) the defendant knew that the objective of the agreement or the means by which it was to be accomplished was unlawful; and (3) the defendant knowingly and voluntarily became a part of that agreement. In order to prove that a defendant knowingly and voluntarily joined the conspiracy, the United States must prove that the substance of their agreement contemplated conduct that satisfied the elements of a substantive offense under § 2339B.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism > Support of Terrorist Organizations > Elements
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

In order to convict a defendant of providing material support or resources to a foreign terrorist organization (FTO), in violation of 18 U.S.C.S. § 2339B, the government must prove beyond a reasonable doubt the following elements: (1) the defendant provided or attempted to provide assistance that constituted material support or resources; (2) the material support or resources were provided or attempted to be provided to a FTO, as defined in 8 U.S.C.S. § 1189, or to an organization that has engaged or engages in terrorist activity, or in terrorism; (3) the defendant acted knowingly and intentionally; and (4) the defendant had knowledge that the organization is a designated terrorist organization, has engaged or engages in terrorist activity, or has engaged or engages in terrorism. 18 U.S.C.S. § 2339B(a)(1). A person "provides" material support or resources "to" a FTO if that person delivers material support or resources intended for a FTO, either directly or through conduits, to someone who is deemed a part of the FTO.

→ a means for transmitting or distributing

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism

For the purposes of 18 U.S.C.S. § 2339B, a person is to be deemed part of a foreign terrorist organization (FTO) if that person is engaged in significant activity on behalf of a FTO relative to that FTO's goals and objectives, a determination to be made on the basis of all of the facts and circumstances pertaining to an individual's relationship with a FTO.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism > Support of Terrorist Organizations > Elements

To determine whether and to what extent a particular individual is acting on behalf of a foreign terrorist organization (FTO), a court considers the following non-exclusive factors: (1) the nature of the assistance provided or received by the individual and how it benefitted the FTO or otherwise advanced its goals and objectives; (2) for what time period the support or resources were provided; (3) whether the individual undertakes his or her activities specifically and exclusively for the benefit of the FTO or whether the individual undertakes similar activities for other organizations or for the public at large; (4) the degree to which the individual's actions are directed by or coordinated with others associated with the FTO or any of its generally recognized representatives; (5) the nature and extent of the individual's contacts within the FTO or with others acting on behalf of the FTO, including access to the FTO's leadership and to non-public information pertaining to the FTO's activities; (6) whether the individual self-identifies with the FTO, represents himself or herself as being part of the FTO, or purports to act on behalf of the FTO; and

(7) whether the individual is reliably identified as being part of a FTO by recognized international law enforcement or other organizations.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism > Support of Terrorist Organizations > Elements

Rarely will the evidence bear on all, or even most, of the factors to determine whether and to what extent a particular individual is acting on behalf of a foreign terrorist organization (FTO). In some cases, there may be sufficient evidence in just one of the categories to demonstrate an adequate link between a person and a FTO so as to establish that the individual undertook significant activities on behalf of the organization and should therefore be deemed part of that organization.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Terrorism > Support of Terrorist Organizations > Elements
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

Independent advocacy is protected and cannot be the basis for a conviction under 18 U.S.C.S. § 2339B, but the statute punishes conduct, not speech. In prohibiting particular forms of support to foreign terrorist groups, § 2339B does not violate the freedom of speech.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

The Pinkerton liability doctrine provides that the overt act of one partner in crime is attributable to all. In other words, the Pinkerton doctrine makes a person liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy. Although each defendant must have some knowledge of the conspiracy, each individual co-conspirator need not be aware of its full scope in order to be deemed guilty for the acts of other members.

Criminal Law & Procedure > Trials > Motions for Acquittal

Fed. R. Crim. P. 29(a) provides that, after the government closes its case in chief, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. In considering a motion for judgment of acquittal pursuant to Rule 29, the dispositive inquiry is whether, as a matter of law, the government's evidence is sufficient to establish factual guilt on the charges in the indictment. When reviewing the sufficiency of the evidence, the court must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established. Importantly, the court does not assess the credibility of witnesses and resolves direct contradictions in testimony in the government's favor.

Opinion

Opinion by: Anthony J. Trenga

Opinion

{217 F. Supp. 3d 884} **MEMORANDUM OPINION AND FINDINGS OF FACT IN SUPPORT OF**

VERDICT

On October 25, 2016, the Court found Defendant Muna Osman Jama ("Jama") guilty on Counts One through Twenty-One of the superseding indictment and Defendant Hinda Osman Dhirane ("Dhirane") guilty on Counts One and Sixteen through Twenty-One and not guilty on Counts Two through Fifteen of the superseding indictment. The Court's verdict followed the presentation of evidence during a nonjury trial held on July 14-18, 2016, supplemental briefing on defendants' Rule 29 motion for a judgment of acquittal, and closing arguments on October 12, 2016. Immediately before the Court returned its verdict, Defendant Jama made an oral motion on October 25, 2016 pursuant to Federal Rule of Criminal Procedure 23(c) requesting that the Court state its specific findings of fact.1 In response to Jama's request, the Court stated its specific findings of fact in open court at the time it issued its verdict and denied Defendants' Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29. The Court now issues this memorandum opinion and written findings of fact in further support of its verdict and its denial of Defendants' Rule 29 motion.

I. BACKGROUND

A. Procedural History

On June 26, 2014, a grand jury returned a twenty-one count superseding indictment against Defendants Jama and Dhirani, together with Codefendant Farhia Hassan ("Hassan"), who was arrested in the Netherlands **{217 F. Supp. 3d 885}** and remains outside of the United States, and two other Codefendants, Fardowsa Jama Mohamed ("Mohamed") and Barira Hassan Abdullahi ("Abdullahi"), who have not been arrested and appear to be located outside of the United States. In Count One, Defendants are charged with Conspiracy to Provide Material Support to a Foreign Terrorist Organization, namely Harakat al-Shabaab al-Mujahideenal-Shabaab ("al-Shabaab" or "AS"), in violation of 18 U.S.C. § 2339B ("Section 2339B"). In Counts Two through Twenty-One, they are charged with Providing Material Support to a Foreign Terrorist Organization in violation of 18 U.S.C. §§ 2 & 2339B.

Defendants waived trial by jury, and the Court held a bench trial beginning on July 11, 2016. On July 14, 2016, after the United States rested its case in chief, Defendant Jama moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. [Doc. No. 232.] The Court reserved decision on the motion.2 Thereafter, the parties continued the presentation of evidence, with all parties resting on July 18, 2016, following which point Defendant Jama renewed her Rule 29 Motion.3 The Court then ordered the filing of supplemental briefing and continued closing arguments to October 12, 2016.4 After closing arguments, the Court again reserved decision on Defendants' pending Rule 29 motion.

B. Superseding Indictment

Count One of the superseding indictment alleges that "[f]rom at least in or about February 2011" and continuing through the date of the superseding indictment, Jama and Dhirane, together with Codefendants Mohamed, Hassan, and Abdullahi, conspired with each other and with others "knowingly to provide material support and resources to a foreign terrorist organization, that is, al-Shabaab," in violation of 18 U.S.C. § 2339B. The superseding indictment further alleges that in furtherance of the conspiracy, Jama and Dhirane and their coconspirators engaged in a series of twenty-six transfers of funds, beginning on February 8, 2011 with a transfer from Jama to Mohamed and ending on January 23, 2013 with a transfer from Dhirane to Daahir Abdi.

Counts Two through Twenty-One of the superseding indictment allege that on specific dates, a defendant or co-conspirator transmitted or attempted to transmit a particular amount of money to a particular individual, thereby providing material support or resources to al-Shabaab in violation of 18

U.S.C. § 2339B. These counts **{217 F. Supp. 3d 886}** are stated chronologically, beginning with an alleged transfer from Defendant Jama to Mohamed on February 8, 2011 (Count Two) and ending with an alleged transfer from Defendant Jama to Osman Jama, her father, on August 8, 2012 (Count Twenty-One). Fourteen of the twenty counts of material support involve transfers from Jama to Mohamed; four involve transfers from Ali B. Sheik, Jama's husband, to Mohamed; and two involve transfers from Jama to Osman Jama.

At the time the events in this case took place, Title 18 of the United States Code, Section 2339B(a)(1) provided that:

> [w]hoever 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 term of years or life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activities (as defined in section 212 (a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the For Relations Authorization, Fiscal Years 1988 and 1989).5"Material support or resources" is defined as:
>
> any property, iangible 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 . . . .18 U.S.C § 2339A(b)(1).

In order to convict a particular defendant of conspiracy to provide material support to a foreign terrorist organization, as alleged in Count One, the United States must prove beyond a reasonable doubt the following elements: (1) two or more persons entered into an agreement that had as its objective providing material support or resources to a foreign terrorist organization in violation of 18 U.S.C. § 2339B; (2) the defendant knew that the objective of the agreement or the means by which it was to be accomplished was unlawful; and (3) the defendant knowingly and voluntarily became a part of that agreement. *See United States v. Jimenez Recio*, 537 U.S. 270, 274, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003) ("The Court has repeatedly said that the essence of a conspiracy is "an agreement to commit an unlawful act."') (quoting *Iannelli v. United States*, 420 U.S. 770, 777, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)); *U.S. v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996). In order to prove that a defendant knowingly and voluntarily joined the conspiracy, the United States must prove that the substance of their agreement contemplated conduct that satisfied the elements of a substantive offense under Section 2339B.

In order to convict each Defendant of the substantive offense of providing material support or resources to an FTO in violation of Section 2339B, as alleged in Counts Two through Twenty-One, the government must prove beyond a reasonable doubt the following elements: (1) the **{217 F. Supp. 3d 887}** defendant provided or attempted to provide assistance that constituted "material support or resources"; (2) the material support or resources were provided or attempted to be provided to a Foreign Terrorist Organization ("FTO"), as defined in 8 U.S.C. § 1189,6 or to an organization that "has engaged or engages in terrorist activity, or . . . in terrorism"; (3) the defendant acted knowingly and intentionally; and (4) the defendant had "knowledge that the organization is a designated terrorist organization, has engaged or engages in terrorist activity, or has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). A person "provides" material support or resources "to" a FTO if that person delivers material support or resources intended for an FTO, either directly

or through conduits, to someone who is deemed a part of the FTO.

The Court has jurisdiction as to each count with respect to each Defendant if, among other grounds, she is a national of the United States, she is an alien lawfully admitted for permanent residence in the United States, the offense occurs in whole or in part within the United States, or the offense occurs in or affects interstate or foreign commerce. 18 U.S.C. § 2339B(d).

II. FINDINGS OF FACT and ANALYSIS OF THE EVIDENCE

The case involves inherently difficult issues of proof because of the secretive and amorphous nature of terrorist organizations, the limited transparency concerning the specific roles and associations of particular persons, and the limited practical ability to trace the extraterritorial movement of specific funds for specific purposes. Here, there is substantial direct evidence, principally in the form of recorded chatroom statements by Defendants and others. But the probative value of that evidence is limited and has to be considered with other circumstantial evidence, including the timing of the alleged transfers relative to actual events involving AS and the reasonable inferences that can be drawn from that evidence. The Court must also consider expert testimony concerning the nature of AS's operations, its known leadership, and those who are associated with its operations. Based on all of the evidence and the Court's assessment of the credibility of the witnesses and the weight to be given any particular piece of evidence, together with reasonable inferences drawn from that evidence, the Court makes the following findings of fact:

1. AS was designated as a foreign terrorist organization by the United States Department of State under Section 219 of the Immigration and Nationality Act and is also an organization that both had engaged and was engaging in terrorist activities at the time of the events involved in this case and therefore was then and remains today an FTO for the purposes of Section 2339B(a)(1).

2. Defendants are both United States citizens and residents of the United States who were born in Somalia.7 At **{217 F. Supp. 3d 888}** all material times, both were ardent, committed, and active supporters of AS who knew and associated with persons who were themselves part of AS. At all material times, they also knew that AS was a designated FTO, that it had engaged and was engaging in terrorist activities, and that it was unlawful to provide certain kinds of support to that organization.

3. Beginning no later than April 2011, in the case of Defendant Jama, and April 2012, in the case of Defendant Dhirane, these Defendants participated in a chatroom known as ISDAC or "Dacwatu al-Tawhid." The chatroom was composed of members of the Somali community in the United States and around the world, commonly referred to as the Somali diaspora. The participants discussed current events concerning Somalia and also the activities of AS as they appeared in the worldwide press. Also, on various occasions, AS leaders and representatives would speak to the group and solicit various forms of support, including financial support.

4. Within a smaller private chatroom hosted by Paltalk, a subgroup of participants known as the "Group of Fifteen" held separate and more confidential discussions approximately once or twice per month. Only those participants from the larger chatroom who had been or could potentially be persuaded to become committed supporters of AS were invited into the Group of Fifteen. Both of these Defendants were members of the Group of Fifteen, which was committed to providing financial contributions approximately monthly for the benefit of AS. This money was delivered to persons involved in AS's operations either on what was referred to as the "Nairobi side" (referring to an area in and around Nairobi, Kenya) or the "Hargeisa side" (referring to an area in and around Hargeisa, Somalia). The chatroom itself was sponsored, supported, and financed through persons closely linked to AS and its fundraising efforts.

5. Both Defendants also played prominent, if not leadership, roles within the Group of Fifteen. One or

both of these Defendants were involved in arranging for representatives or persons associated with AS to speak to both the chatroom and the Group of Fifteen, during which time these AS members solicited support, including financial resources. Defendant Jama would then transmit the funds or cause the funds to be transmitted by people such as her husband, Ali B. Sheikh, to various other individuals more directly connected to AS.

6. Defendant Jama supervised the monthly payments by the Group of Fifteen members.8 Occasionally, she personally solicited contributions. She also monitored whether the individual members had satisfied their monthly commitments and whether those sums had been successfully transmitted to and received by AS contacts on both the Nairobi side and the Hargeisa side, and she **{217 F. Supp. 3d 889}** served in the nature of an enforcer by following up with those members of the Group of Fifteen who had not paid their monthly commitments on time. Jama also instructed Dhirane on how to perform these roles, and Dhirane came to play a similar role as Jama within the Group of Fifteen.

7. As part of their activities within the Group of Fifteen and before they became part of that group, Defendants associated and coordinated with other supporters of AS, including Codefendant Mohamed, located in Nairobi, Kenya, and Codefendant Abdullahi, located in Hargeisa, Somalia. All of these other individuals were actively involved in arranging for and facilitating support for AS. Both Mohamed and Abdullahi had access to AS leadership and coordinated their own activities in light of the specific needs of AS as events unfolded as a result of AS military operations.

8. Mohamed operated two safe houses in Nairobi, Kenya for AS. One of these was focused, at least in part, on providing medical care and treatment to injured AS soldiers. The other one was used as a staging ground in various respects for AS military operations. Mohamed coordinated her work at the two safe houses with the specific needs of AS for years, and there is no evidence that she worked for, with, or on behalf of any individual or entity other than AS.

9. Abdullahi was involved in receiving money for AS in Somalia for such purposes as providing transportation, trucks, and other supportive services to AS. This support included what were referred to in the Group of Fifteen chatroom as "living expenses" in the coded language that the Defendants and others employed to conceal the true nature of their discussions. There is no evidence that she worked for, with, or on behalf of any individual or entity other than AS.

10. Jama and Dhirane were involved in generating and delivering funds for the benefit of AS, through the transmission of those funds to these other individuals such as Mohamed and Abdullahi. Jama principally focused on the delivery of funds to Mohamed and others on the Nairobi side, and Dhirane principally focused on the delivery of funds to Abdullahi on the Hargeisa side. Often, both Defendants knew that various intermediaries were being used as conduits in order to conceal the sources and purposes of those funds. These intermediates included Osman Jama, Defendant Jama's father, and Ali B. Sheik, Jama's husband, among others.

11. As part of their fundraising activities, Defendants had access to leaders within AS and, through those contacts, had access to non-public information pertaining to AS's financial needs as well as other activities with which it was involved, including military activities. They also coordinated to some degree their fundraising with the specific needs of AS.

12. The Court has jurisdiction over both Defendant Jama and Defendant Dhirane with respect to each of the Counts of the indictment.

13. With respect to Count One: Conspiracy to Provide Material Support to a Foreign Terrorist Organization, the United States has proven beyond a reasonable doubt that Defendants Jama and Dhirane each knowingly and intentionally entered into an agreement between themselves and others

to provide material support or **{217 F. Supp. 3d 890}** resources to AS, which they knew was an FTO, in violation of Section 2339B. The Court therefore finds both of the Defendants guilty of conspiracy as charged in Count One.

A. Whether Defendants or Their Codefendants Were Part of al-Shabaab

The defendants, through counsel, concede they were involved in providing funds to particular people in order to assist AS in certain limited ways. The central factual and legal issue with respect to Count One is whether the substance of Defendants' agreement to provide those funds had as its objective providing unlawful material support and resources to an FTO in violation of Section 2339B. Dispositive of that issue is whether these Defendants thought and intended as part of their agreement that the funds that would be delivered to certain individuals would be funds delivered to AS or to individuals who acted as conduits for the delivery of these funds or other unlawful material support to AS. For the purposes of Count One, it is immaterial whether defendants were, in fact, successful in doing so.

While not disputing that they intended to provide certain assistance that would benefit AS, Defendants contend that the substance of their agreement was simply to provide funds to persons who supported, but were independent of, AS, who, in turn, would provide exempted medical assistance to AS. Similarly, Defendants contend that their fundraising activities and their transmission of the alleged funds were done through persons they believed to be entirely independent of AS and for purposes the Defendants believed were lawful. In this regard, Defendants contend that what they intended to provide, and what they did in fact provide with the funds they sent to persons independent of AS, was "medicine" or other lawful assistance to AS as well as to those not part of AS such as orphans. In support of that position, Defendants argue that the term "medicine" is required to be defined broadly both as a matter of statutory construction within the overall context of Section 2339B and related statutes and also in order to be consistent with customary international law and the United States' treaty obligations. By way of summary, Defendants argue, based on these contentions, that the money they agreed to provide was not material support or resources because (1) they did not intend to deliver these funds to AS or anyone who could be considered part of AS; and (2) they intended and expected that the persons who they agreed would receive the funds would use the funds only to provide to AS exempted medicine or other medical-related care that should be considered within the scope of the exemption for "medicine" under the definition of "material support or resources."

There is surprisingly little case law concerning by what standard to determine whether a particular individual is sufficiently associated with an FTO to constitute the organization itself. It appears that no decision of the Supreme Court, Fourth Circuit, or any other circuit court has addressed explicitly what showing is legally adequate to constitute delivery of funds or other material support to an FTO under Section 23398. In *United States v. Ali*, 799 F.3d 1008 (8th Cir. 2015), the Eighth Circuit considered facts very similar to those in this case involving fundraising for al-Shabaab through Internet chatrooms, but the court did not consider specifically whether the persons to whom the defendants delivered their funds were part of AS, as that issue was not raised on appeal. The Eighth Circuit therefore had no occasion to articulate a specific legal test. Likewise, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010), the Supreme Court considered various constitutional challenges **{217 F. Supp. 3d 891}** to certain aspects of Section 2339B, principally under the First Amendment, as did the Fourth Circuit in *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) with respect to related sections. However, neither court specifically considered what involvement or association a person must have with an FTO to be deemed part of that organization for the purposes of Section 2339B.

Defendants argue for a test that requires that a particular individual operates under what they call the "command and control" of recognized AS leadership before that individual may be deemed a part of AS for the purposes of the material support statute. In support of that position, Defendants rely on cases that consider who should be deemed an enemy combatant or a non-privileged belligerent. They also contend that only someone who is judged a "member" of AS, as opposed to a "supporter," "financier," or "facilitator," should be considered part of the organization. In support of that position, they point to the matrix of designations used by the United Nations, as referenced in expert testimony presented by the United States, which distinguishes between a "member" of an FTO and a "supporter," "financier," or "facilitator."9 Defendants claim that, while an FTO is not comparable to a formally organized corporation or other legal or lawful entity, it does have an identifiable structure with identifiable leaders and persons who are under the command and control of that leadership and for that reason, is fundamentally different from other types of domestic criminal organizations. Defendants also contend that any working definition of who is a part of an FTO must accommodate the First Amendment rights of advocacy and association, including First Amendment protections that extend to the expressive conduct imbedded in financial donations, as recognized in such cases as *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). They claim that, for that reason, an essential element of the conspiracy claim must be a non-speech protected overt act in furtherance of the conspiracy.

The government proposes a much less formal test, akin to that used to determine whether someone is part of a criminal enterprise under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. *§§* 1961-1968, or other federal statutes. *See, e.g.*, 18 U.S.C. § 1961(4) (An "enterprise" includes any individual . . . or group of individuals associated in fact although not a legal entity.").

Although the material support statute does not specifically define or address who is part of an FTO, it does have other terms that are either defined or have been construed in ways that are useful in fashioning a test to determine whether someone is sufficiently acting for or on behalf of an FTO to be deemed a part of the FTO. For example, Section 2339B(h) explains that providing prohibited "personnel" involves providing a physical person, which may include himself or herself, who "work[s] under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization." That subsection further provides that "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control." On the one hand, Congress plainly intended for courts to consider the nature of an individual's actions broadly in relation to the overall goals of the terrorist organization **{217 F. Supp. 3d 892}** in determining whether someone is to be deemed part of that organization. On the other hand, Congress also clearly envisioned that courts would not apply the material support statute to those engaged merely in independent advocacy or only isolated, marginal, or tangentially related activities relative to the FTO. The Supreme Court has emphasized that because the statute requires that the "service" or other prohibited support be "to" an FTO, there must be a sufficient connection between the service provided and an FTO. *Humanitarian Law Project*, 561 U.S. at 23-24. But the specific *exclusion* in the definition of "personnel" of individuals working "entirely independently" and the specific *inclusion* of individuals whose activities involve organizing, managing, or supervising various operations (as well as those who operate under the FTO's direction or control) make clear that Congress also did not intend to limit Section 2339B's application to situations where prohibited support is delivered to designated or recognized leaders or to those who operate under some identifiable command and control structure. Rather, Congress intended to reach all persons who act on behalf of an FTO to further its goals and objectives in significant ways. The United Nations' system of categorization of persons associated with an FTO is not inconsistent with Congress's

overall intention.10

The Court concludes that, for the purposes of Section 2339B, a person is to be deemed part of an FTO if that person is engaged in significant activity on behalf of an FTO relative to that FTO's goals and objectives, a determination to be made on the basis of all of the facts and circumstances pertaining to an individual's relationship with an FTO. To determine whether and to what extent a particular individual is acting on behalf of an FTO, in this case al-Shabaab, the Court has considered the following non-exclusive (and somewhat overlapping) factors: (1) the nature of the assistance provided or received by the individual (whether lawful or unlawful) and how it benefitted the FTO or otherwise advanced its goals and objectives; (2) for what time period the support or resources were provided; (3) whether the individual undertakes his or her activities specifically and exclusively for the benefit of the FTO or whether the individual undertakes similar activities for other organizations or for the public at large; (4) the degree to which the individual's actions are directed by or coordinated with others associated with the FTO or any of its generally recognized representatives; (5) the nature and extent of the individual's contacts within the FTO or with others acting on behalf of the FTO, including access to the FTO's leadership and to non-public information pertaining to the FTO's activities; (6) whether the individual self-identifies with the FTO, represents himself or herself as being part of the FTO, or purports to act on behalf of the FTO; and (7) whether the individual is reliably identified as being part of an FTO by recognized international law enforcement or other organizations. Rarely would the evidence bear on all, or even most, of these factors. In some cases, there may be sufficient evidence in just one of these categories to demonstrate an adequate link between a person and an FTO so as to establish that the individual undertook significant activities on behalf of the organization and should therefore be deemed part of that organization.

Here, Defendants Jama and Dhirane, as well as Mohamed and Abdullahi, all engaged **{217 F. Supp. 3d 893}** in a substantial amount of significant activities on behalf of and in coordination with the AS organization itself over an extended period of time. Mohamed operated two safe houses: one for injured AS soldiers and one that facilitated AS's military operations. There is no evidence that she devoted her efforts to any other entity or group or operated an independent organization like Doctors Without Borders or the International Red Cross, which have purposes, goals, and objectives that are not tied to any one particular beneficiary or ideology. The funds Mohamed solicited and received were specifically for AS and for no one else, and she was operationally integrated into the AS organization and coordinated her own activities with AS's broader organizational goals over a period spanning multiple years. Likewise, Abdullahi obtained funds for the use of AS and solicited those funds for that purpose alone. Both Mohamed and Abdullahi had access to AS leadership and coordinated their own activities in light of the specific needs of AS, as events unfolded as a result of AS military operations, whether it be the purchase of an x-ray machine, the payment of rent on safe houses, the purchase of trucks, or payments for AS's other specific needs. Overall, Mohamed and Abdullahi undertook significant activities on behalf of AS so as to be appropriately considered part of AS for the purposes of the material support statute. The roles played by Mohamed and Abdullahi and their respective associations with AS were well known to Jama and Dhirane. For that reason, Defendants understood, intended, and planned that, when they provided money to these individuals or to those associated with either the Nairobi or the Hargeisa side, they provided money to AS.

Jama and Dhirane also played such central coordinating, facilitating, and supervisory roles with respect to the Group of Fifteen and the ISDAC chatroom that they were also operationally integrated into AS as part of its fundraising network. Therefore, they, too, were engaged in significant activities on behalf of AS and also constituted parts of AS for the purposes of the material support statute. Both kept books and records with respect to their AS fundraising, were actively involved in raising and transmitting the funds they raised, and maintained and promoted active relationships with not

only Mohamed, Abdullahi, and others already described, but also with other known and recognized representatives and spokespersons for AS. In short, the Group of Fifteen itself was part and parcel of AS's fundraising network and was integrated organizationally into AS's structure as an FTO.

For the above reasons, as well as those placed on the record in open court, Defendants knowingly and willingly entered into an agreement to provide money to AS, which they knew was an FTO. It is therefore unnecessary for the Court to determine whether the assistance provided to AS fell within the "medicine" exemption.11

{217 F. Supp. 3d 894} B. Whether a Non-Speech Protected Overt Act is Required

In rendering its verdict, the Court has considered Defendants' position that in light of the First Amendment issues that would otherwise exist, the United States must prove a non-speech protected overt act in furtherance of the conspiracy, even though the statute does not explicitly require such an overt act, and, therefore, such an act would not ordinarily be required. In *Humanitarian Law Project*, the Supreme Court made clear that independent advocacy is protected and cannot be the basis for a conviction under Section 2339B, but it also made clear that the statute punishes conduct, not speech. 561 U.S. at 25-26. There is no First Amendment restriction on considering speech to determine knowledge and intent with respect to the prohibited conduct. Likewise, and not withstanding any First Amendment protections for the expressive conduct imbedded in financial donations, "in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech." *Id.* at 39. Here, Defendants agreed to engage in prohibited conduct and are not being punished for their advocacy but rather for their actions. For all these reasons, Congress's prohibition of the particular forms of support that Defendants agreed to provide does not violate any First Amendment rights, and there is no need to incorporate into a conspiracy charge under Section 23398 a non-speech protected overt act in order to avoid any infringement on constitutionally protected speech.12

14. With respect to the substantive counts alleged in Counts Two through Twenty-One: Providing Material Support to A Foreign Terrorist Organization, the United States has proven beyond a reasonable doubt that defendant Jama knowingly and intentionally made or directed each of the specifically alleged transfers to AS in order to provide unlawful material support or resources to an FTO. Jama knew and intended that her payments to Mohamed as alleged in Counts Two, Three, Five, Seven, Eight, Nine, Twelve through Seventeen, Nineteen, and Twenty were all payments to AS, which she knew was an FTO. Likewise, Jama directed her husband, Ali B. Sheikh, to make the payments sent to Mohamed alleged in Counts Four, Six, Ten, and Eleven and knew and intended that those payments go to AS. Jama also knew and intended that her payments to her father, Osman Jama, as alleged in Counts Eighteen and Twenty-One were, at least in part, payments to AS. The Court therefore finds Jama guilty as charged in Counts Two through Twenty-One.

15. The United States has also proven beyond a reasonable doubt that Dhirane is accountable for Jama's illegal payments to AS beginning in April **{217 F. Supp. 3d 895}** 2012 under *Pinkerton* liability. The Court therefore finds Dhirane guilty as charged in Counts Sixteen through Twenty-One and not guilty as charged in Counts Two through Fifteen.

Although the United States did not prove Dhirane personally transmitted any of the funds alleged in Counts Two through Twenty-One, it nevertheless seeks Dhirane's conviction on those same counts based on *Pinkerton* liability. The *Pinkerton* liability doctrine provides that "the overt act of one partner in crime is attributable to all." *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). In other words, "[t]he *Pinkerton* doctrine makes a person liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy." *United States v. Ashley*, 606 F.3d 135, 142-43 (4th Cir. 2010).

Although each defendant must have some knowledge of the conspiracy, each individual co-conspirator need not be aware of its full scope in order to be deemed guilty for the acts of other members. *See, e.g., United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993).

The United States has proven beyond a reasonable doubt that Dhirane knowingly and intentionally joined the alleged conspiracy no later than April 2012, with knowledge of the scope and nature of the conspiracy as well as that its purpose was unlawful. Jama's transfers of funds to AS as alleged in Counts Sixteen through Twenty-One occurred after Dhirane joined the conspiracy and were reasonably foreseeable and within the scope of the conspiracy that she knowingly and willingly joined. The Court therefore finds Dhirane guilty of providing material support in violation of Section 2339B, as charged in Counts Sixteen through Twenty-One, under *Pinkerton* liability based on Jama's convictions on those same counts.

IV. DEFENDANTS' RULE 29 MOTION

At trial, the Court reserved decision on Jama's Rule 29 Motion for Judgment of Acquittal, which she initially made after the close of the government's case in chief on July 14, 2016 [Doc. No. 232] and later renewed. On September 9, 2016, Dhirane moved to adopt and join this motion and the memoranda in support filed by Jama. [Doc. No. 248.] The Court granted that motion in open court on October 25, 2016.

Federal Rule of Criminal Procedure 29 provides that, after the government closes its case in chief, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In considering a motion for judgment of acquittal pursuant to Rule 29, the dispositive inquiry is whether "as a matter of law the government's evidence is sufficient 'to establish factual guilt' on the charges in the indictment." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir. 2003) (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986)). When reviewing the sufficiency of the evidence, the Court "must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982). Importantly, the Court does not assess the credibility of witnesses and resolves direct contradictions in testimony in the government's favor. *See, e.g., United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998); *United States v. Arrington*, 719 F.2d 701, 704 (4th Cir. 1983).

Here, the evidence as it existed at the close of the government's case in chief was **{217 F. Supp. 3d 896}** sufficient to sustain convictions of Defendant Jama on each of the twenty-one counts. The evidence was also sufficient to sustain a conviction of Defendant Dhirane under *Pinkerton* liability on Counts One and Counts Sixteen through Twenty-One but not on Counts Two through Fifteen since the evidence regarding Dhirane sufficiently establishes that she knowingly joined the alleged conspiracy only as of April 2012. For these reasons, Jama's Rule 29 Motion is denied, and Dhirane's Rule 29 Motion is denied as to Counts One and Sixteen through Twenty- One and granted as to Counts Two through Fifteen.

V. CONCLUSION

For the reasons set forth above, the Court finds Defendant Jama GUILTY as charged in Counts One through Twenty-One and Defendant Dhirane GUILTY as charged in Counts One and Sixteen through Twenty-One and NOT GUILTY as charged in Counts Two through Fifteen. The Court also OVERRULES Defendant Jama's evidentiary objections [Doc. No. 233], DENIES Defendant Jama's Rule 29 Motion for Judgment of Acquittal [Doc. No. 232], DENIES Defendant Dhirane's Rule 29 Motion as to Counts One and Sixteen through Twenty-One, and GRANTS Defendant Dhirane's Rule

29 Motion as to Counts Two through Fifteen [Doc. No. 232]. The United States' "Motion for a Verdict Before Ruling on Defendants' Untested Legal Theories in Their Closing Arguments or on Defendants' Rule 29 Motion Based Upon the Geneva Conventions" [Doc. No. 258] is DENIED as moot.

The Clerk is directed to forward copies of this Memorandum Opinion and Findings of Fact in Support of Verdict to all counsel of record.

/s/ Anthony J. Trenga

Anthony J. Trenga

United States District Judge

Alexandria, Virginia

November 4, 2016

Footnotes

1

Rule 23(c) provides that in a nonjury trial, "[i]f a party requests before the finding of guilty or not guilty, the court must state its specific findings offact in open court or in a written decision or opinion." Fed. R. Civ. P. 23(c).

2

Also on July 14, 2016, Defendant Jama filed a Motion to Exclude Specified Exhibits [Doc. No. 233] on the grounds that statements made by persons identified as anyone other than Defendants Jama and Dhirane or whose identity is unclear should be barred because they (1) lack the necessary foundation, (2) are hearsay, and/or (3) do not show intent or state of mind. The Court reserved decision on that objection pending the complete presentation of the government's evidence. On October 25, 2016, the Court overruled those objections in open court on the grounds that there was a sufficient foundation to admit the challenged evidence, the evidence was relevant under Rules 401 and not excludable under Rule 403, and the challenged statements were not hearsay either under Rule 801(d)(2)(A) or (E) or as verbal facts probative of knowledge, intent, motive, plan, preparation, or absence of mistake.

3

On September 9, 2016, Dhirane filed a Motion to Adopt and Join the Rule 29 motion and a memorandum in support of that motion. [Doc. No. 248.] The Court granted Defendant Dhirane's motion on October 25, 2016 in open court.

4

Before the closing arguments, the United States filed a pleading styled a "Motion for a Verdict Before Ruling on Defendants' Untested Legal Theories in Their Closing Arguments or on Defendants' Rule 29 Motion Based Upon the Geneva Conventions." [Doc. No. 258.] The Court denies that motion as moot.

5

An amended version of 18 U.S.C § 2339B took effect on June 2, 2015, increasing the maximum term of imprisonment for providing material support or resources when death does not result from fifteen to twenty years.

6

"The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that-(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). This designation is subject to judicial review.
7

When the Court uses the term "Somalia" throughout this opinion, it refers to the territory that encompasses, among other parts, the self-declared state of Somaliland. The United States does not officially recognize Somaliland but rather considers it an autonomous region of Somalia. Hargeisa, Somalia is located within Somaliland.
8

Defendants argue that their use of the term "living expenses," which they frequently used in reference to the monthly payments, was code for only medicine or medical services and that they intended only that medical-related services be provided to AS with the funds that were provided through the chatroom. The Court finds that the use of that term, particularly with respect to support on the Hargeisa side, was not so limited in its meaning. Rather, it was used more broadly to refer to general transfers of funds or support to AS.
9

Regardless of the designation, however, persons in all designations are subject to sanctions under the UN framework.
10

At trial, the government's expert testified only that being a "supporter," "financier," or "facilitator," did not, in and of itself, necessarily mean that someone was also a "member" of an FTO.
11

Although it is unnecessary for the Court to determine this issue, it observes that there is no evidence that the money transferred by Defendants or other members of the Group of Fifteen and actually provided to AS was used exclusively or primarily to purchase medicinal substances, as opposed to medical-related services or equipment, non-medical safe houses, or non-medical related living expenses and military support. Were it necessary for the Court to rule on the issue of what constitutes "medicine," the Court would adopt the position of the Second Circuit in *United States v. Farhane*, 634 F.3d 127, 142-43 (2d Cir. 2011) that the medicine exception is limited to providing a substance or preparation, as opposed to services within the science or art of medicine. The Court would also find nothing in any international treaty or other international obligations of the United States that would require for the purposes of the material support statute that the medicine exemption be construed broadly to include medical care or humanitarian aid generally.
12

To the extent that an overt act in furtherance of the conspiracy is required, however, the Court finds that both Defendants, as well as others involved in the conspiracy, engaged in wide-ranging overt acts in furtherance of the conspiracy. These included, but were not limited to, the maintenance of books and records with respect to the prohibited agreement and the unlawful objective of the conspiracy, as well as the logistical support for and the overall supervision of the Group of Fifteen's fundraising efforts and the actual solicitation and transmission of funds intended for the benefit of AS.

Exhibit C

* Subsection (g)(6) provides, "[T]he term "terrorist organization" means an organization designated as a terrorist organization under section §219 of (Continued...)

** Section §212(a)(3)(B) of the Immigration and Nationality Act [8 USC § 1182 (a)(3)(B)] provides, Security and Related Grounds. (B) Terrorist Activities. (i) In general. Any alien who --

(I) has engaged in terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of --

(aa) a terrorist organization (as defined in clause (vi); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization

(VIII) has received military-type training (as defined in section §2339D(c)(1) of title 18, United States Code [18 USC § 2339D(c)

(1)]) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act to be engaged in a terrorist activity.

(ii) Exception. Subclause (IX) of clause (i) does not apply to a spouse or child ---

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

---

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as

defined in section §1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any --

(a) biological agent, chemical agent, or nuclear weapon or device or

(b) explosive, firearm, or other weapon or dangerous device (other than for personal monetary gain),

---

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization --

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for --

(aa) a terrorist activity;

(Continued ...)

that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual --

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapon (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know,

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in caluse (vi)(III) or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined. As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined. As used in this section, the term "terrorist organization" means an organization --

(I) designated under section 219 [8 USC § 1189];

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy.

(i) In general. An alien whos entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials. An alien who is an official of foreign government or a purported government, or who is a condidate for election to a foreign government office during the period immediately preceding the

(... Continued)

election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens. An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations. If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.

(i) In general. Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), demestic or foreign, is inadmissibile.

(ii) Exception for involuntary membership. Clause (i) shall not [apply to] a[n] alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such puposes.

(Continued ...)

(... Continued)

(iii) Exception for past membership. Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of teh Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members. The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the partne, spouse, son, daughter or an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecutions. Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide, as defined in section 1091(a) of title 18, United States Code, is inadmissible.

(Continued ...)

(... Continued)

(iii) Commission of acts of torture or extrajudicial killings. any alien who, ourtside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of --

(I) any act of torture, as defined in section 2340 of title 18, United States Code; or

(II) under color of law of any foreign nation, any extrajudicial killings, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 USC § 1350 note), is inadmissible.

(F) Association with terrorist organizations. Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultaion with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers. Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code, is inadmissible.

*** Section, 22 USC § 2656f(d)(2), provides, Definitions. As used in this section-- ... (2) [T]he term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents...

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