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Material Support: The United States v. the Lackawanna Six

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In December 2003, six American-Yemenis were sentenced for terms of seven to ten years for their role in providing material support to Al Qaeda, in violation of Title 18 United States Code §2339B. This article specifically examines the merits of the charge brought against the Six by reviewing precedent that has developed regarding §2339B from 2000 to 2004. This exercise uncovers a controversy over constitutionality, basic rights and due process that, in combination with the facts of the case, could have yielded each of the Six a better deal were the case to go to trial than he received by pleading guilty. Those pleas, made under real pressure from the prosecution, prevented the court from determining whether the Six "had 'provided' support to Al Qaeda, or merely 'received' it."

In December 2003, six American-Yemenis were sentenced for terms of seven to ten years for their role in providing material support to a terrorist organization, in violation of Title 18 United States Code (USC) §2339B. The Six were Sahim Alwan, 30; Yahya Goba, 26; Yasein Taher, 25; Faysal Galab, 27; Shafal Mosed, 25; and Mukhtar Al-Bakri, 23. Following a string of guilty pleas from the Six from January to June 2003, the Lackawanna "sleeper cell" became the hallmark of the Bush administration's War on Terror—the story of the arrests unfolding as it did on the first anniversary of the September 11th attacks. But amid the jubilation of a job well done, the question overlooked was the soundness of the prosecution's case against what was once termed the most dangerous sleeper cell in the United States.

This article specifically examines the merits of the charge brought against the Six while reviewing the facts of the case as known at that time. It becomes clear after some analysis that the prosecution's foundation was not as firm as they led on. This is not to say that should the case have gone to trial, the Six would have been exonerated; the facts of the case in combination with the national psyche at the time seemed strong enough to convict each of the defendants. However, a close examination of the charge filed against the defendants uncovers a controversy over constitutionality, basic rights, and due process. Used effectively, the defense could have exploited this controversy to

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weaken the foundation of the prosecution's case and in so doing, obtain each of the Six a better deal than they received in pleading.

To further this argument, it must be acknowledged that what is attempted here is a hypothetical. Because the Lackawanna Six case did not go to trial, it is impossible to know all of the arguments that would have been presented by the defense. What is provided, however, is the opportunity to view this case using precedent that has since developed regarding §2339B in an effort to understand the loose footing upon which the prosecution stood.

To understand the dynamics of the case, the charge leveled against the defendants must first be examined. Each of the Six was accused of a violation of Title 18 USC § 2339B, which states:

> Whoever, within the United States or subject to the jurisdiction of the United States, 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 for life.[1]

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this "Material Support" statute carried a penalty of up to 10 years imprisonment; this was revised upward to 15 with the option of life following the passage of the 2001 Patriot Act.[2] Furthermore, "Material support or resources" is defined by Title 18 USC §2339A[3] as:

> 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, transportation, and other physical assets, except medicine or religious materials.[4]

In order to determine the strength of the prosecution's case, a summary of the information that was known to the government at the time of the arrests is essential. The following synopsis is broadly based on the statements made by Al-Bakri and Alwan to the FBI in 2002 as well as the Decision and Order issued by Hon. Kenneth Schroeder, Jr. during the bail hearing in October of that same year.[5]

The six defendants left the United States for Pakistan in two groups in the spring of 2001. The first group (A) consisted of Mosed, Taher, and Galab and left the United States in April 2001. The second (B) consisted of Alwan, Goba, Al-Bakri, and a seventh individual named Elbaneh, all of whom departed in May 2001 and flew via Canada, London, and the U.A.E. to Karachi. The arrangements for travel within Pakistan were made by another member of the tight-knit Lackawanna community: Kamal Derwish.

Derwish was an American citizen by birth who settled in Lackawanna in 1998 and eventually developed a relationship with many of the Yemeni youth in that community. Having fought in the "Bosnian jihad," Derwish was a demonstrated extremist with ties to Al Qaeda leadership. In what was subsequently seen as efforts to recruit for that organization, Derwish hosted periodic gatherings at his apartment in Lackawanna, which he shared with Goba. At these gatherings, Derwish spoke for about 20 minutes regarding the plight of Muslims the world over, after which the group would socialize over take-out.[6] Through the bonds that developed, it was Derwish who convinced each of the Six of the virtue of jihad and the need to better themselves as Muslim men through pilgrimage.

Considering that the statements offered to the FBI were from members of Group B, more detail was known of Group B's activities than Group A's. Approximately one week after arriving in Pakistan, Group B met with Derwish, who informed them that they were to travel to Afghanistan to meet "The Most Wanted," a reference to Osama bin Laden according to the government. In two sets, Group B traveled to Quetta, Pakistan: Goba and Al-Bakri traveled on their sixth day in Karachi whereas Derwish, Elbaneh, and Alwan followed on day nine. From Quetta, they traveled to Kandahar, the first set leaving Quetta before the second arrived. Upon reaching Kandahar, each set was put up at a guest house where during their respective stays they were exposed to lectures on jihad and the justification of suicide attacks. After spending some time at the guest house, the individuals were brought to the Al-Farooq training camp.

Alwan and Elbaneh were the last to arrive at Al-Farooq. Upon reaching the camp, they met the members of Group A as well as of the first set of Group B. Members of Group A had commenced training three to four weeks earlier; the first and second sets of Group B commenced with basic training together. While at the camp, the defendants had met with Osama bin Laden at a gathering at which he espoused anti-American and anti-Israeli sentiment. All this was corroborated by statements made to the FBI by Alwan and Al-Bakri in 2002.

Each of the individuals remained at Al-Farooq for at least five weeks, with the exception of Alwan who left after ten days, returning to the United States on 21 June 2001. Each received training in firearms, with some receiving more specialized training such as mountain climbing. Additionally, Al-Bakri requested and was able to stay an additional week for "extra help," finally returning to the United States in August 2002—as did Goba. Taher, Galab, and Mosed returned to the United States on 27 June 2001. The dates of the return are verifiable through customs and immigration records. However, neither Derwish nor Elbaneh returned to the United States.[7]

During the course of the surveillance of the individuals in New York, no concrete evidence was produced to implicate any of the Six in a terror plot. However, questionable items were found during searches of each individual's residence. Such items included the following: A stun gun recovered from Mosed; three tapes of a "highly incendiary nature" regarding the call to jihad from Goba; tapes of a "militant nature" advocating a fight against the West from Alwan; a .22 caliber pistol from Al-Bakri for which he did not possess a permit and that had an illegal smooth bore making tracing bullets more difficult;[8] and documents condoning suicide attacks from Taher. Very little in the way of incriminating communication was identified, save a vague email from Al-Bakri stating that "I would like to remind you of obeying God and keeping him in our heart because the next meal will be very huge."

Taken as a whole, this information was undeniably damning. Those who signed up to represent the Six, including John J. Molloy, who represented Al-Bakri, were aware that it would be difficult, if not impossible, to acquit their clients of providing material support. Instead, their plan was to cast sufficient doubt on the prosecution's case in order to obtain a less harsh sentence; in the words of Molloy, they sought to "make the government work for its pound of flesh."[9] With the rapid succession of guilty pleas, however, the defense did not have that chance. With these pleas came the confession by Mosed, Goba, Taher, and Galab that they indeed had trained with Al Qaeda in Afghanistan; Al-Bakri and Alwan had already made statements to that affect during the investigation. Yet significantly, Al-Bakri's and Alwan's statements did not automatically translate into guilt; that is, even with their confessions on record, the defense felt that it could undermine the charge leveled against their clients. The question is upon what basis the

defense could have established its case and why it eventually advised the Six to plead guilty.

The most significant argument undermining the prosecution's case rests on the sheer constitutionality of Title 18 USC §2339B, specifically the terms "personnel" and "training" used in the definition of "Material Support" therein. The crux of this argument is that the vagueness of these terms renders the statute unconstitutional. In fact, this argument was put forth by the defense during the bail hearings in October 2002. In response, however, the magistrate, citing United States v. Lindh, accepted both the reasoing that the statute did not infringe on constitutional rights and the definition that "to provide personnel is to provide people who become affiliated with the organization and work under its direction: the individual or individuals provided could be the provider himself, or others, or both."[10] Under such an interpretation, the Six may well have been found guilty of the charge put forth. Yet by accepting the Lindh precedent, the magistrate consciously rejected another set by the Court of Appeals for the Ninth Circuit in 2000 in Humanitarian Law Project (Humanitarian) v. Reno.[11] In examining the case law corresponding to Humanitarian, it becomes clear that the defense's contention of unconstitutionality may have been valid.

Humanitarian is a human rights advocacy group that sought to support the Kurds of Iraq and the Tamils of Sri Lanka in their respective quests for liberation. Alhough both groups had legitimate political movements through which to funnel support, both also had alleged terrorist links. Consequently, the advocacy group found that the "Material Support" statue was so vague as to potentially implicate them as supporters of foreign terrorist organizations (FTOs) through their work with legitimate segments of the movements. In taking the case to court, the group argued against the Attorney General that the ambiguity inherent in §2339B threatened First Amendment rights to association and expression. The logic proceeds as follows: Due to the vagueness of the terms used in the statute, it becomes difficult to operate in support of legitimate political causes without the possibility of being indicted for supporting government defined terrorist organizations. Consequently, the freedom to associate and/or to express one's political views becomes restricted—a direct violation of First Amendment principles.

In hearing the case, the Ninth Circuit agreed with Humanitarian, stating that the term "personnel" as well as "training" as used in the AEDPA "blurs the line between protected expression and unprotected conduct."[12] The Ninth Circuit would reaffirm this ruling on appeal by the United States in 2001, stating that the terms were "overbroad, and therefore void for vagueness under the First and Fifth amendments,"[13] the latter ensuring due process under the law. In essence, it was found that the statue as written could not adequately address, for example, whether an advocacy group providing political support to a movement could be found guilty of providing personnel to an FTO if, unknowing to the group, such support freed members of the movement to carry out terrorist attacks. As such, the statute was judged unconstitutional based on vagueness.

Using the Humanitarian case as a precedent, other courts have ruled on the constitutionality of §2339B, clarifying what is needed for an individual to be found guilty of this charge. In United States v. Al-Arian (2004), the Hon. James S. Moody, Jr. embarked on such an interpretation. The magistrate largely agreed with the Ninth Circuit's contention that the statute was ambiguous as written. As such, it constituted a Fifth Amendment violation by allowing an individual to be convicted of providing assistance to an FTO, regardless of whether the individual had the intention of doing so or whether he knew his support was in fact aiding terrorists.

In response to this shortcoming highlighted by the Humanitarian case, Moody of-

fered an alternate interpretation to the statute. Examining the term "knowing" appearing in §2339B, Moody stated that it necessarily applied to the "material support" element of the statute. In affect, he decided that in order for an individual to be found guilty under this section of the USC, he would have to *knowingly* provide material support to an organization that he *knew* to be an FTO.[14] Moody further clarified that to be charged with providing material support, it was the government's responsibility to prove that not only did the defendant know that his support was considered "material support" but that "defendant knew *(had a specific intent)* that the support would further the illegal activities of a [sic] FTO [emphasis added]."[15] It is this last assertion that could have provided the defense sufficient ground to counter the prosecution.

It is not in doubt that the defendants did travel to Afghanistan and receive training at Al-Farooq—a camp they knew to be linked to Al Qaeda. What is arguable, however, is whether the defendants sought to further the "illegal" activities of Al Qaeda by receiving such training. In fact, the defense may have been able to establish that the intention of most, if not all, of the defendants was more benign.

This argument could best be applied to Alwan, whose actions cast serious doubt on whether his intentions were to further the cause of Al Qaeda. It was established that Alwan, upon commencement of training, began searching for a way to leave after realizing the extent of his involvement. His testimony states that he approached numerous camp leaders to request permission to leave, only being granted such after faking an ankle injury and speaking one-on-one with Derwish.[16] Al-Bakri's statement corroborates Alwan's early departure. At the October 2002 bail hearing, Judge Schroeder himself stated that Alwan "apparently disavowed or disclaimed any continued participation in the activities of Al Qaeda when he managed to extricate himself from the Al-Farooq training camp."[17] Furthermore, Alwan's cooperation with the FBI and his "expressed statements of disagreement with the beliefs of Al Qaeda"[18] convinced the magistrate that Alwan did not pose so great a threat as to require detention. From these facts alone, the defense could have established that Alwan did not have "a specific intent" to further the goals of Al Qaeda.

As for the others, it was known that only Goba and Al-Bakri finished the six-week training regimen, the latter remaining for an extra week; the others—Taher, Galab, and Mosed—left the camp after five weeks. However, Al-Bakri was also cooperative with the FBI during his interview in Bahrain providing Special Agent Needham—the lead investigator for the case—the first confirmation that the Six had traveled to Afghanistan. Despite these facts, Judge Schroeder found that, *for purposes of bail only*, these five could be considered a threat to the community or at risk of fleeing. Consequently, the defense may have been able to supplement these facts with others to raise the doubt as to whether even they had the requisite "specific intent."

The first of the facts was an obvious lack of evidence that any of the Six were indeed planning a terrorist attack. The evidence often cited as being most incriminating—the "Big Meal" e-mail—can be discredited once the reply of the recipient (Goba's brother) is viewed: "Anyway, what meal are you talking about? I swear I don't understand anything. Is it a hamburger meal or what?"[19] The confusion inherent in this response brings into question the allegation of a planned event. Another tip that caused the alarm bells to ring was talk of a "wedding" that was to occur soon. "Wedding" has in the past been used by Al Qaeda as code for an attack. However, the FBI and CIA were relieved—or possibly disappointed—when it was discovered that "wedding" referred only to Al-Bakri's marriage, which was to take place in Bahrain. Indeed in response to the question asked by Judge Schroeder as to what exactly the defendants were

planning, the prosecution's response was "It's a difficult question" and the court may well have to determine that.[20] Lacking evidence of any plan, it become difficult to establish that any of the Six really had a "specific intent" to do anything.

Additionally, of the items found during the searches of the defendants' homes, only the .22 caliber smooth bore pistol sans permit and stun gun were explicitly illegal. These items would have been sufficient to convict on weapons charges but little else. The other material, disturbing at its contents may have been, does not provide sufficient proof of guilt of any crime. In fact, finding such material/propaganda can hardly be unexpected given the activities in which the group was known to have participated. However, they do not constitute evidence that any of the Six planned to act on what was contained therein.

Looking at these facts, it becomes evident that the prosecution's case was far from air-tight. Still, any assertion that the Six may have been found not guilty in a trial is hard to support based on what was known. But drawing on precedent that has developed since Lackawanna, it becomes reasonable to assume that, at the very least, the facts in the case may well have provided sufficient doubt as to the intentions of the Six. In so doing, there was a chance for the defense to undermine the prosecution's case and secure more favorable sentences. In the end, however, the defense advised their clients to plead guilty. To some, this alone demonstrates strength of the prosecution's case. This may be true in part, but the possibility must also be considered that the pressure from the government had played a larger role.

Defense attorneys in the Six's case have been vocal about the pressure placed on their clients by the tools at the prosecution's disposal, the most potent of which was the Enemy Combatant card. That threat was real as Bush had already asserted this right in tagging both Jose Padilla and Yaser Esam Hamdi with the label. With such a designation comes the risk of indefinite imprisonment and the death penalty. Patrick Brown, a lawyer for the defense, stated "We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us. So we just ran up the white flag and folded. Most of us wish we'd never been associated with this case."[21] Michael Battle, the prosecuting attorney for the United States in Buffalo, acknowledges that the prosecution held the Combatant Card, although he denies explicitly threatening the defense.[22] Yet with the Department of Defense standing ready to urge Bush to designate the Six Enemy Combatants should any trial not proceed in DoD's favor,[23] the pressure was real. Given the circumstances, the question becomes whether such a threat is fundamentally different from more direct forms of coercion. Needless to say, for many it is not.

At the very least, what becomes apparent is that the prosecution's case was not clear-cut. The charge filed against the Six was based on a statute whose very constitutionality has repeatedly been called into question. The evidence indicating that the Six were planning a terrorist attack is at best fickle and at worst non-existent. And the pressure faced by the Six brings into question, not only the method used in prosecuting alleged terrorist in this brave new world, but also the amount of faith the government had in its case. When all was said and done, after the Six had plead guilty, Michael Battle acknowledged that he does not refer to the Six as a terrorist cell: "It's a heavy burden to prove and I wasn't prepared to do that."[24] Meanwhile, it seems even Attorney General Ashcroft has admitted that there was no proof that the Six planned to, or even intended to, carry out a terrorist attack.[25] In seeing how the debate surrounding §2339B has progressed and the case law that has come forth, this doubt of any "specific intent" on behalf of the Six to further the goals of Al Qaeda was a substantial hole in the

prosecution's case. Would that hole have been large enough for all six defendants to walk through? Probably not, though Alwan stood a better chance than the others. Would that hole have allowed the Six to get a more favorable deal? That seems likely as it undermined the assertion that the Six provided "material support" to an FTO. At the end of the bail hearings, Judge Schroeder put the case into perspective stating: "I haven't heard of any acts of violence or propensity to acts of violence in the history of these defendants." He continued on to question whether the Six "had 'provided' support to Al-Qaeda, or merely 'received' it."[26] The chance to find out was lost as Al-Bakri submitted the final guilty plea.

Notes

1. "US Code Collection," *Legal Information Institute.* 2004. Cornell Law School. 25 April 2004. Available at (http://www4. law.cornell.edu/uscode/18/2339B.html).
2. Ed Carpenter, Jason Felch, Sarah Moughty, James Sandler, and Ben Temchine. "The Tools of Counterterrorism," *Frontline.* January 2004. The Public Broadcasting Service. 25 April 2004. Available at (http://www.pbs.org/wgbh/pages/ frontline/shows/sleeper/tools/tools.html#material).
3. In its definition clause, §2339B states that "the term 'material support or resources' has the same meaning as in §2339A."
4. "US Code Collection," *Legal Information Institute.* 2004. Cornell Law School. 25 April 2004. Available at (http://www4. law.cornell.edu/uscode/18/2339A.html).
5. "Lackawanna Cell Case," *The Al-Qaeda Documents Vol. 2* (Alexandria, VA: Tempest Publishing, 2003), pp 106–240.
6. Michael Purdy and Lowell Bergman, "Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case," *The New York Times,* 12 October 2003.
7. Derwish was killed in November 2002 while in Yemen when a missile from a U.S. Predator Drone struck the car in which he was riding. In January 2004, it was announced that Elbaneh was taken into custody in Yemen. The U.S. government is negotiating the terms for his possible extradition.
8. The search of Al-Bakri's residence also turned up a rifle with a telescopic lens. It was determined that this belonged to his father and was largely not of consequence.
9. Michael Powell, "No Choice But Guilty: Lackawanna Case Highlights Legal Tilt," *Washington Post,* 29 July 2003.
10. "Lackawanna Cell Case," p. 160.
11. Ibid., p. 159.
12. Ibid.
13. Laurie L. Levenson, "Prosecuting Terrorists," *National Law Journal,* 26(25), 2004.
14. "United States v. Al-Arian: Case No. 8:03-cr-77-T-30TBM," 12 March 2004. *Lexis Nexis,* 25 April 2004, p. 12.
15. Ibid.
16. Michael Purdy and Lowell Bergman, "Where the Trail Led."
17. "Lackawanna Cell Case." *The Al-Qaeda Documents Vol. 2.* Alexandria, VA: Tempest Publishing, 2003. pp 161.
18. Ibid.
19. Michael Purdy and Lowell Bergman, "Where the Trail Led."
20. Ibid.
21. Michael Powell, "No Choice But Guilty."
22. Ibid.
23. Michael Purdy and Lowell Bergman, "Where the Trail Led."
24. Ibid.
25. Michael I. Niman, "The Lackawanna Six & Rambo III," *The Humanist.* March/April 2004.
26. Mark Miller, Mark Hosenball, Nada el Sawy, and Daniel Klaidman, "The Hunt for Sleeper Cells," *Newsweek,* 30 September 2002, p. 27.