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Testimony of David D. Cole
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Hearing: An Examination of the Material Support Statute
May 5, 2004
U.S. Senate Judiciary Committee
HATCH: I'm pleased to introduce our second panel of witnesses. We will first hear from David Cole, professor of law at the Georgetown University Law Center. Mr. Cole has been involved in numerous cases involving the material support provision. And following Mr. Cole will be Paul Rosenzweig, the senior legal research fellow at the Heritage Foundation. Mr. Rosenzweig is an adjunct professor of law at George Mason University.

So we want to thank both of you for being with us today, and we look forward to hearing your testimony and any suggestions you can make for us.

Mr. Cole?

COLE: Thank you, Senator Hatch. Thank you for inviting me to testify. And I ask that my written remarks be incorporated into the record.

HATCH: Without objection, we'll put all written remarks into the record.

COLE: There's no doubt that cutting off funding for terrorist activity is an important and legitimate government objective, but Congress and the executive have pursued it through unlawful means. There are, in fact, three statutes that impose penalties on people for their associational support of organizations that have been designated as terrorist.

One is 2339B -- that is the principal focus of this hearing. Another is IEEPA, the International Emergency Economic Powers Act, which allows the government to designate anyone, citizen, foreign national, U.S. corporation, non-profit, or foreign organization, as a terrorist, using a definition that is nowhere provided in any statute or any regulation, and then make it a crime for people to support that individual or group.

And the Immigration Act, as amended by the Patriot Act, authorizes the government to deport foreign nationals for providing support, whether or not it is wholly innocent or not, to any organization that the attorney general and secretary of state have designated as terrorists, under a definition so broad that it would literally include the Department of Homeland Security. That's how broad the definition is.

There are three problems with these statutes, generically speaking. First, they impose guilt by association. They penalize not material support for terrorist activity. That's 2339A. There's no problem with that statute. But instead, they penalize support for blacklisted organizations, organizations that have been labeled terrorists, regardless of whether the support has anything whatsoever to do with the terrorist activity of that group.

And so, for example, in the case I'm litigating in California, the Humanitarian Law Project, the government has maintained that our client, who is providing -- was providing human rights advocacy training to a group in Turkey that represents the Kurds, to encourage it to pursue its means through lawful, non-violent means, is covered by this statute, and would be prosecutable if they continue to urge this group to stop engaging in terrorism and to engage in lawful, non-violent means.
Second, the statute is vague and over broad. It would include the person who gives gas to a person, knowing that the person is a leader of a foreign terrorist organization. It would, as a federal judge in Miami recently wrote, it would include a cab driver who gave a ride to the leader of a foreign terrorist organization who is here to testify at the UN. All the government has to prove is that the cab driver knew that the person was a leader of this terrorist organization, and that the organization was designated. There would be no requirement that the cab driver's ride, in any way, facilitated any kind of criminal activity.

Third, these statutes afford the executive branch unfettered discretion in labeling political groups as terrorist groups. They either provide no review of the labeling process, or meaningless review. Under the International Emergency Economic Powers Act, as I referred to before, there is literally no definition of what a specially designated terrorist is. Yet President Clinton named a U.S. citizen, Mohammed Salah, a specially designated terrorist.

That means that it is now a crime for anyone to provide Mr. Salah with any support whatsoever, whether it be a piece of bread, whether it be a newspaper, whether it be medical services, whether it be legal services. The statute makes it a crime to provide support to him in any way, shape, or form. He is essentially subject to internal banishment. And if this were enforced literally, he would starve to death.

Yet he has never been provided a hearing, there has been no grand jury, there's no jury trial whatsoever, and there's no definition of the label that President Clinton affixed to him, "specially designated terrorist." I submit that that is a statute which is written far too broadly to deal with the legitimate objective of cutting off support for terrorist activity.

We've seen this kind of government response before. In the cold war, we were concerned about a foreign organization, the Communist Party, that had illegal ends, that Congress found engaged in terrorist means to further those ends, and the argument was, we need to cut off all support to that group, and we need to facilitate investigation of communists whether or not they're supporting the illegal activities of the group.

The Supreme Court accepted the factual assertion that the Communist Party engaged in illegal ends, used terrorist means to further those ends. But it nonetheless held that it was unconstitutional to punish someone for support or membership of that group, the Communist Party, without proof of specific intent to further the terrorist activity or the illegal activity of the Communist Party, and it held that in a series of cases.

Section 2339B, if construed not to require that kind of specific intent to further the terrorist activity of the group, imposes guilt by association, in violation of the First Amendment, and in violation of the Fifth Amendment.

Thank you very much.